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**ENERGY TRANSITION –  
HOW TO MITIGATE  
THE RISK OF  
DISPUTES IN  
DECOMMISSIONING**



**– THOUGHT LEADERSHIP**

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## ENERGY TRANSITION – HOW TO MITIGATE THE RISK OF DISPUTES IN DECOMMISSIONING

The global rise in renewable energy projects has brought into focus the need to decommission ageing fossil fuel assets effectively and sustainably. Decommissioning is often overlooked as part of the energy transition. Nonetheless, it is a crucial part of the journey and it can be problematic. The acquisition of fossil fuel assets by new entrants into the market – who may be under-resourced and under-estimate the potential decommissioning liabilities and responsibilities they are inevitably assuming – creates risks. The complexity, cost and scale of decommissioning activities are enormous, as are the inevitable associated environmental, legal and logistical challenges. As a consequence, the scope for regulatory, technical and financial disputes is extremely broad. This paper considers some of the ways in which parties to decommissioning projects may seek to limit their exposure to liability and to mitigate against the risk of being drawn into protracted and costly disputes.

### Examples of international and regional conventions and guidelines

- United Nations Convention on the Law of the Sea (UNCLOS)
- IMO's Guidelines and Standards for the Removal of Offshore Installations and Structures on the Continental Shelf and in the Exclusive Economic Zone (1989) (IMO Guidelines)
- Convention for the Protection of Natural Resources and Environment of the South Pacific Region
- Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean
- Convention for the Protection of the Marine Environment of the North-East Atlantic
- Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution
- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention)

In the context of the energy transition, it is important to consider what happens to existing ageing assets and whether they must be totally removed or whether they can be repurposed in a responsible and sustainable way. Decommissioning carries significant risk at each stage of the decommissioning process, and no two decommissioning projects are the same (taking into account the location, age and complexity of the relevant assets). The legal challenges of decommissioning projects are complex due to the various applicable international and regional conventions and guidelines (see the examples below), the underlying national decommissioning laws and guidelines (at different levels of maturity), and the associated contractual arrangements, often between multiple and multi-national participants. For more on the various international regimes and how to mitigate and manage the risks, see our recent briefing "[Energy in transition – the role of decommissioning](#)".

Decisions on how to resolve disputes will inevitably be informed by the scope of the decommissioning operations and the individual risk profile for each project, depending on the location and nature of the structure to be decommissioned. Taking these factors into account, risks include wreck removal, plugging and

abandonment of wells, disposal of waste products and hazardous substances, delay, pollution, environmental remediation, personal injury, and property damage, to name but a few, and potential reputational damage if it all goes wrong. The questions that arise are relevant to more than just offshore oil and gas assets – mines, fossil-fuelled power plants, refineries, storage facilities and pipelines and renewable energy projects, such as offshore wind facilities also face decommissioning challenges.

### Navigating disputes under industry standard form contracts

In an attempt to standardise the contractual arrangements for decommissioning activities, two standard form contracts have been developed by industry in the UK:

- the *LOGIC General Conditions of Contract (Including Guidance Notes) for Offshore Decommissioning* (Edition 1, December 2018) (**LOGIC**), published for use in the UK North Sea; and
- the *BIMCO DISMANTLECON Dismantling, Removal and Marine Services Agreement* (**DISMANTLECON**), published for international use.

Liabilities and indemnities in both the *LOGIC* and *DISMANTLECON* standard forms employ the standard knock-for-knock liability arrangements common to offshore construction projects where the contractor is responsible for its own property and workforce, pollution and negligent third-party damage or injury, with the owner retaining responsibility for its own workforce, the asset being decommissioned and any other property at the decommissioning site. For more on the knock-for-knock regime, see our recent briefing "[Offshore decommissioning contracts – operation of the knock-for-knock regime](#)".

