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Amsterdam, Netherlands

Big Gas Debate 2016
15 June
London, UK (Hogan Lovells)

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18th Annual Africa Energy Forum
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The Petroleum Regime in Mongolia

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Attracting representatives from over 95 countries, and industry leaders from global energy giants such as Shell, Total S.A., and Chevron, LNG X is the major international conference that focuses on the Liquefied Natural Gas (LNG) market. Taking place every three years at different international locations, this year's "LNG 18" was hosted in Perth, Western Australia. Australia is set to be the largest global exporter of LNG in the next decade, overtaking Qatar by 2020. MORE >

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With 138 respondents from the Energy, Minerals, and Resources sector, our report, *Steering the Course*, highlights that the sector is one of the most transparent, with less than half (41 percent) of compliance teams believing important operations and parts of the business are hidden from them, compared to 63 percent in the technology, media and telecommunications (TMT) sector, and 62 percent in the transport sector. However, it remains an industry where profit over prevention is rife: 59 percent of CCOs say people in their companies fear losing their jobs if they miss a target, and 48 percent attest that their CEOs are not prepared to walk away from a contract if there is a risk of bribery and corruption. This is hardly surprising in an industry where, according to our findings, 62 percent of CCOs do not report directly to the CEO.

As regulators around the world are becoming more proactive in tackling corruption and in co-operating with each other, and regulatory pressure is generally increasing globally (a feeling shared by 71 percent of respondents) regulatory guidelines don't help 43 percent of CCOs ascertain the legal level of compliance. Energy companies are tackling the problem head-on and putting in place robust AB&C compliance programs to arm themselves against these challenges. How does your company compare? To help you benchmark against what others are saying in your market, read our report, and take our mini compliance quiz for a quick health check of your compliance program, through 13 multiple-choice questions. And for a more thorough assessment, you can request our compliance guide: this benchmarking model explores what makes for a basic, intermediate, or advanced compliance program.

Visit our microsite for all of our material. We hope that our Steering the Course research report, self-assessment tool and compliance guide help you get the full picture on anti-bribery & corruption issues as they affect your

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business. You can also read our key findings on how anti-bribery and corruption compliance affects all companies—whatever their industry.

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Environmental Groups Seek to Ban Oil and Gas Operations in Colorado

The Colorado Constitution reserves the right of the people of the state to enact legislation or amend the constitution directly through the ballot initiative process. Environmental groups are currently working on qualifying four measures for the 2016 general election that would negatively impact oil and gas development in Colorado – Initiative No. 40 (“Right of Local Community Self-Government”); Initiative No. 63 (“Right to a Healthy Environment”); Initiative No. 75 (“Local Control of Oil and Gas Development); and Initiative No. 78 (“Mandatory Setback from Oil and Gas Development”). Initiatives 40 and 63 generally aim to provide local governments with expanded authority to regulate business in a way that is more protective of the environment, while Initiatives 75 and 78 are expressly directed at the oil and gas industry. We do not anticipate that all of these measures will be approved for the 2016 general election. However, passage of any one of these measures could dramatically impact the ability of oil and gas companies to operate in Colorado.

Initiative 40 creates “an inherent and inalienable right" in Colorado’s Constitution to "local community self-government,” which expands the authority of local governments to enact local laws that “establish, define, alter, or eliminate competing rights, powers, privileges, immunities, or duties of corporations or other business entities.” Initiative 63 creates an “inherent, indefeasible, and inalienable right to a healthy environment” and protection of such right is “deemed to be a fundamental right.” This measure also expands the authority of local governments to enact laws in furtherance of this fundamental right. Further, both measures make clear that local laws enacted pursuant of these rights cannot be preempted by state law.

