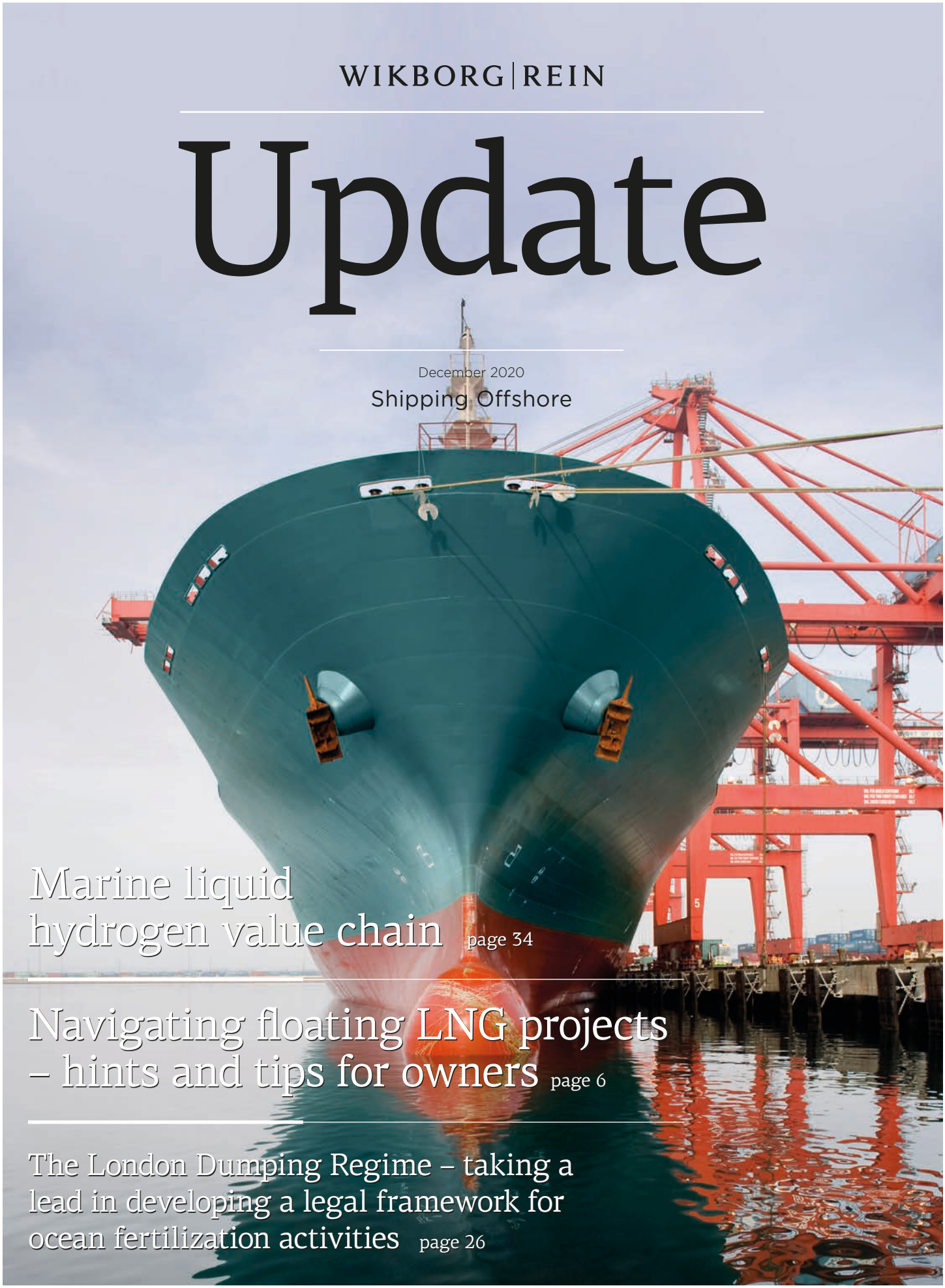
WIKBORG | REIN

Update

December 2020

Shipping Offshore



Marine liquid hydrogen value chain page 34

Navigating floating LNG projects – hints and tips for owners page 6

The London Dumping Regime – taking a lead in developing a legal framework for ocean fertilization activities page 26

From being a regime focusing primarily on protecting the marine environment from dumping (mainly from ships), the regime takes on a more active protective role and mandates itself as the appropriate forum for providing a global regulatory framework for geoengineering activities. • PAGE 26

NAVIGATING FLOATING LNG PROJECTS – HINTS AND TIPS FOR OWNERS

PAGE 6

SHIPPING OFFSHORE UPDATE

Publisher WIKBORG REIN DECEMBER 2020
Chief editor HERMAN STEEN, JONATHAN PAGE
Editorial team BAPTISTE WEIJBURG, ALEXANDER WINTERVOLD
Photos GETTYIMAGES.COM
Layout & design HELENE S. LILLEBYE
Print ROLF OTTESEN / 1600 COPIES

Dear friends and readers,

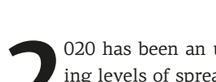
2020 has been an unprecedented and challenging year. The Covid-19's alarming levels of spread and severity, and the wide-ranging measures put in place by governments following the outbreak of the pandemic, have caused the worst global economic crisis since the Second World War. This has plunged national economies into deep recessions, with several big companies filing for bankruptcy, and others are expected to follow. On a private and personal level each of us have also felt the pandemic's impact our lives.

Many sectors have however shown resilience and innovation following the initial fear and shock that rocked even the most stable of economic foundations. This combined with the prospects of available vaccine(s) next year, has thankfully altered some market expectations. Everybody is now hoping for a faster and stronger economic recovery next year.

As regards the shipping and offshore markets, they have also had a bumpy ride in 2020. Companies have had to adjust and adapt to changing market and working conditions, but even in the darkest of times we see yet again that opportunities will come. The pandemic has accelerated and amplified trends, most importantly a global demand for the industry to adopt sustainable practices within the ocean space. This is essential for society and also presents significant commercial opportunities for ambitious stakeholders. Key areas are energy transition, green initiatives, innovation of future fuels, digitalisation, electrification and autonomous ships. Together with other industry stakeholders we have partnered with Nor-Shipping to facilitate meaningful steps forward in these areas.

This Update contains articles on important developments in our industry, considering issues such as ocean wind and wind farms, the marine hydrogen value chain and ocean fertilization, as well as enforcement of arbitration awards, risks in floating LNG projects, and the Haliburton decision on the impartiality of arbitrators. I hope that you will find these articles interesting and informative. We welcome any feedback and would be particularly interested in receiving requests for topics that you would like us to address in future Updates.

Enjoyable reading!



Gaute Gjelsten
Head of Wikborg Rein's Shipping Offshore Group

Herman Steen Jonathan Page
Editors of the Shipping Offshore Update

PHOTO: Wikborg Rein

Are you seated comfortably?

WHEN IS THE LAW APPLYING TO AN ARBITRATION AGREEMENT NOT THE SAME AS THE LAW APPLYING TO THE CONTRACT?

In Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb [2020] UKSC 38 the UK Supreme Court has (by a 3:2 majority) recently clarified that, in the absence of an express choice of law, the law governing the validity and scope of the arbitration agreement is that of the seat of the arbitration and not the law applicable to the contract.

After a power plant fire in Russia, the plant's insurers, OOO Insurance Company Chubb, ("Insurers") paid out USD400 million to the plant's owner and took an assignment of its rights against Enka, a Turkish sub-contractor involved in the building of the plant, commencing proceedings against Enka in the Moscow courts.

Responding, Enka objected to the Moscow proceedings and commenced arbitration in London and applied for an anti-suit injunction in London to stop the proceedings in Moscow.

The governing law of the arbitration agreement was crucial because, if it was governed by English law then it was accepted that the claims fell within the arbitration agreement. However, if Russian law applied then it was arguable that the claims did not fall within the arbitration agreement.

This application was denied at first instance (December 2019) but was granted on appeal (April 2020), where the Court of Appeal held that the arbitration agreement was governed by English law as the law of the seat of the arbitration, as a matter of implied choice, subject only to any extenuating circumstances indicating the contrary.

Insurers then (unsuccessfully) appealed against the injunction to the Supreme Court (October 2020), albeit the reasons offered to maintain the injunction by the Supreme Court differed from those in the Court of Appeal.

THE SUPREME COURT DECISION

The majority (Lords Kerr, Hamblen and Leggatt) held that:

1. They would apply English law as the law of the forum to determine whether or not the parties had made a choice of law;
2. That in identifying which law governs the validity, scope or interpretation of an arbitration agreement, they must apply English common law rules as the Rome I Regulation excludes arbitration agreements;
3. Applying English common law rules, the arbitration agreement will be governed by: (a) the law expressly or impliedly chosen by the parties; or (b) in the absence of such a choice, the law with which the contract is most closely connected;
4. Where an express choice of law has not been made for the arbitration agreement, but an express or implied choice of law has been made to govern the main contract (which contains the arbitration agreement), then the parties will be presumed to have intended that the law of the main contract should also govern the arbitration agreement, and the choice of a different seat does not automatically displace this presumption;
5. A presumption that the law of the main contract should also govern the arbitration agreement could be overcome where there is a "*serious risk that, if governed by the same law as the main contract, the arbitration agreement would be ineffective*" or by provisions of the law of the seat stating specifically to the contrary;
6. However, if the parties have not chosen a law to apply to the main contract (whether express or implied), the law of the seat will generally be most closely connected to the arbitration agreement and will therefore apply;
7. If the arbitration agreement is part of a multi-tier dispute resolution clause including negotiation and/or mediation terms, the law of the seat of the arbitration will also apply to those other terms in the clause;
8. Therefore, English law was the proper law of the arbitration agreement by virtue of it being the law most closely connected to it as the law of the seat of the arbitration, there being no express or implied choice of Russian law as the law of the main contract nor any extenuating circumstances to prevent this conclusion.