Both the *LOGIC* and *DISMANTLECON* contracts contain a tiered dispute resolution clause (clause 36 and clause 25, respectively). It starts with negotiations between the owner and the contractor representatives. Under the *LOGIC* contract, if the dispute remains unresolved, the process requires the dispute to be referred to named nominees (tier two), followed by executive director negotiations (tier three). The *LOGIC* contract then provides a non-binding option for parties to refer the dispute to a form of alternate dispute resolution (**ADR**) (which is not prescribed), after which (irrespective of whether the option is exercised), either party can refer the dispute to either litigation or adjudication to be conducted in accordance with the procedure in the *Scheme for Construction Contracts (England & Wales) Regulations (Construction Act)*. Adjudication is an interim step and is binding only until the dispute is finally determined by litigation or arbitration (if agreed by the parties).

In contrast, the *DISMANTLECON* contract provides that if the dispute is unresolved after the initial round of negotiations, it is referred directly to executive directors for negotiation (tier two) before progressing to interim adjudication in accordance with the Construction Act procedure (tier three), which is binding until the dispute is finally determined by arbitration (tier four), with

four alternate arbitration options provided depending on whether the governing law is English, US, Singapore or other. Unlike the *LOGIC* contract, the *DISMANTLECON* contract also provides that either party can refer to mediation any dispute in respect of which arbitration has been commenced.

### Tailoring the disputes process by contract

While parties will be content, in some cases, with the designated dispute resolution process in the above standard forms (noting that there is optionality in both forms), sophisticated contracting entities will often seek, at an early stage, to tailor a dispute resolution process to best suit their individual risk profile and the particular project, noting that agreement on a dispute resolution process after a dispute has arisen is problematic. In that context, project proponents usually have the greatest ability to influence, if not dictate, the project's contractual provisions and processes at project commencement, and for that reason the considerations below largely fall on their shoulders.

As a relatively nascent sector in some regions, particularly outside the North Sea and the Gulf of Mexico, managing decommissioning risks and potential liabilities may require innovative solutions that are more likely to be developed by a collaborative as opposed to an adversarial approach. While it may be a stretch to suggest that mediation is a collaborative environment, there is likely to be greater scope in a mediation for parties to agree innovative ways to resolve challenges and mitigate risks that may give rise to liability than in a forum where determinations of liability are rendered by a third party. For that reason, contracting parties may wish to propose more extensive ADR processes beyond those contained in the standard forms.

Another area where parties may wish to tailor the process for dispute resolution is where decommissioning requires the involvement of multiple parties (i.e.,

### Examples of recent cases with a decommissioning element heard in the UK courts:

- *Apache UK Investment Limited v Esso E&P UK Ltd* [2021] EWHC 1283 (Comm)
- *TAQA Bratani v Rockrose UKCS8 LLC* [2020] EWHC 58 (Comm)

owners, operators, contractors, subcontractors etc). On such projects, ensuring back-to-back dispute resolution processes may avoid confusion or argument as to which forum has jurisdiction to determine disputes and ensure that all disputes are resolved under the same applicable law, not least of all in order to mitigate against the risk of inconsistent decisions and to promote certainty.

Where back-to-back dispute resolution processes exist, it is important to consider if it is advantageous to permit the joinder of parties and/or consolidation of proceedings (especially where multiple parties are involved). Depending on where a party sits in the contracting chain, there may be advantages or disadvantages in joinder or consolidation. From the perspective of project proponents (i.e., lenders/operators/owners):

- on the one hand, joinder/consolidation can reduce the number of dispute proceedings arising out of a project (including the duration in which disputes are litigated/arbitrated), potentially reducing legal costs and achieving greater efficiency (for example, by permitting joinder of relevant subcontractors to an upstream dispute); and
- on the other hand, downstream parties may seek to pursue claims upstream against a project proponent based on the perception that they have deeper pockets and have a greater appetite to settle disputes. If that risk is real, project proponents may seek to discourage joinder/consolidation and allow the downstream parties to resolve disputes without their involvement.