Initiatives 75 and 78 both include declarations that “oil and gas development, including the use of hydraulic fracturing, has detrimental impacts on public health, safety, general welfare, and the environment.” As such, Initiative 75 authorizes local governments to regulate oil and gas development in a manner that is more protective of public health and the environment than state law. Similar to Initiatives 40 and 63, such local laws would not be subject to state preemption. Local governments would also be authorized to entirely prohibit oil and gas development within their boundaries. Initiative 78 creates a statewide setback of 2500 feet for oil and gas wells from occupied structures and so-called “areas of special concern,” which include “public and community drinking water sources, lakes, rivers, perennial or intermittent

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streams, creeks, irrigation canals, riparian areas, playgrounds, permanent sports fields, amphitheaters, public parks, public open space". The measure also allows for other state or local governments to establish larger setbacks from occupied structures. Accordingly, Initiative 78 would have the most dramatic impact on Colorado's oil and gas industry. Preliminary analysis by industry indicates that over 85 percent of surface locations for oil and development would be eliminated if Initiative 78 is approved.

A team comprised of lawyers from Denver (Scot Anderson, Liz Titus, and Shelby Martin) and Washington, D.C. (Neal Katyal and Morgan Goodspeed) have advised clients on the potential effects of and legal challenges to the measures should they pass. Denver lawyers Cole Finegan, Liz Titus, and Katy Bonesio represent oil and gas industry groups and the campaign to defeat these measures, should they receive approval for the 2016 ballot.

The Petroleum Regime in Mongolia

Mongolia is nearly entirely dependent on the import of finished petroleum projects. Wary of this dependence, Mongolia has been trying to develop its domestic petroleum sector by attracting foreign investors through a revision of its legal framework and by introducing tax incentives for oil refineries.

In general, the petroleum industry is divided into two main sectors being (i) the petroleum sector (upstream); and (ii) petroleum products sector (downstream). These are regulated by two separate laws, being the *Law of Mongolia on Petroleum* enacted on 1 July 2014 (Petroleum Law), and the *Law of Mongolia on Petroleum Products* (Petroleum Products Law) enacted on 1 July 2005. Both petroleum and petroleum production activities are licensed activities in Mongolia.

1. Petroleum Products Law and Downstream sector

The Petroleum Products Law defines petroleum products as "all types of fuel products, special liquids, combustible gases, lubricating materials, bitumen, black oil and other products that are produced through the refining of petroleum and other chemical compounds."

The Petroleum Products Law sets out the following five different classifications of activities in relation to petroleum products: (a) import; (b) production; (c) trade; (d) transportation; and (e) storage. The import, production, and trade of petroleum products requires a license, whereas transportation and storage activities must be carried out in compliance with the Petroleum Products Law and relevant regulations, but without the need for a license. Furthermore, on 7 February 2013, an amendment was made to the Petroleum Products Law requiring an additional license for retail trade of petroleum products, which was until such time an unlicensed activity.

2. Petroleum Law and Upstream sector

A revised version of Petroleum Law came into effect on 20 July 2014.

2.1 General content

The Petroleum Law distinguishes between two main categories of petroleum products, being: (i) "oil" and (ii) "unconventional oil". Oil refers to crude oil and natural gas in addition to refined petroleum, whereas unconventional oil refers to oil sands and shale.

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As a welcome departure from the previous regime, the new Petroleum Law identifies just three types of petroleum-related activities: (i) research, (ii) exploration, and (iii) extraction. Exploration and extraction activities for oil and unconventional oil are subject to licensing procedures under the Petroleum Law, whilst other activities, such as research and pet storage and transportation, are subject to a simplified permission procedure.

The Ministry of Mining and the Petroleum Authority of Mongolia (PAM) are the two primary regulators for the petroleum sector. The Ministry of Mining is responsible for policy issues, the issuance of licenses and organizing tenders for exploration sites. PAM is the main implementing authority responsible for matters such as concluding production sharing agreements, approval of annual plans, and fee collection.

2.2 Research and Production Sharing Agreements

The term "research" is defined as "geological, geochemical and geophysical research conducted in order to determine the presence and condition of oil and unconventional oil in a certain area". If PAM approves the research results, a legal entity can submit a proposal to enter into a production sharing agreement, by way of submitting a draft agreement.

2.3 Exploration

The Petroleum Law defines the term "exploration" as "geological, geochemical, geophysical activities, drilling and test extractions conducted in order to explore an oil deposit and determine the amount of its reserves."

The Ministry of Mining will issue an exploration license to a Mongolian company that has entered into a production sharing agreement with PAM. Alternatively, an exploration license may be issued to a company that has won a bid for a reserve where PAM and a company conducting research have not been able to conclude a production sharing agreement.