The minority (Lords Burrows and Sales dissenting) preferred the proper law of the contract to apply even if it was determined by being the law most closely connected to the contract. However, the majority considered that different parts of a contract may be governed by different laws, and while it is generally reasonable to assume that parties would intend all parts of their contract to be governed by a single law, the part dealing with an arbitration agreement was more susceptible to having a different law applying, given its focus on dispute resolution and its potential for separation from the main contract where the validity of the main contract was in question.

As such, the Supreme Court continued the anti-suit injunction, but it also held unanimously that even if Russian law applied to the arbitration agreement, the injunction would still run while the English courts decided if the agreement was valid under Russian law and if so, whether the Insurers' claim fell within it, given their duty towards the arbitration in London.

In the absence of an express choice of law, the law governing the validity and scope of the arbitration agreement is that of the seat of the arbitration and not the law applicable to the contract.

COMMENT

Although a 3:2 majority decision, the Supreme Court has clarified an important issue as regards international arbitration seated in London. In the absence of an express choice of law, the law governing the validity and scope of the arbitration agreement is that of the seat of the arbitration and not the law applicable to the contract. While it can always be said this issue is easily avoided by the parties making a choice of law in the main contract, there are occasions when the parties cannot or do not want to agree a proper law in their main contract. In this event, if parties do agree to seat the arbitration in London, this will be taken to show a willingness to let English law as the law of the seat determine whether the arbitration agreement is valid or not, rather than let it be decided by the law most closely connected to the main contract whatever that is determined to be. It reflects the position adopted in the New York Convention and UNICTRAL and the legislative policy of the Arbitration Act 1996 and is another step towards an internationally consistent approach to arbitration. •

CONTACTS /

Robert Joiner
raj@wr.com.sg

Alex Hookway
ahw@wrco.co.uk

Navigating floating LNG projects – hints and tips for owners

In this article, we explore some of the key issues facing vessel owners when bidding for and negotiating floating LNG projects, whether for FLNG units (floating liquefaction) or FSRUs (floating storage and regasification)

Often the procurement of the floating asset will be on a public or private competitive procurement basis, and vessel owners will be asked to compete with others in the market. There are no hard and fast rules to the way that these tenders are run, and some will deal with much of the detail at the tender phase, whilst others will leave the heavy lifting to be handled in face to face (or, more commonly in these times, virtual) discussions with the short-listed bidder(s). The wordings of bid bonds will need to be carefully reviewed to ensure these cannot be called on capriciously, and any term sheets or letters of intent will need to be analysed for legally binding content.

It is vitally important for a unit owner to get on top of the local regulatory issues at an early stage as these can add significantly to the complexity and costs of any project.

UP FRONT COSTS

The documents that are needed in such projects are often complex and time consuming to negotiate. Project timelines, however, often cannot wait, and require early expenditure on certain engineering and long lead items in order to maintain the viability of the project. Thought needs to be given at an early stage as to how the vessel owner can protect itself in the event that it spends substantial sums before definitive project documents are signed, and bespoke arrangements are often entered into.

NEWBUILDING/CONVERSION CONTRACT

Regardless of whether a bespoke newbuilding is being constructed, or an existing trading vessel is being converted, the parties will need to assess how much oversight and access the project developer is going to be given in relation to the construction/conversion contract, how free the owner is to exercise its rights under that contract, and what step in rights the project developer is to have in the event of a breach of the construction/conversion contract or the employment contract for the unit.

DELIVERY AND ACCEPTANCE

The delivery and acceptance regime is a hugely important piece of the jigsaw, and appropriate time in the discussions should be set aside for such discussions. There will usually be deadlines for (a) arrival of the unit at the project site and (b) the passing of performance tests. Failure to meet the deadlines will usually result in a liability of the owner for significant liquidated damages, unless the owner can point to a failure on the part of the project developer or a force majeure event. Bearing in mind the significant sunk costs expended by owners up to the point of the unit arriving at the project site, it will also be important for the owners to start to receive an income stream as early as possible, to cover at least the operating expenses and the financing costs. This might be challenging for project sponsors who are yet to earn an income stream themselves from the project if the project infrastructure is not ready in time, and an appropriate accommodation will need to be reached. Thought will also need to be given as to the point at which the project sponsors can terminate the lease or charter contract for delay in delivery or acceptance, the damages which might flow from that, and the ability to accept a deficient unit and on what basis.

PAYMENT AND PERFORMANCE

Once the unit has been accepted and in service, the owners will normally be entitled to a daily rate to cover both capex and opex. Detailed consideration will need to be given as to the basis on which that daily rate may be reduced or not applicable, depending on the ability of the unit to perform the services required of it. In regasification projects, the owners will often be asked to give performance warranties in respect of LNG loading rates (from a carrier to the unit), regasification flow rate and modulation, fuel consumption, and the specification of regasified LNG. In liquefaction projects, relevant performance warranties will often relate to LNG unloading rates (from the unit to a carrier), liquefaction rates, LNG retainage and the specification of LNG sent out. Prudent owners will seek to cap these liabilities and ensure they are the sole remedies for the particular shortfall in performance.

COUNTRY ISSUES

It is vitally important for a unit owner to get on top of the local regulatory issues at an early stage as these can add significantly to the complexity and costs of any project, and having reliable local input throughout the process is key. Depending on the jurisdiction in question, import and export regimes can be burdensome, the tax landscape may be challenging and the regulatory and environmental issues should never be underestimated. There may also be political risks which will need to be factored in to the parties' thinking, and insurance advice at an early stage in the process is always helpful.

LIMITATIONS ON LIABILITY

The usual liability framework deployed in floating LNG projects is a knock-for-knock regime akin to FPSO or drilling contracts in the oil sector. Simplistically, both parties will take responsibility for their own people and property (including pollution and contamination), and for liability to third parties arising out of the indemnifier's negligence. We would expect to see a well thought out consequential loss exclusion covering each party's group, and an overall cap on the unit owner's liability. The devil is often to be found in the detail of these provisions, and warrant a careful review during the course of negotiations.

The ability of each party to finance their project scope is paramount, and must always be borne in mind throughout negotiations.

FINANCING

The ability of each party to finance their project scope is paramount, and must always be borne in mind throughout negotiations to ensure that the final commercial deal reached between the parties is "bankable". Lenders will generally wish to have various standstill and step-in rights in the event of a breach by their borrower, and time should always be allocated to deal with complex direct agreements between the project parties and their respective lenders. •

At Wikborg Rein we have many years' experience of representing vessel owners in these types of floating projects, and are ideally placed to assist our clients in achieving their desired outcomes.

CONTACTS /

Jonathan Goldfarb
jgo@wrco.co.uk

Renaud Barbier-Emery
rbe@wrco.co.uk

IMPOSING CONDITIONS TO CONTRACTUAL CONSENT – IS IT REASONABLE?

In the recent decision in Apache North Sea Ltd v INEOS FPS Ltd [2020] EWHC 2081 (Comm), the Commercial Court has provided guidance on the interpretation of consent provisions in a contract where such consent is not to be "unreasonably withheld".

The dispute arose between INEOS FPS Limited ("**INEOS**"), owner and operator of the Forties Pipeline System (the "**FPS**"), and Apache North Sea Limited ("**Apache**"), who own interests in the Forties Field in the North Sea. Apache had entered into a transportation and processing agreement (the "**TPA**") with the original operator of the FPS in 2003. The TPA regulated the terms on which hydrocarbons produced by Apache from its North Sea fields would be brought on-shore through the FPS. INEOS subsequently purchased the FPS and became a party to the TPA.

Attachment F to the TPA set out Apache's estimated production profile up to the end of 2020. In June 2019, Apache sought INEOS's consent to amend Attachment F to confirm its capacity requirements from 2021 up to 2040. The TPA entitled Apache to amend Attachment F and, subject to there being sufficient uncommitted capacity, and subject to INEOS's consent, with such consent "*not to be unreasonably withheld*".

INEOS stated that it was prepared to provide its consent if Apache agreed to revise the contractual tariff per barrel under the TPA for the extended period. This change would provide INEOS with a significant additional benefit. Apache argued that it was unreasonable for INEOS to place such a condition on its consent.

THE COMMERCIAL COURT'S DECISION

The Commercial Court agreed with Apache that INEOS was not entitled to demand an increase in tariff as a condition to providing its consent. The presiding judge, Mr Justice Foxton J, found that under the terms of the TPA, Apache was entitled and obliged to transport hydrocarbons through the FPS at the agreed tariff. Under the TPA this entitlement and obligation was envisaged to last beyond 2020. Accordingly, in seeking to change the tariff as a condition for its consent, INEOS was attempting to impose a "fundamental revision" to the parties' bargain which was inconsistent with the terms of the contract and thus unreasonable.

The judge noted that the mere fact that the consenting party could gain an entitlement by imposing a condition would not in itself make that condition unreasonable or illegitimate, citing Lewison J in Sargeant v Macepark (Whittlebury) Limited [2004] EWHC 1333 (Ch).

In its judgment, the Court relied primarily on the decision in *Sequent Nominees Ltd v Hautford Ltd* [2020] AC 28 , which had considered consent provisions in property leases. In relying on this case, the Court confirmed that even if a consent provision requires a standard of "reasonableness", while construing such provision, the Court should not do so in isolation, but should have in mind the overall terms of contract. The Court did however acknowledge that it remains important not to *"trespass on issues which are properly part of the evaluative exercise"* for the consenting party.

CAN A PARTY 'REASONABLY' IMPOSE A LEGITIMATE CONDITION?

In reaching its decision, the Court identified situations where setting conditions to consent could be legitimate. The judge noted that the mere fact that the consenting party could gain an entitlement by imposing a condition would not in itself make that condition unreasonable or illegitimate, citing Lewison J in *Sargeant v Macepark (Whittlebury) Limited* [2004] EWHC 1333 (Ch). Conditions providing benefits to the consenting party may be legitimate and reasonable, to the extent the consenting party seeks to address a legitimate concern and provided that the conditions imposed provide a benefit that compensates or mitigates the consenting party against the consequences of providing such consent.

