THE SHIPPING LAW REVIEW

EIGHTH EDITION

Editors
Andrew Chamberlain, Holly Colaço and Richard Neylon

THE LAWREVIEWS

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PREFACE

The aim of the eighth edition of this book is to provide those involved in handling shipping disputes with an overview of the key issues relevant to multiple jurisdictions. We have again invited contributions on the law of leading maritime nations, including both major flag states and the countries in which most shipping companies are located. We also include chapters on the law of the major shipbuilding centres and a range of other jurisdictions.

As with previous editions of *The Shipping Law Review*, we begin with cross-jurisdictional chapters looking at the latest developments in important areas for the shipping industry: competition and regulatory law, sanctions, ocean logistics, piracy, shipbuilding, ports and terminals, offshore shipping, marine insurance, environmental issues, decommissioning and ship finance.

Each jurisdictional chapter gives an overview of the procedures for handling shipping disputes, including arbitration, court litigation and any alternative dispute resolution mechanisms. Jurisdiction, enforcement and limitation periods are all covered. Contributors have summarised the key provisions of local law in relation to shipbuilding contracts, contracts of carriage and cargo claims. We have also asked the authors to address limitation of liability, including which parties can limit, which claims are subject to limitation and the circumstances in which the limits can be broken. Ship arrest procedure, which ships may be arrested, security and counter-security requirements, and the potential for wrongful arrest claims are also included.

The authors review the vessel safety regimes in force in their respective countries, along with port state control and the operation of both registration and classification locally. The applicable environmental legislation in each jurisdiction is explained, as are the local rules in respect of collisions, wreck removal, salvage and recycling. Passenger and seafarer rights are examined, and contributors set out the current position in their jurisdiction. The authors have then looked ahead and commented on what they believe are likely to be the most important developments in their jurisdiction during the coming year. This year, we welcome Costa, Albino & Lasalvia Sociedade de Advogados as the new contributors of the chapter focusing on maritime law within Brazil. There are also two new jurisdictions in this edition – Israel (Harris & Co) and Mexico (Adame Gonzalez De Castilla Besil) – and Portugal makes a return, with Andrade Dias & Associados as the new contributors.

The shipping industry continues to be one of the most significant sectors worldwide, with the United Nations Conference on Trade and Development (UNCTAD) estimating that the operation of merchant ships contributes about US$380 billion in freight rates within the global economy, amounting to about 5 per cent of global trade overall. Between 80 per cent and 90 per cent of the world's trade is still transported by sea (the percentage is even higher for most developing countries) and, as of 2019, the total value of annual world shipping

trade had reached more than US$14 trillion. Although the covid-19 pandemic has had a significant effect on the shipping industry and global maritime trade (which plunged by an estimated 4.1 per cent in 2020), swift recovery is anticipated. The pandemic truly brought to the fore the importance of the maritime industry and our dependence on ships to transport supplies. The law of shipping remains as interesting as the sector itself and the contributions to this book continue to reflect that.

Finally, mention should be made of the environmental regulation of the shipping industry, which has been gathering pace this year. At the International Maritime Organization's (IMO) Marine Environment Protection Committee, 72nd session (MEPC 72) in April 2018, it was agreed that international shipping carbon emissions should be cut by 50 per cent (compared with 2008 levels) by 2050. This agreement will now lead to some of the most significant regulatory changes in the industry in recent years, as well as much greater investment in the development of low-carbon and zero-carbon dioxide fuels. The IMO's agreed target is intended to pave the way for phasing out carbon emissions from the sector entirely. The IMO Initial Strategy, and the stricter sulphur limit of 0.5 per cent mass/mass introduced in 2020, has generated significant increased interest in alternative fuels, alternative propulsion and green vessel technologies. Decarbonisation of the shipping industry is, and will remain, the most important and significant environmental challenge facing the industry in the coming years. Unprecedented investment and international cooperation will be required if the industry is to meet the IMO's targets on carbon emissions. The 'Shipping and the Environment' chapter delves further into these developments.

We would like to thank all the contributors for their assistance in producing this edition of *The Shipping Law Review*. We hope this volume will continue to provide a useful source of information for those in the industry handling cross-jurisdictional shipping disputes.