As with other types of disputes, there are also the usual considerations relevant to the choice between litigation and arbitration for decommissioning projects, including:

- litigation is typically an open process whereas arbitration is confidential. Depending on the type of dispute and a party's media strategy, either could be favourable, but typically the confidentiality of arbitration will favour operators and owners;

- in the case of international disputes, recognition and enforcement of arbitral awards is often easier than enforcement of judicial decisions thanks to the New York Convention on the Enforcement of Arbitral Awards, 1958 pursuant to which some 159 states have agreed to enforce awards from other party states;
- arbitration generally gives parties greater flexibility in how disputes are to be resolved (i.e., by choice of rules and language) and in particular the selection of the decision maker(s). This is likely to be particularly important for decommissioning disputes, where parties may seek to appoint an arbitrator(s) with particular specialist knowledge; and
- the strength of the rule of law also differs between jurisdictions. Where decommissioning projects involve multinational parties, arbitration can provide a forum independent from the jurisdiction of the courts in which the decommissioning project is being undertaken and can also provide the advantages of international enforcement of arbitral awards.

## Insurance

While well-drafted and considered dispute resolution provisions provide some protection, specific insurance for decommissioning is available to protect parties from potential liability. This protection is provided for, by way of example in clause 24 of the *LOGIC* contract, which requires the owner to arrange Decommissioning All Risks (**DAR**) insurance. DAR insurance is specifically designed to cover parties for the work they perform during the decommissioning phase of the project, recognising that the risk allocation under decommissioning contracts is often governed by a knock-for-knock regime. This cover is intended to complement (as opposed to replace) the other traditional forms of insurance, such as the operator's property and liability cover. Any DAR insurance policy should include the contractor, subcontractors and their respective affiliates as additional insureds, given the broad scope of potential exposure. It is worth noting that there is scope under

the *LOGIC* contract for the owner, at its discretion, to elect not to arrange DAR insurance. This may, however, be problematic, particularly given the risk of liability for environmental damage. In contrast the standard form *DISMANTLECON* contract makes no reference to DAR insurance, but specifies the more standard insurance requirements for construction projects. For example, contractors are required to procure hull and machinery (**H&M**) cover for vessels and professional indemnity insurance with stated limits, with operators required to procure third party liability insurance.

## Conclusion

In conclusion, to mitigate against exposure to liability, parties involved in decommissioning projects should consider a range of measures, including:

- adopting one of the standard form contracts developed by industry for decommissioning projects;
- tailoring contracts to adopt dispute resolution processes that will mitigate disputes; and
- ensuring that the project is suitably insured, including by taking out DAR insurance.



## Decommissioning around the world

### Australia

In Australia, the Federal Government has recently sought submissions from industry regarding establishing Australia as an offshore decommissioning hub in the Asia Pacific region. The Government proposes to publish a roadmap shortly to achieve that goal. A few key principles that will continue to shape Australia's offshore decommissioning journey include:

- Total removal of assets is the base case. Deviations may be allowed but only if the alternative will have an equal or better outcome than total removal. This is often difficult to demonstrate.
- Decommissioning is primarily the responsibility of titleholders, however trailing liability provisions are now in effect, enabling the regulator to call on previous titleholders, related companies, or persons related to current or former titleholders to undertake remedial work. While invoking the trailing liabilities provisions is seen as a last resort, it will factor into decisions on the sale of ageing assets, and arrangements that effect a change of control.
- Decommissioning should not be considered as an end-of-life activity, but rather must be taken into account throughout the lifecycle of a project, with decommissioning plans in place at an early stage of operations, and assets having to be properly maintained and capable of removal at the appropriate time.
- Decommissioning activities are to be completed before the end of the title, and within 5 years of permanent cessation of operations.

### Gulf of Mexico

The Gulf of Mexico is renowned as one of the most mature offshore hydrocarbon basins in the world and is said to have one of the most diverse decommissioning sectors. It is set to continue riding the decommissioning wave for some time to come, with an estimated 6.89% growth in the 5 years to 2025. Apart from the obvious calls for decommissioning services due to ageing assets and fields approaching end of life, the demand for decommissioning activities in the Gulf of Mexico is fueled (at least in part) by susceptibility to hurricane damage and other adverse weather events.