COMMENT

The issue of withholding consent arises regularly under long and short term shipping charter parties, long-term oil and gas contracts, construction contracts and in the context of corporate matters, e.g. joint ventures agreements. The judgment in *Apache North Sea Ltd v INEOS FPS Ltd* provides much needed guidance on consent provisions in the context of general commercial contracts, as guiding authorities on consent clauses in the past have generally been in the context of property disputes.

Given the current market conditions arising from the ongoing global pandemic, many industry players may likely be reviewing their existing long term agreements to assess whether consent rights could be a means to trigger a renegotiation of contractual terms. A key takeaway form this judgment is that to establish whether consent may be withheld, the parties' bargain as a whole needs to be considered, and not the consent provision in isolation.

The Commercial Court agreed with Apache that INEOS was not entitled to demand an increase in tariff as a condition to providing its consent.

In providing or seeking consent, industry players should therefore closely consider the guidance from the Commercial Court's judgment:

Generally, it will not be considered reasonable for a consenting party to seek to impose conditions which have the effect of enhancing or increasing their rights under the contract.

A party may, however, legitimately attach conditions to its consent which have the effect of enhancing their rights, to the extent these conditions seek to address a legitimate concern and provide a benefit that compensates or mitigates the consenting party against the consequences of providing such consent.

A party which either refuses to consent, or attaches conditions to its consent, must have regard to the parties' bargain as a whole and the reason for withholding unconditional consent cannot be something "wholly extraneous and completely dissociated" from the contract.

The interpretation of these clauses depends on the specific facts and circumstances of the case. To avoid uncertainty, parties should therefore be careful when drafting such clauses, keeping in mind their contractual relationship. Instead of a discretionary reasonableness assessment, the parties should, if possible, consider including clear parameters or conditions for when consent can be withheld. •

CONTACTS /

Nikhil Datta
nid@wrco.co.uk

Jonathan Page
jpa@wrco.co.uk

International enforcement of arbitral awards

– the devil is in the detail (as usual)

The New York Convention allows for recognition and enforcement of international arbitral awards in most states. In this article, we outline the main steps of the process of enforcing international arbitral awards, adding our practical insight on the peculiarities of specific jurisdictions

Around one year ago, on 27 December 2019, Gazprom "voluntarily" paid almost USD 3 billion to Naftogaz, Ukraine's state-owned gas company, to settle damages and interest due under an arbitral award rendered in February 2018. Voluntarily is in quotation marks because the payment was made only after Wikborg Rein's Gas Dispute team (including the authors) had spent roughly one and a half years of pursuing enforcement action in a number of jurisdictions and were getting close to securing a victory. This process and other international enforcement projects have taught us that even if international law provides that arbitral awards should be easily recognised and enforceable in most countries, local procedural and substantive law may significantly affect the prospects of success. In this article, we outline the main steps of an enforcement process, with some observations on the peculiarities of specific jurisdictions.

ASSET IDENTIFICATION

The first step in enforcing an arbitral award is to identify and locate the assets belonging to the losing party, the award debtor. Asset identification may be done in public registers or databases and local counsel may be able to assist with this process. It may also be useful to engage a corporate investigator to search for assets that may not be easily identifiable.

Once assets are identified, it is important to confirm that they in fact have value. It is also important to confirm that assets are held directly by the award debtor, and not by one of its subsidiaries, since courts in most legal systems rarely allow creditors to "pierce the corporate veil" to seize the subsidiaries' assets.

Furthermore, local rules about the jurisdictional limits of asset attachment or seizure orders should be investigated. For instance, if a Swiss company has issued physical share certificates and removed them from the canton in which enforcement is sought, an attachment order issued by a court of that canton has no effect.

In some jurisdictions, the award creditor (the winning party in the arbitration) can request that authorities and courts use their powers to force the award debtor to disclose the location of its assets. In England and Wales, the courts regularly exercise their power to compel a debtor to identify all of its assets in the jurisdiction. In the US, there is a specific federal statute (28 U.S.C § 1782) which can provide asset discovery in the US in aid of foreign enforcement proceedings. By contrast, in the Swiss canton of Zug, it is entirely a matter for the creditor to prove the existence of assets belonging to the award debtor, and failure to do so is a ground to refuse enforcement.

PRE-RECOGNITION ATTACHMENT

Once the award creditor has identified the debtor's assets, it should consider requesting that a court attach these assets before the creditor applies for recognition of the award. Pre-recognition attachments do not transfer any rights over the assets to the award creditor, but they prevent the award debtor from dissipating or diminishing those assets.

To succeed with an application for pre-recognition attachment, most courts require the award creditor to prove that there is a real risk that the award debtor will dissipate assets and to undertake to begin recognition proceedings within a certain period after the attachment has been issued.

If assets are located in several jurisdictions, it may be advisable to commence enforcement proceedings simultaneously in many or all of them. The element of surprise may prevent a recalcitrant debtor from hiding assets in one jurisdiction as soon as it learns of enforcement proceedings in another.

RECOGNITION PROCEEDINGS

The next step to enforce an award is to get a judgment recognising the award. The award creditor will most likely rely on the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards (the "NY Convention"), to which more than 160 states are signatories.

The NY Convention requires national courts in signatory states to give foreign arbitral awards the same treatment as they would domestic court awards. Therefore, provided that certain requirements are met, courts in signatory states must recognise foreign arbitral awards as binding and enforceable in their jurisdiction.

The NY Convention provides only limited grounds for a local court to refuse recognition and enforcement:

1. Invalidity of the arbitration agreement.
2. The debtor was not given proper notice of the arbitration or was otherwise unable to present its case.
3. The tribunal exceeded its mandate or lacked jurisdiction.
4. Irregularity in the composition of the tribunal or the procedure.
5. The award is not binding or has been suspended or set aside by a competent authority in the jurisdiction in which the award was made.
6. The dispute was not capable of settlement by arbitration, or enforcement would violate public policy.

A local court may stay recognition and enforcement pending challenge or set-aside proceedings. In some jurisdictions, for example England and Wales, a stay tends to be the default when challenge proceedings have been initiated, while in others, for example Germany and the Netherlands, a stay is not so easily granted. This is largely explained by the fact that the legal test for whether a stay should be granted differs between jurisdictions. Furthermore, some courts, for example in Switzerland, will look to the court hearing the challenge for signals as to whether enforcement abroad should be delayed; others, like the English courts, will make their own assessment without regard to the position of the court hearing the challenge.

Another factor which can delay proceedings is that some jurisdictions take a formalistic approach to service of notice on the award debtor. The award creditor should therefore check which rules apply for service and notification, how these rules are interpreted and practiced, and how potential delays can be mitigated. Notably, some countries may have bilateral agreements on service with the debtor's country that may be applied instead of the Hague Service Convention. Sometimes, the authorities charged with serving notices in the country of the debtor may appear to wilfully delay service to protect a politically well-connected debtor.

SEIZURE OF ASSETS

If a local court has recognised an award, the award creditor can execute the award by seizing the award debtor's assets. The exact process for seizure differs in various jurisdictions, but certain common features can be identified.

First, the award debtor is given notice before seizure takes place, which may need to be delivered in accordance with international treaties or domestic laws. As described above, this can delay the process and allow the debtor to argue that notice was improperly served.

Second, the court typically orders an independent bailiff or a government authority to seize the assets. Again, the award debtor may have an opportunity to slow or resist the process by arguing that the bailiff or authority has acted improperly.

Once assets are seized, they are either transferred to the award creditor or they are sold, with the proceeds then distributed to the award creditor. If the assets are to be sold by the award creditor, it may need to organise an auction or identify a seller, processes that can be time-consuming. •

CONTACTS /

Aadne M. Haga
aha@wr.no

Charlie Pope
cpo@wr.no

Ulrikke Størseth
ust@wr.no

NEWS & VIEWS

• *PERSONELL NEWS* • *SHORT TOPICS* • *SECTOR NEWS* •

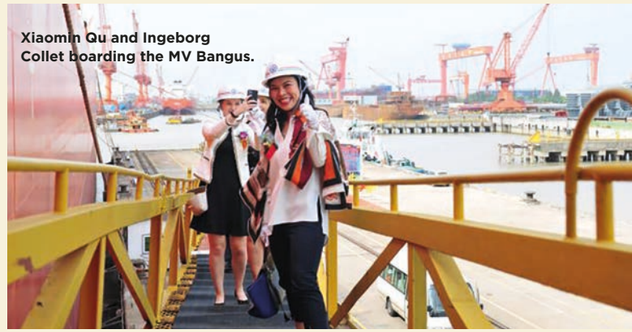
Particiapants got a tour of the ship.

Wikborg Rein's Ingeborg Collett (left) and Therese Trulsen (right) with the Norwegian Ambassador to China Signe Brudeseth, whom was was the god mother of the vessel.

Vessel naming ceremony

On 14 October **Xiaomin Qu**, **Therese Trulsen** and **Ingeborg Collett** from Wikborg Rein's Shanghai office attended the vessel naming ceremony for Klaveness's new CLEANBU combination carrier MV Bangus at New Yangzi Shipbuilding in Jinjiang, located about 2.5 hours outside Shanghai. MV Bangus is the fifth in a series of eight CLEANBU combination carriers contracted by Klaveness at New Yangzi Shipbuilding. The CLEANBU vessels are employed in trades where standard dry bulk and tanker vessels sail in ballast over long distances. By combining a tanker cargo in one direction, a dry bulk cargo on the return voyage and minimum ballast in-between, the CLEANBUs reduce the carbon emissions per transported tonne-mile by 30-40% relative to standard tanker and dry bulk vessels.

The Norwegian ambassador to China Signe Brudeset was the god mother of the vessel, and the ceremony included champagne-throwing, fireworks, traditional Chinese drums and dragons. The participants also got a tour of the ship, providing new insights into the modern technology used to make the ship more environmentally friendly, efficient and safe. •



Xiaomin Qu and Ingeborg Collet boarding the MV Bangus.

