TORT TRIAL & INSURANCE PRACTICE

Committee News

Defending Liberty Pursuing Justice

Winter 2014

Admiralty and Maritime Law Committee

Editors Note: The Patson Wilbroad Arinaitwe article is part one of a four-part series analyzing the key issues impacting the oil and gas sector of the maritime industry. The remaining articles will be published throughout the remainder of the year in our Committee's quarterly newsletters.

RISK ALLOCATION IN OIL AND GAS SERVICE CONTRACTS: A COMPARATIVE ANALYSIS OF U.S. OUTER CONTINENTAL SHELF AND U.K. CONTINENTAL SHELF JURISDICTIONS.

By: Patson Wilbroad Arinaitwe[1]

ABSTRACT

The oil and gas industry has evolved over time. With technological innovations, oil companies have explored and discovered new reserves in deep waters. These offshore operations have associated environmental, commercial, operational, and accidental risks involving oil spills. In addition to the operator, a typical oil and gas platform in the offshore operations has many players like contractors and subcontractors providing different specialised services necessary for oil and gas exploitation. This in itself increases the risk and makes it difficult to insure against all the conceivable risks. As a result, many jurisdictions with offshore oil and gas activities are seeking ways to provide a safer oil and gas exploration and production environment and assure

Continued on page 14

1 Patson Wilbroad Arinaitwe is an Associate at *Sebalu and Lule Advocates*, which is one of the leading law firms in Uganda and a Member of the DLA Piper Africa Group. He is heavily involved in corporate commercial litigation and the firm's energy and oil and gas portfolio advising numerous oil and gas majors operating in Uganda. He can be reached at parinaintwe@sebalulule.co.ug or +256772661665. This article is an extract from a masters research paper submitted in partial fulfillment of an LLM in Oil and Gas Law at Robert Gordon University- Aberdeen (UK).

IN THIS ISSUE:

Chair

James P Koelzer
Robins Kaplan Miller & Ciresi
2049 Century Park E, Ste 3400
Los Angeles, CA 90067-3208
(310) 229-5443
Fax: (310) 229-5800
jpkoelzer@rkmc.com

Chair-Elect

Pamela Annette Palmer
Morris Polich & Purdy LLP
1055 W 7th St, Ste 2400
Los Angeles, CA 90017-2550
(213) 891-9100
Fax: (213) 488-1178
ppalmer@mpplaw.com

Last Retiring Chair

Laurie J Sands
Riker Danzig et al
1 Speedwell Ave, Headquarters Plaza
Morristown, NJ 07960-6838
(973) 451-8534
Fax: (973) 451-8763
lsands@riker.com

Scope Liaison

David Vandiver Wilson II
Hays McConn Rice & Pickering
1233 West Loop S, Ste 1000
Houston, TX 77027-9109
(713) 654-1111
Fax: (713) 650-0027
dwilson@haysmcconn.com

Council Representative

G Glennon Troublefield
Carella Byrne et al
5 Becker Farm Rd, Ste 200
Roseland, NJ 07068-1788
(973) 994-1700
Fax: (973) 994-1744
gtroublefield@carellabyrne.com

Membership Vice-Chair

Raymond Timothy Waid
Liskow &Lewis
One Shell Square
701 Poydras Street, Suite 5000
New Orleans, LA 70139
(504) 556-4042
rwaid@liskow.com

Newsletter Vice-Chair

Christopher Nolan
Holland & Knight LLP
31 W 52nd St, Fl 11
New York, NY 10019-6111
(212) 513-3307
Fax: (212) 341-7237
chris.nolan@hklaw.com

Technology Vice-Chair

Glenanne Bowden
Robins Kaplan Miller & Ciresi
2049 Century Park E, Ste 3400
Los Angeles, CA 90067-3208
(310) 229-5861
gbowden@rkmc.com

Vice-Chairs

James Wilson Bartlett III
Semmes Bowen & Semmes
25 S Charles St, Ste 1400
Baltimore, MD 21201-2400
(410) 539-5040
Fax: (410) 539-5223
jbartlett@semmes.com

Philip C Brickman
Fowler Rodriguez Valdes-Fauli
400 Poydras St, Fl 30
New Orleans, LA 70130-3245
(504) 523-2600
Fax: (504) 523-2705
pbrickman@frfirm.com

K. Blythe Daly
Holland & Knight LLP
31 W 52nd St, Fl 11
New York, NY 10019-6111
(212) 513-3570
Fax: (212) 385-9010
blythe.daly@hklaw.com

Michael J Daly
Pierce Atwood LLP
10 Weybosset St, Fl 4
Providence, RI 02903-2818
(401) 588-5113
mdaly@pierceatwood.com

Janice R Hugener
The Hugener Law Group
1 Sansome St, Ste 3500
San Francisco, CA 94104-4448
(415) 944-9413
Fax: (415) 869-5403
jhugener@hugenerlaw.com

Christopher Hamilton
Hamilton Miller & Birthisel LLP
100 S Ashley Dr, Ste 1210
Tampa, FL 33602-5313
(813) 223-1900
Fax: (813) 223-1933
chamilton@hamiltonmillerlaw.com

Grady S Hurley
Jones Walker et al
201 Saint Charles Avenue, 48th Floor
New Orleans, LA 70170-1000
(504) 582-8224
Fax: (504) 589-8224
ghurley@joneswalker.com

Anne L Kulesa
PO Box 751
Bartonsville, PA 18321
(570) 517-1482
anne.kulesa@gmail.com

Joseph Kulesa
Fisher & Fisher Law Offices LLC
3041 Route 940, Suite 107
Mount Pocono, PA 18344-1324
(570) 839-8690
Fax: (570) 839-7675
joseph.kulesa@pocono-lawyers.com

Harmony Iris Loube Jones
Holland & Knight LLP
800 17th St NW, Ste 1100
Washington, DC 20006-3962
(202) 469-5175
harmony.loube@hklaw.com

Jessica Link Martyn
416 S Vanpelt St
Philadelphia, PA 19146-
(757) 687-7706
jessicalmartyn@gmail.com

Olivia Calhoun Palmer
8694 Glascow Island Lane
Edisto Island, SC 29438
(843) 556-3838
ocpalmer@gmail.com

Jefferson Poole
3531 Helms Ave
Culver City, CA 90232-2414

Giuseppe Rosa
Giuseppe L Rosa Esq & Associates
4 Piazza G Fracastoro
Cavaion Veronese, VR 37010
39 04 5803 0630
Fax: 39 04 5803 1040
glrosa@glrosalaw.com

Pamela L Schultz
Severson & Werson
1 Embarcadero Ctr, Fl 26
San Francisco, CA 94111-3745
(415) 677-5627
Fax: (415) 956-0439
pls@severson.com

Ryan F Tennant
1240 Appling Dr, Unit 301
Mount Pleasant, SC 29464-3696
rftennant@charlestonlaw.edu

LETTER FROM THE CHAIR

Dear AMLC Colleagues:

It is hard to believe we are already at the midway point of our ABA year! I'm pleased to report that we are continuing to plan informative and interesting educational events. Here are just a couple of the exciting items on our agenda:

The AMLC is co-sponsoring A Day at Lloyd's of London Part II and Alternative Dispute Resolution on January 27, 2014 at the St. John's School of Risk Management. This is the second program in a series that is intended to develop a greater understanding of the Lloyd's and international insurance marketplaces. We are excited to note that the Keynote Speaker will be Maurice "Hank" Greenberg, the former Chairman and CEO of American International Group and current Chair and CEO of C.V. Starr & Co., Inc.

The TIPS Spring Leadership Meeting will take place May 14-18 in Boca Raton, Florida. In light of the fantastic location, we expect a great turnout for this meeting. Our own Chris Hamilton has agreed to take the lead planning a fun and educational events for our time in Boca Raton.

We pride ourselves on being a welcoming and inclusive group, so if you are considering whether to get more involved, I strongly encourage you to do so. We do our best to provide leadership opportunities for anyone who wants to get involved. If you have any questions, please feel free to contact me or any of the Committee Leadership. You can find us in the TIPS Leadership Directory, on the TIPS website, and on LinkedIn.

Attending our monthly conference call is a great first step. The call normally takes place the third Thursday of every month at 12:30 pm Eastern time. The dial number is: (866) 646-6488 and the conference code is 1885350536. Our regular calls are a great way to stay apprised of our plans, and get involved with the Committee. You can also click here to join our LinkedIn group and view our TIPS General Committee webpage here.

