Decommissioning in the UK Continental Shelf: a Litigator's Perspective

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Introduction

Since the 1970s, the UK has been a significant producer of oil and gas. It is the largest producer of oil and second largest producer of natural gas in the EU. Over 95 per cent of the UK's oil and gas production is derived from offshore fields in the UK Continental Shelf (UKCS).

The UK's oil and gas industry has been a critical source of revenue for both the public and private spheres. Since 1975, the industry has generated over £20 billion of tax revenue and produced approximately 3,318,221,993 tonnes of crude and 2,616,204 million cubic metres of gas.[1] Presently, however, the industry is in serious peril.

With high taxes, increased running costs and the recent free-fall of oil prices from circa US $110 to circa US $50–60, many of these offshore fields in the UKCS may no longer be economically viable. As Oil and Gas UK's Activity Survey 2015 explains, at US $50 a barrel, approximately 20 per cent of oil production in the UKCS and 33 per cent of fields are loss-making on a cash basis.[2] The UKCS's prominence in oil and gas production may therefore be in jeopardy. Does that mean opportunities no longer exist?

Decommissioning

As an oilfield's lifecycle progresses, its economic value decreases. Over time, an oilfield's risk-return profile becomes inverted and net returns no longer cover current and projected costs. Once this happens, an oilfield is no longer considered economically viable and production is likely to stop. Under the current regulatory regime (discussed further below), the oil or gas field's installations and pipelines will need to be decommissioned.

Decommissioning is the process by which the operator[3] of an offshore oil or gas installation and pipeline plans for, and subsequently shuts down, operations at the end of a field's life: closing the wells, cleaning up, making the installation safe, removing some or all of the facilities and re-using or disposing of them as appropriate. In 2010, Deloitte estimated that, even with the technological advancements in offshore extraction, 65 per cent of the circa 350 active oil and gas fields on the UKCS will be due for decommissioning by 2020.[4] This includes over 66 per cent of all sub-sea units and 45 per cent of existing platforms.

Given the excessive supply of oil and gas, weak global demand growth, high exploration and production costs, and depressed and stagnating oil and gas price levels, Deloitte's estimate no longer seems realistic. According to Tony Craven Walker, Chief Executive of Serica Energy, the end of the North Sea Basin could come much earlier than previously expected.[5]

Decommissioning is not a uniquely British problem and, on the bright side, the need to start decommissioning earlier is likely to provide British companies with the opportunity to be the first movers in the industry. As Sir Ian Wood's report suggests: "if the UK can develop its expertise in this area, it will have a competitive advantage which can be exported to other oil provinces as they mature".[6]

The market value of decommissioning

Oil and Gas UK estimated in their 2013 Economic Report that decommissioning the UK oil and gas fields may cost more than £35 billion over the next 30 years. The more recent Sir Ian Wood Report suggests that, based on recent well-abandonment performance, costs could escalate significantly and easily exceed £50 billion.[7]

This level of expenditure will provide incredible commercial benefits to companies that are able to develop decommissioning capabilities and expertise. To take a simple example, consider the position of heavy lift operators. According to DecomWorld, a total of 150,000 tonnes of material will need to be removed from the North Sea.[8] This includes 105 topside modules, 35,000 tonnes of jackets and 3,000 tonnes of sub-sea facilities. With the average topside module weighing 1,710 tonnes and

[1] See *https://www.gov.uk/oil-and-gas-uk-field-data* [Accessed July 14, 2015].
[2] See *http://www.oilandgasuk.co.uk/cmsfiles/modules/publications/pdfs/EC044.pdf*, p.46 [Accessed July 14, 2015].
[3] In fact, as discussed below, there may be a number of parties liable for decommissioning. Except where it is clear from the context, the authors use "operator" to include all potential decommissioning parties.
[4] See *https://www.energyinst.org/_uploads/documents/Decommissioningbriefing_v2_latest.pdf* [Accessed July 14, 2015].
[5] See *http://www.ft.com/cms/s/0/4f0442e0-bcd2-11e4-a917-00144feab7de.html#axzz3VrEx2cWq* [Accessed July 14, 2015].
[6] Sir Ian Wood, *UKCS Maximising Recovery Review: Final Report* (February 24, 2014), p.51
[7] It is interesting to note that more than half of this cost (estimated at around 60 per cent) will ultimately be borne by the UK Government through tax relief. This is especially true given the recent introduction of decommissioning relief deeds (DRD), which entered into existence in October 2013. A DRD is essentially a contract between the government and an s.29 Notice holder, which guarantees the tax relief available at the date that the contract is executed.
[8] See *http://analysis.decomworld.com/structures-and-maintenance/heavy-lift-and-disposal-test-north-sea* [Accessed July 14, 2015].