BIMCO: SHIPLEASE

September 2020 has seen the recent publication of the new "SHIPLEASE" indicative term sheet by the Baltic and International Maritime Council (BIMCO). SHIPLEASE has been drafted to provide the first set of standard terms and conditions for sale and leaseback transactions of second-hand vessels.

As an indicative non-binding term sheet, the intention is to set out the terms and conditions involving the proposed vessel sale and leaseback transaction, which once agreed, are to be incorporated into a memorandum of agreement, a bareboat charter and related security documents as negotiated by the parties.

As Nick Fell, Executive Vice President, Corporate Services and General Counsel of BW Group and chairperson of the term sheet drafting group recently said "Sale and leaseback transactions and structures have been booming in recent years and are now an essential tool for financing the shipping industry". This rise in popularity of alternative sale and leaseback financing, rather than traditional bank financing, has meant that there is an increasing need for standardisation across the market. Wilson Liu, Senior Director at Minsheng Financial Leasing demonstrated this by recently commenting that "There are quite a number of newcomers in the market and having an industry standard is therefore a useful starting point. The term sheet will also facilitate the process for more experienced players".

SHIPLEASE does just this, providing a useful balanced starting point for both operating and financial leases for single or multiple vessel transactions. Moreover, although the term sheet has primarily been developed for sale and leaseback transactions involving second-hand vessels, it can easily be adapted to be used for transactions involving newbuilds or vessels that are undergoing major refit. The term sheet has been based upon SHIPTERM and SHIPTERM S (BIMCO's two existing term sheets for bilateral and syndicated term loan facilities) using the same basic structure throughout, although it is important to note that it does significantly vary from these forms in certain places as SHIPLEASE is not applicable to term loan facilities. The term sheet is however flexible in nature and can be amended and/or adjusted to suit any specific terms or more complicated arrangements as required on a transaction by transaction basis.

Part I of SHIPLEASE follows the customary BIMCO box layout style allowing the parties to set out the key details of their transaction. Part II provides an overview of the transaction and contains the "standard provisions" that parties are open to negotiate. The Annexes allow the parties to set out more detailed provisions on the important topics of vessel specifics, the hire schedule, amounts to be paid in case of termination and on change of control, as well as financial covenants. To provide further assistance, BIMCO have also published useful explanatory notes to help navigate the individual clauses.

The sale of the vessel is contemplated to be covered by a memorandum of agreement based on BIMCO Norwegian Saleform (2012) with the purchase price being the lower of (i) the average of two current broker valuations and (ii) an agreed maximum price in a fixed amount or based on a separate calculation. This offers some flexibility for the parties, but the purchase price in a second hand sale and leaseback transaction will, in our experience, typically be a fixed amount.

The bareboat charter of the vessel is contemplated to be covered by a BIMCO BARECON (2017), which in these cases typically will be supplemented by additional clauses. SHIPLEASE includes a useful catalogue of core provisions for the leaseback arrangement, including hire, charter period, termination, purchase option / purchase obligation, charterer's security, insurances, representations and warranties, covenants (vessel, general, information and financial) and termination events. Provisions for facilitation of lessor's financing (subject to quiet enjoyment undertaking from the mortgagee) and alternatives for lessor's transfer are also included.

SHIPLEASE, along with SHIPTERM and SHIPTERM S, completes the BIMCO suite of term sheets available to financiers, shipowners and their advisors. It is a timely and much needed effort to standardise sale and leaseback transactions, providing a solid and well balanced base for negotiation. •

BIMCO SHIPLEASE:
https://www.bimco.org/contracts-and-clauses/bimco-contracts/shiplease# .

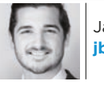
"Sale and leaseback"

A transaction where an owner sells a vessel and immediately leases it back from the purchaser. This allows the owner to utilize the cash invested in the vessel for other purposes, whilst continuing to use the vessel to operate its business. Sale and leasebacks can be attractive as alternative methods of raising capital and has become increasingly important in the capital mix of shipping companies in recent years.

CONTACTS /

Andreas Fjærvol-Larsen
afl@wr.no

Jonathan Page
jpa@wrco.co.uk



Jack Baker
jba@wrco.co.uk

"Fisktrans"

Withdrawal of wreck removal order following consideration of proportionality

In a recent administrative appeal decision, the Norwegian Coastal Administration (the "NCA") Head Office reversed the wreck removal order issued by the NCA Emergency Response Centre in respect of the "Fisktrans" which sank in Northern Norway in 2017. The decision confirms that the pollution authorities shall consider the proportionality of the measures ordered when exercising their administrative discretion.

The cargo ship "Fisktrans" experienced steering problems, grounded and later sank near Brennvika in Steigen municipality in Northern Norway on 25 January 2017 during difficult weather conditions. The vessel had a length overall of 58.4 m. While originally built in 1952, it had been retrofitted several times. The vessel sank to a depth of 152 m, where it became partially embedded in the soft clay seabed. At the time of the sinking the vessel was carrying a cargo of unpacked minced fish and had limited quantities of fuel onboard.

THE INITIAL WRECK REMOVAL ORDER

Following a notice from the NCA Emergency Response Centre that it was considering ordering the removal of the wreck, experts were engaged on behalf of the owners and insurers of the vessel to provide advice on the technical feasibility of a wreck removal and an environmental assessment of the net benefits of the removal of the wreck. The resulting reports concluded that a wreck removal, although technically possible, would be very costly and involve significant health, safety and operational risks. The reports also found that the environmental impact of the wreck was limited and that, since there would be negative environmental consequences of carrying out a wreck removal operation, there was no net benefit in removing the wreck.

It was therefore argued that there was no legal basis for ordering the wreck removal and that, in any event, ordering the wreck removal would be disproportionate taking into account the location of the wreck (depth, embeddedness in seabed, exposure to weather conditions), technical challenges, the risk to health and safety and very high costs, as well as there being no net environmental benefit in removing the wreck.

The assessment was whether the environmental benefits of removal were proportional to the costs, the risks concerning health and safety, as well as environmental and other negative consequences of removal.

The NCA Emergency Response Centre nevertheless ordered the removal of the wreck in November 2018. In its wreck removal order, it dismissed the application of a proportionality requirement in its exercise of administrative discretion, and noted that all wrecks should in principle be removed. In their view allowing a wreck to remain would be contrary to environmental principles and the general developments in international environmental law.

PREVIOUS CONSIDERATION OF PROPORTIONALITY

The decision of the NCA Emergency Response Centre was not surprising taking into account previous precedents on the application of proportionality to environmental law in Norway, including on wreck removal in particular. In a judgment from 2011 (Rt-2011-304 "Frøholm"), the Norwegian Supreme Court dismissed the idea of a general proportionality rule in administrative law, and in a 2015 judgment (LB-2015-54634 "Server"), Borgarting Appeal Court held that the provision in the Pollution Act which sets out the conditions for when there is a duty to remove a wreck did not contain a proportionality requirement. However, neither of these judgments had considered whether proportionality was a required element in the exercise of administrative discretion. The NCA Emergency Response Centre did not accept that there was such a requirement.

THE APPEAL

The owners and insurers of the "Fisktrans" remained of the opinion that there was no basis for the wreck removal order, and therefore filed an administrative appeal against the order.

THE APPEAL DECISION – WITHDRAWING THE WRECK REMOVAL ORDER

A year and a half after the complaint had been filed, the NCA Head Office issued its decision on the complaint in October 2020. In the decision the NCA Head Office upheld the view that there were as a starting point two alternative legal bases on which to order a wreck removal, namely (1) that the wreck was considered a threat to the environment and (2) that it was aesthetically unsightly (Norw. "*skjemmende*"). However, it proceeded to consider whether factors other than the environmental impact of the wreck should be taken into account when exercising their discretionary authority.

The NCA Head Office agreed with the views of the owners and insurers, and first looked at the co-relationship between the purpose and guidance for application of the Pollution Act, as set out in sections 1 and 2 of the Act respectively. The NCA Head Office noted that the purpose of the Act was to ensure "*satisfactory environmental quality*" (emphasis added), which in itself indicated that environmental aspects were not the only relevant concerns for the interpretation and application of the Act. The purpose of the Act was immediately followed by a provision which prescribes a weighing of environmental aspects against other concerns, including economic factors. On this basis the NCA Head Office concluded that:

"The provision must be interpreted as obliging the one who applies the law to also take into consideration a clean environment, socio-economic efficiency and fairness, as policy considerations underpinning the Act and the rules on cost liability. In matters on cost liability, there is no consideration of guilt or what is considered reasonable based on the polluter's personal circumstances, economic position or similar. Socio-economic efficiency is a question of the benefits of the measure and the overall societal costs of pollution. In practice, much of the value of the benefits and the costs must be estimated on an uncertain basis."

The NCA Head Office then noted that the owners and insurers had documented that a wreck removal operation would be very demanding and costly, and that it could pose a risk to both the environment and the personnel involved in the operation. Furthermore, the NCA Emergency Response Centre had not presented any evidence to the contrary. While expressing doubt as to its conclusion, the NCA Head Office accordingly withdrew the wreck removal order.

WEIGHING OF FACTORS EQUALS PROPORTIONALITY TEST

The NCA Head Office does not describe its weighing of environmental considerations against other factors as a proportionality test. However, what the NCA Head Office is effectively doing in its decision is assessing whether the environmental benefits of having the wreck removed outweigh the risks concerning health and safety, as well as the economic, environmental and other negative consequences of the removal. The decision is particularly interesting because it marks a pause in a recent development whereby the Norwegian authorities have explicitly stated that all wrecks should be removed on the basis that they constitute threats to the environment. The confirmation that the authorities must also take into account other factors when exercising their discretion is therefore important, and in line with the exercise of similar discretion by environmental authorities in other countries. Despite this important confirmation, it must be noted that proportionality as part of the exercise of administrative discretion is subject to limited review by the courts, the threshold as a starting point being that the exercise of administrative discretion is highly unreasonable. This consideration of proportionality therefore differs from the proportionality assessment made under the Nairobi Wreck Removal Convention where the relevant legal basis for the wreck removal expressly provides for a proportionality test to be fulfilled as a condition for the issuance of an order to remove a wreck. •

The purpose of the Act is to ensure "satisfactory environmental quality", which in itself indicates that environmental aspects are not the only relevant concerns.