I look forward to hearing from you! ⚖

All the best,

James P Koelzer, Chair


AMERICAN BAR ASSOCIATION
RUB 'O THE GREEN:
LITIGATION, ETHICS
AND THE RULES
NATIONAL CLE PROGRAM
Register Today!
www.americanbar.org/tips
SPONSORED BY
TORT TRIAL & INSURANCE PRACTICE SECTION
MARCH 20-22, 2014
LOEWS VENTANA CANYON RESORT
TUCSON, AZ
Inaugural TIPS Golf Tournament
and CLE Program-Earn Ethics Credit!
UNITING
PLAINTIFF, DEFENSE,
INSURANCE, AND
CORPORATE COUNSEL
TO ADVANCE
THE CIVIL
JUSTICE SYSTEM
ABA
Defending Liberty
Pursuing Justice
TORT
TRIAL
INSURANCE
TORT TRIAL & INSURANCE PRACTICE

TRADETALK

For our ninth "Trade Talk" piece, we are pleased to spotlight Stuart Sperling, head of BG Group's Shipping Legal team. BG Group has been transformed from an offshoot of a former nationalised utility into an international energy business focused on exploration, production, and LNG. Since 1997, when the company was formed, its total resource base has jumped from 3.6 billion barrels of oil equivalent (boe) to over 18 billion boe. Today, it has more than 5200 employees and operations in more than 20 countries and is ranked among the 15 largest companies listed on the London Stock Exchange. BG Group grew and developed a portfolio of high-quality assets across the gas chain, including Egypt, Trinidad and Tobago, and Kazakhstan, as well as the UK North Sea. Increasingly, it has focused on developing two highly distinctive capabilities: a world-class exploration business and a unique LNG model. Below are excerpts from our interview with Stuart which address his views on the maritime industry, issues concerning the hiring of outside counsel, and the best analysis of the Houston Astros and Rockets you will ever read.

Q. Stuart, tell us what prompted you to get into the maritime legal industry?

R. Serendipity. I was dating a woman in college who was from New Orleans. When I visited Tulane, her parents put on an incredible rush job (anyone who ever ate and witnessed the power scene at Ruth's Chris on Broad can appreciate); I quickly fell in love with the city. I did not, however, have the same affinity for law school. In fact, there were many times I considered leaving. The tide finally turned when I took Robert Force's Admiralty I course at Tulane University Law School. I was immediately taken by the fact patterns and judges who would cite authoritative case law from the 19th century in their opinions. Following that introduction, I developed a passion for maritime law and proceeded to take every maritime course Tulane had to offer. My passion was fueled by the school's outstanding maritime program and the incredibly sharp adjunct professors who were then, and still today, giants in the area of maritime law.

Q. Can you describe your experience of working at BG Group?

R. It has been a great ride thus far. I joined the company in July of 2006 and have been constantly amazed at how nothing is stagnant and how quickly things change. For instance when I joined BG, liquefied natural gas (LNG) was being imported in mass quantities to the United States. Many companies were also building LNG import terminals in the U.S. Within a couple of years, though, Henry Hub prices became depressed, the U.S. experienced a shale gas revolution and Asia's thirst for gas rose at an exponential rate. All of this led the U.S. to go from being an importer of LNG to emerging into a major exporter. This in turn brings a new set of challenges in terms of jurisdictional issues, the size of your portfolio, and shipping routes. For me, a profession that forces you to be proactive and understand, as well as appreciate, the impact of geopolitical events on your business makes for an exciting career.

Q. What are your views on hiring outside counsel?

R. Truth be told we handle a good amount of our shipping legal work in house. For the work that necessitates outside counsel, I try to find firms that specialize in the particular area at hand. Once that piece is in play, I consider what personalities would best fit the matter. A very contentious arbitration may require a different personality than a settlement agreement potentially linked to future business. I also think the role of in-house counsel has dramatically evolved over the last 15 years. Whereas in the past, the perception of in-house counsel may have been limited to giving instructions to outside counsel and subsequently delivering that feedback to the business, today's in-house counsel holds a key position on the deal team. That does not mean outside counsel have become superfluous. Rather, they must understand where they add value. Ultimately, in retaining outside counsel, I look for counsel that complements the team already in place and who is able to grasp the tangible and intangibles of what the company is seeking to achieve.

Q. What legal issues are coming across your desk with some frequency these days?

R. Chinese newbuild and joint venture arrangements; Brazil oil evacuation; LNG shipping portfolio; shipping incident management.

Q. For our practitioners, which maritime event(s) do you get the most out of?

R. When I was in private practice, I quite liked the Maritime Law Association, Southeastern Admiralty Law Institute, and Tulane's Admiralty Law Institute, all of which are excellent platforms to mingle with fellow shipping attorneys, as well as hear about recent case law developments. The landscape for in-house counsel does not naturally lend itself to the same level of collegiality, forcing you to look within the seams for other opportunities to interact with maritime

practitioners. The Marine Money conferences and the Connecticut Maritime Association events are two good examples of other opportunities. I have also been fortunate to have recently been a part of OCIMF's Legal Committee, which traditionally holds a meeting in the spring and a meeting in the fall.

Q. In addition to the AMLC newsletter, of course, which maritime publication do you find most useful?

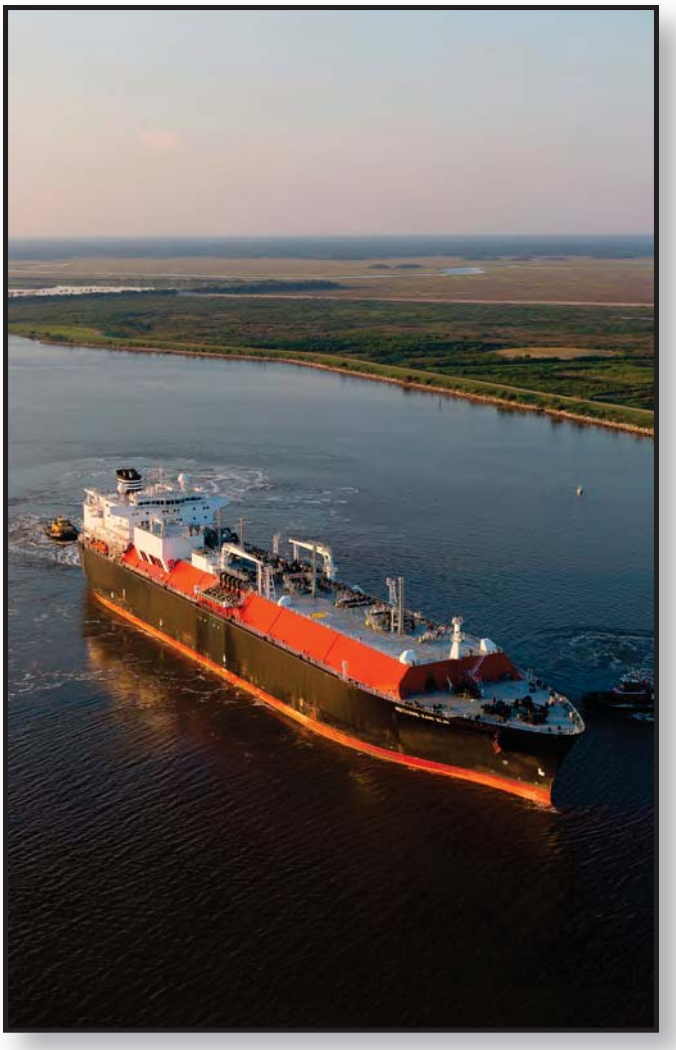
R. I am admittedly a glutton for Tradewinds and Lloyds List.

Q. Thank you for taking time to speak with us today. As a final question, being located in Houston, Texas, which team will win more games in 2014, the Houston Astros or Houston Rockets?

R. The question is actually more complex than one would think. The reason is twofold. First, the NBA season is 82 games (not including the playoffs), whereas the MLB regular season is 162 games. Second, the NBA season begins in late October and ends in June of the following year. Pitchers and catchers report for spring training February 15 and the season will end in late October (thank you, Bud Selig). Therefore, in answering this question, you are really comparing the Houston Rockets' total wins over the back-half of their 2013-14 season and the first half of their 2014-15 season to the Houston Astros' 2014 season.

Now that we have properly framed the question, let's do some analysis:

- The Rockets will make the playoffs during the 2013-14 season, which will increase their total number of games by at least 4 additional games, with a chance for 16 additional wins
- The Astros will not make the playoffs during the 2014 season, capping their total games at 162
- Preseason wins do not count
- The Rockets best season in franchise history was 1993-94 where they won 58 regular season games and 15 post season games (first rounds used to be 3 games) to win the NBA Championship. That year they won a total of 73 games.
- The Astros have averaged 54 wins each of the past 3 seasons.
- Over the last 20 years, when the Rockets have made the playoffs, they have averaged 50 wins in the regular season.



- The Rockets are currently on pace to have a 55-win season.
- The Rockets seems to be finally coming together as a team and understanding different roles, but it could be a different story at the beginning of next season.
- Whilst the Astros have made a few offseason moves, they will not be great next year. They do, however, have of a chance of being a slight bit better than the last 3 years.
- Only 3 major league baseball teams have lost more than 100 games more than 3 years in a row.
- Thus, the answer hinges on how far you think the Rockets will go in the 2013-14 playoffs versus how many games you think the Astros will improve from their 54 win average over the last 3 seasons.

