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BREXIT – WHAT NOW?

We anticipate that, following the historic events that unfurled on 23 June 2016, you will now be wondering what Brexit means for your business.

In terms of the mechanics of the Brexit process, what happens to EU rights, agreements and treaties during the “exit period” and what happens after the exit negotiations, Philippe Ruttley (Partner and Head of EU and Competition Law) and Solange Leandro (Senior Associate, EU and Competition Law) have produced a full briefing which can be accessed here.

It is very difficult to say with any certainty at this stage how Brexit will affect the energy industry, as the “Leave” campaign is yet to articulate, and the UK yet to negotiate with the EU, what our relationship with the EU will look like going forwards. Will we follow the Norwegian or Swiss models or something similar? Or will we negotiate our own trade deals with the EU as Canada has done? Decisions will clearly need to be made regarding how the UK and EU will have access to each other’s energy markets and whether the UK will remain in the single energy market. This is all likely to take some time.

Given the reaction of the financial markets to Brexit, the fall in the oil price and the value of sterling, we look to be entering a period of instability and uncertainty, which is likely to have a knock-on effect in the near term on companies’ investment decisions. This could have an effect on UK energy projects which may be stalled or delayed.

As to the particular implications of Brexit for issues such as EU legislation (and UK legislation based on EU Directives) affecting the energy sector, renewables, climate change targets and policies, interpretation and termination of contracts, choice of law, dispute resolution (jurisdiction and enforcement) and arbitration, we will of course be monitoring developments closely and will continue to provide regular updates as the process for the UK’s exit from the EU unfolds. The impact of Brexit on the sanctions landscape is discussed in a separate article, below.

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IMPLIED TERMS: HE WHO TAKES THE VIEW THAT SILENCE IS GOLDEN DOES SO AT HIS PERIL

As part of a recent trend by the English appellate courts to clarify the principles governing the interpretation of contracts, the Supreme Court has also revisited the law on implied terms. *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd [2015] UKSC 72* is now the leading authority in this area, so it is important that those involved in negotiating, drafting and interpreting contracts are familiar with the key points arising out of this judgment.

**Background**

There are two types of implied term, namely: (1) those imposed by law, whether by statute or common law, unless expressly excluded by contracting parties (where possible to do so); and (2) those implied in light of the express terms of the contract, commercial common sense and the facts known to both parties at the time the contract is entered into. M&S deals with the second category of implied terms.

Prior to M&S, Lord Hoffman’s judgment in the Privy Council case of Attorney General of Belize v Belize Telecom [2009] 1 WLR 1988 arguably relaxed the requirements for implying a term into a contract by subsuming this process with the exercise of interpretation of the contract. Whilst acknowledging (consistent with earlier jurisprudence) that necessity remained the test for implying a term, Lord Hoffman concluded that ultimately there was only one question to be considered, namely “is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?” (*Belize Telecom*, para 21).

**M&S**

In M&S, the Supreme Court emphasised that there has been no dilution of the traditional requirements for implying a term into a contract and that the process of interpreting a contract and the process of implying a term into a contract were distinct and governed by different rules that should not be conflated. Lord Neuberger (with whom Lords Sumption and Hodge agreed) made it clear that, going forward, Lord Hoffman’s observations in *Belize Telecom* should be treated as “characteristically inspired discussion rather than authoritative guidance on the law of implied terms.”
(M&S, para 31). It is then only after the exercise of construing the express words of the contract is complete that the issue of an implied term falls to be considered.

In summary, the following requirements will need to be satisfied for a term to be implied:

1. It must give business efficacy to the contract, so that no term will be implied if the contract is effective without it. The test is not one of absolute necessity, not least because necessity falls to be judged by reference to business efficacy. However, the bar is high. A term can only be implied if without the term the contract would lack commercial or practical coherence.

2. It must be so obvious that it ‘goes without saying’.

Requirements 1 and 2 above are alternative in the sense that only one of them need be satisfied (albeit it was acknowledged that it would be a rare case where only one of the two requirements were in fact met). The remaining requirements (below) are cumulative.

3. The implication of a term is not dependent on the reaction/intention of the actual parties, but of the hypothetical answer of notional reasonable people in the position of the parties at the time of contracting.

4. A term should not be implied merely because it appears fair or one of the parties would have agreed to it had it been suggested to them.

5. It must be capable of clear expression.

6. It must not contradict any express term of the contract.

7. The term must be reasonable and equitable. Whilst endorsing this requirement, previously identified by Lord Simon in *BP Refinery (Westernport)* Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings (1977) 52 ALJR 20, para 26, Lord Neuberger questioned whether it actually added anything, noting that if all of the other requirements had been met, it was hard to think that the implied term would not be reasonable and equitable.

**Comment**

Where contractual disputes arise, particularly where the contract terms do not address the factual scenario that has arisen, it is commonly argued that one or more terms fall to be implied into the subject contract. Before M&S, such arguments rarely succeeded and the Supreme Court has confirmed this will continue.