Andrew Chamberlain, Holly Colaço and Richard Neylon
HFW
London
May 2021

Chapter 10

DECOMMISSIONING IN THE UNITED KINGDOM

Tom Walters[1]

I OVERVIEW

The UK oil and gas industry continues to make a substantial contribution to the country's energy security and economy. However, the UK Continental Shelf (UKCS) is a mature oil-producing basin and has been heavily affected by the sustained period of low oil and gas prices since 2014. Following the outbreak of the covid-19 pandemic, Brent crude oil prices dropped in April 2020 to their lowest level since 2002 (US crude oil prices went negative for the first time since records began in 1983). As a result, decommissioning of UKCS infrastructure has been put firmly on the agenda for many operators seeking to reduce their balance sheet liabilities.

According to the latest report from Oil and Gas UK,[2] approximately £500 million of decommissioning expenditure was placed on hold or deferred until 2022 and it is widely expected that there will be reduced activity in almost all areas of decommissioning work in the short term. Notwithstanding this, it is expected that 230 fields will see some form of decommissioning activity between 2020 and 2029 on the UKCS. To put this into context, it is anticipated that 1,616 wells will be plugged and decommissioned, 93 topsides will be lifted and removed, 85 structures will be dismantled and 22,076 concrete mattresses will be removed as well as 7,790 kilometres of pipeline. The total weight of topside and structures to be removed is around 900,103 tonnes – equivalent to 1,551 Airbus A380s.

With the volume of decommissioning that is required, there are opportunities for the offshore industry to step in as efforts are made to continue to drive down costs. The cost of decommissioning is decreasing with well decommissioning costs having steadily reduced during the past five years. For example, the cost of decommissioning a platform well has been reduced from £2.89 million per well in 2017 to £2.44 million per well in 2020 (up slightly on the previous year of £2.28 million).

Total expenditure on decommissioning between 2019 and 2028 in the UKCS is expected to be in the region of £15.1 billion, with an average spend of £1.5 billion per year for the next decade.

Decommissioning is an obligation and liability rather than an activity with intrinsic value to the operator. It is complex and fraught with legal and regulatory challenges, not just around establishing and approving decommissioning plans, but also in relation to funding

1 Tom Walters is a partner at HFW.

2 The UK Oil and Gas Industry Association Limited (trading as OGUK) Decommissioning Insight Report 2020.

the costs, allocating liabilities under joint operating agreements, asset transfers, litigation risks with contractors, and the need to comply with all the relevant EU, international and local environmental regulations.

The unit costs for decommissioning are falling, in part because the industry is building up knowledge and learning from each project, but future cost savings will come from maximising efficiencies in the decommissioning process, which means standardising contracts, vessels, rules and procedures and adopting technological advances.

The recent market conditions have also provided a reminder that decommissioning needs to be flexible and adaptable so that when conditions change, operators and contractors can respond accordingly.

In the coming decades, significant investment will be required to retire North Sea oil and gas fields. The true effects of the covid-19 pandemic may not become apparent for a while but, inevitably, there will be a reduction in cash flow in all sectors of the oil and gas industry and this will include decommissioning. Investment in decommissioning will have to be even more carefully managed but the United Kingdom still has the potential to build expertise in safe and responsible decommissioning of platforms and pipelines that can be exported around the world, for example, to the Gulf of Mexico.

II OVERSIGHT OF DECOMMISSIONING ACTIVITY

In response to the decline in production from the UKCS, the UK government commissioned a review of the UK offshore oil and gas recovery and regulation, led by Sir Ian Wood. The UKCS Maximising Recovery Review Final Report was published in February 2014 (the Wood Report). Following the report, the government set out its proposals for implementing the Wood Report's recommendations. As part of this, the Oil and Gas Authority (OGA) replaced the Department for Energy and Climate Change as the entity responsible for petroleum licensing and regulation of the upstream oil and gas sector, including:

a oil and gas licensing;
b oil and gas exploration and production;
c oil and gas fields and wells;
d oil and gas infrastructure; and
e carbon storage licensing.

The OGA was established as a fully independent regulator in April 2015 and a government-owned company was set up, with the Secretary of State for Business, Energy and Industrial Strategy as the sole shareholder.