I believe the Astros will be about 10 games better than they have been, putting them at 64 wins in 2014. I think the Rockets will win 55 games over the course of 2014. I also think the Rockets will win two playoff rounds giving them another 8 games. For those keeping score, we've got 64 for the Astros and 63 for the Rockets, with one critical series left to debate: the Western Conference Championship.

I think the Rockets may be a season or two away from going all the way and thus will lose in the Western Conference Championship, but not before peeling off 2 additional wins for a total of 65 wins to the Astros 64. ⚖

Benefits of AMLC Membership

Opportunities to Become Involved

- Publication in the AMLC Newsletter or TIPS Law Journal
- Networking Opportunities
- CLE and Webinar Opportunities
- Leadership Positions
- Mentoring Relationships
- Law Student Writing Competition

Join Subcommittees

- Plaintiff
- Defense
- Insurance
- International
- Law Students/Young Lawyers
- Academic (Professors/Authors)

Additional Information

For more information regarding the benefits that membership in the AMLC can provide to you, check out our webpage at http://ambar.org/tipsadmiralty and join our group on LinkedIn. The Committee is open to all, including non-lawyer maritime professionals, law students and lawyers in every practice area who want to keep abreast of developments in the field.

JOIN OUR LINKEDIN COMMITTEE PAGE

http://www.linkedin.com/groups?viewMembers=&gid=3058724&sik=1317664044449

2013-2014 Section Sponsors

THE TORT TRIAL & INSURANCE PRACTICE SECTION WOULD LIKE TO THANK OUR 2013-2014 SECTION SPONSORS FOR THEIR GENEROUS SUPPORT

PREMIER SECTION SPONSOR

THOMSON REUTERS™

SECTION SPONSORS

DECISIONQUEST™

MDD
FORENSIC ACCOUNTANTS

Since 1995
AUDIO • VIDEO
CourtCall®
REMOTE COURT APPEARANCES

BPU MANAGEMENT V. DOWCP – THE FIFTH CIRCUIT'S CLARIFICATION OF THE LWHCA'S OTHER ADJOINING AREA SITUS TEST.

By: Michael Streich[1]

In *BPU Management v. DOWCP*[2], the Fifth Circuit Court of Appeals again addressed jurisdictional coverage under the Longshore and Harbor Worker's Compensation Act ("LHWCA") in analyzing the LHWCA's "other adjoining area" situs test. Following its recent decision in *New Orleans Depot Services, Inc. v. DOWCP*[3], which addressed the test's geographic prong, the Fifth Circuit turned its attention to the "functional prong" in deciding *BPU*. The determinative question in this case was whether the "other adjoining area" — the situs of the claimant's injury — was one customarily used for unloading vessels. Looking to the "general purpose" of the area, the Fifth Circuit found it was too far removed from any unloading operations to be "integral to the unloading process."[4] Accordingly, it did not satisfy the LHWCA's functional prong and coverage was denied.

From 1997 until 2006, the claimant in *BPU*, David Martin, worked as a dockworker at an alumina processing facility on the Texas gulf coast. The facility is located along a navigable waterway so vessels can easily unload feedstock materials, such as bauxite, and load finished product, such as aluminum.

Since the facility in question includes both its manufacturing and loading/unloading process, bauxite unloaded from vessels moves directly into the alumina production process. A conveyer system moves the raw bauxite from the docks at the facility's deep-water port, over a street and fence separating the dock from the processing area, and into one of several storage bins. The raw bauxite remains in the storage area until it is needed, which can vary from a few weeks to a period of years. When needed, the bauxite exits the storage bin through a small gate and is mechanically sifted and transported via a network of "cross-tunnel" conveyer belts until it reaches the rod mill for production. During this transportation, raw bauxite often spills off the conveyor belts and onto the floor, occasionally having to be shoveled back onto the belts by the facility's employees.

Although Martin's primary duty was to ensure ships were properly docked and loaded, he usually spent several hours per month shoveling spilled bauxite back onto the conveyer belt in the cross-tunnel. The back injury for which he sought LHWCA compensation occurred while performing this task.

Unable to return to work, Martin filed a claim for benefits under the LHWCA. At his benefits hearing, the Administrative Law Judge ("ALJ") determined the cross-tunnel where Martin was injured is an LHWCA-covered situs because it is "linked to buildings where vessels were loaded and unloaded."[5] On appeal, the Benefits Review Board ("BRB") agreed, finding the cross-tunnel has a substantial nexus with the loading and unloading processes because the cross-tunnel is located underneath the storage area, which adjoins and has a "functional relationship with navigable waters."[6] Martin's employer then appealed to the Fifth Circuit.

On appeal, the Fifth Circuit found the ALJ and BRB mischaracterized the nature of the cross-tunnels and their relationship to the unloading process. Although the storage areas and cross-tunnels are physically connected to the unloading process, responsibility for control and management of the bauxite transfers to the facility's engineering employees once the material is deposited into storage. Moreover, the bauxite may remain in storage for periods of months or years between the time it is unloaded from the vessel and actually used in production. According to the Fifth Circuit, the LHWCA covers all unloading activities in the chain of transferring

---

1 Michael E. Streich is an Associate Attorney at *Royston, Rayzor, Vickery & Williams LLP* in Houston, Texas. He assists corporate clients in all phases of litigation in state and federal trial courts and at arbitration proceedings. His experience includes matters involving patent infringement, maritime law, vessel collisions and allisions, personal injury defense, energy litigation, commercial transactions, air and sea cargo claims, and other litigation matters. He can be reached at Michael.Streich@roystonlaw.com or 713.224.8380.

2 732 F.3d 457 (5th Cir. 2013).

3 718 F.3d 384 (5th Cir. 2013) (en banc).

4 *BPU*, 732 F.3d at 465 (quoting *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 47, 110 S.Ct. 381, 107 L.Ed.2d 278 (1989)).

5 *BPU*, 732 F.3d at 460.

6 *Id.*

cargo from a vessel to land transport, but it does not cover those employees whose only "responsibility is to pick up stored cargo for further trans-shipment."[7]

Relying on decisions from its sister Circuits and the United States Supreme Court, the Fifth Circuit found the Supreme Court had suggested a "clear rule" in that unloading operations stop when cargo is unloaded for trans-shipment over land: "vessel-unloading includes the transfer of cargo from ship to shore only until it is surrendered for land transport."[8] This transfer marks the end of the maritime unloading process because it is the point where a longshoreman's responsibility for unloading cargo ceases. Applying this theory to the facts at hand, the Fifth Circuit easily found delivery of the shipped bauxite into the storage bins is the functional equivalent of surrendering cargo for land transport. Because the vessel unloading process had already ended, the cross-tunnels were not customarily used for unloading vessels and did not satisfy the LHWCA functionality prong.

While *BPU* is significant in its clarification of the "other adjoining area" situs test, it may also create further issues for employees whose jobs are performed in various areas of a multi-purpose facility. That said, *BPU* appears to support the conclusion that LHWCA employees can, in certain circumstances, walk in and out of coverage during the course of their work days—a scenario frowned up on by Congress and the Supreme Court.[9]

7 *Id.* at 463 (quoting *P. C. Pfeiffer Co., Inc. v. Ford,* 444 U.S. 69, 83, 100 S.Ct. 328, 62 L.Ed.2d 225 (1979)).

8 *BPU*, 732 F.3d at 464.

9 *See, e.g., P. C. Pfeiffer.,* 444 U.S. at 84 ("Congress did not intend the Act's coverage to shift with the employer's whim.")

OFFSHORE VESSEL REGISTRATION AND THE LEGALITIES AFFECTING VESSEL NATIONALITY

By: Andres I. Beregovich[1]

It is eight-thirty on a Monday morning in south Florida. A small group of persons board a sea-going vessel of palatial proportion that is floating beside the dock. Minutes later, the engines begin to churn the waters aft of the boat and head east into the sun kissed waters of the Atlantic. The definition of craftsmanship and elegance is slightly more than one hundred feet from bow to stern, capable of traveling long distances at sea without ever seeing a port. On board are new owners and their family, a broker who arranges for the purchase of vessels between two parties, a seasoned captain, and an attorney specializing in registering vessels in a territory outside of United States jurisdiction.

On this morning the vessel will transfer ownership at a longitude and latitude miles into international waters beyond the Floridian coast. Shortly after returning from the sales transaction at sea, the vessel's registration will be changed to a territory offshore, it will fly the flag of the British Virgin Islands, the home port at the stern of the vessel will read Tortola, and it will be protected under and governed by the sovereign island nation of the British Virgin Islands.

The possibility for a vessel docked in the United States that is primarily used in the United States and owned by Americans, to be legally registered to and protected by another nation's laws without ever having to enter into the territory of another nation is actual and legitimate. Desirable pragmatic and legal reasons for an attorney's client to choose a process of flying the flag of another country on their vessel instead of their own are based on a history of giving their vessel a nationality.