Following the clarifications in M&S, the test to be satisfied before a term will be implied into a contract has arguably become more onerous. As such, it would be foolhardy to assume that the court will step in to fill any gaps in your contracts, particularly where the parties are sophisticated commercial entities who have had the benefit of experienced legal advice.

It is therefore more important than ever to ensure that contracts are couched in comprehensive terms and, so far as possible, expressly deal with all eventualities.

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ANTI-ORAL VARIATION CLAUSES – DO THEY MEAN WHAT THEY SAY?

Many, if not most, major commercial contracts include clauses requiring any variation to be in writing. “In writing” does not mean that a formal document is required.

In C&S Associates UK Limited v Enterprise Insurance Company Plc [2015] EWHC 3757 (Comm) exchanging emails signed off by people with the relevant authority was found to be compliant with a variation clause which stated: “Any variation of this Agreement shall not be effective unless made in writing and signed by or on behalf of each of the Parties to this Agreement.”

It might be thought that such a clause means what it says and something “in writing”, however informal, is always required. However, the recent Court of Appeal decision in Globe Motors, Inc and others v TRW Lucas [2016] EWCA Civ 396 makes it clear that is not the case and that contracts can still be amended orally or by conduct despite such a clause.

The clause in Globe Motors read:

6.3 Entire Agreement; Amendment: This Agreement, which includes the Appendices hereto, is the only agreement between the Parties relating to the subject matter hereof. It can only be amended by a written document which (i) specifically refers to the provision of this Agreement to be amended and (ii) is signed by both Parties.

The Court of Appeal accepted that there was conflicting authority on the effect of such clauses and has, in an obiter section of its judgment, clarified the issue.

It held that parties cannot prevent themselves from being able to vary or waive contractual terms, even informally; it is always open to parties to renegotiate irrespective of terms in the contract. That includes the ability to vary or waive the requirements of a variation clause, even without fulfilling them, by essentially forming a new contract which varies the original.

The Court of Appeal (in particular Lord Justice Underhill) held that such a flexible approach to interpretation was more important and better supported by the authorities than arguments based on the potential difficulty and inconvenience of parties and courts having to address ill-founded allegations of variation.

That is not to say these clauses are entirely without effect. The tighter such a clause is drafted, the stronger the evidence will need to be to demonstrate that the parties have indeed varied or waived it.

Cases on anti-oral variation clauses are rather like buses at a bus stop. Having waited for clarity for some time, several have now come along in quick succession. In a further Court of Appeal case decided on 21 June 2016, MWB Business Exchange Centres Limited v Rock Advertising Limited [2016] EWCA Civ 553, the obiter from Lord Justice Underhill in Globe Motors has now been expressly approved.

A licence agreement in that case contained the following clause dealing with variations:

This licence sets out all of the terms as agreed between MWB and the licensee. No other representations or terms shall apply or form part of this licence. All variations to this licence must be agreed, set out in writing and signed on behalf of both parties before they take effect.

Despite this clause oral discussions between Rock’s managing director and MWB’s credit controller were held to have varied the contract. In coming to this conclusion Lord Justice Kitchin commented that, for him, the most powerful consideration was that of party autonomy which entitles the parties to a contract to agree the terms they choose.
Finally, in a related but very similar vein the Court of Appeal has also recently considered whether a contract can come into being despite a formal agreement having been envisaged but never actually signed and despite an unfulfilled requirement for signature to make it binding.

In *Reveille Independent LLC v Anotech International (UK) Limited* [2016] EWCA Civ 443 the parties had negotiated a deal memo which was expressed not to be binding until both parties had signed it. Anotech amended the deal memo, signed it and sent it to Reveille. Both Reveille and Anotech then carried out the work envisaged by the deal memo. Reveille never signed and Anotech later claimed the contract was not binding. The Court of Appeal held that the requirement for Reveille’s signature was for Reveille’s benefit and could be (and had been) waived by Reveille. Reveille had clearly and unequivocally accepted the contract by its actions and was entitled to claim under it. Again, a lack of formal signature despite agreement that one was required was overcome by the conduct of the parties and party autonomy was paramount. The *Reveille* case is a reminder that if you do not intend to be bound by an agreement (or indeed by a variation) until it is codified into a formal document make sure that is clear in the correspondence or better yet state expressly it is ‘subject to contract’. Ensure all relevant departments or personnel act consistently with that position.

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ENERGY ACT 2016 AND MER UK STRATEGY

Significant changes to the UK energy industry have been introduced as a result of the MER UK Strategy (the Strategy for Maximising Economic Recovery of UK Petroleum, created out of the Wood Review of 2013/14) and the Energy Act 2016. We will be exploring the themes arising out of these in more detail over the next few Smart Bulletins. In this first article in the series, however, we provide a brief overview of the changes that have been introduced and what to expect going forwards.

The Energy Bill received Royal Assent on 12 May 2016. It is a key stage in the implementation of the Wood Review, which called on the government and industry to develop a strategy for maximising economic recovery of UK petroleum and recommended the establishment of a new arm’s length regulatory body.

As part of the UK’s new oil and gas regulatory regime, the Oil and Gas Authority (“OGA”) was established in April 2015 (initially as an Executive Agency of DECC) and the MER UK Strategy, which is legally binding pursuant to the Petroleum Act 1998 (as amended), came into force on 18 March 2016.