The strategy for maximising economic recovery in the United Kingdom (MER UK) was implemented as part of the recommendations in the Wood Report. This required that 'all stakeholders should be obliged to maximise the expected net value of economically recoverable petroleum from relevant UK waters, not the volume expected to be produced'.

The consequence of this is that, if a relevant party decides not to maximise the possible production from a particular field, it must allow others to seek to take over, to maximise the recoverable hydrocarbons from the field by divesting the licence or asset 'to other financially and technically competent persons'. This is intended to ensure that decommissioning activity is not undertaken too early. MER UK further requires an operator who is unable to raise suitable finance to proceed with operating an installation, or whose returns are unsatisfactory and cannot divest itself of the asset, to relinquish the licences after a reasonable period.

III REGULATION OF DECOMMISSIONING ACTIVITIES

The Department for Business Energy and Industrial Strategy (BEIS) is the competent authority responsible for establishing the framework and implementing the policies set out in MER UK. It is responsible for petroleum licensing and regulation of the upstream oil and gas sector, including:

a decommissioning of offshore oil and gas installations and pipelines; and

b enforcing environmental legislation as it applies to upstream oil and gas activities.

The Secretary of State has overall responsibility for the activities of BEIS and its policies, and for exercising many of the powers under the Petroleum Act 1998 and related legislation. A number of these powers were transferred to the OGA by the Energy Act 2016 upon it coming into force in May 2016 and have implications for those engaged in and undertaking decommissioning activities in the UKCS.

The OGA works with BEIS to assess individual decommissioning programmes and considers the costs, and future or alternative use, and encourages collaboration to help drive down the costs of decommissioning. Once the OGA has carried out its review and undergone appropriate stakeholder scrutiny, the decommissioning programme is submitted to BEIS as part of the consultation process before receiving final approval.

The Offshore Petroleum Regulator for Environment and Decommissioning (OPRED) is responsible for regulating environmental and decommissioning activity for offshore oil and gas operations in the United Kingdom and is part of BEIS. OPRED regulates the planning and execution of offshore oil and gas decommissioning and has two core objectives: (1) to ensure that decommissioning plans are consistent with the UK's regulatory obligations and (2) to protect the taxpayer from paying for the full cost of decommissioning.

IV HEALTH AND SAFETY AND DECOMMISSIONING

As part of the oil and gas life cycle, decommissioning activities in the UKCS are underpinned by the UK health and safety legislative regime. The primary piece of legislation is the Health and Safety at Work Act 1974 (HSWA74). This imposes criminal liability on both companies and individuals who are in breach of the HSWA74. Penalties include unlimited fines and imprisonment.

There are additional regulations that apply to the oil and gas industry that sometimes impose strict liability and can also trigger civil liability, including the Offshore Installations (Offshore Safety Directive) (Safety Case etc) Regulations 2015 (SCR) and the Control of Major Accident Hazards Regulations (which came into force on 1 June 2015, revoking the 1999 Regulations).

The Health and Safety Executive's (HSE) Energy Division is responsible for overseeing health and safety arising from work activity in the offshore oil and gas industry on the UKCS.

The HSWA74 imposes strict criminal liability on all employers, who are under a duty to ensure the health and safety of all those affected by the conduct of an employer's operations, so far as is reasonably practicable. This duty therefore applies to all employees, contractors and third parties (including visitors and members of the public). If an employer can demonstrate that it has taken all reasonably practicable steps to avoid a breach, it will be afforded a complete defence to any charge or breach of the HSWA74. Individual officers, managers and directors whose neglect, consent or connivance contributed to the breach can

also be prosecuted under the HSWA74 and imprisoned if convicted. Under the HSWA74, it is the duty of every employee while at work to take reasonable care for the health and safety of himself or herself and of other persons who may be affected by his or her acts or omissions.