The process of registering vessels is ubiquitous.[2] Developed nations historically considered the flagging of their vessels to be a practical and symbolic extension of territorial rights.[3] In accord, the rights and laws protecting the people of the governing nation were extended and assigned to the navigable vessels of that nation under a system called ship registry.[4]

Offshore jurisdictions that operate 'Open Registries,"[5] better known as 'Flags of Convenience,' are "countries allowing the registration of foreign-owned and foreign controlled vessels under conditions which, for whatever the reasons, are convenient and opportune for the persons who are registering the vessels."[6] The process is performed by legally creating a business entity in the foreign jurisdiction where the owner finds the laws of the territory advantageous to their needs, and the business entity then purchases the boat and registers it with the foreign country's shipping registry.[7] It is the sole responsibility of the state issuing registration to make sure that the vessel conforms to the conditions by which the registration is granted and maintain control over the internal affairs of the vessel.[8] The vessel then conveniently flies the flag of the country it is registered to, regardless of the vessel owner's nationality, the vessel's initial nationality before transfer, or where the vessel was built.

The United States Supreme Court has ruled in accordance with the principles of international law generally accepted by civilized nations in that so long as there exists a *genuine link*[9] between the state and ship, the laws of the state to which the vessel is registered generally has complete jurisdiction over the vessel's internal affairs.[10]

---

1 Andres Beregovich is the principal at *The Beregovich Law Firm, P.A.*, in Orlando, FL, a solo practice devoted to business, and investor immigration. Andres is a graduate of the George Washington University and London School of Economics. He received his J.D. at the Barry University School of Law where he wrote the essay as a directed research paper under Barry Hart Dubner, a professor of law, and expert widely renowned for his work on sea piracy and traditional ocean zones. Andres may be reached at (407) 809-9000 or at andres@beregovichlaw.com.

2 Jane M. Wells, *Vessel Registration in Selected Open Registries*, 6 Mar. Law. 221 (1981).

3 Directors of the Columbia Law Review Ass'n, Inc., *Panlibhon Registration of American-Owned Merchant Ships: Government Policy and The Problem of the Courts*, 60 Colum L. Rev. 711, 713 (May 1960).

4 H. Edwin Anderson, III, *The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives*, 21 Tul. Mar. L.J. 139, Winter 1996, at 141.

5 Frank L. Wiswall, Jr., Address at Southeastern Admiralty Law Institute (1981).

6 Boleslaw A. Boczek, *Flags of Convenience: An International Legal Study* 111-112 (1962).

7 Gregory A. McLaughlin, *Choosing a Home Port: Offshore Registration*. Southern Boating, Apr. 2004 at 92.

8 Restatement (Third) of Foreign Relations Law § 501, note 7 (1987).

9 Convention on the High Seas, *U.N. Treaty Series*, 450, Art. 5 (Apr. 29, 1958).

10 *McCullough v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963).

Registering a vessel in a territory outside of United States jurisdiction is beneficial to owners because it "[S]ubjects the boat to the laws of that country, and it is treated as a foreign vessel when it enters U.S. waters. The U.S and foreign countries all deal with vessels for customs, immigration, duty, and other purposes based on how the boat is flagged, rather than who the ultimate beneficial owner of the boat might be."[11] The impact of giving a vessel a convenient nationality is clear and convincing.

The *Rochdale Report*,[12] compiled in 1970, prominently outlines the earliest inherent benefits afforded to vessel owners who opt to use flags of convenience. These factors remain considerably the same today. The most important consideration to American vessel owners when registering their vessels is safeguarding their interests from United States jurisdiction over personal injury claims occurring on U.S. flagged vessels on the high seas, arising out of the Jones Act.[13]

The Jones Act[14] allows any seaman regardless of nationality working on U.S. flagged ships, to bring a personal injury claim for negligence against their employer. Offshore vessel registration may limit a vessel owner's liability from potential tort claims when either chartering their boat for commercial purposes or from licensees who sustained injuries while on their vessel.[15] Additionally, offshore vessel registration may be convenient to certain vessel owners because they have the possibility to forum shop in open registry countries with accommodating laws.[16]

Another popular reason for using flags of convenience is that vessel owners may see increased profits by taking advantage of the relaxed restrictions normally found in open registry countries on issues of commercial chartering, vessel age and or structural condition, as well as, training and safety standards for crew.[17]

Other economic considerations that attract clients are their vulnerability to paying a slew of local, state, federal, or luxury taxes associated with vessel transactions in their home countries.[18] Open registries operate as a tax haven to sidestep excessive levies since vessels operating under foreign flags in U.S. waters are not exposed to certain taxes.[19] Additionally, open registries operating as tax havens may provide increased protection against creditors.[20]

Lastly, sea piracy and terrorism on the high seas in certain parts of the world make traveling dangerous for Americans.[21] Flying an American flagged vessel may increase chances of attack. Therefore, vessel owners worried about their security may consider offshore vessel registration to quell avoidable scrutiny.[22]

Beware, however, registrant convenience and protection under the laws of an open registry is not absolute. Environmental disaster, substandard safety enforcement, poor crew training, and lax vessel inspections have been cited to open registry operations, and may ultimately affect the chances of prosecution or civil liability in United States. The landmark "significance of connection test"[23] passed down by the United States Supreme Court, as well as a patchwork of other holdings have continuously allowed vessels to be stripped of their jurisdiction to put an end to "mechanics on evasive schemes."[24]

Therefore, while there is no greater authority on the high seas than that of the law of the nation to which a vessel may be registered, the trend has been increasingly to view vessel nationality as an element among many that dictates control over the vessel itself. There no longer exists the possibility for a beneficiary to completely remain hidden from liability by registering offshore. Jurisdiction has its limits. ⚖

11 McLaughlin, *supra*, at 92.
12 Committee of Inquiry into Shipping, *Rochdale Report*, Cmd. No. 4337, H. M. Stationary Office, London (1970).
13 McLaughlin, *supra*, at 92.
14 46 U.S.C.A. §30104 (West 2006).
15 McLaughlin, *supra*, at 92.
16 Anderson, III, *supra*, at 148.
17 McLaughlin, *supra*, at 92.
18 *Id.* at 93.
19 *Id.*
20 *Id.* at 94.
21 *Id.* at 93.
22 *Id.*
23 *Lauritzen v. Larsen*, 345 U.S. 571, 573 (1953).
24 *Bartholomew v. Universe Tank Ships Inc.*, 263 F.2d 437 (2d Cir. 1959).

RISK ALLOCATION IN…

Continued from page 1

that in case of the occurrence of the risks identified, the parties involved are not exposed to indeterminate liabilities.

In U.S.A. and U.K. offshore operations, the oil and gas industry has adopted different contractual mechanisms to allocate the risk, including indemnification, exclusion, limitation of liability, force majeure, dispute resolution, and insurance clauses. However, their application and interpretation by courts has differed in some ways. This paper will discuss how there clauses have been applied and enforced by courts. It will further examine how statutory rules and public policy issues have shaped the application of the above contractual mechanisms in the U.S. and how the unfettered freedom of contract doctrine has shaped their application and interpretation in U.K. In the U.S., particular attention will also be given to oilfield anti-indemnity provisions in federal law as well as Texas and Louisiana state legislation. This paper will also focus on how courts in the two jurisdictions have construed contractual risk allocation clauses in the wake of liabilities that followed the Piper Alpha disaster in the North Sea and Deepwater Horizon accident in the Gulf of Mexico.

Introduction

Businesses face risk every day. Without risk, a business or organization would not grow and thrive.[2] However, the oil and gas industry is a very high risk business.[3] In addition to the huge capital investment,[4] there is market price volatility, operational hazards, environmental risks, and operations sensitivities which bring with it a high degree of risk in terms of property damage and loss of life.[5] Accidents have happened in the past like the Piper Alpha in the North Sea in 1988 and the Deepwater Horizon oil spill in the Gulf of Mexico in 2010.[6] Moreover, with the advancement of technology, offshore operations have gradually extended to deeper and more unsafe regions. Equally, operations are now possible in extreme latitudes where weather and icebergs previously made offshore operations impossible.[7]

However, the costs and risks are still significantly high that such projects are usually carried out by a consortium rather than a single operator.[8] Major operators depend on oilfield service contractors to provide specialized services which support the whole process of oil and gas exploration and production.[9] These contractors are usually engaged under one or more service contracts.[10] This brings about many contractors and sub-contractors who in practice work as independent contractors albeit engaged by operating companies.[11] This is a reflection of the complexity of the global oil and gas industry. The nature of these complex projects expose operators and contractors alike to high risk of liability arising from actions of the other parties and other service contractors and subcontractors.[12] Oil companies recognize that not a single contractor can absorb such risks and financial exposures and cannot insure against all risks and liabilities.[13] Consequently, the offshore oil and gas industry has developed the practice of contractually re-allocating risks or entirely excluding or limiting the liability of each other or third parties.[14] This arrangement is premised on the notion that liability should not flow from breach or fault lines alone[15] but should be borne by the party best placed to insure against or otherwise absorb that particular kind of loss or liability.[16] Further, choice of law has also become

2 The Institute of Risk Management, *'What is Risk Management?'* available at http://www.theirm.org/aboutheirm/ABwhatisrm.htm accessed on July 3, 2013.