Whilst the Energy Act and the MER UK Strategy provisions principally apply to licensees, operators and infrastructure owners, but not service providers, given the central tenets of cost reduction and collaboration, there will be a knock-on effect on the industry as a whole.

MER UK Strategy
The MER UK Strategy is legally binding on “relevant persons”, being:

> The OGA;
> Offshore licensees;
> Operators of offshore licenses;
> Owners of upstream petroleum infrastructure; and
> Persons planning and carrying out the commissioning of upstream petroleum infrastructure.

The obligations set out in the MER UK Strategy must be complied with “in a timely fashion”, although there is not yet any guidance on what this means in practice.

The “Central Obligation” of the Strategy requires that “relevant persons must, in the exercise of their relevant functions, take the steps necessary to secure that the maximum value of economically recoverable petroleum is recovered from the strata beneath relevant UK waters”.

There is further guidance by way of “Supporting Obligations”, which clarify how the Central Obligation applies to certain circumstances, for example, exploration, development, asset stewardship, technology, decommissioning and OGA Plans.

In relation to the Central and Supporting Obligations, there are also “Required Actions and Behaviours”, the most pertinent of which are cost reduction, collaboration and licence or asset relinquishment.

The OGA has said it will publish guidance on how it expects relevant persons to comply with the MER UK Strategy later this year. At the time of going to press, the OGA has just published a new decommissioning strategy, related to its desire to cut, by more than a third, the cost of abandoning North Sea oil and gas platforms that have stopped producing. We shall comment on this, and any further guidance coming out of the OGA, in future editions.

Energy Act 2016
Broadly, the Energy Act 2016 covers the following areas:

> Establishment of the OGA as an independent regulator. The OGA is charged with asset stewardship and regulation of domestic oil and gas recovery;
Transfer of powers to the OGA from the Secretary of State for Energy and Climate Change. It also gives the OGA new powers in relation to “relevant persons” including access to external meetings, data acquisition and retention, dispute resolution and sanctions;

Introduction of provisions relating to fees and charges to recoup the cost of certain of DECC’s functions to the industry, in particular, environmental regulation;

Provision for the OGA to be consulted on abandonment programmes prior to submission and an obligation on the OGA to consider and advise on alternatives to abandonment or decommissioning, such as re-using or preserving the asset;

Amendments to some of the provisions of the Energy Act 2011 relating to access to upstream petroleum infrastructure;

Decentralising decision-making on new onshore wind farms by making local authorities in England and Wales the primary decision makers for all new onshore wind projects (including those over 50MW which previously required the Secretary of State’s consent);

Bringing forward the early closure of the RO subsidy scheme to new onshore wind developments in Great Britain (subject to certain grace periods).

Within the Act are a number of matters to which the OGA must have regard in exercising its functions, including minimising public expenditure, security of supply, storage of carbon dioxide, the need for collaboration between the OGA, government and relevant persons, the need to encourage innovation in technology and working practices and the need to maintain a stable system of regulation that will encourage investment.

The OGA is given new powers under the Act to impose sanctions to ensure compliance with offshore licences and also with the MER UK Strategy. The sanctions may take the form of enforcement action, financial penalties (not to exceed £1 million), licence revocation or removal of the operator.

The OGA also becomes the licensing authority in place of the Secretary of State for the purposes of the Offshore Petroleum Licensing (Offshore Safety Directive) Regulations 2015.

Opportunities
So what does this mean for Contractors?

At this stage, and absent further guidance from the OGA, it is difficult to predict the full impact that the MER UK Strategy will have. That said, although Contractors are unlikely to be caught directly by the MER UK Strategy, the heavy emphasis on co-operation and maximising assets will undoubtedly mean that they will be on the receiving end of a trickle-down effect from operators and licence holders as they seek to fulfil their obligations thereunder.

It is likely that, with these increased obligations, operators will be looking to Contractors to develop technologies and techniques to maximise recovery. It may well then follow that operators will seek to introduce provisions into their contracts which limit their exposure in the event that such technologies and techniques fall short of the standard required to allow the operators to comply with their MER UK Strategy obligations. That might extend to such things as fitness for purpose requirements or carve outs to indemnity schemes. Contractors should, therefore, be wary about taking on too much of this liability in their contracts and should seek to manage any liability at an appropriate level, having in mind the circumstances of the contract and their particular involvement. We will address these issues in more detail in future articles.

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UPDATE ON THE UK TRANSPARENCY REGIME – IMPORTANT CHANGES TO UK COMPANIES LAW ARE NOW IN FORCE

In our October 2015 bulletin, we mentioned some forthcoming changes to UK companies legislation, including the introduction of a mandatory new PSC (person of significant control) Register and the abolition of corporate directors for all UK entities. This note provides an update on the status of these changes, as at July 2016.

Almost every UK incorporated entity will be subject to the changes brought in by the UK Small Business, Enterprise and Employment Act 2015. If there is a UK company in your company’s group structure, then this note is relevant to you.