The term of an oil exploration license may be no more than eight years and can be extended twice for up to two years each time. Unconventional oil exploration licenses are issued for a term of no more than 10 years which can be extended once for a maximum of a further five years.

2.4 Extraction

The term "extraction" is defined as "extraction site development and the extraction of oil and unconventional oil."

Extraction is also a licensed activity. Within 90 days of the expiry of the exploration term, an exploration license holder must present a reserve report to the Ministry of Mining in order to obtain its approval of the reserve. The Ministry of Mining will approve a reserve on the basis of an opinion issued by a committee formed under the Ministry and PAM.

The term of an oil extraction license may not exceed 25 years, but can be extended twice thereafter by up to five years each time. The initial term of an unconventional oil exploration license can be no more than 30 years, but again may be extended once for a maximum of five years.

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What Next for U.S. LNG Export Projects?

The U.S. liquefied natural gas (LNG) sector continues to surprise. Even for an industry that has weathered significant strategic shifts over the last decade, recent developments have been particularly dynamic.

Recent Developments

Over the past five months:

- The first cargo of LNG produced in the lower 48 states departed from the Sabine Pass terminal in Louisiana, not long after the corporate ouster of the chief executive behind its genesis.
- The Federal Energy Regulatory Commission (FERC) rattled some investors by issuing its first denial of an LNG export project – that of Jordan Cove LNG – but then approved the application of another relatively un-contracted export project, Magnolia LNG.
- At least two LNG export projects under development have been publicly cancelled or indefinitely suspended, including one of the very few proposed West Coast projects.
- Industry leader Shell consolidated its position in the U.S. LNG market by absorbing BG Group.
- The U.S. Congress moved closer to adopting legislation mandating the U.S. Department of Energy to act on exports of LNG to non-free trade agreement countries within a short period of time following completion of an environmental analysis, which would eliminate some regulatory uncertainty.

At the same time, global economic trends are dampening the near-term prospects for LNG. A sustained decline in oil prices has sharply reduced the arbitrage opportunities between the U.S. and Asia, as spot prices for LNG in Asia are at their lowest levels in many years. A large and growing imbalance in supply and demand is expected to plague the global LNG market until at least the end of this decade. Meanwhile, nearly 60 million tonnes per annum of production capacity is under construction at six U.S. export projects, all of it expected to become operational by 2020. A further 20 export projects are under development in the U.S. and have entered the regulatory process at FERC or United States Maritime Administration (MARAD), as applicable.

Outlook for Further Projects

While skeptics are questioning whether the era of new LNG liquefaction

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capacity in the U.S. is over, U.S. LNG export projects should over the longer term have a competitive advantage in a low price environment. For example, U.S. LNG export projects remain some of the least expensive liquefaction projects in the world on a cost per tonne of production basis—while U.S. projects in construction or planned will cost anywhere between US$550-US$1,000 per tonne of production per annum, most projects in Asia range between US$2,000-US$4,000 per tonne of production per annum.[1] U.S. projects also benefit from security of supply, supported by a large, robust and liquid gas market, and a relatively favorable and predictable legal environment. U.S. suppliers also offer buyers significant contractual flexibility, and in particular the absence of (contractual) destination restrictions is U.S. sale and purchase agreements may become increasingly important; over 30 countries now import LNG and that number is expected to grow as additional developing markets embrace LNG as a reliable source of energy.

As global demand eventually returns and accelerates during the next two decades, logic dictates that increases in production should come in large part from U.S. suppliers. Those developers who take a long-term perspective and capitalize—through technology, design, or otherwise—on the fundamental benefits and efficiencies of their domestic market should emerge in a second, perhaps smaller wave of successful export projects.

[1] LNG World Shipping, January/February 2016.

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Acacia acts as an intermediary in the patent marketplace under various business models. Through its “partnering model,” Acacia asserts patent portfolios from corporations, research labs and universities and individual inventors, sharing the net profits 50/50 after legal and other enforcement costs. Through its “purchasing model,” Acacia acquires 100 percent ownership of patent portfolios, often from distressed corporations or failed corporations controlled by venture capitalists, and keeps 100 percent of the profits. Through its “hybrid model,” Acacia provides up-front capital as an advance on future licensing revenue streams, targeting major corporations seeking to monetize their patent portfolios.