3 Chris Thorpe, *Fundamentals of Upstream Petroleum Agreements*, at (UK, C.P. Thorpe Ltd, 2008).

4 Tobby Hewitt, *'Who is to Blame? Allocating Liability in Upstream Project Contracts'* (2008) 26 (2) J. Energy Nat. Resources L, 177, 178.

5 Id.

6 Other major accidents include the 2001 Petrobras-operated Offshore Platform which killed 11 people, sinking off the cost of Rio de Janeiro. In 2009, the West Atlas mobile drilling rig leaked oil and gas into the East Timor Sea from the Montara Oilfield near Australia, and later sank after a fire.

7 Ernest E. Smith, et al. *International Petroleum Agreements*, at (2nd Ed, 488 Rocky Mountain Mineral Law Foundation, 2000).

8 Id.

9 Anthony Jennings, *Oil and Gas Exploration Contracts*, at 91 (London, Sweet & Maxwell, 2002).

10 Thompson Andrew, Karolczak Jon, *'Service Contract Liability after Deepwater Horizon'* (2010) Energy & Resources Newsletter, available at http://www.minterellison.com/Pub/NL/201011_ERc/ accessed on May 29, 2013.

11 Calendonia North Sea Ltd v. London Bridge Engineering Ltd. [2002] UKHL 4. This case emanated from The Piper Alpha disaster that led to a claim against twenty four different contractors. Among those who were on platform 134 were employed by contractors and 31 by the operator.

12 See n. 9.

13 Kenneth G. Engerrand, 'Indemnity for Gross Negligence in Maritime Oilfield Contracts' 10 Loy. Mar. L. J 319, 321 (2011-21012).

14 See n. 10.

15 Bill Hearn, "Allocating and Managing Procurement Risks" (2004), The Canadian Institute's Legal & Business Guide available at http://www.mcmillan.ca/Files/allocating%20and%20managing%20procurement%20risks%20bill%20hearn%200104.pdf accessed on March 17, 2013.

16 Greg Gordon, John Paterson, Emre Usenmez, (eds), *Oil and Gas Law; Current Practice and Emerging Trends*, at 464 (2nd ed, Dundee University Press 2011).

an important element when negotiating service contracts since risk management can be aggravated by complex conflicts of legal rules and their applicability.[17] Parties to service contracts understandably want to choose a legal jurisdiction they are familiar with to govern their relationship as part of risk management strategy.

Although many jurisdictions recognise the general enforceability of the contractual risk allocation provisions, enforceability and interpretation can vary significantly from jurisdiction to jurisdiction. This research will critically examine their application in United Kingdom (UK) and United States of America (US) upstream offshore jurisdictions. In the context of US jurisdiction, specific attention will be put federal law, and State law of Texas and Louisiana. This is because most of the Outer Continental Shelf (OCS) oil and gas exploitation in the US is majorly situated off the coasts of Texas and Louisiana.[18]In addition, Texas and Louisiana have enacted legislations that invalidate certain contractual provisions that would otherwise allow an oil company to be indemnified by its contractors under offshore oil and gas contracts.[19] Further, since US's legal system consists of many levels of codified and un-codified legal principles, both federal and state laws will be considered in this research. Moreover, US and UK were chosen because of their strong 'presence' in the offshore business that impact international agreements used in Oil and gas projects.[20]

Service Contracts

It is important to appreciate the contractual framework within which risk allocation is examined. A service contract is simply an agreement in which a company agrees to provide certain services for a monetary payment.[21] Jennings states that services required by the operator in upstream activities include; well services, drilling, supply vessels, seismic processing services storage space for data or equipment, geophysical data acquisition among others.[22] The primary consumers of such field services are operators and contractors which include large integrated companies.[23]

Service contracts bear salient features common to any contract. If an operator and a contractor agree to certain terms, a contract is formed and any default entitles the other party a right to damages under general contract law. A right to terminate the contract would be available to the aggrieved party in case of fundamental breach.[24]However, the contracting process provides an avenue to negotiate and refine its rights in accordance with parties' objectives.[25] Thus ordinarily, risks and liabilities in relation to a specific project are clearly spelt out within these service contracts. These contracts serve as a framework of the law between the parties and will express which party has assumed or negotiated a particular risk in connection with the project.[26]

Risk allocation

Risk allocation is also a product of contracting process. Thus it is vital to appreciate the context within which risk will be analysed. Megens defines risk as a "hazard, exposure to mischance or chances of bad consequences" or "the probability of an event occurring coupled with the consequences if it does occur."[27] The above definition reflects risk as a negative attribute to a project that needs careful management. Much as Megens defines risk within the general construction industry, the above definition and exposition is still relevant to the oil and gas industry. Risk allocation itself influences the value of the contract to the parties involved and the cost of the project.[28] Megens further asserts that while there are other risk allocation mechanisms (for example insurance); contracts are still the major tool. The less clear the contract or contract administration structure, the greater the risk it poses.[29]

17 Penny L. Parker, John Slavish, 'Contractual Efforts to Allocate the Risk of Environmental Liability: Is there a way to make Indemnities worth more than the Paper they are Written on?' (1990-1991) 44 SWL J 1349, 1350.

18 Dean A. Sutherland, 'Significant Development in Maritime Personal Injury Law' (2004) 64(2) La. L. Rev 306.

19 Id. 307.

20 Genevieve Macattram, 'How can the Indemnity Clause Expand or Limit the Responsibility for Liability of the Parties in International Oil and Gas Contracts?' available at www.dundee.ac.uk/cepmlp/car/html/CAR10_ARTICLE2.PDF accessed on May 29, 2013.

21 Ernest E. Smith, John S. Dzeinkowski, eta'l (n. 6) 480.

22 Jennings (n. 8), 91.

23 United States International Trade Commission, 'Oil and Gas Field Services: Impediments to Trade and Prospects for Liberations' (USITC Publication 3583, (March 2003), available at http://www.usitc.gov/publications/docs/pubs/332/pub3582.pdf accessed on June 10, 2013.

24 Id.

25 Gerald I. Katz, 'Contract Risk Allocation' (Conference Paper on Contractual Risk Transfer Seminar at International Risk Management Institute, 29 October 2001) available at http://www.geraldkatzpc.com/files/2012/03/contract-risk-allocation.pdf accessed on June 11, 2013.

26 Id.

27 Megens Peter, 'Different Perspectives of Construction Risk- How Should it be Allocated?' (1996) 15 (4) AMPLA Bull 179,180.

28 Neilson Ewan C., Wils John, *The Technical and Legal Guide to Global Hydrocarbons*, (Aberlour Press, Aberdeen 2011), 278.

29 Megens Peter (n. 26) 189.

Common Law Risk Allocation

Common law makes certain presumptions on parties' basic obligations and how liability and risks should in the ordinary course of events be borne. In the context of this research, Common law refers to the rules of customary law which have been recognised by English Courts.[30] These are founded on precedents incrementally developed over time from case to case.[31] Under general contract law, a party is obliged to comply with the terms expressed in the contract, lest will be in breach.[32] Unless explicitly excluded by contract between the parties, an aggrieved party can bring an action for damages as a remedy in the case of a breach.[33]Recoverable damages are subjected to the principle of remoteness.[34]

For torts, liability is generally established where there is a legal duty, that duty is breached, which causes damage and the defendant is responsible.[35] The defendant's behaviour is evaluated against some substantive standard of fault in the course of determining liability.[36] Damage must be must be a kind of harm recognised as attracting legal liability.[37] In a nutshell, liability under common law is pegged on breach and or fault which must be proved as a matter of fact and law. Where there is no fault or breach, loss lies where it falls.

Contractual Risk Allocation.

The oil and gas industry has adopted its unique contractual mechanisms to manage its significant risks and liabilities which are not aligned to the common law position. Gordon identifies three contractual mechanisms used to allocate risk; a) indemnity and hold harmless clauses; b) exclusion clauses; and c) overall limitation of liability clauses.[38] However, force majeure, dispute resolution and insurance clauses are also critical contractual tools for risk management albeit not the main focus of this research.