PSC Register – update
Since 6 April 2016, UK entities are required to have as part of their statutory registers (and therefore available to the public) a ‘PSC Register’. The register contains prescribed details of all individuals and ‘relevant legal entities’ (RLE) which exercise (or have the right to exercise) significant control or influence over that entity. Failure to comply is a criminal offence.

If the PSC Register has not yet been set up for your UK entities, the steps to compliance are:

1. Take reasonable steps to establish who are the registrable PSCs or RLEs (if any);
2. Notify the identified PSCs or RLEs and confirm the information to be included in the PSC Register;
3. In the meantime, insert the prescribed statement into the statutory register to avoid being in breach of the legislation; and
4. Once you have received the required details from the PSC, produce the PSC Register.
To help with step 1, please see the attached guidance note.

Corporate directors - update
Currently, a UK company is permitted to appoint a corporate director (i.e. a corporate entity) as long as at least one of the directors of the company is a natural person.

With effect from October 2016 (the anticipated effective date), it will no longer be possible for a company to appoint a corporate director (subject to some limited exceptions).

For UK companies where there is a corporate director in situ, the company will have 12 months from October 2016 to remove it and, if desired, replace it with a natural person. After the 12 month period, the corporate director will automatically cease to be a director of that company.

Steps to take in advance of October:
1. Identify any UK companies in your group which have corporate directors;
2. Consider whether any exception applies to enable their continued appointment; and
3. If no exception applies, take steps to resign that corporate director from the board and, if necessary, replace it with a natural person. Given the 12 month transition period, it is not necessary to do so urgently.

Final thoughts
These changes are a significant plank in the UK government’s drive to increase the transparency of UK entities and have far reaching consequences for those involved in running them. The Ince & Co Corporate Team can assist you to remain compliant in this new regulatory environment.

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MODERN SLAVERY ACT 2015

Slavery is a matter for history, not for the oil and gas industry. Or is it?

Only last month, an offshore supply vessel, the MV Malaviya Seven, and her sister ship, the Malaviya Twenty, both owned by GOL Offshore, were detained in Scotland and Great Yarmouth respectively after it was alleged that Indian crew members on board the Malaviya Seven had not received any wages for at least two months. It is understood that the vessel was providing offshore services to a number of companies operating in the North Sea. The vessels are now likely to be detained for weeks, if not months, whilst the situation is resolved. At best, the vessels’ clients are deprived of the services the vessels were contracted for; at worst, those companies may also find themselves in a slavery investigation.

In addition, on 10 June 2016, the High Court handed down its first ever judgment under the Modern Slavery Act 2015. In its judgment, the High Court found a gangmaster company liable to compensate victims of modern slavery, although the level of compensation has yet to be determined. The workers in question were from Lithuania and had been trafficked to the UK and were working in supply chains producing premium free range eggs for McDonalds and leading British supermarket chains.

These cases highlight the need for all companies to take adequate steps to ensure that they are not unwittingly participating in modern slavery.

Why is this important?
The Modern Slavery Act 2015 ("MSA") was introduced to the House of Commons as a bill in October 2013, received Royal Assent on 26 March 2015 and came into force on 31 July 2015.

The purpose of the MSA is to consolidate existing slavery and human trafficking offences whilst increasing the maximum penalties for such offences. It also establishes an independent Anti-Slavery Commissioner, introduces new restrictions on those convicted, or not yet convicted, of offences under the Act and introduces new compensatory measures and protections for victims of trafficking.

Under the MSA, a person commits an offence if it holds another person in slavery or servitude, or requires or forces another person to perform compulsory labour. There is also a further offence where a person “arranges or facilitates the travel of another person” with a view to that person being exploited.

These offences are applicable to any UK national regardless of where in the world the offence takes place, or to any non-UK national if any part of the arrangements or facilitation takes place in the UK, or if the travel consists of arriving into, departing, or travelling within the UK.

Both civil and criminal penalties can attach to any offence under the MSA and, in some circumstances, the Act provides for the forfeiture of vessels that have been used (or were intended to be used) for trafficking.

Obligations on companies
Under Part 6 of the MSA, commercial organisations caught by the Act must prepare a slavery and human trafficking statement for each financial year. This is a statement of the steps the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place in any of its supply chains and in any part of its own business. Alternatively, a statement can be filed stating that no steps have been taken.

Companies that will need to fulfil this obligation are any that carry on a business or part of a business in any part of the UK, supply goods and services and have a total turnover of not less than an amount prescribed by the Secretary of State. Following a consultation process, the relevant turnover figure is currently £36 million, and this includes turnover from a company’s subsidiaries.
Summary
As set out above, it is early days for the MSA and many issues of interpretation of the Act remain outstanding before the full extent of its reach and impact is known. However, contractors and shipowners need to be aware that there are potentially far reaching consequences of failure to adequately assess the risk of slavery occurring in their supply chains, or indeed their business, including possible detention or forfeiture of their vessels or vessels that are involved in providing offshore services to them.

If you have any doubt about whether the reporting obligation described in this article applies to you, or need help in completing the necessary report, please get in touch.