currently estimated to cost £4,200 per tonne to remove,[9] heavy lift operators could generate £754,110,000 in revenue (assuming that the entire cost burden will be the fees paid to heavy lift operators). Even if this figure is discounted so that the fees generated by heavy lift operators constitute only 60 per cent of the total cost per topside tonne (a reasonable estimate given their key role in topside removal) and this is distributed over a 30-year period, heavy lift operators acting in the decommissioning arena may be able to generate £15,822,200 per year in revenue solely from the removal of topsides during decommissioning operations.

These potential gains are not limited to industry players. Opportunities related to decommissioning will also be available in the legal and financial spheres.

Regulatory framework

The obligation to decommission offshore installations on the UKCS was first enshrined in the UN Convention on the Continental Shelf 1958. This Convention requires that "any installations which are abandoned or disused be entirely removed"[10] (art.5(5)). This was reinforced by art.60(3) of the UN Convention on the Law of the Sea 1982. This Convention requires that disused or abandoned installations be removed only to the extent necessary "to ensure safety of navigation, taking into account any generally accepted international standards".[11]

The current decommissioning regulatory framework in the UK is based on an international law ruling: the OSPAR Decision 98/3 on the Disposal of Disused Offshore Installations. The OSPAR Decision 98/3 provides a general prohibition on the "dumping, and the leaving wholly or partly in place, of disused offshore installations within the maritime area". It does, however, permit certain derogations. These derogations primarily relate to concrete structures and to steel jackets installed before February 9, 1999 weighting greater than 10,000 tonnes. Certain pipelines may also be left wholly or partially in place.[12]

For decommissioning in UK waters, the primary UK regulatory framework is set out in the Petroleum Act 1998, as amended by the Energy Act 2008. Compliance with the UK regulatory framework is currently administered by the Department of Energy and Climate Change (DECC), which provides useful guidance notes on the topic.

Decommissioning in the UKCS—no escape

The obligations and potential liabilities created under the Petroleum Act are extensive. To ensure that the British Government is not left with any of the decommissioning costs (other than those born through tax relief), the Petroleum Act empowers the secretary of state to require almost anyone connected with an offshore installation to submit a decommissioning programme by serving what is commonly known as a "section 29 notice".

The class of persons on whom the s.29 notice can be served is very wide and includes (s.30(1)):

1. the installation and/or pipeline owner;
2. any person managing the installation or its main structure (e.g. operator);
3. any person who owns an interest in the installation and/or pipeline (otherwise than as security for a loan);
4. in relation to the subject installation, any person having the right to explore and/or exploit mineral resources and/or store gas (the licence-holder);
5. a former licence-holder who has "transferred without consent" under its licence;
6. any party to a joint operating agreement (JOA) ; and
7. a company associated with any of the above.

Once a party is served with a section 29 notice, it becomes jointly and severally liable for all decommissioning costs related to the particular installation(s) referenced under the section 29 notice. Moreover, where the secretary of state has served a section 29 notice, under s.34 of the Petroleum Act, additional section 29 notices can be served, withdrawn and re-served at any time, creating a liability that exists in perpetuity. This liability exists even when a company no longer has an interest in the offshore field, whether because they sold their interest in the field or are no longer involved in the management of that particular field.

DECC's Guidance Notes state that section 29 notices will be served, in the first instance, on licensees, operators, owners of the relevant offshore installation and parties to a JOA. The Guidance Notes do, however, state that the secretary of state has the option to serve a section 29 notice more widely in cases where it is judged that suitable arrangements have not or will not be made to ensure that a satisfactory decommissioning programme is carried out.[13] Accordingly, this means that parties with limited exposure to gains from an offshore field (such as offshore drilling companies) may be left liable for some, or all, of the total decommissioning costs.