Wikborg Rein assisted the owners and insurers of the vessel.

CONTACTS /

Herman Steen
hst@wr.no

Nina M. Hanevold-Sandvik
nmh@wr.no

OFFSHORE FLOATING WIND TURBINES AND DEEPWATER FISH FARMS – different frameworks for success

The regulatory framework that exists within the shipping and offshore industries is long established. Whilst the existing framework effectively extends to also encompass the offshore floating wind sector in Norway, the same cannot be said for deepwater fish farms.

The general principle (which will no doubt be familiar to all readers of this publication) is that maritime assets above a certain minimum size are required to be registered in a national ship registry. By dint of being registered, the relevant asset will be required to comply with a host of national, regional and international rules and regulations, whose ultimate aim is to ensure that certain minimum standards relating to, inter alia, design, construction, classification, crewing, safe operation and pollution prevention are maintained and adhered to.

Registration of a vessel or asset in a recognized and respected flag state may therefore be regarded as a form of "quality assurance".

In Norway, such government regulation is managed by the Norwegian Maritime Authority, which has around 12,000 vessels (both commercial and non-commercial vessels) on its books, flagged under both the Norwegian Ordinary Ship Register (NOR) and the Norwegian International Ship Register (NIS). Any vessel operating in Norwegian waters exceeding 15 meters in length as well as oil platforms and other mobile offshore units (such as drilling rigs) are required to be registered, unless already registered under a foreign flag.

Oil platforms and mobile offshore units engaged in petroleum activity on the Norwegian continental shelf are also subject to additional rules and regulations imposed by the Petroleum Safety Authority Norway (PSA).

In addition to helping to ensure that shipping and offshore activities are carried out in a safe, secure and regulated manner, vessel registration in a flag state plays an important role in the financing of maritime and offshore assets by enabling lenders to obtain security for loans into these sectors in the form of a registerable and enforceable encumbrance over the relevant asset in the form of a vessel mortgage, giving the holder of such mortgage priority over unsecured creditors.

REGULATORY FRAMEWORK FOR OFFSHORE FLOATING WIND TURBINES

Given the depth of the waters around Norway, fixing offshore turbines to the sea bed is not as easy as it is in other more Southerly parts of the North Sea. For that reason, in its push to develop an offshore wind industry, Norway has focused on utilizing floating turbines (FTUs) and following years of development, the construction of the first floating offshore wind farm (Hywind Tampen) was commenced at Kvaerner Stord earlier this year. Electricity generated at the Hywind Tampen farm will provide renewable power for the the Snorre A and B and Gullfaks A, B and C platforms.

The regulatory framework currently being applied to such FTUs is the same as that applied to other shipping and offshore assets, with FTUs being registerable as "other floating units" in the Norwegian Ordinary Ship Register in accordance with the Regulation on Registration of Other Floating Units published by the Norwegian Ministry of Industry and Ministry of Fisheries in 1994.

As a nod to the similarities such FTUs bear to other mobile offshore units and installations, overall supervisory responsibility for the regulation of such FTUs has been given to the PSA by a government decision of 17 August 2020 who has confirmed that it will be looking to develop more bespoke regulations for the offshore floating wind turbine sector in the coming months. Whilst the regulations are yet to be developed and presented, it is to be assumed that the provisions will broadly follow the principles which have been adopted and applied to mobile offshore units.

Such a development is to be welcomed, and once enacted, this will mean that all interested parties, whether they be owners, operators, lenders or insurers will have a degree of predictability and certainty as to the rules and regulations to be applied. The certainty over title and the ability to create a registerable mortgage over such FTUs will also enable the owners of such FTUs to obtain project financing more easily.

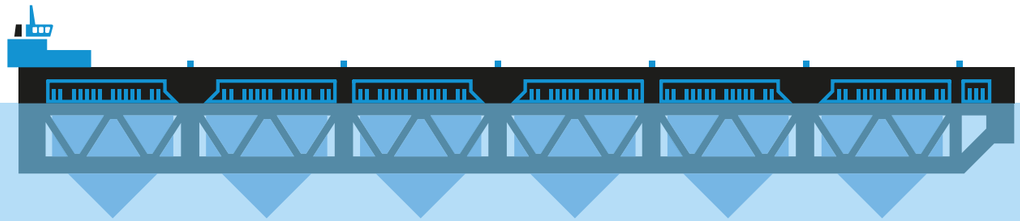
REGULATORY FRAMEWORK FOR DEEPWATER FISH FARMS

In contrast, the regulatory framework for the construction and operation of offshore fish farms is not as developed. Indeed, it is not yet clear which government entity in Norway shall be given overall control over the development of such regulations and the authority to police their application.

As of now it is also not possible to register an offshore fish farm under the Norwegian flag.

From a financing point of view, this presents a huge obstacle to owners or potential owners of such assets with potential lenders having to rely on pledges over shares and equipment and assignments of revenue streams etc. rather than a registerable "in rem" right over the unit itself in the form of a mortgage.

We await with interest further clarification from the Norwegian government as to whether offshore fish farms will be subject to similar regulation as the shipping, offshore oil and gas and offshore wind sectors or whether a new bespoke regulatory regime will be applied and will address any future developments in subsequent publications. •



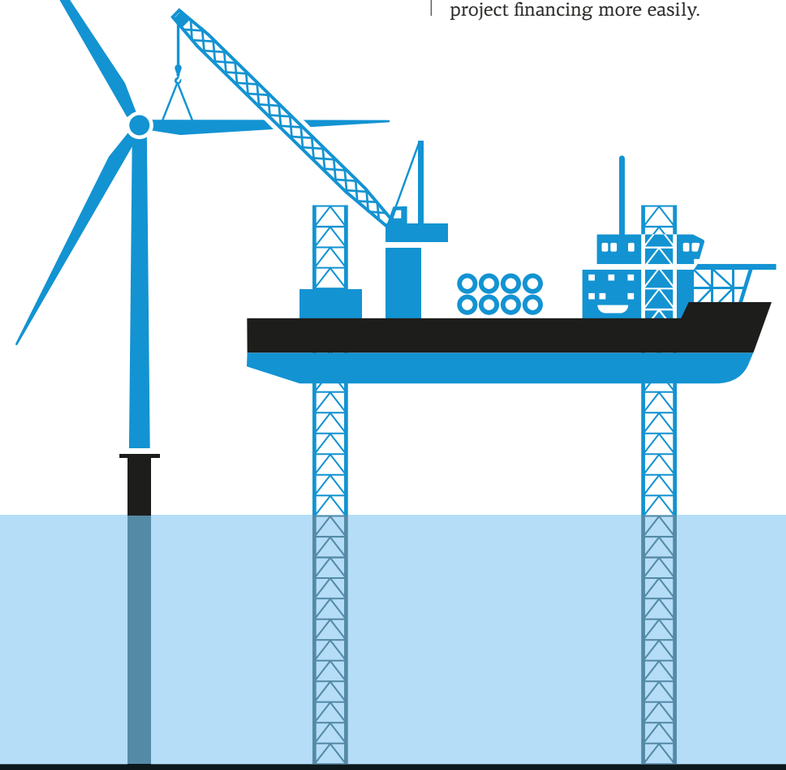


Illustration: Roy Smith

CONTACTS /

Morten Valen Eide
mei@wr.no

Lise Voraa
lvo@wr.no

Halliburton Company v Chubb Bermuda Insurance Ltd [2020] UKSC 48

Arbitrator bias and the duty of disclosure: Supreme Court adopts a pragmatic approach

When parties agree in a contract that any disputes arising from that contract will be referred to arbitration, they hope that any tribunal that will be appointed will be free of bias and approach the matter fairly. One of the long running debates, particularly in specialist fields where there has traditionally been a limited pool of arbitrators, is to what extent arbitrators need to disclose previous relationships with the parties to an arbitration or their lawyers.

In this recent Supreme Court judgment, the court examined the requirements that an arbitrator has to disclose related and/or linked appointments.

For those now participating in London-seated arbitrations (of any format) going forward, the judgment will likely lead to increased disclosure by arbitrators and greater transparency of their relationships with the parties and their lawyers. This is a (largely) welcome development and continues to build on the existing strength of London-seated arbitration.

BACKGROUND FACTS

The case concerned an arbitration under a Bermuda Form liability policy which arose out of the damage caused by the explosion and fire on the Deepwater Horizon drilling rig in the Gulf of Mexico in 2010.

The appellants ("**Halliburton**") entered into a Bermuda Form liability policy ("**Policy**") with ACE Bermuda Insurance Ltd, which is now called Chubb Bermuda Insurance Ltd ("**Chubb**"), in 1992 and the Policy was renewed annually. Following extensive litigation in the United States, Halliburton settled various claims, paying approximately USD 1.1 billion.

Halliburton claimed against Chubb under the Policy but Chubb refused to pay Halliburton's claim. Halliburton invoked the Policy arbitration clause and each party nominated an arbitrator. The nominated arbitrators were unable to agree on the third arbitrator as chairman so in accordance with the arbitration clause the court appointed Mr Rokison QC (proposed by Chubb), as third arbitrator (hereinafter the "**First Reference**").

Following Mr Rokison's appointment in the First Reference, he went on to accept a further two appointments ("**Further References**") closely connected (involving Chubb and on similar issues) with the First Reference. Halliburton discovered these appointments in November 2016, and, during the course of correspondence with Halliburton's lawyers, Mr Rokison (while reiterating his impartiality) pragmatically offered to resign if both parties could agree upon a replacement chairman, but in the absence of such an agreement he would continue as appointed so as to avoid breaching his other statutory duties (as arbitrator) to the parties. The parties could not agree to a replacement chairman and in December 2016 Halliburton sought an order from the High Court under the 1996 Arbitration Act ("**1996 Act**") that Mr Rokison be removed as an arbitrator.