The *Piper Alpha* disaster in 1988 led to a number of wide-ranging changes in the oil and gas regulatory regime as part of the report following Lord Cullen's public inquiry. This placed responsibility on the 'duty holders' to:

a prepare a safety case that demonstrates they have the ability and means to control major accident risks to an extent that is acceptable to the HSE;

b consult the installation's safety representatives in the preparation, revision or review of the safety case;

c operate the installation in compliance with the arrangements described in the current safety case;

d implement effective measures to prevent uncontrolled releases of flammable or explosive substances;

e maintain the integrity of the installation's structure, process plant, temporary refuge and all other equipment;

f maintain the integrity of the wells and the pipelines throughout their life cycle (this applies to well operators and pipeline operators); and

g prepare a plan for dealing with an emergency, should one occur.

The SCR now require the operator or owner of every offshore installation to prepare a safety case and submit it to the regulator for acceptance. The Regulations now incorporate additional requirements of the EU Offshore Safety Directive (OSD),[3] and BEIS has issued its own guidance to the SCR.

As such, oil and gas operations in external waters in the UK's territorial sea or designated areas within the UKCS are required to submit a safety case. Activities in internal waters (e.g., estuaries) will continue to be covered by the Offshore Installations (Safety Case) Regulations 2005 and its guidance L30.

The purpose of the SCR is to reduce the risks from major accident hazards, increase the protection of the marine environment and coastal economies against pollution, and to ensure improved response mechanisms in the event of such an incident.

V OTHER REGULATIONS

The following regulations are also central to the offshore regulatory regime:

a the Offshore Installations (Management and Administration) Regulations 1995 (as amended);

b the Offshore Installations (Prevention of Fire and Explosion and Emergency Response) Regulations 1995; and

c the Offshore Installations (Design and Construction) Regulations 1996 (DCR).

3 Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013 on safety of offshore oil and gas operations and amending Directive 2004/35/EC.

However, there are many other relevant regulations, such as:

a the Management of Health and Safety at Work Regulations 1999;
b the Control of Major Accident Hazards Regulations 1999; and
c the Provision and Use of Work Equipment Regulations 1999.

The DCR are relevant to decommissioning activities. The Regulations are in two parts.

The first section deals with integrity, workplace environment and other miscellaneous matters. This places an obligation on the duty holder to ensure that an installation possesses such integrity as is reasonably practicable at all time. The duty holder must ensure that an installation is designed and built so that, so far as is reasonably practicable:

a it can withstand the forces acting on it as may be reasonably foreseeable;
b its layout and configuration, including the plant and machinery fitted, do not prejudice its integrity;
c fabrication, transportation, construction, commissioning, operation, modification, maintenance and repair can take place without prejudicing its integrity;
d it can be decommissioned and dismantled safely; and
e in the event of damage to the installation, it will retain sufficient integrity to enable action to be taken to safeguard the health and safety of the personnel on it or operating nearby.

The second section requires the duty holder to ensure that suitable arrangements are in place for maintaining the integrity of the installation, including suitable arrangements for:

a periodic assessment of its integrity; and
b the carrying out of remedial work in the event of damage or deterioration that may prejudice its integrity.

These obligations continue to apply throughout the decommissioning of an installation and need to be considered when undertaking decommissioning activities.

VI THE PETROLEUM ACT 1998 AND DECOMMISSIONING

The decommissioning of offshore oil and gas installations and pipelines on the UKCS is overseen by BEIS' Offshore Decommissioning Unit and is underpinned by the legislation set out in the Petroleum Act 1998 (PA98), as amended by the Energy Act 2008 (EA08) and the Energy Act 2016 (EA16).

The 1992 Convention for the Protection of the Marine Environment of the North East Atlantic (the OSPAR Convention) sets out the UK's international obligations on decommissioning. OSPAR Decision 98/3 on the Disposal of Disused Offshore Installations further sets out and clarifies the obligations on a state to deal with offshore infrastructure. This states that dumping or leaving an offshore installation in whole or in part is prohibited but recognises that derogation from the prohibition may be permitted case by case for the removal of large steel jacket footings or concrete installations. Notwithstanding this, OSPAR Decision 98/3 indicates that:

a the topsides of all installations must be returned to shore;
b steel installations with a jacket weight of less than 10,000 tonnes must be completely removed for reuse, recycling or final disposal on shore;
c for steel structures with a jacket weight greater than 10,000 tonnes, it is possible to consider whether the footings of the offshore installation may remain in place;

d for concrete installations, it is possible to seek derogation for those left in place in whole or in part;

e all installations installed after 9 February 1999 (when OSPAR Decision 98/3 came into force) must be completely removed; and

f exceptions may be considered for other structures when there are exceptional and unforeseen circumstances resulting from structural damage or deterioration or other reasons that would prevent the removal of a structure.