Decommissioning agreements

There is currently no standard form contract for decommissioning. This is unsurprising as the decommissioning industry is still in its infancy with few facilities having been decommissioned. Until an industry

[9] See *http://www.ft.com/cms/s/0/4f0442e0-bcd2-11e4-a917-00144feab7de.html#axzz3VrEx2cWq* [Accessed July 14, 2015].
[10] See *http://sedac.ciesin.columbia.edu/entri/texts/continental.shelf.1958.html* [Accessed July 14, 2015].
[11] See *http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf* [Accessed July 14, 2015].
[12] OSPAR Decision 98/3 at [2] and [3].
[13] See *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69754/Guidance_Notes_v6_07.01.2013.pdf* [Accessed July 14, 2015].

standard is reached, decommissioning project contracts are likely to be based on other offshore contracts (in particular, drilling and offshore construction contracts) as well as shipbuilding, onshore construction, nuclear decommissioning and other project agreements.

As the decommissioning industry develops, industry standard clauses are likely to emerge. For example, offshore drilling contracts typically include a "knock-for-knock" indemnity clause (discussed further below). These clauses provide reciprocal indemnities, usually stipulating that each party will be responsible for its own staff and equipment and for pollution emanating from its own property, regardless of the cause of the damage. Ship-building, onshore construction and other project contracts tend not to adopt this approach. However, these clauses make sense in drilling contracts, where the costs and loss of profits from a short period of delay while a dispute is resolved can be enormous. Whether they are as suitable in the decommissioning context, where the facility is no longer operational and loss of profits is not a significant factor, is an important commercial question.

The practical, commercial and legal uncertainties involved in offshore decommissioning makes it an area likely to be plagued with disputes. Given the nature of decommissioning, such disputes are likely to fall into five principal categories:

(1) judicial reviews;
(2) delay and disruption disputes;
(3) pollution, property and indemnity claims;
(4) sale and purchase disputes; and
(5) insurance and reinsurance disputes.

Judicial reviews

The significant potential liabilities arising from being served a section 29 notice, together with the (currently) limited case law interpreting the Petroleum Act make it likely that for recipients of a section 29 notice will challenge the validity of that section 29 notice in court.

The principal areas of challenge may include whether the recipient of the section 29 notice falls within the definitions in s.30 of the Petroleum Act, and whether the secretary of state properly exercised his/her discretion in deciding to serve the section 29 notice.

Industry players who have limited gains from an offshore field, such as contractors, may be particularly motivated to challenge a section 29 notice served on them. The secretary of state may, however, choose to withdraw the section 29 notice, which would end the judicial review proceedings without concluding the issues at hand. By doing so, the secretary of state would retain the right to re-serve the contractor again at a later date. Although this outcome would result in a significant level of commercial uncertainty, it is likely given the government's motivation not to bear any of the decommissioning costs (other than through tax relief).

Delay claims

From the project perspective, the most substantial category of disputes is likely to arise out of delays in the decommissioning process.

Decommissioning an offshore platform is a large and complex undertaking. It is composed of numerous technically challenging and time consuming phases requiring coordination between a number of contractors and subcontractors. Planning each phase and estimating its respective costs is far from an exact science and has, in previous instances, resulted in serious under-estimations. For example, in the North West Hutton Decommissioning Programme, BP estimated the overall decommissioning costs to be £160 million. The actual cost was £246 million, 53 per cent greater than anticipated.[14] This additional cost was linked to delays in dredging, trenching and cutting activities and the rig had decayed much more than expected.

North West Hutton was one of the first major decommissioning projects, and an overrun of more than 50 per cent in estimated costs is likely to be unusual as the industry matures but, with costs in the hundreds of thousands or more per week, there are likely to be substantial disputes arising from delays.