The deepwater decommissioning sector, by virtue of its area of operations, generally faces greater challenges than the shallow water sector, eg. greater costs, logistical, operational, safety, technical and regulatory challenges. The susceptibility to regional weather and sea conditions, and the limited weather working days, emphasises the need for expedition and flexibility in decommissioning operations (from an operational and scheduling perspective), and for a suitable regulatory framework. The decline in production in the Gulf of Mexico has seen an increase in demand for both shallow water and deepwater decommissioning activities. It is estimated that most of the Gulf's gas production occurs in shallow water (i.e. water depths less than 122m). The shallow water decommissioning market in the Gulf was valued at some US \$6.3 billion in 2022.

The risk of insolvency of offshore oil and gas operators (often fueled by low prices and reduced demand) can create both decommissioning challenges and opportunities, as seen by the recent insolvency of one of the largest oil and gas producers in the Gulf of Mexico. The company filed for Chapter 11 in August 2020. Its reorganisation plan was approved in 2021, but not before the company attempted to offload over US \$7 billion worth of clean-up liabilities. Attempts were made to hold previous owners of the fields accountable for decommissioning costs and to abandon some assets including wells, pipelines, and drilling platforms. While the company attempted to avoid responsibility for clean-up costs, the US Interior Department filed objections to its plan to transfer leases to other predecessor

companies and to abandon wells, citing environmental obligations which cannot be transferred without Federal Government approval. The company won its Chapter 11 application. The restructuring plan allowed the company to recapitalise debt and continue to operate its assets in the Gulf of Mexico as going concerns. This bankruptcy plan also enabled the company to set aside funding to meet its obligations to decommission abandoned wells. Predecessor companies were therefore not obligated to contribute to the clean-up of abandoned wells.

### **The North Sea**

Four countries have oil and gas interests in the North Sea – the UK, Norway, Denmark, and the Netherlands. The North Sea is an active decommissioning market, with an estimated decommissioning spend of over £30bn by 2040. The sector operates within a stringent regulatory framework, overseen by the North Sea Transition Authority (NSTA), which reported that last year alone, the North Sea oil & gas sector expended some £1.6 billion on decommissioning redundant wells and infrastructure.

The default position under the OSPAR Convention (Convention for the Protection of The Maritime Environment of the North East Atlantic) is for total removal of offshore installations. OSPAR Decision 98/3 (which came into effect in 1999) prohibits partial removal in the absence of a derogation. Derogations are tightly controlled and regulated and are subject to stringent assessment and consultation procedures to determine if the derogation is necessary. A special consultative meeting in accordance with OSPAR Decision 98/3 was held in London in November 2021 to address, amongst other things, OSPAR prohibitions on dumping, and leaving wholly or partly in place, disused offshore installations. The meeting concluded that following assessment, the competent authority of the relevant Contracting Party may permit an operator to leave installations or parts of installations in place in appropriate cases.

An example of partial installation decommissioning is the Brae fields project in the North Sea. These fields consist of the Brae Alpha, East Brae and Brae Bravo platforms. In June 2022, Heerema Marine Contractors' Spleinir crane vessel removed the 1,000-tonne Brae Alpha rig in a single-lift. It then removed the 11,000-tonne Brae Bravo jacket. Both have been transported to AF Offshore Decom's base in Norway where materials are being processed. The decommissioning work at Brae follows the 2021 removal of Brae Bravo topsides weighing 36,000 tonnes. The partial operations thus far have been completed with no health and safety incidents. It is clear that leaving parts of installations in place in appropriate cases may be efficient to ensure that the continuing development of skills and capabilities to facilitate the complete transition of operations in complex gas fields.

The decommissioning resources operating in the North Sea tend to be very mobile, which obviously assists with supply chain issues. This is not necessarily the case with some more remote jurisdictions. However, one of the most challenging aspects of managing the decommissioning supply chain is finding vessels with suitable capabilities that can match the technical challenges of particular lifts in the North Sea.

### **The Gulf of Guinea**

The Gulf of Guinea (located on the west coast of the African continent) encompasses a number of jurisdictions, including Nigeria, Chad, Cameroon, Equatorial Guinea, Angola, and Congo, each with offshore oil and gas sectors at varying levels of maturity. The Gulf of Guinea has estimated oil reserves of 24 billion barrels. Some countries such as Nigeria and Angola have well established operations and have joined the ranks of major oil producing countries, while others have more nascent operations. All will need to deal with decommissioning operations at some stage during the project life cycle.