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WHAT IS THE CONNECTION BETWEEN EAVESDROPPERS AND COMMON BARRATORS, SCOLDS, NIGHT WALKERS AND LITIGATION FUNDING?

A decade ago, and after a slow burn starting almost 40 years before, litigation funding, or third party funding (TPF) joined forces with after the event insurance (ATE) and started to play an increasing role in litigation and arbitration. Then, catalysed by the implementation in April 2013 of the ‘Jackson reforms’ which were intended to control the costs of civil litigation and promote access to justice, the use of TPF and ATE accelerated exponentially, such that they now offer significant opportunities to claimants and potential claimants seeking to de-risk and take the cost out of the litigation or arbitration in which they might need to become involved.

TPF is an arrangement between a specialist funding company and a client (typically the claimant in the litigation), whereby the funder will agree to finance some or all of the client’s legal fees and disbursements in exchange for a share of the ‘case proceeds’ (usually the recovered damages). A significant advantage of this type of funding is that it is non-recourse, meaning the funder will only get its money back if the case is successful and a sufficient recovery is achieved. In that event it will recover the amount it has spent on the case, together with its success fee (which might be a proportion of the sum recovered or a multiple of the amount spent). If the claim fails the funder gets nothing.

ATE insurance is where an insurance company provides an indemnity for legal costs in the event that a client loses a piece of litigation or arbitration. Its main focus is liability for the opponent’s recoverable costs, but depending on the precise terms of the policy it may also cover the claimant’s disbursements (although typically not counsel’s fees or own solicitor’s fees). It therefore provides a safety net against an adverse outcome.

Combining TPF and ATE de-risks litigation and takes the cost out of it.

Brief Historical Background

On 1 January 1966 the Law Commission laid before Parliament a white paper setting out its “Proposals to Abolish Certain Ancient Criminal Offences”.

A year later the Criminal Law Act 1967 was passed and by s.13 the following seven activities – highly illegal in medieval England - were decriminalised:

1. Challenging to fight (instigating a duel).
2. Eavesdropping (listening to private conversations and spreading scandals).
3. Being a common barrator (persistently stirring up quarrels).
4. Being a common scold (indulging in persistent abuse).
5. Being a common night walker (being “out and about when decent folk are abed”).
6. Maintenance (procuring another person by financial assistance (i.e. by funding him) to institute, carry on, or defend civil proceedings without lawful justification).
7. Champerty (an aggravated form of maintenance involving the provision of financial assistance (i.e. providing funding) in return for a share, or all, of the proceeds of the civil proceedings).

All of these activities had been punishable as common law misdemeanours but were now wholly obsolete.

Maintenance and champerty had also been civilly actionable by a “common informer” under section 3 of the Maintenance and Embracery Act 1540, the original purpose of which was to provide a remedy for certain types of interference with the course of
justice in proceedings concerned with the title to land. This too was long obsolete and so, as well as being decriminalised in the 1967 Act, maintenance and champerty also ceased to be torts incurring civil liability.

Thankfully there is no need to think about the first five of these activities ever again – at least not from a legal perspective – although the world is still amply populated with eavesdroppers and common barrators, scolds and night walkers.

However there was, and is, still a need to be aware of maintenance and champerty. This is because, by section 14.2 of the 1967 Act, although no longer crimes or torts, agreements which “savour” of maintenance or champerty will be deemed contrary to public policy and will not be enforceable. By its very nature and purpose an agreement to provide TPF (a litigation funding agreement – LFA), being an agreement to support litigation in which the funder has no interest in return for a fee payable out of any money recovered, clearly runs the risk of being found to be champertous and unenforceable.

The Boost a Decade Ago

The Court of Appeal came to the rescue in 2005 in the case of Arkin v Borchard Lines Limited & Others [2005] EWCA CIV 655 where it held that to breach the rule against maintenance or amount to champerty there must be something improper about the LFA. For example, the funder being entitled to an excessive or disproportionate share of the proceeds of the litigation, or being entitled to control the litigation as opposed to just fund it. The question in each case will simply be whether the funding arrangement “…will leave the claimant as the party primarily interested in the result of the litigation and the party in control of the conduct of the litigation”. If it will, then the LFA will be valid and enforceable. If it will not, then it will not.

This was the ‘green light’ and the funding industry has not looked back since.

In Arkin the court ruled that a funder of a losing claimant would be liable for the defendant’s recoverable costs in the same way as the claimant – although limited to the amount paid by the funder to fund the case (the “Arkin Cap”). For this reason a professional third party funder will invariably require a claimant to take out an ATE insurance as well, but there is an established market for ATE insurance and TPF and ATE insurance have grown hand in hand since 2005.

There have been a number of developments in recent years relating to TPF and ATE which is a fast moving and expanding industry and Ince & Co would be pleased to provide further information and let you have any advice or assistance you might need with regard to funding requirements.

More information about the benefits of litigation funding and how it works can be accessed via this link.