Under these various models, Acacia acts as a patent assertion entity, or PAE, sometimes called a non-practicing entity, or NPE. That is, Acacia does not practice the patent portfolios, does not manufacture products, and does not provide services (except patent licensing and enforcement). As one might expect, Acacia is a prolific filer of patent infringement litigation and, through its subsidiaries, one of the most common filers in the plaintiff-friendly Eastern District of Texas. However, Acacia’s subsidiaries also file in other districts, such as the Western District of Texas, which is home to Austin, and the Southern District of Texas, which is home to Houston.

In July 2015, for example, Acacia subsidiary Rapid Completions LLC asserted in the Tyler Division of the eastern District of Texas a portfolio of six patents that were initially developed and owned by Packers Plus Energy Services Inc., by suing various Baker Hughes, Weatherford, Peak, and Pegasi Energy entities. These patents relate to multi-zonal completion of horizontal wells including ball-drop, sliding sleeve, and packer technology for use in the hydraulic fracturing of both tight and conventional oil and gas reservoirs, as well as unconventional shale formations.

Fast forward to April 2016. Acacia no longer lists its Houston office on its website. According to his LinkedIn page, the former Houston-based Vice

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The world is changing.
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We created Hogan Lovells to be a different kind of law firm - a law firm that anticipates change to support you strategically, commercially, and day to day.

President for Licensing, Energy says he left Acacia in February 2016. Acacia's headquarters in Newport Beach, California confirms the closing of its Houston office.

However, the oil and gas and smart energy industries cannot escape Acacia, with or without a Houston office. In April 2016, Acacia subsidiary Rapid Completions filed in the Houston Division of the Southern District of Texas another litigation asserting an additional patent initially developed by Packers Plus, again suing various Baker Hughes, Weatherford, and Peak entities. The patent generally covers methods and apparatuses for oil and gas wellbore fluid treatments.

Consequently, while Acacia may no longer have a physical presence in Houston, it remains a presence at the Courthouse and in the minds of litigation counsel in Houston's oil and gas and smart energy industries.

Cite for Mother of All Patent Trolls:

- http://www.patentlyapple.com/patently-apple/2015/08/the-mother-of-all-patent-trolls-is-behind-new-infringement-case-against-apple-over-memory-technology-found-in-macs-and-idevic.html
- http://www.ipwatchdog.com/2010/08/10/patent-trolls-acacia-research-funding/id=12017/

Cite for No Houston Office:

- https://web.archive.org/web/20140725151743/http://acaciaresearch.com/contact/ (listing Houston office)
- http://acaciaresearch.com/contact/ (no Houston office)

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A New Approach to LNG: Re-thinking LNG Development Strategies at Global Conference held in Perth, Australia

Attracting representatives from over 95 countries, and industry leaders from global energy giants such as Shell, Total S.A., and Chevron, LNG X is the major international conference that focuses on the Liquefied Natural Gas (LNG) market. Taking place every three years at different international locations, this year's "LNG 18" was hosted in Perth, Western Australia. Australia is set to be the largest global exporter of LNG in the next decade, overtaking Qatar by 2020. The Energy and Natural Resources Group at Hogan Lovells is one of the largest in the world. Within its' global network of over 45 offices, including in its offices in Australia, over 400 lawyers are working for energy and natural resources clients.

Concern was expressed at the recent slowdown in demand for LNG at the conference. There was optimism that the market would pick up, but because of this concern a key focus of the conference was the development of innovative strategic approaches to the LNG market. Emphasis was placed upon the relationship between oil prices and the price of LNG, with many key figures advocating for an overhaul in pricing mechanisms for LNG. Ben van Beurden, the Chief Executive at Shell, has suggested that LNG be linked to the Henry Hub price, a spot gas price used in the U.S. By contrast, Peter Coleman, the Chief Executive at Woodside Energy, has argued that the strength of the LNG market could be undermined by the volatility of spot-pricing mechanisms. He asserted that the LNG market would be better served by long-term pricing structures.