THE EARLIER DECISIONS

That application was dismissed and Halliburton appealed to the Court of Appeal.

The Court of Appeal decided that while the existence of appointments in such related arbitrations could cause the party which

was not involved in the related arbitrations to be concerned, the appointment of a common arbitrator did not on its own justify the inference of apparent bias; something more of substance was required.

The second issue which the Court of Appeal addressed was to identify the circumstances in which an arbitrator should make disclosure of matters which may give rise to justifiable doubts as to his or her impartiality.

The Court of Appeal held that Mr Rokison ought (as a matter of law) to have made a disclosure to Halliburton at the time of his appointments in the Further References. Nonetheless, the court agreed that the fair-minded and informed observer, having considered the facts, would not conclude that there was a real possibility that Mr Rokison was biased. Halliburton appealed the decision to the Supreme Court.

THE ISSUES BEFORE THE SUPREME COURT

The principal issues raised in the appeal were:

(i) whether and to what extent an arbitrator may accept appointments in multiple references concerning the same or overlapping subject matter with only one common party without thereby giving rise to an appearance of bias; and
(ii) whether and to what extent the arbitrator may do so without disclosure.

THE SUPREME COURT DECISION

The Supreme Court unanimously dismissed Halliburton's appeal and held that:

(i) in relation to the first issue, if an arbitrator accepts appointments in several references concerning the similar or overlapping subject matter with only one common party, this may give rise to an appearance of bias;
(ii) as to the second issue, unless the parties to the arbitration otherwise agree, arbitrators do have a legal duty to make disclosure of facts and circumstances which would, **or might reasonably**, give rise to the appearance of bias, though such a duty of disclosure is dependent upon the customs and practice in the relevant field;
(iii) as a matter of English law (and recognising the differences in arbitration formats), and in the absence of an agreement to the contrary between the parties, multiple (related) appointments should be disclosed; and
(iv) therefore, a fair-minded and informed observer (the relevant objective test) **would not** have inferred that there was a real possibility of unconscious bias on Mr Rokison's failure to disclose the further appointments as:
  (a) the position on arbitrator disclosure under English law was not clear at the relevant times;
  (b) the time sequences of the three references may have explained why Mr Rokison disclosed the First Reference in the Further References but not the other way around; and
  (c) that the Further References would have likely been resolved by a preliminary issue hearing such that there would not be any overlap in evidence or legal submissions with the First Reference.

COMMENT

The decision of the Supreme Court seeks to balance the need to set an appropriate threshold of disclosure to protect against arbitrator bias (or the appearance of bias), without encouraging unnecessary intervention in arbitral processes, and, while clarifying the legal position, questions remain amount how the law will be applied in practice going forward.

In particular, it remains to be seen how the clarification of the law will be addressed in the context of repeat appointment forums such as the London Maritime Arbitrator's Association (for maritime disputes) and The Grain and Feed Trade Association (for commodity disputes), which often draw upon a relatively small pool of arbitrators and where it is not uncommon for the same arbitrators to be repeatedly appointed by the same company or group of companies.

We suggest that all parties to future arbitrations consider their approaches to requesting arbitrator disclosure prior to appointment, to avoid issues such as here. We hope, following this decision, that all arbitration formats and arbitrators will take active steps to both: (i) record appointments; and (ii) use that data to make appropriate disclosures.

Ultimately, and despite some continuing concerns about the manner in which arbitrator disclosure should be sought and provided, this judgment should further strengthen international confidence in London-seated arbitrations by:

(i) restating the core principles of arbitrator impartiality;
(ii) recognising the importance of confidentiality in arbitration proceedings, but also how this can be balanced with arbitrator disclosure obligations; and
(iii) reiterating that parties should have confidence in the ability to seek appropriate High Court intervention in appropriate circumstances. •

CONTACTS /

Shawn Kirby
sdk@wrco.co.uk

Alex Hookway
ahw@wrco.co.uk

The London Dumping Regime

– taking a lead in developing a legal framework for ocean fertilization activities

Contracting Parties to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 (the London Convention) and the 1996 London Protocol[1] have taken steps to address potential harm to the marine environment from the evaluation of new experimental technologies designed to reduce carbon dioxide in the atmosphere.

---

[1] For a longer and more detailed version of this article see: Elise Johansen, 'Ocean fertilization' in E. Johansen, S.V. Busch and I.U. Jakobsen The Law of the Sea and Climate Change – Solutions or Constraints (Cambridge University Press, 2020).

Photo: NOAA MESA Project

In order to meet the goals of the Paris Agreement, large-scale extraction of carbon dioxide (CO_2) seems imperative.

MITIGATING CLIMATE CHANGE WITH OCEAN FERTILIZATION

'Ocean fertilization' refers to adding iron or other nutrients, such as volcanic ash, phosphate and urea, into the ocean in areas with low biological productivity in order to stimulate phytoplankton growth. In theory, the resulting phytoplankton draw down atmospheric CO_2 and then die, falling to the ocean bed and sequestering carbon. Simply put, the objective of ocean fertilization is to mitigate climate change by putting some of the carbon into a 'hidden' reservoir, where it cannot reach the atmosphere.

LACK OF INTERNATIONAL REGIME FOR OCEAN FERTILIZATION ACTIVITIES

From a legal perspective, there are many uncertainties in relation to ocean fertilization activities. No international treaty regime or bodies are devoted to ocean fertilization or geoengineering activities in general. That does not mean that ocean fertilization takes place in a 'legal black hole'. While the UN Climate Change Regime views ocean fertilization as a mitigation measure, the Law of the Sea Regime (LOSC) categorizes ocean fertilization as pollution. The latter regime is the one setting the premises for the regulatory approach. As ocean fertilization is an activity carried out in the ocean space and affecting the marine environment, it must adhere to the assigned limits of the LOSC Part XII obligations.

By adopting a regulatory regime for ocean fertilization activities, the London Dumping Regime has addressed a gap in the law of the sea and created a pre-emptive regulatory regime that endorses and implements a highly precautionary approach.

REGULATING OCEAN FERTILIZATION UNDER THE LONDON DUMPING REGIME

The London Dumping Regime has taken a leading role in developing a legal framework for ocean fertilization. Sparked by the increasing interest in this activity by both scientists and private operators, the contracting parties set about constructing a regulation on ocean fertilization. Having confirmed their belief 'that the scope of work of the London Convention and Protocol included ocean fertilization', in 2008 the contracting parties adopted 'Resolution LC-LP. 1 (2008) On the Regulation of Ocean Fertilization'. This resolution defined ocean fertilization as 'any activity undertaken by humans with the principle intention of stimulating primary productivity in the oceans', and reaffirmed the belief that ocean fertilization fell within the scope of the London Convention and Protocol. The 2008 resolution stated that ocean fertilization for non-scientific purposes is subject to and contrary to the London Convention and Protocol.

Legitimate scientific research, by contrast, involves 'placement of matter for a purpose other than mere disposal' and may be permitted on a case-by-case basis if conducted in accordance with the Assessment Framework adopted by the contracting parties in 2010. Pursuant to this Framework, parties must undertake environmental assessments, emplace monitoring procedures and facilitate adaptive management. The Assessment Framework has been criticized for its scope and its content, inter alia for failing to provide incentives for the necessary scientific research on risk analysis by raising bureaucratic barriers to research experiments. Nevertheless, the Framework is described as a model of precautionary and adaptive management, offering both procedural and substantive environmental requirements. Neither the 2008 nor the 2010 resolution is legally binding, but a legally binding resolution to regulate ocean fertilization was adopted in 2013. This resolution amends only the London Protocol, and adds a new Article 6bis:

Contracting Parties shall not allow the placement of matter into the sea from vessels, aircraft, platforms or other man-made structures at sea for marine geoengineering activities listed in Annex 4, unless the listing provides that the activity or the sub-category of an activity may be authorized under a permit.

A new Annex V adds the Assessment Framework for matter that may be considered for placement under Annex 4. The resolution stipulates that only ocean fertilization activities 'constituting legitimate scientific research taking into account [the] specific [2010] assessment framework' can be considered for a permit. The amendments will enter into force sixty days after two thirds of forty-eight contracting parties have deposited instruments of acceptance of the amendment with IMO. That has not yet happened, as of the date of this SO Update.

TAKING ON A NEW ROLE

By adopting a regulatory regime for ocean fertilization activities, the London Dumping Regime has addressed a gap in the law of the sea and created a pre-emptive regulatory regime that endorses and implements a highly precautionary approach. This initiative under the London Dumping Regime is interesting because it demonstrates a wide interpretation of its mandate. From being a regime focusing primarily on protecting the marine environment from dumping (mainly from ships), the regime takes on a more active protective role and mandates itself as the appropriate forum for providing a global regulatory framework for geoengineering activities. However, there are practical problems with the London Dumping Regime taking on this regulatory role. The low endorsement of the London Protocol, and even lower endorsement of the amendment, make it difficult to argue that these regulations have become binding on all LOSC parties through the rule of reference included in LOSC Article 210. Another problem with the London Dumping Regime is the reliance on flag state jurisdiction. States have jurisdiction over ocean fertilization activities in their maritime zones and over vessels and aircrafts flying their flag, which leaves ocean fertilization activities on the high seas subject solely to flag-state jurisdiction.