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SUPREME SURPRISE: ANTICIPATING THE SUPREME COURT’S DECISION IN MT HØJGAARD A/S V E.ON CLIMATE AND RENEWABLES UK ROBIN RIGG EAST LTD

We have reported in the past on this long running litigation and the decisions in the High Court and the Court of Appeal. The Supreme Court initially rejected the application for permission to appeal the Court of Appeal’s decision, but in an unprecedented U-turn late November last year it has now granted permission.

The Supreme Court ruling can be expected to have wide-ranging consequences for those with warranty, “fitness for purpose”, “good industry practice” and similar obligations in construction contracts, and may have wider implications for the construction of contracts.

The context
The case revolves around who bears the contractual risk of a significant error in an industry design standard “J101”. The contractor, MT Højgaard (“MTH”), relied on J101 when designing, fabricating and installing the wind turbine foundations for the offshore wind farm Robin Rigg in the UK for E.ON Climate Change and Renewables (“E.ON”). An element of J101 was wrong by a factor of ten which caused the transition pieces to slide down the foundations. The core issue in the lower courts was whether references in the Technical Requirements (which formed part of the contract) to an onerous 20 year service lifetime were sufficiently clear to create additional strict obligations for MTH on top of more common general obligations for the design to be in accordance with J101, for the works to be “Fit for Purpose” and in accordance with “Good Industry Practice” and references to a 20 year design lifetime.

At first instance the Technical and Construction Court held that there was a 20 year service lifetime guarantee and the risk of the error in J101 lay with the contractor.
The Court of Appeal (MT Højgaard A/S v E.ON Climate and Renewables UK Robin Rigg East Ltd and another [2015] EWCA Civ 407) held that there was no such warranty and left the risk with E.ON.

The Court of Appeal’s iterative contract interpretation
It may surprise some that the Court of Appeal did not find that the several seemingly clear specific references to a 20 year service lifetime in the Technical Requirements were sufficient to override the more general obligations in the contract and that it found that the 20 year design lifetime was qualified by compliance with J101 and Good Industry Practice. One of the keys to the Court of Appeal’s decision was an iterative interpretation approach. Stepping into the shoes of a reasonable person with the knowledge available to the parties the Court checked the rival contract meanings against each other and their commercial consequences and found that it did not make sense to regard the references to a 20 year lifetime as overriding all other provisions of the contract. The normal standard required was compliance with J101, which was expected (but not absolutely guaranteed) to produce a life of 20 years. If E.ON had required a guaranteed operational life of 20 years it should have flagged it clearly in the contract documents and not “tucked it away” in the Technical Requirements. That marks a much more sympathetic approach to the contractor than at first instance, particularly since the provisions appear to have been contained in several places of the main body of the Technical Requirements.

The Supreme Court’s “U-turn”
We can only speculate as to why the Supreme Court changed its mind, and has now granted permission to appeal. The test to be met is that there is an “arguable point of law of general public importance”. Given the very unusual feature of the Supreme Court’s change of heart clearly one of the points raised is something the Supreme Court particularly wishes to clarify. That will be of interest to all involved in this field.

The case is listed to be heard next year. We will provide a further update once the Supreme Court judgment has been handed down.
RUSSIAN SANCTIONS UPDATE AND THE IMPACT OF BREXIT

Sanctions continue to have a significant impact on the energy industry and while the focus since the start of the year has mainly been on the lifting of the majority of the EU’s sanctions against Iran, there have been recent developments in relation to the restrictions imposed as a result of the Russia/Ukraine conflict. In addition, the UK’s decision to leave the European Union following the referendum, raises a number of questions about the future EU sanctions landscape.

We give a brief update below.

Russia/Ukraine
In July 2014 EU Regulation 833/2014 came into force imposing economic sanctions on Russia. These were imposed as a consequence of Russia’s failure to comply with EU demands regarding the annexation of Crimea and Sevastopol. This Regulation targeted the military, oil and financial services industry and was further amended by EU Regulation 960/2014 in September 2014 and EU Regulation 1290/2014 in December 2014.

The Regulation prohibits making available, directly or indirectly, a wide range of technologies (primarily used in energy projects) originating inside or outside the EU, to anybody in Russia or to anyone outside Russia for use in Russia, without prior authorisation. It is also prohibited to provide, directly or indirectly, associated services necessary for certain categories of exploration and production projects in Russia (including its Exclusive Economic Zone and Continental Shelf). It is also prohibited to directly or indirectly purchase, sell, provide investment services or assistance in the issuance of, or otherwise deal with, transferable securities and money-market instruments with certain maturities in relation to certain entities who have been designated as being subject to sectoral sanctions.

These restrictions are set to expire on 31 July 2016, however, EU ambassadors have, in the last couple of weeks, agreed to extend the restrictions until January 2017.

In addition to the above, an EU-wide asset freeze and travel ban was also imposed in March 2014 on those undermining the territorial sovereignty or security of Ukraine and those supporting or doing business with them under EU Regulation 269/2014 and in relation to those responsible for misappropriating State Funds pursuant to EU Regulation 208/2014. These targeted asset freezes and travel bans on Russia/Ukraine have recently been extended and are not due to expire until 15 September 2016.