The treatment of delay and the expected completion date will depend on the terms of the applicable decommissioning contract. It is anticipated that the typical decommissioning contract would follow the mechanism found in most construction or projects contracts: a set completion date (or number of days for completion) which may be extended by certain permissible delays, and a requirement that the contractor gives the employer notice of those delays.

Where the contract is silent as to the time for completion, a term is likely to be implied that it must be completed within a reasonable time. This will be a question of fact to be determined in the context of the particular project. The complexity of the decommissioning process and infancy of the industry will make this exercise difficult, time consuming and costly.

Delays generally fall into four categories:

(1) those expressly assigned in the contract as contractor's risk;
(2) those expressly assigned in the contract as employer's risk;
(3) those expressly assigned in the contract as force majeure events; and
(4) other breaches of contract by the employer that cause delays (including acts which prevent the contractor from carrying out the contract, and are a breach of the implied duty of cooperation).

Project contracts generally expressly provide that the contractor is entitled to an extension of time for Categories (2) and (3) (referred to as "Relevant Events", "permissible delay" or by similar terminology). Problems

[14] See *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/371545/NWH_Decommissioning_Programme_Close_Out.pdf* [Accessed July 14, 2015].

arise where parties do not expressly allocate the risk for a delay falling into Category (4). For example, the employer may agree under the decommissioning contract that it will provide unfettered access to the installation but delays caused by the employer's work on nearby installations might not be an event falling into the permissible delay category under the contract. In these situations, a contractor normally argues that it should be entitled to an extension of time because the employer should not be entitled to benefit from its own breach of contract. The employer, in contrast, argues that the contractor should only be entitled to an extension of time where the delays fall into the categories set out in the contract. Ultimately, this is a question contractual interpretation and the outcome will depend on the wording and facts of each case.

Using clear and express wording in the contractual framework will reduce the risks of an expensive dispute. However, with no standard form for decommissioning agreements, it is likely that the commercial terms that parties agree will differ in each case providing scope for delay disputes.

A common issue in delay claims is whether the contractor is entitled to an extension of time where there is concurrent delay (a situation where a delay falls into more than one of the categories listed above). Without express wording in the contract, the question of concurrent delay carries great uncertainty. Indeed, where the parties use the JCT Standard Form of Building Contract 1998 edition, concurrent delay is treated differently depending on whether the contract is governed by English or Scottish law (English law treats it as permissible, while Scottish law does not).[15]

Another area that may cause particular difficulties in the decommissioning context is force majeure clauses. Decommissioning is a serious endeavour and specialised offshore machinery and vessels will likely be in demand to carry out the works. Currently, the number of specialist vessels is limited and there is a real possibility that they may be unavailable at the time when they are needed. For example, the decommissioning process of the YME Platform off Norway has been delayed a result of completion delays in constructing the specialized heavy lift vessel, *Pioneering Spirit*. Whether the non-availability of these vessels should be a force majeure event under the contract is a commercial consideration and one that is likely to involve difficult negotiation.

Where there is a force majeure event, the question of who should pay the costs of that event arises. There will still be vessels on charter and personnel offshore who must be paid. Where the contract is silent as to who must bear these costs, it is likely to be determined by the interpretation of the payment mechanism and the remainder of the contract. Where there are extended periods of force majeure, a dispute will likely follow.

Projects inevitably overrun. Decommissioning projects are not unusual in this regard. Where there is delay under a construction contract, the contractor would typically pay liquidated damages at a daily rate until the project was complete. Whether this approach will be appropriate in a decommissioning project is unclear. The enforceability of liquidated damages provisions under English law is subject to a number of principles, including the requirement that they reflect a genuine pre-estimate of the employer's likely losses. If they do not, they are likely to be struck down as a penalty and be unenforceable. The infancy of the industry is likely to make it difficult to provide genuine pre-estimates of loss. Further, in decommissioning projects, there is no end product and the employer's loss is therefore likely to be more limited. The actual costs an employer may incur as a result of delays will depend on the payment structure in the contract (in a fixed-price contract, for example, it is likely to be limited to its project costs, while in a costs-plus project, the employer will have to pay additional sums for the additional time). The appropriate remedy will therefore vary from contract to contract.