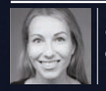
CONTRIBUTING TO THE SUSTAINABLE DEVELOPMENT GOALS

Ocean fertilization has the potential to become a vital technology for achieving the emissions target in the Paris Agreement. This makes developing and applying ocean fertilization techniques important in the c ontext of the UN Agenda for Sustainable Development, especially in relation to Sustainable Development Goal (SDG) 13, which urges action to combat climate change, and SDG 14, on ensuring sustainable use of the oceans. If overcoming the practical issues, the London Dumping Regime has the potential to offer a much-needed regulatory framework for ocean fertilization activities. •

Illustrations: The UN

CONTACTS /

Elise Johansen
elj@wr.no



Cathrine Hetland
cbh@wr.no

Photo: NOAA MESA Project

"Full City"

5

key takeaways from the limitation fund proceedings

In November 2020, the limitation fund established following the grounding of the "Full City" near Langesund, Norway, in 2009 was finally distributed. The limitation fund proceedings, which ran in parallel with the proceedings concerning the limitation fund established following the "Server" casualty in 2007, have helped clarify several procedural aspects of limitation funds.

The "Full City" grounding caused a major oil spill and, as a result, a state led clean-up operation, criminal proceedings against the master and third officer (the latter was eventually acquitted), and civil claims for damages against the owners. We have written about these aspects of the incident in previous articles.

Now that the limitation fund proceedings have come to an end, we set out below five key takeaways from those proceedings.

1 CLUB LETTERS FROM IG CLUBS ARE ACCEPTED AS SECURITY

When the limitation fund was established in 2012, the limitation amount was deposited in cash with the district court/fund administrator, while a club letter was issued by the vessel's English P&I club as security for interest calculated from the time of the incident until the establishment of the fund. The court's acceptance of the club letter as security confirmed that such letters are considered adequate security not only when issued by Norwegian insurers (as referred to in the preparatory works to the Norwegian Maritime Code), but also by other reputable insurers, such as non-Norwegian members of the International Group of P&I Clubs. This precedent was followed in another subsequent limitation fund, where both the parties and the court permitted a club letter issued by another English P&I club to constitute the limitation fund (both the limitation amount and interest).

2 A GOOD FUND ADMINISTRATOR WILL FACILITATE A SMOOTH PROCESS

An experienced maritime lawyer was appointed as fund administrator for the limitation fund, and his involvement was helpful in ensuring progress in the proceedings, while also giving adequate opportunities for the parties to reach agreement on issues, where this was possible. In accordance with the procedural rules set out in the Maritime Code, the parties can choose to accept the administrator's non-binding preliminary opinion on disputed issues or initiate limitation proceedings. In this case, several procedural issues were solved based on the fund administrator's preliminary opinions. As the fund administrator's final adjustment is used as the basis for the distribution of the fund (unless disputed by the parties), it is important to seek the appointment of a fund administrator who is knowledgeable, neutral and can gain the trust of the parties involved in the limitation proceedings.

3 ON ACCOUNT PAYMENTS REDUCE INTEREST EXPOSURE

Following the "Full City" and "Server" limitation fund proceedings, it is now clear that interest will be calculated on the claimants' portion of the limitation amount (i.e. the dividend) in accordance with the underlying rules on interest, such as interest on overdue payment, deprivation interest (Norw. "avsavnsrente") or agreed interest. Interest will continue to accrue until payment is made, regardless of whether the limitation amount has been deposited in cash or not. Since it may take a number of years before a limitation fund is distributed, on account payments of undisputed claims will therefore limit the owners' exposure to interest. Such payments will however require agreement between the parties interested in the fund or a decision by the court.

It is important to seek the appointment of a fund administrator who is knowledgeable, neutral and can gain the trust of the parties in the limitation fund.

Photo: Kystverket

Photo: Kystverket

4 COORDINATION BETWEEN PARALLEL FUNDS MAY BE COST-SAVING

The only claimants in the "Full City" limitation fund were the Norwegian state, who filed their claim for clean-up costs, and the owners/insurers, who filed their claim for reimbursement of expenses and costs relating to SCOPIC, clean-up and certain subrogated claims. Norway has made a reservation under the Limitation of Liability for Maritime Claims Convention and has established separate, higher national limitation amounts for clean-up costs. The owners' own costs are also subject to this higher limitation amount, and the owners are accordingly entitled to file a claim for their own costs in a limitation fund. This was similar to the set-up in the "Server" limitation fund, which was established half a year earlier, although with different owners and insurers.

Due to a number of similarities between the disputed issues in the two limitation proceedings, it was decided to stay the corresponding aspects of the "Full City" proceedings pending final and enforceable judgment in the "Server" proceedings, with the principles set out in that judgment then being applied to the "Full City" claims. Meanwhile, issues that were particular to the "Full City" fund were considered by the fund administrator and proceeded in parallel. Overall, cooperation between the two funds led to a reduction in the state's claim in both funds, and significant cost-saving. In dealing with late submissions of new legal arguments by the state in the "Server" fund, the owners and insurers were in turn able to rely on the principles established in the "Full City" judgment to support their position.

5 BE AWARE OF THE PARTICULAR RULES ON PRECLUSION

The "Full City" and "Server" limitation proceedings have shown that those involved in a limitation fund must be prepared for new legal arguments being presented by the claimants up until the final distribution of the fund. This may prolong the proceedings. Unfortunately, there is little that the owners and insurers can do to speed up the process towards the final distribution of the fund if there is a dispute with the claimants. Fortunately, there are three particular rules on preclusion that apply to reduce delay and abuse of process in limitation proceedings. First, a party will be precluded from objecting to the fund administrator's adjustment if this is not raised during a fund meeting. Second, a party will be precluded from objecting to the fund administrator's adjustment before the courts if a deadline to file a writ of summons to object is missed. Third a party will be precluded from bringing a claim against the fund after distribution of the fund has been considered by the court of first instance (district court).

In the "Full City" fund, the state sought to bring new and increased interest claims after they had confirmed their agreement to the fund administrator's adjustment. The court of appeal therefore held that the claim was precluded. While the case was settled, it clearly shows that the courts are willing to apply the preclusion rules in order to ensure progress in the fund proceedings.

THE LONG TAIL OF A MAJOR CASUALTY

The "Full City" limitation fund was finally distributed 11 ½ years after the incident. It is therefore a reminder that the resolution of legal issues following major casualties can be a drawn out process with several twists and turns, all of which requires patience from the owners, insurers and legal advisors. We would like to express our gratitude to the owners and manager of the vessel and the London P&I Club for their trust and excellent cooperation in this matter. •

CONTACTS /

Nina M. Hanevold-Sandvik
nmh@wr.no

Gaute Gjelsten
ggj@wr.no

Morten Lund Mathisen
mlm@wr.no

MARINE LIQUID HYDROGEN VALUE CHAIN – CONSIDERATIONS

A complete liquid hydrogen value chain is currently in development on the west coast of Norway. What are the key issues affecting the development of such a large scale cooperation project?

In order to achieve the international and national goals and commitments to reduce CO2-emissions, several companies within the maritime sector are now looking into alternatives to conventional fuel.

The most common alternative is electric power and use of batteries, but such technology currently has its limits due to weight, capacity and consumption, and might not be a viable alternative for all types of vessels. The maritime industry is therefore also looking into other types of low and zero-emission fuels, such as liquid hydrogen. This may in particular be necessary for large and high speed vessels, such as cruise ships and high speed ferries.

A key barrier to the potential use of liquid hydrogen as an alternative source of fuel for the maritime industry in Norway has been the lack of a sufficient number of end-users. The result has been an inefficient value chain and a corresponding high cost. End-users have therefore not had any real incentive to change from conventional fuel to liquid hydrogen. In order to seek to change this, a consortium comprising nine companies active on all levels of a potential value chain for liquid hydrogen was established late 2019 in Norway.

Establishing such a new value chain raises several legal, economic and technical questions. It involves several areas of law, and not only the participants in the consortium, but also third parties and public authorities. In this short article we will describe some of the considerations in these types of projects.

LEGAL FRAMEWORK – FROM LETTER OF INTENT TO EXECUTION

In projects where several companies cooperate, it is necessary to have a solid legal framework which clearly sets out each participant's rights and obligations, as well as certain governance principles for the cooperation. In the early phases of a project, this may be done on a high level basis in the form of a letter of intent or similar "soft"-binding documents. However, once the project starts, it is necessary to set out these principles in more detail. This is normally done in the form of a consortium agreement.

A consortium agreement includes rules on each of the participants financial contributions, a budget, a description of what the participants shall deliver and develop, and a project schedule. Further, it will typically contain rules on governance and organisation, intellectual property rights, as well as provisions on default, liability, termination and confidentiality. Depending on the participants and the type of project, other matters such as competition law, pre-agreement on transfer or right to use intellectual property rights, exclusivity and warranties could also be relevant. If the project receives public funding, the public funding authorities may also have specific requirements that they will want built into the agreement.

It is important that the consortium agreement takes into account the particulars of the project, how it is intended to progress, and what its results are intended to be. In the event of establishment of a new value chain, the participants may for example envision that there may be sub-projects, or that it is necessary to establish new companies for the purposes of execution and commercialisation. Such matters should, to the extent possible, be addressed early and regulated in the consortium agreement. If not, there may be difficult discussions between the participants at a later stage in the project.

Execution of a project may be done by all of the participants individually, or through collaboration between all or some of the participants. It may also be divided between the participants depending on which markets they are currently active in. For example, while it may be necessary for ship owners to be part of a project, it may not make sense that they also participate in commercialisation and execution of the production and supply of fuel.

Certain parts of the project may also require substantial investment, with the consequence that two or more participants decide to establish a jointly owned company – a joint venture. The specifics for such joint ventures are normally separately agreed in partnership or shareholders' agreements.

RECEIVING STATE AID

In order to establish and carry out a project, funding from public authorities may be necessary. This is particularly the case for new technology or development of new value chains, which may not in itself be commercially viable without public funding.

Establishing such a new value chain raises several legal, economic and technical questions. It involves several areas of law, and not only the participants in the consortium, but also third parties and public authorities.

An important aspect of such funding is that it is governed by state aid rules. The main principle in this respect, is that all state aid is forbidden, except for pre-cleared schemes or aid for pre-defined purposes. Although most of the available funding schemes have been pre-cleared, it might be worth exploring other options – still within the state aid rules – if none of the available schemes cover the project.