OPRED has overall responsibility for ensuring that decommissioning programmes submitted for approval in accordance with the PA98 also meet the principles set out in MER UK for cost savings, future alternative use and collaboration.

Decommissioning obligations on an operator arise when the Secretary of State serves a Section 29 Notice issued in accordance with Section 29 of the PA98. This requires the operator of the field and each one of the licensees to submit a decommissioning programme. In the first instance this would include parties to joint operating agreements for installations, and owners for pipelines. It is usual for the party that has physical control over the installation to take the lead but all the parties remain jointly and severally liable for the costs of decommissioning the installation.

The Section 29 Notice will either specify the date by which a decommissioning programme for the installation or pipeline is to be submitted or, as is more usual, provide for it to be submitted on or before such date as the Secretary of State may direct. This usually occurs on or before the cessation of production.

The decommissioning programme sets out the measures to decommission disused installations and pipelines and will describe in detail the methodology to be engaged for the removal of the asset. When it is proposed that an installation or pipeline (or part thereof) is to remain in position, it must also state what provisions will be put in place for monitoring and maintaining the remaining structure.

After the decommissioning programme has been approved, the Section 29 Notice holders are legally obliged to carry out the work. The Secretary of State has powers to require remedial action to be taken if a programme is not carried out, or its conditions are not complied with, and failure to comply with any such notice is an offence under the PA98. In extremis, the Secretary of State can carry out the remedial action and recover the costs from the person to whom the notice was given.

The government has been keen to ensure that UK taxpayers do not foot the bill for an operator's decommissioning costs and so legislative changes implemented by the EA08 and EA16 have broadened the parties on whom a Section 29 Notice can be served. This currently includes not just the current licensees but any person who has or who has had an interest (financial or otherwise) in the installation or pipeline. This includes any parent or associated companies of a licensee.

OPRED has served Section 29 Notices on additional stakeholders when it has considered the decommissioning arrangements proposed by the operator and licensees to be unsatisfactory. The Secretary of State's power to do this is set out in Section 34 of the PA98. It follows that the Secretary of State cannot send a Section 29 Notice to a person if that person has never been entitled to derive any benefit (financial or otherwise) from an installation and they are a licensee or a party to a joint operating agreement (or similar agreement) but have never been in one of the other categories of persons to whom a Section 29 Notice can be served.

A Section 29 Notice holder will remain liable for the decommissioning of an installation or pipeline unless the Section 29 Notice is withdrawn. As discussed above, the obligation to carry out the approved decommissioning programme is joint and several.

When an asset changes hands as a result of a decision by the licensee to sell the asset as a going concern or as a result of MER UK, the Secretary of State may release a former licensee from its Section 29 obligations. This is usually done in circumstances where OPRED is satisfied that there is adequate financial security to cover the decommissioning liabilities. Security in the form of a decommissioning security deed (to which the Secretary of State may be a party and can draw down on), letter of credit or facility agreement with a third-party financier will usually ensure that the new licensee can discharge its decommissioning liability. However, even if a former licensee is discharged from its Section 29 obligations, either by agreement with OPRED or otherwise under contract, the Secretary of State can reimpose liability on a party under Section 34 of the PA98. Therefore, any company that has been a licensee at any time since development of a field is potentially liable for the decommissioning of that field until decommissioning is complete.

Since decommissioning is an inherent cost and a liability for an operator as a result of operating on the UKCS, there is tax relief for decommissioning costs. This is given at the point the costs are incurred and the decommissioning carried out.

In response to pressure from the industry, in September 2013 the government introduced decommissioning relief deeds, which are agreements entered into between the government and oil and gas investors providing tax relief for investors for decommissioning expenditure in certain circumstances.