The current low LNG prices were highlighted as an opportunity to introduce new consumers into the market. Richard Guerrant of ExxonMobil discussed the emergence of new markets and buyers internationally, highlighting Indonesia, Bangladesh, and India as countries that are likely to increase their use of LNG. Similarly, Shell chief Ben van Beurden considered markets to be opening up in countries such as Thailand, Pakistan, and Poland. A number of the major LNG producers have indicated that they are investing in ship-fuelling operations and floating re-gasification units as a way of attracting these new markets and expanding their consumer base.

In light of the UN Climate Conference held in Paris last year, international environmental commitments were another key focal point at LNG 18. In the opening speech of the conference, Prime Minister Malcolm Turnbull stressed

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the crucial role that LNG has in this area, stating that "gas is a critical part of the environmental agenda for the future to a cleaner, greener, planet." The potential role of LNG in complying with environmental obligations is a feature that conference participants have argued should be highlighted when marketing LNG products.

The Chief Executives of both Total S.A. and Origin Energy discussed the disjuncture between the international treaty obligations of states and their increasing usage of coal. Due to cheaper prices, countries such as Korea are prioritizing coal as a key energy resource, leading to recent reduction in demand for LNG. Several industry leaders have called for the introduction of a carbon pricing mechanism to encourage the use of LNG. This view was not shared by all of the conference participants, however, with John Watson of Chevron raising concerns that a carbon price mechanism would detrimentally impact upon the energy supply of developing countries, thus increasing "energy poverty."

The importance of corporate social responsibility was also emphasized at LNG18. Colin Barnett, Premier of Western Australia, asserted that large oil and gas companies needed to do more to be seen by the community as good corporate citizens. This meant better and more proactive engagement with the community. He emphasized that these companies should not place undue reliance on incumbent governments and politicians to advocate the relevance and benefits of their projects and should assume a more active and direct role in doing so themselves.

Public Trust Challenges to Pipelines

Until 2010, Michigan was rarely one of the first states that came to mind when considering petroleum production and transportation. But on July 25 of that year, Enbridge pipeline 6B ruptured in Marshall, Michigan, spilling over one million gallons of crude tar-sands oil from Alberta into a tributary of the Kalamazoo River. The spill then flowed to the river itself, one of the largest in Michigan. This was and remains the largest inland oil spill in United States history, and cleanup has cost almost US$1 billion to date. This catastrophe, coupled with the well-publicized Deepwater Horizon spill in the Gulf of Mexico the same year and the high-profile controversy surrounding the proposed Keystone XL Pipeline, drew Michiganders' attention to the existing pipelines in the Wolverine State, along with heightened scrutiny from legislators, regulators, and NGOs.

Unfortunately for Enbridge, another Michigan pipeline that is now in the limelight is Enbridge Line 5, which lies beneath the Straits of Mackinac, the narrow channel between the Upper and Lower Peninsulas of Michigan that connects Lake Michigan with Lake Huron. Line 5 transports oil and other petroleum products to the Straits, and then it splits into two lakebed pipelines that rest on an underwater state easement. Line 5 was constructed in 1953 when it was considered a safer alternative to transporting oil on tankers. This may be true; in 62 years, the pipeline has never had a major leak. Nevertheless, in the wake of the Kalamazoo River spill, groups such as For the Love of Water (FLOW) have launched campaigns to shut down the pipeline. These campaigns rely heavily on the concept of the public-trust doctrine.

The public-trust doctrine, which dates back to ancient Roman times, is premised on the idea that certain public spaces and natural resources belong to the people. The state serves as a "trustee" of these resources and must maintain these communal assets in trust for the benefit of current and future generations. The public-trust doctrine is typically applied to protect public uses such as navigation, commerce, and fishing. Michigan's water-law jurisprudence is permeated by the doctrine. For example, in 2005, the Michigan Supreme Court held that the state's public-trust rights permit the public to walk along the shoreline of privately owned beaches below the high-water mark. Although citizens' rights to public-trust resources have not traditionally extended to preserving environmental quality, numerous public-interest groups have attempted to use the doctrine in recent years to do just that. Proposed local ordinances that would prohibit fracking and climate-change lawsuits are just two examples.