Crimea/Sevastopol
Pursuant to UN General Assembly Resolution 68/262 of 27 March 2014, Crimea and Sevastopol continue to be considered part of Ukraine. The EU authorities have continued to condemn what is considered to be the illegal annexation of Crimea and Sevastopol and restrictions were introduced by the EU in 2014 in response to this annexation, effectively trying to restrict trade and assistance to the region, including assistance to the energy industry in the territory.

In June 2014 the EU adopted Council Decision 2014/386/CFSP and Council Regulation (EU) No 692/2014 which has subsequently been amended by Decision 2014/507/CFSP and Regulation 825/2014. In December 2014, the latest EU Regulation on Crimea/Sevastopol came into effect (Regulation 1351/2014). The restrictions contained in this Regulation replaced a number of the earlier restrictions, and were more extensive in scope.

Pursuant to the current restrictions it is prohibited to import goods into the EU that have originated in Crimea/Sevastopol and to provide directly or indirectly financing or financial assistance, insurance and reinsurance related to such import.
It is also prohibited to sell, supply, transfer or export certain goods and technology to any natural or legal person, entity or body in Crimea/Sevastopol or for use in Crimea/Sevastopol that relate to the following industry sectors:

a. Transport;
b. Telecommunications;
c. Energy; and
d. The prospection, exploration and production of oil, gas and mineral resources.

In addition, it is prohibited to provide technical assistance, or brokering, construction or engineering services directly relating to infrastructure in Crimea/Sevastopol. There are also a number of restrictions that curtail investment in Crimea/Sevastopol including restrictions on real estate in the region, ownership or control of entities in Crimea/Sevastopol and the creation of any joint venture.

These restrictions have recently been renewed until 23 June 2017.

EU sanctions post Brexit
The UK’s departure from the EU will have an impact on the sanctions landscape. While nothing will change in the immediate future (as with other areas of EU law the UK will continue to implement EU Regulations for 2 years after the UK has officially notified the EU of its wish to leave), going forwards the UK will be able to forge its own economic sanctions but will be unable to influence the decisions of the EU. This will add an additional layer of complexity.

In relation to the sanctions against Russia in particular, the UK’s influence has been crucial. The UK was one of the key member states that pushed for the restrictions against Russia and it has also recently supported extending the restrictions despite opposition from other EU members. Whether the EU will continue to pursue such restrictions once the UK leaves the EU remains to be seen.

While it is not clear what path the UK will take in relation to sanctions post-Brexit, it is probable that the UK will continue to favour the use of economic sanctions as a tool of foreign policy. Further, without the need to achieve agreement between 28 member states the UK will be free to impose whatever restrictions it considers appropriate and will be able to act quickly.

Whatever happens in the UK/EU discussions over the next few years it is clear that the sanctions landscape will remain a complex one. Compliance officers, particularly those working in companies affected by UK jurisdiction, will now have to contend with potentially differing US, EU and UK sanction regimes.

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FIRM NEWS AND EVENTS

Outlined below is a wrap-up of news and events that have been taking place at Ince & Co over the last couple of months.

Cases
Ince & Co secures Court of Appeal victory for Transocean
In April we successfully represented Transocean Drilling UK Limited in its appeal against Providence Resources Plc.

The English Court of Appeal handed down judgment on the construction of a consequential loss clause in a drilling contract between Transocean and Providence, in a decision with potentially far reaching implications for the energy industry and commercial parties generally. In doing so it has given guidance on how consequential loss clauses should be interpreted generally.

For the detailed review of this judgment please see our article.

People news
Ince & Co recruits and promotes two transactional energy partners
In June we were delighted to announce the recruitment and promotion of two partners into our transactional energy practice in London. These appointments form part of the firm’s strategy to grow its transactional offering in its core sectors and geographies to complement its leading contentious capability.

Nuno Frota joined Ince & Co from Trafigura, one of the world’s largest private oil and metals traders, where he was senior legal counsel for Africa. Nuno is triple qualified in England and Wales, Angola and Portugal. Nuno has been involved in high value oil and gas projects in Africa for clients in the upstream, midstream and downstream markets and has further mining and minerals expertise. He also advises on African foreign direct investment and international joint ventures related to natural resources.

Martin Sandgren was promoted to the Ince & Co partnership. He joined the firm as of counsel in 2014 from Siemens Wind Power where he was co-head of legal for five years. He is triple qualified in England and Wales, the United States and Sweden. Martin focuses on structuring, negotiating and managing legal risks on large and complex on- and off-shore renewable energy projects. He has experience of advising on transactions throughout Europe, the Middle East, Africa, the United States and East Asia. He has particular experience advising on EPC/consortiums, offshore construction, supply and service agreements, charterparties and other vessel related contracts, project finance and project agreements. He also advises on joint ventures, M&A, disputes, insurance and risk management matters.

Jan Heuvels, Ince & Co’s International Senior Partner, commented:

“The partner appointments of Nuno and Martin provide further evidence of the progress that we are making in building our transactional offering in our core sectors and geographies to complement our leading contentious capability. Since June 2015, we have announced a total of 19 new partners, 13 of whom specialise in advising clients on transactions.”