Technological advances continue to facilitate decommissioning operations globally. A recent example in the Gulf of Guinea was the UK-based Decom Engineering's (specialist in cutting technology) use of its C1-24 chop saw in water depths of up to 1,050m on a decommissioning project for an international energy company. The increasing accessibility of decommissioning technology may also have a role to play in mitigating against the risk of greenwashing allegations. Increased access to decommissioning equipment enables adherence to decommissioning regulations and international sustainability standards. This increased compliance mitigates against and reduces the risk of greenwashing disputes and ensures operators maintain their social licence to operate.

### **The Middle East**

With the concentration of ageing offshore oil and gas facilities, decommissioning is a major issue in the Middle East. Some member countries do not have developed legislative and regulatory decommissioning frameworks, which often leads to uncertainty. One example is the UAE, which does not have specific decommissioning legislation, relying instead on its more general environmental regulations, with each Emirate having its own separate environmental laws. On the other hand, for example the Kurdistan region of Iraq has enacted the Oil and Gas Law No. 22 of 2007, that governs the abandonment and decommissioning of facilities, and empowers the Minister of Natural Resources to make regulations concerning abandonment and decommissioning.

Save for applicable international regulations and treaties concerning the abandonment of wells, there is often no local law directive with respect to the contractor's specific obligations concerning infrastructure decommissioning. As there is scarce local legislation dealing specifically with decommissioning liabilities, to the extent addressed, decommissioning liabilities in the Middle East are typically dealt with by incorporating express provisions in the original Host Government Agreement (HGA). Contractors' liabilities for decommissioning under older HGAs are usually dealt with on a case-by-case basis.

Companies must nonetheless abide by international obligations, including UNCLOS (the United Nations Convention on the Law of the Sea), the 1958 Geneva Convention on the Continental Shelf, the 1992 Convention for the Protection of the Marine Environment of the Northeast Atlantic (OSPAR Convention) and the Energy Charter Treaty.

### **South East Asia**

To date, decommissioning activities in South East Asia have overall been fairly restricted, despite the increasing scale of decommissioning activities likely to be required in the next 10 years. It is a very large market comprising a relatively high number of small structures and wells.

In many Asia Pacific jurisdictions, the legislative framework for decommissioning is either non-existent or not sufficiently mature. Some of the older Production Sharing Contracts (PSCs) or concession agreements do not address decommissioning, expressly or impliedly. However, the tide is turning in favour of decommissioning recognition in national and international laws. Certain oil and gas companies are taking proactive steps to assist in shaping the emerging decommissioning laws of both developed and developing jurisdictions.

In 2012, the ASEAN Council on Petroleum published the "Regional Decommissioning Guidelines" (ASCOPE) as a starting point to address decommissioning issues in some jurisdictions (e.g., Thailand, Brunei, Darussalam, Vietnam and Malaysia) which have started implementing decommissioning regulations and guidelines and gas field transfer requirements that must be met should an operator wish to transfer its gas field to succeeding operators.

An example of this is seen in a major dispute over decommissioning offshore in Southeast Asia between an international energy company (IEC) and a host state-backed energy company when the state-backed company assumed operatorship of the relevant field. Disputes have arisen as to who is liable for removing offshore assets within the field. Arbitration proceedings ensued, which were suspended pending negotiations. In addition, a legal dispute arose between the IEC and the host state government department for mineral fuels. The disputes relate to the requirement under local law that operators have to pay decommissioning costs of assets they have installed, including those that will be transferred to another operator. The IEC was asked to pay the full decommissioning cost (exceeding US\$2 billion) including the cost of decommissioning assets which would be transferred to the new operator. The IEC contested this, arguing that its decommissioning liability is limited to infrastructure that is no longer usable, with the transferred assets being the responsibility of the new operator. The IEC has now opted to continue negotiations with the host state rather than seek arbitration to resolve the dispute over who should pay the decommissioning costs. The IEC has, for the moment, agreed to remove platforms that the new operator does not require. The new operator has to determine which platforms to keep in order to service its production commitments.

The outcome of this dispute may have ramifications for other operators in the region.

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