In Norway, it has for example not been clear whether it would be possible to receive public funding for the production of liquid hydrogen as part of the establishment of a new value chain. The reason for this is that even though the establishment of such a value chain would be innovative, the production of liquid hydrogen is in itself not innovative. However, a recently approved scheme in Germany indicates that this may also be possible to achieve within the state aid rules, at least for several parts of the project.

COMPETITION LAW CHALLANGES

The participants in a research and development project may be deemed actual or potential competitors, or risk becoming so in the future. It may therefore also be important to take into account applicable competition law rules, and include provisions or mechanisms which ensures compliance.

In general, the risk of acting in breach of applicable competition law is low in the early phases of a research and development project as at this stage, cooperation may be necessary and well founded.

Normally therefore, the risk increases as the project develops. Whilst due care is necessary at all stages, taking into account competition law is particularly important if two or more of the participants in the project decide to establish a joint venture for project execution and commercialisation. In the event that this is decided, a key strategic decision to make is whether the joint venture shall be "full-function" or not.

In order for the joint venture to be a full function company, it must be an autonomous economic entity which operates on a lasting basis. In addition, the company must be under the joint control of the participants. The requirement of joint control must be considered in connection with the establishment of the joint venture. In this respect, the participants should take into consideration that this requirement in principle may be met even if one of the participants are envisioned to have a majority shareholding. However, in such a case specific mechanisms in the partnership or shareholders' agreement, such as granting the minority shareholders sufficient veto rights, are necessary in order to ensure that the requirement of joint control is met.

A full-function joint venture will need to be notified to and cleared by the relevant competition law authorities. Which competition law authority is relevant in the circumstances will depend on the relevant market and the turnover of the participants involved. It may be national competition law authorities or the EU Commission. Once cleared, there will be less need for continuous monitoring of competition law compliance for the joint venture as such. Alternative forms of co-operation may be easier to set up, but all require continuous self-assessment to ensure compliance. The costs of setting up a full-function joint venture might be small compared to the costs of continuous monitoring and potential sanctions in the event of a breach.

USE AND PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

Intellectual property is key in innovative projects. Achieving success and cooperation in projects where multiple participants take part require highly tailored and clear-cut regulations on intellectual property.

In these types of projects, participants normally require protection of the intellectual property they bring into the project, commonly referred to as the "background intellectual property rights" or "project background". In addition, the participants need to agree on ownership of any intellectual property which may be developed in the project, normally referred to as the "foreground intellectual property rights" or "project results". There may also be other rules related to intellectual property rights, for example that a single participant is to keep certain rights which are developed.

How this is regulated will depend on the individual project. Whilst the specific regulations may vary, it is generally important to take into account the project execution and commercialisation early in order to ensure that the relevant participants are granted ownership and sufficient rights to be able to carry this out efficiently. If this is not done, there may be difficult discussions between the participants at a later stage in the project. •

CONTACTS /


Christian James-Olsen
col@wr.no


Knut H. Magnussen
khm@wr .no


Jens Drageset
jdr@wr.no

WIKBORG REIN'S SHIPPING OFFSHORE GROUP

OSLO

Partners

Finn Bjørnstad
fbj@wr.no / +47 415 04 481

Trond Eilertsen
tei@wr.no / +47 901 99 186

Andreas Fjærvoll-Larsen
afl@wr.no / +47 959 33 614

Anders W. Færden
awf@wr.no / +47 908 28 382

Gaute Gjelsten
ggj@wr.no / +47 995 23 535

Birgitte Karlsen
bka@wr.no / +47 902 57 337

Morten Lund Mathisen
mlm@wr.no / +47 994 57 575

Johan Rasmussen
jra@wr.no / +47 918 00 933

Herman Steen
hst@wr.no / +47 930 34 693

Are Zachariassen
aza@wr.no / +47 909 18 308

Specialist Counsel

Nina M. Hanevold-Sandvik
nmh@w.no / +47 911 18 200

Senior Lawyers

Halvard Saue
hsa@wr.no / +47 906 53 258

Sindre Slettevold
sis@wr.no / +47 977 59 418

Senior Associates

Mari Berg Rindahl
mrd@wr.no / +47 910 03 617

Julia Skisaker
jsk@wr.no / +47 905 84 276

Mads Ødeskaug
mod@wr.no / +47 992 69 943

Aleksander Fjeldberg Taule
aft@wr.no / +47 976 09 401

Associates

Peter Kristian Jebsen
pkj@wr.no / +47 938 35 577

Markus Laurantzon
mbl@wr.no / +47 418 48 363

Oskar Otterstrøm
oot@wr.no / +47 916 98 462

Simen Varhaug
sva@wr.no / +47 406 04 099

Alexander Wintervold
awi@wr.no / +47 950 75 706

BERGEN

Partners

Øyvind Axe
axe@wr.no / +47 970 55 558

Morten Valen Eide
mei@wr.no / +47 932 20 980

Christian James-Olsen
col@wr.no / +47 928 33 919

Geir Ove Røberg
gor@wr.no / +47 900 35 045

Of Counsel

Øystein Meland
ome@wr.no / +47 901 42 033

Senior Lawyers

Stian Holm Johannessen
shj@wr.no / +47 917 59 272

Knut Magnussen
khm@wr.no / +47 922 53 547

Senior Associates

Anne Celine Troye
act@wr.no / +47 468 86 671

Jonas Nikolaisen
jni@wr.no / +47 932 53 485

Associates

Jens Drageset
jdr@wr.no / +47 454 67 583

Håvard S. Njølstad
hsn@wr.no / +47 468 83 488

Andreas Slettevold
and@wr.no / +47 958 42 824

Lisa Voraa
lvo@wr.no / +47 948 76 838

LONDON

Partners

Renaud Barbier-Emery
rbe@wrco.co.uk / +44 78 8959 8672

Jonathan Goldfarb
jgo@wrco.co.uk / +44 78 8959 8115

Chris Grieveson
cjg@wrco.co.uk / +44 79 6644 8274

Matt Illingworth
mji@wrco.co.uk / +44 78 8959 9449

Rob Jardine-Brown
rjb@wrco.co.uk / +44 77 8572 2147

Shawn Kirby
sdk@wrco.co.uk / +44 78 4169 7476

Jonathan Page
jpa@wrco.co.uk / +44 78 0351 5388

Nick Shepherd
njs@wrco.co.uk / +44 77 0375 6039

Mike Stewart
mis@wrco.co.uk / +44 79 7121 4231

Baptiste Weijburg
baw@wrco.co.uk / +44 78 4148 1102

Specialist Counsel

Eleanor Midwinter
elm@wrco.co.uk/ +44 78 4142 2690

Mary Lindsay
mel@wrco.co.uk / +44 77 0375 6038

Senior Lawyers

Alex Hookway
ahw@wrco.co.uk/ +44 75 9381 2011

Lesley Tan
les@wrco.co.uk / +44 78 8960 5529

Senior Associates

Bård Breda Bjerken
bbb@wrco.co.uk / +44 78 4149 7728

Camilla Burton
ccb@wrco.co.uk / +44 75 4076 0797

Nikhil Datta
nid@wrco.co.uk / +44 75 6242 0775

Sebastian Lea
sle@wrco.co.uk / +44 75 6242 1029

Fiona Rafla
fra@wrco.co.uk / +44 78 4147 0380

Associates

Andrew Cottrell
aco@wrco.co.uk / +44 79 3505 7732

Alexandra Eriksen
aer@wrco.co.uk / +44 78 4148 7667

Sindre T. Myklebust
smy@ wrco.co.uk / +44 77 3604 0741

Sebastian Sandtorv
sbs@wrco.co.uk / +44 79 3500 2048

Marcus Charles Sharpe
mcs@wrco.co.uk / +44 078 8957 5055

Trainee Solicitors

Matthew Alker
maa@wrco.co.uk / +44 75 4740 6959

Jack Baker
jba@wrco.co.uk / +44 75 9138 5954

Sofie Gleditsch
sgl@wrco.co.uk / +44 79 9902 9976

Gry Hallas
gha@wrco.co.uk / +44 79 3506 0946

SHANGHAI

Partners

Chelsea Chen
cch@wrco.com.cn / +86 138 1687 8480

Yafeng Sun
yfs@wrco.com.cn / +86 139 1700 6677

Ronin Zong
rlz@wrco.com.cn / +86 138 1665 0656

Specialist Counsel

Xiaomin Qu
xqu@wrco.com.cn / +86 135 6475 3289

Senior Lawyers

Claire Jiang
cji@wrco.com.cn / +44 138 1676 7292

Therese Trulsen
ttr@wrco.com.cn / +86 185 2131 2626

Senior Associates

Ingeborg Collett
icb@ wrco.com.cn / +86 185 2132 1616

Tianyi Li
tli@wrco.com.cn / +86 150 0055 5069

Jiahao Lu
jil@wrco.com.cn / +86 137 8890 9200

Sherry Qui
shq@wrco.com.cn / +86 135 0171 2717

Associates

Iris Shen
irs@wrco.com.cn / +86 135 6414 9309

SINGAPORE

Partners

Robert Joiner
raj@wr.com.sg / +65 8518 6239

Ina Lutchmiah
ivl@wr.com.sg / +65 9662 3756

Senior Lawyer

Matthew Dow
mdo@wr.com.sg / +65 9829 2244

Senior Associate

Hélène Sironneau
hsi@wr.com.sg / +65 9662 4864

VIEIRA REZENDE ADVOGADOS
in alliance with Wikborg Rein

Wikborg Rein contact

Daniela Ribeiro Davila
dribeiro@vieirarezende.com.br /
+55 21 2217 2893

www.wr.no

Oslo
Tel +47 22 82 75 00
oslo@wr.no

Bergen
Tel +47 55 21 52 00
bergen@wr.no

London
Tel +44 20 7367 0300
london@wr.no

Singapore
Tel +65 6438 4498
singapore@wr.no

Shanghai
Tel +86 21 6339 0101
shanghai@wr.no