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Those familiar with Michigan should not be surprised that the theory would be tested there as well. Although known primarily for its heavy industries at the time Line 5 was constructed, the state has rebranded itself in recent decades through its “Pure Michigan” tourism campaign, a campaign that relies heavily on wild-lands recreation, vibrant resort communities, and the concept of five pristine Great Lakes. With 3,288 miles of freshwater coastline (the second-longest coastline in the United States after Alaska), Michigan is particularly vulnerable to a major oil spill. No one doubts that—particularly at the Straits, which connects two Great Lakes—a leaking pipeline would dramatically affect the state’s ecosystems, recreation opportunities, and tourism economy.

FLOW has not yet translated its efforts into legal action, and it’s not clear what a lawsuit to close Line 5 premised on the public-trust doctrine would look like or whether it would be successful. But oil-and-gas and resources lawyers should keep their heads up as use of the doctrine evolves, especially when petroleum-transportation issues—whether involving pipelines, crude-by-rail, truck, or tanker—grab national attention.

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Drilling Rig Contracts – Return to the Status Quo on the Exclusion of Liability for "Spread Costs"

In an important decision for the oilfield services industry, the English Court of Appeal has overturned a Commercial Court decision restricting the scope of risk allocation provisions in drilling rig hire contracts, in a move which provides certainty for commercial parties and reinforces the principle of freedom of contract.

Rig hire contracts, which are usually based on standard industry agreements such as the LOGIC form, generally include mutual undertakings by the oil company and the rig owner to indemnify and hold each other harmless in respect of all consequential loss. Such undertakings form part of a wider scheme for apportioning responsibility for loss and damage of all kinds, backed by insurance—so-called "knock for knock" provisions.

The Court of Appeal's decision in *Transocean Drilling UK Ltd v Providence Resources Plc* confirms that commercial parties are free to agree to exclude liability for loss and damage, and provisions to that effect should be given their ordinary and natural meaning. The decision will, of course, be welcomed by rig owners who have for many years contracted on the expectation that liability for spread costs incurred as a result of rig downtime can be validly excluded by agreement, and have calculated their day rates on the basis of this understanding of the allocation of risk between the contracting parties.

The dispute

The dispute related to an adapted LOGIC contract by which Transocean agreed to hire a semi-submersible drilling rig to Providence for the purposes of drilling an appraisal well in an oilfield off the south coast of Ireland. The dispute centred on whether:

(1) the suspension of drilling operations and delay resulting from the misalignment of part of the blow-out preventer was caused by breaches on the part of Transocean, and

(2) providence could recover the cost of personnel, equipment, and services contracted from third parties which were wasted as a result of the delay (referred to as "spread costs").

A copy of the Court of Appeal's judgment can be found here.

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strategically, commercially, and day to day.

The judge at first instance found that the delay was caused by Transocean's breach and this was not challenged by Transocean on appeal. As to the second question, it was held that Providence was entitled to recover its spread costs for the period of delay, despite indemnity provisions in the contract which purported to exclude the parties' respective liability for consequential loss.

Court of Appeal's decision

Overturning this decision on the issue of spread costs, the Court of Appeal held that it was important to construe the exclusion clause in its proper context – that the parties were of equal bargaining power and had entered into mutual undertakings to accept the risk of consequential loss flowing from each other's breaches of contract, as part of a broader "knock for knock" scheme for allocating losses between the parties.

Against that background, and in circumstances where the language of the exclusion clause was – in the opinion of the Court of Appeal – clear and unambiguous, it was not necessary or appropriate to construe that exclusion clause restrictively in order to avoid commercial oppression. As such, the court confirmed that primacy will be given to the language chosen by the parties to express their intentions.

As to Providence's argument that such an interpretation would leave it without a remedy for Transocean's breach of contract and relegate the contract to a mere "declaration of intent," the presiding judge, LJ Moore-Bick, emphasised that, *"it cannot be said that the contract is devoid of legal content just because the parties have agreed that neither should be entitled to recover from the other consequential, as opposed to direct, loss."*