VII ORDERS

OPRED works with the HSE to implement the OSD. The Offshore Safety Directive Regulator is the competent authority responsible for implementing the requirements of the OSD. OPRED can issue a variety of notices and sanctions against appointed installation and well operators, non-production installation owners and operators of oil handling facilities (pipelines), which includes permit holders, or holders of consents who may be engaged in certain offshore oil and gas activities.[4] Depending on the nature of the breach, OPRED may:

a issue a letter if there has been a minor contravention or if action is required to comply with a notice or to take some specific action;

b serve an enforcement notice: this informs the party that it has breached, or is likely to breach, the requirements of relevant legislation. The enforcement notice will allow for compliance with the prescribed conditions;

c serve an improvement notice: this informs the party that it is in contravention of one or more statutory provisions, or one or more provisions and that the contravention is likely to continue. The improvement notice sets out the steps that must be taken and the period within which they must be carried out;

d serve a prohibition notice: this is served when there is the imminent risk of serious pollution and will specifically prohibit the activity giving rise to the risk, specifying the

4 BEIS Enforcement Policy: Offshore Petroleum Regulator for Environment and Decommissioning – January 2020.

steps to be taken and the period within which they must be carried out. A prohibition notice may also withdraw or impose additional conditions on an operation under a relevant permit; or

e revoke a permit: the Secretary of State may revoke a permit when a party is in breach of any conditions attached to a permit.

In addition to the powers set out above, OPRED can also use the Offshore Environmental Civil Sanctions Regulations 2018 to impose a fixed monetary penalty or a variable monetary penalty (discussed in further detail in Section VIII).

The HSE also has wide-ranging enforcement powers under the HSWA74 and other regulations. An HSE inspector may enter any workplace, including docks and offshore installations, to inspect health and safety conditions and to investigate accidents to personnel working in a port or while loading or unloading a ship. An inspector can similarly investigate accidents occurring to a ship's crew.

Enforcement may include:

a serving notices on duty holders;

b withdrawing approvals;

c varying licences, conditions or exemptions;

d issuing simple cautions;

e prosecution; and

f providing information or advice, in person or in writing.

The Maritime and Coastguard Agency (MCA) is responsible for enforcing all merchant shipping regulations in respect of occupational health and safety, the safety of vessels, safe navigation and operation (including manning levels and crew competency).

Sometimes the jurisdiction of the HSE, MCA and the Marine Accident Investigation Branch overlaps and they will agree who takes the lead for a given activity, depending on whether the activity is within the internal waters or territorial sea of Great Britain or the UKCS. This excludes responsibility for health and safety enforcement activities offshore.

VIII FINES AND PENALTIES

The OGA has powers to issue fines of up to £1 million (EA16, Section 45). It may also order the removal of the operator of a licence and ultimately revoke a licence for one or all of the licence holders in the event of non-compliance with applicable requirements. For example, ConocoPhillips (UK) Limited was fined £3 million (plus more than £150,000 in costs) in February 2016 for its failure to carry out an adequate risk assessment for an offshore installation, and Transco plc was fined £15 million in 2005 for its failure to prevent an explosion from a leaking gas main.

In addition to these, as of 1 October 2018, OPRED is responsible for enforcing the Offshore Environmental Civil Sanctions Regulations 2018 (the OECS Regulations). Prior to enactment of the OECS Regulations, breaches of environmental legislation were usually dealt with by criminal prosecution. Following consultation, and in an effort to reduce the administrative burden on the courts, it was decided to introduce civil sanctions to impose fines for certain offences under existing environmental regulations as an alternative to a criminal prosecution. A fine under the OECS Regulations will be either a fixed monetary

penalty, ranging from £500 to £2,500, or a variable monetary penalty up to a maximum of £50,000 when there are 'aggravating factors' such as a history of non-compliance. Civil penalties will now be issued for breaches of the following regulations (among others):

a The Offshore Combustion Installations (Pollution Prevention and Control) Regulations 2013;
b The Offshore Petroleum Activities (Oil Pollution Prevention and Control) Regulations 2005;
c The Offshore Installations (Emergency Pollution Control) Regulations 2002;
d The Offshore Chemicals Regulations 2002; and
e The Merchant Shipping (Oil Pollution Preparedness, Response and Co-operation Convention) Regulations 1998.