A remedy often provided in such circumstances is the right to terminate if delays exceed a certain point in time. However, this can be a risky remedy to exercise. Where the employer wrongly terminates, the contractor is likely to argue that the termination was a repudiatory breach of contract entitling the contractor to substantial compensation.

On the other hand, it may not be necessary to include a specific remedy for delay in the contract at all. For example, where the project is not time critical, the employer may not suffer a loss other than the costs related to that distinct project. Alternatively, stipulating a cap on the fees that the contractor can earn may itself be a sufficient remedy.

Property, pollution and indemnity claims

On July 6, 1988, 12 miles off the north east coast of Scotland, there was an explosion on the Piper Alpha Oil Platform that claimed the lives of 167 people. The disaster resulted in a total insured loss of about £1.7 billion. Since that date, there have been a string of offshore incidents in the North Sea, including the Forties Alpha gas line rapture in 2003, the loss of well control on the Gullfaks C in 2010, and the Gannet Alpha oil spill in 2011.[16]

Decommissioning of aged oil and gas platforms is a dangerous endeavour. Many of the original construction and design plans of the older North Sea platforms are no longer available. With such old structures, it can be difficult to determine the stability of each section of the platform. Incorrect calculations, bad weather conditions and poor planning or coordination can lead to structural instabilities and other dangers. In extreme conditions, parts of the installation could disintegrate or large pieces of debris could fall from the installation. Rigs which have

[15] *Walter Lilly & Co Ltd v Mackay* [2012] EWHC 1773 (TCC); [2012] B.L.R. 503.
[16] See *http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028_b3-978-1_final_report.pdf* [Accessed July 14, 2015].

not been properly maintained or which have been abandoned and left standing for a while before decommissioning commences may suffer from serious corrosion. There may be hydrocarbons which have not been extracted, creating the potential for a spill. Debris could be hard to control and may cause collisions or pollution. There will also be the normal risks found during offshore construction, including the risks of extreme weather, collisions and injury at work. With hundreds of personnel, numerous specialised vessels and millions of pounds worth of equipment, the level of damages could be enormous.

Allocating the risk between the parties for these dangers will be crucial. As noted above, this is often achieved in offshore oil and gas contracts by a knock-for-knock indemnity. A knock-for-knock indemnity, in its basic form, provides that each party agrees to bear responsibility for and indemnify the other in respect of: (1) loss or damage to their own property; (2) injury to or death of their own employees; and (3) in some instances, pollution emanating from their own property. A knock-for-knock indemnity may also cover a party's "group", which may include the party's contractors, subcontractors and affiliates.

As noted above, parties should consider carefully whether knock-for-knock indemnities will be an appropriate risk allocation for their particular decommissioning project. For example, where the losses arising from disruption to the programme will be limited, a more traditional allocation of risk, where the party at fault pays, may be more appropriate for the project. Accidents on offshore installations are usually investigated very quickly and, in many situations, this is unlikely to lead to serious disruptions. Where the installation is particularly unstable, the contractor should be particularly careful to ensure that it does not accept potentially very high liabilities for a relatively low gain. The employer may also prefer to pay the contractors an increased contract sum which could cover all losses, possibly excluding pollution. This might be justified on the basis that the employer gives the contractor full control of the installation. Ultimately, the appropriate division of liability is likely to vary from project to project, and will depend on, among other things, the structure of the decommissioning agreement, the stability of the installation, the relative bargaining powers of the parties and the availability and price of insurance.

If knock-for-knock clauses are used, issues may arise as to which companies form part of each party's "group" and whether particular conduct is covered under the knock-for-knock regime. Defining the boundaries of the knock-for-knock indemnities is therefore important and wording should be considered in light of the scope of work to be carried out.

Parties should also consider carefully their exclusion clauses. English law allows parties to exclude losses arising from a party's own negligence, gross negligence (construed as a particularly "serious" case of negligence) and even, in some situations, wilful misconduct by its employees. For such an exclusion to apply sufficiently clear wording is required in the contract.[17] The parties should be careful to consider how they wish to allocate risk between them, weighing commercial certainty against the potential need to bear losses arising from another party's acts of negligence, gross negligence and wilful misconduct.