Jeremy Farr, Ince & Co’s Global Head of Energy, added:

“I’d like to welcome Nuno to the team and congratulate Martin on his promotion. Their considerable expertise and in-house experience make them a natural choice for partnership. Their appointments add further strength to our transactional offering to clients, particularly in the African oil and gas and the international renewables sectors.”

Ince & Co has considerable experience of advising on energy transactions in Africa. In 2015, the firm advised Golar on Sub Saharan Africa’s first Floating Storage and Regasification Unit (FSRU) project. Earlier that year the firm also advised Golar on the development of a Floating Liquefied Natural Gas (FLNG) export project off the coast of Cameroon.
Ince & Co’s renewables team is involved in over half of the UK’s Round 1 and 2 offshore wind farm projects both operational and under construction, many projects in continental Europe, and on-shore wind and geothermal power projects in Asia Pacific.

**Ince & Co further strengthens Middle East partner presence**

On 1 May we announced the partner promotion of Pavlo Samothrakis in our Dubai office. Pavlo has been with Ince & Co since 2006 and moved to the Dubai office in 2008. He advises on a wide range of contentious and non-contentious matters in the shipping & international trade and offshore energy sectors.

On the contentious side, Pavlo deals with charterparty/bill of lading disputes, ship arrests, shipbuilding disputes, ship sale and purchase disputes and casualty work. Pavlo has represented owners of vessels and other parties in the shipping and offshore sectors in relation to several recent maritime casualties within the Middle East region, including acting for shipowners and their insurers in relation to an explosion on board a vessel in Fujairah and a significant collision that occurred in Jebel Ali Port, UAE.

Pavlo also advises clients on commercial and transactional matters including the drafting of charterparties, contracts related to offshore services, contracts of affreightment, sale of goods contracts, vessel sale and purchase transactions and shipbuilding contracts. Pavlo has particular experience of advising on contracts for the shipment, handling and transportation of Liquefied Natural Gas. He recently advised charterers in relation to a long term time charter party and LNG storage and regasification agreement, with a contract value of approximately US$450 million.

Rania Tadros, Managing Partner of Ince & Co’s Dubai office, commented:

“Pavlo has been integral to the development of our shipping and offshore energy practices in the Middle East since he joined the Dubai office in 2008. His legal expertise, sector knowledge and excellent client skills make him a perfect fit for the partnership and will assist us to continue to grow our Middle East presence.”
Paul Herring, Chairman of Ince & Co, commented:

“The Middle East is of significant importance to our clients in the maritime industry and is a region where we see future growth potential. Pavlo’s appointment further enhances our market leading maritime capability around the world and reflects our ongoing commitment to our clients in the sector.”

Ince & Co celebrated 10 years in Dubai in April.

Business
Ince & Co launches new consultancy firm, Ince Consultancy LLP
In April we launched Ince Consultancy LLP, an independent international consultancy firm, which is associated with the law firm’s international network.

Ince Consultancy LLP offers a range of services to the shipping, energy, insurance, aviation, trade and real estate industries and utilises the firm’s wealth of expertise and deep sector understanding. Ince Consultancy LLP is incorporated in England but headquartered in Hamburg, Germany, and advises its international clients in the following areas:

> Advisory: financial and tax advice and structuring of projects
> Introductory: introduction of third parties and deal origination
> Arrangement: helping clients to efficiently execute projects

Ince Consultancy LLP is led by Managing Partner, Jan Hungar. Jan is an industrial engineer and lawyer with specialist industry knowledge of the shipping, insurance, energy and real estate sectors. Jan delivers financial, corporate, investment and structural advice to clients considering investment opportunities, M&A and other transactions as well as using his extensive network of contacts to make introductions and bring interested parties together. Other key members of the team include Regina Langholz (Partner and Managing Director) who is a tax advisor, Daniel Jones (Partner), Tim Schommer (Partner), Jan Heuvels (Partner), Stephen Jarvis (Board Member) and Alan Hodgson (Board Member).

Jan Hungar, Managing Partner of Ince Consultancy LLP and Ince & Co’s Hamburg office, commented:

“Clients across our chosen sectors work with us as advisors, introducers and arrangers with regard to, mergers, cooperations, syndications, investments, financings, sales and acquisitions, restructurings and other projects. We have already secured a number of significant instructions and feedback from our clients has been extremely positive.”

Jan Heuvels, International Senior Partner of Ince & Co and Partner of Ince Consultancy LLP, added:

“The launch of Ince Consultancy is very much in line with our strategy of growing the transactional arm of our business to complement our leading contentious practice. It shows that we have diversified our service lines in order to satisfy our clients’ demands and adapt to ever-changing market conditions.”

For further information on Ince Consultancy LLP, please visit: http://inceconsult.com/

Smart Contracting Seminars – Autumn 2016
Our “Smart Contracting” seminar series continues during Autumn 2016. Dates will be advised in due course, they will however be hosted in the following locations:

> Aberdeen
> Dubai
> Houston
> Kuala Lumpur
> Singapore

If you are interested in attending a “Smart Contracting” seminar please email energy@incelaw.com