The above provisions serve the purpose of re-allocating risk so that one party assumes another's liability or holds harmless in the event of damage or injury. Sanchez argues that this does not only demonstrate the economic necessity of offshore operations[39] but also that parties with the most control over the risk should be responsible for any loss regardless of who is at fault.[40] Risk allocation provisions especially indemnities are well established in the petroleum industry and the recent cases[41] in UK only underpin their importance.[42] However, the arrangement between the contracting parties and the expectations of the outside world needs to be properly managed not to "upset the expectations of either the contracting parties or others who interact with them".[43]

Applicable Law

It is important to take into account what law may govern the interpretation and validity of risk allocation provisions used. The problem could arise where a service contract was negotiated in two or more countries or States, finalised in a place of mutual convenience otherwise unconnected with the parties, and could refer to a performance spread over several countries or states.[44] There are usually no issues concerning formation of the contract, thus the applicable law will deal with issues such as interpretation and performance among others.[45] In U.S, the applicable law analysis depends in part on whether the scope of the contract in question contemplates operations in territorial state waters or in Outer Continental Shelf.[46] The applicable law within

30 Akech Migia, "The Common Law's Approach to Liability and Redress its Applicability to East Africa", (Workshop Paper Presented in Nairobi Kenya, September, 2003)

31 Id.

32 H.G. Beale (ed), *Chitty on Contracts* (1 General Principles) (13th Ed, Sweet & Maxwell, 2008), 1399.

33 Edwin Peel, *Treitel on The Law of Contract*, (13th Ed, Sweet & Maxwell, 2011) 988.

34 Hadley v Baxendale (1854) 9 Exch 341.

35 Paula Giliker, Silas Beckwith, *Tort*, (3rd Ed, Sweet & Maxwell, 2008), 24.See also, Richard Kidner, *Casebook on Torts*, (9th ed, Oxford University Press, 2006) 35.

36 Nettleship v Weston [1971] 2 QB 691.

37 Fairchild v. Glenhaven Funeral Services Limited (2002) UK HL 22.

38 Greg Gordon, John Paterson, Emre Usenmez, (eds), (n 15) 443.

39 Sanchez Larissa, 'Validity of Contractual Indemnity Provisions Pertaining Injuries Sustained Offshore' (2006-2007) 31 Tul. Mar. LJ 177, 177.

40 Id.

41 Caledonia North Sea Ltd v. London Bridge Engineering Ltd and Farstad v. Envirico

42 Greg Gordon 'Contribution and Indemnification: Farstad Supply AS v Enviroco Ltd' (2010) 14(1) Edin LR. 102,105.

43 Id.

44 Peter N Swan, *Ocean Oil Gas Drilling and the Law,* (Ocean Publications, Inc., New York, 1979), 127-128.

45 Id., 128.

46 OCSLA defines the outer limit of the Outer Continental Shelf as follows; "…Outer Continental Shelf limits greater than 200 miles but less than either the 2,500 meter isobath plus 100 nautical miles or 350 miles are defined by a line 0 nautical miles seaward of the foot of the continental slope or by line seaward of the foot of the continental slope connecting points where the sediment thickness divided by the distance to the foot of the slope equals 0.0l whichever is farthest."

state waters is controlled by choice of law rules of the particular State.[47] Thus the law applicable is important in understanding the application and enforcement of risk allocation provisions.

Judicial interpretation

Judicial decisions help to fine-tune negotiating and drafting strategies by capitalising on the prospect that courts will interpret the written agreements business lawyers negotiate in a manner that advances their client's best interests.[48] Therefore, keeping abreast with the current judicial interpretations and anticipating how a court will construe commercial agreements is a critical part of the business lawyer's job.[49]

Professor Fridman asserts that an indemnity is a contractual terms and as such the general rules of contractual interpretation will apply.[50] However, while such rules apply, there are special rules that do apply to indemnity clauses. They are akin to an exclusion clause as they essentially limit and shift liability from one party to another; the reason they are construed narrowly against the party seeking to rely on the clause.[51]Fridman's position rhymes with Hewitt assertion that indemnity clauses such as knock for knock clauses are governed by similar rules of construction like those that apply to exemption clauses.[52]More expansive examination of rules of interpretation will be dealt with in detail later in chapter three and four.

CONTRACTUAL RISK ALLOCATION

Introduction

This chapter introduces the contractual risk allocation as part of the broad concept of risk management and its objectives. It further discusses the conceptual framework of different risk allocation mechanisms commonly used in oil and gas upstream contracts which are indemnification clauses, exclusion and limitation of liability clauses, force majeure clauses and insurance. The mechanisms discussed in this chapter will inform the researcher's analysis of application and interpretation of different contractual mechanisms examined in subsequent chapters.

Risk Management

Contractual risk allocation which is the focus of this research is part of the broad concept of risk management. Katz defines risk management as an art of ascertaining, scrutinising, responding to and controlling project risk factors in a manner which best assures all stakeholders[53]that the business is being effectively managed.[54] This encompasses systematic techniques on how to handle both predictable and unpredictable risks inherent in the oil and gas industry.[55]It also involves evaluating identifiable risks and ascertaining the most effective means of protecting against each risk and identifying which party is best able to effect the protection.[56]The party's willingness to accept the transfer of risk mostly could depend upon the level of control they have over the risk and how much the transfer of risk would be worth among others.[57]

Contractual risk re-allocation mechanisms are some of the risk management tools applied in the oil and gas industry arguably borrowed from the construction industry.[58] If a contract is silent on the issue of risk, then the risk of loss or harm will be determined in accordance with the law which could be commercially inappropriate.[59]

Objectives of Contractual Risk Allocation in Oil and Gas Projects

While it might seem inapt for instance to protect the party guilty of negligence, the rationale for risk allocation may not be realized in another way. Risk allocation is an important function in the management of commercial

47 Daniel B. Shilliday, Walter R. Mayer, W.R, John J. Micheal, Andrew P. Slaina, 'Contractual Risk-Shifting in Offshore Energy Operations' (2006-2007) 81, Tul. L. Rev 1579, 1583.

48 Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 Harv. L. Rev. 457, 457.

49 Id.

50 Gerald Henry L. Fridman, Law *of Contract in Canada,* (5th ed. Toronto, Carswell, 2006) 454-462.

51 Id.

52 Hewitt (n. 3), 193.

53 Gerald I. Katz, (n. 24).

54 Id..

55 Id.

56 IBA, *Energy Law' 86*, (IBA, Munich, 1986) 354.

57 Hooker Vincent, 'Major Oil and Gas Projects-the Real Risks to EPC Contractors and Owners' (2010) 26 (2) Constr. LJ 98, 107.

58 O'Neil E. William, 'Insuring Contractual Indemnity Agreements under CGL, MGL, and P&L Policies' (1996-1997) 21Tul. Mar. LJ 359, 360.

59 AIPN (2002) Guidance Notes on International Model Contracts, Well Services and Seismic Acquisition, p. 23.

oil and gas contracts. It facilitates technical progress by allowing adjustment of the liability framework under the law to suit particular interests of the contracting parties.[60] This is so because usually service contracts are made in uncertain economic times where the success of the project cannot be assured and draftsmen have to anticipate the unforeseen.[61] Fault-based system would be unsuitable because determination of fault following an incident for instance often involves time-consuming and expensive litigation.[62] With risk allocation, liability would be determined by reference to the contract which is drafted with the aim of avoiding determination of fault that is usually costly and time consuming.[63] In that regard, both parties have an equal incentive to alleviate avoidable risks.[64]

In business practice, risk re-allocation can also be a necessary condition to the realization of certain operations in environments susceptible to risks.[65] This is achieved by allowing parties evaluate their risk exposure in accordance with the clear lines of risk allocation negotiated in the contract.[66] They limit risk to a level acceptable to most contractors and to avoid the need for 'multiple and overlapping layers' of insurance by permitting the company and the various contractors to carry insurance covering their own equipment and personnel rather than the damage this equipment and personnel can cause.[67] Usually there are many companies (contractors and subcontractors) represented on an oil platform.[68] As Gordon argues, if all of them were obliged to obtained insurance cover of 'fairly remote, but potentially catastrophic risk' that they might contribute towards the annihilation of the platform, the cost involved would be astronomical assuming that they can obtain such insurance.[69] A Louisiana Court in *Darty v. Transocean Offshore USA,Inc.*[70] while supporting the enforcement of indemnity agreements observed that indemnities help in elimination of the expense of redundant insurance coverage and a reduction in unnecessary litigation and its associated expense.[71]Risk allocation is a business decision that a subcontractor could take into account in pricing its work and such clauses are designed in the economic sense to shift the risks arising from a hazardous enterprise.[72]

Without such mechanisms, each party would conduct independent investigations, duplicate everything and hold their cards close.[73] This would increase the cost of operation without adding any value to them. For these and other reasons, a fault-based approach to risk allocation is generally considered ineffective. Consequently, most parties to oil and gas service contracts will most likely choose to allocate much of the risk on a "no-fault" basis because of the above compelling business and operational reasons.

Mechanisms of Contractual Risk Allocation

The oil and gas industry in US and UKCS has developed different contractual mechanisms to re-organise risk allocation. These mechanisms include; Indemnification, exclusion and limitation of liability clauses, choice of law clauses, dispute resolution provisions and Insurance. The discussion below gives conceptual framework of the key mechanisms.

Indemnification

Indemnity provisions are widely used in service contracts to customise risk allocation. Despite their familiarity, the scope and extent of liability of indemnity provisions remains controversial in the oil and gas industry.[74] An indemnity is defined as "*a clause*

60 Micheal Polkinghorne., 'Exclusion Clauses: Navigating the Minefield' (December 2012), available at http://www.whitecase.com/parisenergyseriesno6/#.UdwrUvkwdTI accessed on July 9, 2013.