Sale and purchase disputes

The strategic decision to transfer ownership of assets typically occurs between 10 and 20 years into a field's life.[18] At this point, income from production is reducing and the risk profile begins to increase. Larger oil and gas companies may find it more economical to focus on new discoveries. In the UKCS, many small, efficient and specialised operators purchased licences and installations, which create a new generation of energy companies that benefit from the remaining barrels of oil and volumes of gas that these facilities hold. However, they also became potential targets of a section 29 notice, which would leave them severally liable for the entirety of the decommissioning costs.

Decommissioning liability is therefore a critical risk that must be addressed in or as a part a sale and purchase transaction. This could be achieved by providing an indemnity provision in the sale and purchase agreement (SPA) or, alternatively, by entering into a side agreement known as a decommissioning security agreement (DSA). The parties to these agreements agree to be liable only for a percentage of the decommissioning costs, generally based on the commercial benefit that each party derives from the field. The potential cost of decommissioning, may, however, be simply factored into the purchase price.

With the depressed oil and gas prices, some private equity investors are seeing acquisition opportunities in the energy market. For example, Blackstone has raised approximately US $4.5 billion for its energy focused fund.[19] The emergence of private equity owned oil and gas companies active in the UKCS provides its own set of potential risks, including private equity investors failing fully to understand the risks arising from decommissioning liabilities.

All private equity transactions are structured with an exit in mind. A fund's aim is to return profits to investors on completion of a successful exit. Accordingly, private equity companies are likely to be unwilling to accept any transfer of decommissioning liability under the SPA or to enter into DSAs.

[17] *Canada Steamship Lines Ltd v R* [1952] A.C. 192.
[18] See *http://www.raeng.org.uk/publications/reports/decommissioning-in-the-north-sea* [Accessed July 14, 2015].
[19] See *http://www.hedgethink.com/resources/growing-opportunities-for-private-equity-in-oil-and-gas/* [Accessed July 14, 2015].

This does not mean that private equity buyers and sellers are immune from incurring decommissioning liability. For example, if the seller enters into insolvency and cannot pay its share of the decommissioning costs, the secretary of state or other section 29 notice holders may attempt to force the private equity company (or its wholly or partly owned entity) to foot their portion of the decommissioning Bill.

The range of disputes that can arise out of sales of oil and gas facilities is extremely wide. It is likely, however, that the majority of disputes will relate to the process of disclosure that is carried out under the sale and purchase/M&A transaction.

Disclosure is an integral part of the deal process, providing the buyer not only with the information to establish a true valuation but also allocating risk between the seller and the buyer. As part of this process, a disclosure schedule (or disclosure letter) is provided by the seller to the buyer. Disclosures generally fall into two separate categories: "affirmative disclosures" constitute warranties about the seller's business or assets; and "specific disclosures", constitute exceptions to representations and warranties made elsewhere in the SPA.

When an oil and gas facility (or holding company) is sold, the buyer will typically require representations and warranties from the seller as to the number of barrels of oil or volume of gas that the facility is expected to produce on an annual basis and for the remainder of its lifetime. In some circumstances, a minimum level is made a specific warranty under the SPA. Buyers can later find that the facilities produce less oil or gas, are in a worse condition or have a shorter life-span than expected. In these circumstances, they may bring claims against the seller for misrepresentation or breach of a warranty under the SPA.

Buyers may also argue that, under the Sale of Goods Act 1979, warranties stipulating that the installation is of satisfactory quality, reasonably fit for purpose and complies with the description provided are implied into the SPA. Taking this position, buyers may argue that these warranties have been breached by providing facilities which are in a worse condition, have a shorter lifespan or hold less oil and gas than expected.

In a typical international sale, there is a very wide exclusion clause that excludes all statutory warranties in favour of a contractual regime. Normally, these contracts fall into one of the exceptions in the Unfair Terms in Contracts Act 1977 (UCTA) and the Act has no effect on the validity of the exclusion clause.

The position is a little more complex for facilities in the UKCS. In the UKCS, UCTA is likely to apply to the contract and, where both parties are acting in the course of business, the clause will only be enforceable where it satisfies the requirement of reasonableness.[20] In practice, however, this requirement will be easy to satisfy. The high value sale of an oil and gas installation will normally be entered into by two experienced commercial parties, both of whom will be advised by lawyers. Most likely, The SPA includes its own, tailor-made warranties and allocation of risk. It is also standard in the oil and gas industry for the statutorily implied warranties to be excluded. It would also be strange if industry sales excluded these terms throughout the world except in the UKCS. As a result, these exclusions will normally be considered reasonable and the standard warranties will normally be excluded.

Sellers should also be alive to the risk that buyers, when faced with a high decommissioning liability, may bring proceedings where there is a weak underlying claim in the hope of receiving a substantial nuisance settlement. Sophisticated buyers are aware that lawyers will advise that any claim carries litigation risk and may be encouraged by the prospect that, with a claim running into hundreds of millions, a nuisance settlement can run into tens of millions. This is a particular risk where private equity is involved. Private equity investors do not have the same reputational risks as industry players in bringing litigation. Private equity companies are also more likely to litigate for purely financial reasons, particularly as their primary goal is to obtain the highest return on investment.

Sellers should be attuned to this risk and should be reluctant to give warranties as to the future oil production from the facility, its lifespan or its condition. Sellers can protect themselves further by including terms in the contract restricting their liability for breach of contract or misrepresentation, or including a non-reliance clause in the SPA. Another term that sellers may wish to include is a warranty of due diligence by the buyer. Such clauses are popular in M&A, SPAs and IT contracts. They offer an additional level of protection to non-reliance clauses, as they expressly provide that the buyer has carried out its own investigations into the asset it is purchasing.

Insurance and reinsurance claims

Decommissioning contractors are likely to require (among other policies): P&I insurance to cover liability arising from its vessels, insurance to cover personal injury to its workmen and employees, and specialist insurance covering physical loss or damage including fault in the decommissioning process.

Operators and licence-holders may also take out insurance policies covering their decommissioning liability (known as decommissioning security insurance). These policies provide coverage for two main risks: First, the risk that an operator or licence-holder who has sold its installation or licence is required to pay for this installation to be decommissioned. Secondly, the risk that the abandonment of the installation (and, therefore, the decommissioning liability) may occur significantly earlier than expected, which may raise the need for significant financing.

[20] Section 6(3) of UCTA.

In both cases, liability under the policy can amount to hundreds of millions of pounds. As a result, insurers are likely to scrutinise any claim made under the policy very carefully before agreeing coverage. Insurers and brokers should carefully consider the terms of the policy before underwriting or taking out the policy. Operators and licence-holder should ensure that, if they sell an installation or receive a section 29 notice, the terms of the SPA or the steps that they take do not prejudice any coverage under the insurance.

Litigation v arbitration

The offshore industry has traditionally preferred arbitration to litigation. International arbitration gives the advantage of flexibility, confidentiality, limited appeals, the ability to appoint specialist arbitrators and improved enforceability of awards around the world. On the other hand, arbitrators cannot force parties to arbitrate and parties can slow down the process by dragging their feet and by challenging the arbitrators' jurisdiction. Arbitration can also be very expensive, as the parties must pay the arbitrators' fees and the venue hire charges as well as their own legal fees. It can also be difficult to include more than two parties in the same arbitration, or to conduct back-to-back arbitrations.

For these reasons, for some decommissioning disputes, litigation may be preferable. Some disputes are likely to involve a number of parties, all of which may be based in the EU where judgments are mutually enforceable. Further, England has specialist Commercial and Technology and Construction Courts, which have strong reputations and include judges with specialist experience in energy and project disputes.

In these circumstances, parties should consider carefully (and tactically) which forum is likely to be preferable for disputes arising from their project.

Conclusion

The development of the decommissioning industry is both an incredible opportunity and a difficult challenge. This article is intended to provide an overview and provides just that, an overview of the potential opportunities and likely challenges to be faced from a litigator's perspective. It is almost impossible to foresee and pre-empt all potential issues. However, companies that do recognise the common sources of disputes and act on them will be more likely to be in a position to devote core energies to building value rather than limiting loss.