61 Id.

62 Minter Ellison, 'Service Contract Liability after Deep-water Horizon," (November, 2010) available at http://www.minterellison.com/Pub/NL/201011_ERc/ accessed on 23rd July, 2013.

63 Id.

64 Christopher L .Evans, F Lee Buttler, 'Reciprocal Indemnification Agreements in the Oil Industry: The Good, the Bad and the Ugly' (2010) 77(2) Def. Counsel J, 226, 228-229.

65 Rajski Jerzy, 'Limitation of Liability and Exclusion Clauses in International Contracts' (2002) 3(4) IBLJ 321, 323.

66 Macattram (n. 18).

67 David Gardner, 'United Kingdom: The Hidden Dangers of "Knock for knock" Indemnities' (July, 2009), available at http://www.mondaq.com/x/83204/Insurance/The+Hidden+Dangers+Of+Knock+for+Knock+Indemnities accessed on March 18, 2013.

68 Greg Gordon, John Paterson, Emre Usenmez, (eds), (n. 15) 476.

69 Id. 454-455

70 Darty v.Transocean Offshore USA., Inc. 875 So 2d 106, 111-12 (La. App. (4th Cir.) 2004). See also; Rodrigue v. Legros, 563. 2d 248, 255 (La. 1990) where court stated that, "*By allowing indemnity provisions to be fully enforceable, the federal maritime law gives parties the contractual freedom to allocate risks between themselves*."

71 Cary A Moomjian CAM OilServ Advisors LLC, 'Drilling Contract Historical Development and Future Trends Post- Macondo' (Conference Paper in San Diego, California, March 7, 2012).

72 Day v Ocean Drilling & Exploration Co 353 F. Supp. 1350 (E.D. La. 1973).

73 AIPN, Guidance Notes for International Model Service Contracts; Well Services and Seismic Acquisition, (2002).

74 Jennings (n. 8) 97.

whereby one party agrees to make good a loss suffered by another."[75] Black's Law Dictionary gives a more expansive definition of indemnity as;

"…an undertaking whereby one agrees to indemnify another upon the occurrence of an anticipated loss…A contractual or equitable right under which the entire loss is shifted from a tortfeasor who is only technically or passively at fault to another who is primarily or actively responsible."[76]

An indemnity clause does not change liability; it simply shifts the financial consequences of such liability.[77] Liability exists based on the applicable law although the express terms of the contract can transfer or limit such liability to the extent permitted by the applicable law.[78] For ease of reference, this research will refer to the party agreeing to provide the indemnity as the "indemnitor" and the party receiving the indemnity as the "indemnitee".

Indemnification can be unilaterally applied or encompass situations where not just one of the parties, but both agree and exchange obligations to indemnify each other of likely losses or liabilities specified in the contract i.e. mutual indemnity and hold harmless[79] or 'cross-indemnity' or 'knock-for-knock' indemnity.[80] These terms will be used interchangeably. Each party undertakes to take responsibility for all the losses that befalls its personnel and property or that of third party from a specified act or condition or damage which results from a claim or demand.[81] They normally cover aspects like a) the degree of fault that caused liability, third party liabilities, and extent of associated damages.[82] The indemnity clauses are also characterised by an accompanying provision asserting that the indemnifier defend claims taken against the indemnified party and including clauses expressly providing the way in which claims are to be handled.[83]

In US, indemnities take three basic types based on the scope of the indemnification obligation undertaken by the indemnitor and the degree to which the indemnitor assumes liability for the negligence.[84] These are; 1) Basic Form Indemnification Agreement whereby the indemnitor assumes "unqualified obligation to hold the indemnitee harmless for all liability associated with the subject matter of the agreement, regardless of which party is at fault"[85]; 2) Intermediate Form of Indemnification where the indemnitor assumes all liabilities of the indemnitee relating to the subject matter of the agreement except where the injury or damage is caused by the indemnitee's sole negligence[86]; and 3) Limited Form Indemnification or 'comparative fault indemnification where the indemnitor is obligated to indemnify the indemnitee only to the extent of the indemnitor own liability or fault.[87] Indemnitee's negligence is not covered under limited form indemnification.[88]

In UK, to "indemnify" and "hold harmless" was not clear until Court in ***Farstad Supply A/S v. Enviroco Limited***[89] clarified that the expression '*defend, indemnify and hold harmless*' is not a purely indemnity clause but an assorted provision containing elements of indemnity and exclusion. Court held that Indemnity clauses operate as exclusions when they operate in the context of "direct exposure to the other contracting party" as opposed to

75 Ray Govier, "The Principle of Indemnification" (Managing Contracts and Risks in the Offshore Oil and Gas Supply and Construction Market Seminar- B Documentation [Insurance and Liabilities], London, April, 1995) 1-8, quoted in, Chijioke S. Ugwuanyi, 'Examining the Exclusionary nature of Oil and Gas Contract Mutual Indemnity Hold Harmless Clauses' (2012) 4 IELR 136-146.

76 Black's law Dictionary (6th Ed, 1990) 692.

77 IBA, (n. 55) 353.

78 Id.

79 Chijioke S. Ugwuanyi, 'Examining the Exclusionary nature of Oil and Gas Contract Mutual Indemnity Hold Harmless Clauses' (2012) 4 IELR 136,137.

80 Greg Gordon, John Paterson, Emre Usenmez, (eds), (n. 15) 446.

81 Penny L. Parker, John Slavich, (n. 16) 1353.

82 Makarov Timur, 'Indemnity in the International Oil and Gas Contracts: Key Features, Drafting and Interpretation', (2008) CAR CEPMLP Annual Review.

83 Greg Gordon, John Paterson, Emre Usenmez, (eds) (n.15) 448.

84 Richard L. Angell, Veronica M. Bates, Joanne Munro, 'Commercial General Liability Coverage for Indemnity Agreements' available at http://www.hsblaw.com/data/newsletters/Bates-Commercial.pdf accessed on July 6, 2013.

85 Id.

86 A Sample of the Intermediate form indemnification agreement in the construction industry is as follows,

"*To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner and the Architect and their agents and employees from and against any and all claims, damages, losses and expenses, including, but not limited to, attorney's fees arising out of or resulting from the performance of the work, provided that such claim, damage, loss or expense (i) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property 9other than the work itself) including the loss of use resulting therefrom and (ii) is caused in whole or in part by any negligent act or omission of the Contractor, any subcontract, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder*".

87 Richard L. Angell, Veronica M. Bates, Joanne Munro, (n. 83).

88 Id.

89 Farstad Supply A/S v. Enviroco Limited [2010] UKSC 18.

third-party losses.[90] Reciprocal indemnity clauses may also cover indemnitee's own negligence. In the case of ***Canada Steamship Lines Ltd. v. R***[91] court noted that it is possible for one to be indemnified for its own negligence, but there was no indemnity on the facts of that particular case. This principle will be expounded on further as it applies in UK and US in subsequent chapters.

Exclusion and Limitation of Liability

Exclusion and limitation clauses have increasingly taken on a vital role in the general international commercial contractual practice used in upstream oil and gas projects. These are clauses that seek to limit or exclude liability for particular types of losses and are accepted as legitimate methods of allocating risks involved in operations.[92] The exclusion clauses allow the party to exclude its liability in the circumstances it would have been liable under the applicable law.[93] Parties to a service contract usually wish to go much further than the governing law of their contract and expressly limit or exclude liability in their contract.[94] There are a number of ways in which liability can be limited; 1) applying financial caps on liability on the maximum amount recoverable, for example by reference to a fixed amount or a percentage of the contract value;[95] 2) Impose time limitation; 3) procedural or other restrictions on a party's ability to claim; [96] and 4) exclusion of certain categories of loss, such indirect loss, unforeseeable loss or consequential loss.[97]

Using the modes above, limitation clauses can be used to moderate liability which is independent of fault by extending the circumstances where liability is excluded. How these clauses are applied and enforced also varies from jurisdiction to jurisdiction.

Force Majeure Clauses

Force majeure as used in commercial contracts[98] has been defined as a clause which "entitles a party to suspend or terminate the contract on the occurrence of an event which is beyond the control of the parties and which prevents, impedes, or delays the performance of the contract."[99] Traditionally these were mostly natural occurrences usually termed as 'acts of god'. With technological innovation in the oil and gas industry, the *force majeure* clause is no longer a clause making God responsible for any occurrence. It has developed such as to share the risks between parties, when faced with the uncontrollable events.[100] *Force majeure* clause modifies the common law doctrine on impossibility of performance, by contractually allocating the risk of non-performance between parties in exchange for mutually perceived economic benefits.[101] Parties agree as to which events will suspend or excuse performance under the contract, and then allocating the risk of that non-performance.[102]

The use of *force majeure* clause as a risk allocation tool might pose additional questions. For instance, can parties include events in the *force majeure* clause even when such events would not qualify as force majeure under the force majeure doctrine?[103] The New York Supreme Court in ***One World Trade Ctr. v. Cantor Fitzgerald Sec.***,[104] while stating the general

90 Egbochue, Chidi 'Reviewing 'Knock for knock' Indemnities following Macondo Well Blowout', (2013) 7(4) Constr. L. I 7, 10.

91 Canada Steamship Lines Ltd. v. R., [1952] 2 D.L.R. 786 (PC).

92 Rajski J, (n. 64) 328.

93 Id.

94 Polkinghorne M, (n. 59).

95 Tobby Hewitt, 'An Asian Perspective on Model Oil and Gas Services Contracts', (2010) 28(3) J. Energy & Nat. Resources L. 331,333.

96 For instance in the case Westerngeco Ltd v ATP Oil & Gas (UK) Ltd [2006] EWHC 1164, parties provided a financial cap equivalent to the contract value.

97 Rajski J (n. 64) 326.

98 Konarski H, 'Force Majeure and Hardship Clauses in International Contractual Practice' (2003) 4 IBLJ 405,407.

99 Al-Emadi Abdulla Talal, 'The Hardship and Force Majeure Clauses in International Petroleum Joint Venture Agreements' (Oxford Student Legal Studies Paper No. 2/2011, July 4 2011).

100 Konarski H, (n. 97) 406.

101 An example of a Force majeure clause, article xiii in a 1982 liquefied natural gas sales agreement.

"In the event that any party to this Agreement is rendered unable, wholly or in part, by *Force Majeure* to carry out its obligations under this Agreement, such party shall give notice by telex or telegraph to the other parties to this Agreement in the English language setting forth the full particulars of such *ForceMajeure* and the estimated duration thereof as soon as possible after the occurrence of said *Force Majeure*. Upon the giving of such notice the obligations of such party, insofar as they are affected by such *Force Majeure*, shall be *suspended*, except for the obligations to make payments hereunder, during the continuance of any inability so caused, but for no longer period, and such cause shall so far as possible be remedied with reasonable dispatch. The party claiming *Force Majeure* shall *exercise reasonable efforts to mitigate the effects* of such *Force Majeure* on the performance of its obligations under this Agreement. The term "*Force Majeure*" as employed herein shall mean *any event beyond thereasonable control* of the parties hereto, including without limitation, *acts of God; forces of nature; perils of the sea; shipwrecks; collisions; stranding; burstingof boilers; breakage of shafts; acts of the public enemy; wars; blockades; civil wars …"*

102 Christopher J. Constantini, 'Allocating Risk in Take-or-pay Contracts: Are *Force Majeure* and Commercial Impracticality the Same Defense?' (1989) 42 So. LJ 1047.

103 Tomas Chevallier- Boutell, "Use of Force Majeure as a Risk Allocation Mechanism in the context of International Project Finance" available at www.dundee.ac.uk/cepmlp/gateway/files.php?file=cepmlp_car13. accessed on July 21, 2013.

104 One World Trade Ctr., LLC v. Cantor Fitzgerald Sec., 789 N.Y.S.2d 652, 655 (N.Y. Sup. Ct. 2004).

rule buttressed the principle that a party is excused from performance "only if the *force majeure* clause specifically includes the event that actually prevents a party's performance".[105] For a party to properly assert and defend a *force majeure* event must satisfy that; a) the event was listed or contemplated by the *force majeure* clause;[106] b) the event was neither foreseeable nor controllable by its proponent; and c) the event was the proximate cause of the non-performance.[107]

Regardless of the advantage of listing every event, in practice it might be impossible to foresee or even agree on every event beforehand. Most of the well drafted *force Majeure* clause would include at least that the event must be "beyond the control of the parties" to cover similar events not listed.[108]Further, actions on grounds of force majeure clauses are rare since parties to oil and gas contract usually settle disputes and reserve litigation for extreme cases.[109] In any case parties will rarely invoke force majeure when they have other clauses like insurance, penalty clauses which are less risky.[110]

Insurance Clauses.

Parties to service contracts aim at protecting themselves from liability not only through reciprocal and hold harmless clauses, but also contractual provisions requiring the indemnitor to procure an insurance cover as a conscious risk-shifting device. Usually operators run various insurances relevant to their operations especially blow out, including third party liabilities, control of wells, re-drill and accidental pollution from a well out of control.[111]Almost all Contractor's contractual liability insurances in the UKCS exclude blowout or subsurface pollution or below wellhead risk.[112] In US, insurance clause often require a party to procuring the insurance to name the other party as an additional assured, and to effect a waiver of subrogation from the insurer.[113] This Insurance provides a back-up for indemnity obligations.[114] After the Macondo incident, there has been an upsurge demand for insurance coverage in the oil and gas industry both in US and UK.[115] Most players have resorted to self-insurance where money is set aside using actuarial and insurance information so that the amount set aside (similar to an insurance premium) is sufficient to cover future, uncertain losses.[116]

Conclusion

There are a number of common contractual risk allocation mechanisms employed in oil and gas projects UK and US. However, the chapter did not seek to exhaust all the modes used. Whichever mechanism is chosen, it is important that it provides answers to key questions such as the nature and degree of risk, applicable law and the regulatory framework it operates in. It is not intended to discuss different forms of risk allocation in any more detail at this point. However, the application and enforcement of indemnities exclusion and limitation of liability clauses in UK and US will be discussed in the chapter three and four respectively. ⚖

105 Id.

106 Most modern *force majeure* clauses contain a laundry list of items such as Acts of God, epidemic, plague, explosion, chemical or radioactive contamination or ionising radiation, lightning, earthquakes, tempests, flooding, fire, cyclone, hurricane, typhoon, tidal wave, whirlwind, storm, volcanic eruption and other unusual and extreme adverse weather or environment conditions or action of the elements. These sorts of lists are meant to specifically cover the groups of events that will excuse non-performance, and should therefore qualify as a *force majeure* event.

107 William C. Wright, 'Force Majeure Clauses and the Insurability of *Force Majeure* Risks' (2003) 23 Fall Constr .LJ 16.

108 Al-Emadi (n. 98).

Chevallier- Boutell (n. 102).

109 Marmursztejn Muriel, 'Force Majeure Clauses of an Oil Company's Upstream Agreements: A Review' (1998) 7 IBLJ 781, 801.

110 Id., 801.

111 Peter Cameron, 'Liability for Catastrophic Risk in the Oil and Gas Industry' (2012) 6 IELR 207.

112 Id.

113 O'Neil E. William, 'Insuring Contractual Indemnity Agreements under CGL, MGL, and P&L Policies' (1996-1997) 21, Tul. Mar. LJ 359, 360.

114 Id., 370.

115 Cameron, (n. 110)

116 King, Rawle O, "Deep-water Horizon Oil Spill Disaster: Risk, Recovery, and Insurance Implications, Congressional Research Service" (July 2010) available at http://www.cnie.org/NLE/CRSreports/10Aug/R41320.pdf accessed on 23rd July 2013.

2014 TIPS CALENDAR

February 2014

5-11 **ABA Midyear Meeting** — **Swissotel Chicago**
Contact: Felisha A. Stewart – 312/988-5672 — **Chicago, IL**
Speaker Contact: Donald Quarles – 312/988-5708

20-22 **Insurance Coverage Litigation Committee Midyear Meeting** — **Arizona Biltmore Resort & Spa**
Contact: Ninah F. Moore – 312/988-5498 — **Phoenix, AZ**

March 2014

13-15 **Workers' Comp & Labor Law Joint CLE Program** — **Conrad Chicago Hotel**
Contact: Donald Quarles – 312/988-5708 — **Chicago, IL**

20-22 **Ethics CLE Program & Golf Tournament** — **Loews Ventana Canyon Resort**
Contact: Donald Quarles – 312/988-5708 — **Tucson, AZ**

April 2014

3-4 **Emerging Issues in Motor Vehicle Product Liability Litigation National Program** — **Arizona Biltmore Resort & Spa**
Contact: Donald Quarles- 312/988-5708 — **Phoenix, AZ**

4-5 **Toxic Torts & Environmental Law Committee Midyear Meeting** — **Arizona Biltmore Resort & Spa**
Contact: Felisha A. Stewart – 312/988-5672 — **Phoenix, AZ**

12-16 **TIPS/ABOTA National Trial Academy** — **National Judicial College**
Contact: Donald Quarles – 312/988-5708 — **Reno, NV**

Property Insurance Law Spring CLE Meeting — **TBD**
Contact: Ninah F. Moore – 312/988-5498

May 2014

7-9 **Fidelity & Surety Committee Spring Meeting** — **The Brown Hotel**
Contact: Donald Quarles – 312/988-5708 — **Louisville, KY**

14-18 **TIPS Section Spring Leadership Meeting** — **Boca Raton Resort & Club**
Contact: Felisha A. Stewart – 312/988-5672 — **Boca Raton, FL**
Speaker Contact: Donald Quarles- 312/988-5708