An operator or contractor undertaking decommissioning activities in the UKCS needs to ensure that it works within the various regulations set out above. Failure to do so may result in a fine and prosecution.

IX MANAGING RISK IN CONTRACTS

One of the most important areas that needs to be given thought is the contractual allocation of risk between the parties. As with any contract, particularly those intended for use in the offshore environment, clarity of responsibility is important, from both a financial and an operational perspective.

Given the increasing frequency and complexity of the decommissioning operations that are being carried out, there has been an attempt by the industry to provide guidance and standardisation in relation to the contracts that govern these operations. With this said, this is very much a new area and the documentary framework is accordingly in its relative infancy. Many of the projects that have been undertaken have been on bespoke terms put forward by the operator. Depending on the commercial bargaining power of the parties, it may be that a contractor is able to push back on some of the fundamental terms as they will invariably be drafted in favour of the operator. As with any contract, the parties should both seek legal advice in relation to the specific terms to understand the extent and entirety of their exposure.

To date, two contracts have been developed with the technical challenges of decommissioning in mind: the BIMCO[5] DISMANTLECON contract launched in September 2019; and the LOGIC Decommissioning Contract.

i DISMANTLECON

The BIMCO drafting subcommittee, made up of expert legal, insurance and technical practitioners in the area, has developed the DISMANTLECON contract to grapple with the significant challenges and peculiarities associated with a decommissioning project.

The two-part form adopted for this contract is reminiscent of the other documents in the BIMCO pro forma suite. The foundations of the contract are based on the WRECKSTAGE 2010 contract, with amendments reflecting the specific nature of the project. The contract is intended to be used for a wide variety of structures (pipelines, topsides, mattresses, etc) but not for the plugging and abandonment of wells, nor for onshore disposal, which remains with the operator to deal with as the contract ends at the time of delivery. Throughout the

5 The Baltic and International Maritime Council.

contract, title remains with the operator and is not transferred to the contractor. This reflects the obligation on the operator under the PA98. It is anticipated that an amended version of BIMCO's RECYCLECON will be modified for use with onshore disposal to allow users the option of extending the services by contract to deal with full disposal of the property.

The extent and scope of decommissioning work on offshore structures is often difficult to determine at the outset. Accordingly, DISMANTLECON provides for an extensive variation regime that allows for price and time adjustment on a continuing basis. The parties must carefully negotiate and define 'technical information', 'rely upon information' and 'assumptions', as these determine how and when variation orders may be triggered.

A further important principle adopted in DISMANTLECON is an offshore knock-for-knock liability and indemnity regime, whereby each party takes responsibility for loss, damage or injury to their people and property in certain situations, regardless of cause.

Finally, DISMANTLECON uses adjudication as a form of fast-track interim dispute resolution with the intention of avoiding delay and reducing costs.

ii LOGIC

The LOGIC contract was drafted by Oil and Gas UK's Decommissioning Working Group, which is made up of operators, contractors and professional advisers. The form is based on the LOGIC Maine Construction Form and, like other contracts in the LOGIC suite, it is structured with specific conditions in Section II of the contract. The intended scope of the contract is for the dismantling, removal and transport of the asset to shore. The contract can be used for any element of offshore infrastructure, whether topside or subsea.

As with the DISMANTLECON contract, title in the property remains with the operator.

X INSURANCE

There is an obligation under both DISMANTLECON and LOGIC for the parties to maintain appropriate insurance. Given the specialist nature of the operations, thought should be given to the inter-relationship between the different insurance policies that a contractor may have in place for the proposed services. Typically, a contractor's protection and indemnity policy is unlikely to provide adequate cover for decommissioning operations and so the contractor should seek to obtain an extension to its existing cover or procure specialist insurance.

Some operators may consider taking out a decommissioning all risks (DAR) policy for the duration of the project. In these circumstances, a contractor should also consider what additional cover might be needed over and above the operator's DAR insurance arrangements.

XI CONCLUSION

Decommissioning in the North Sea presents a significant opportunity for the offshore marine contracting community at a time when the oil and gas industry has been hit particularly hard by a number of factors. It is also an interesting and developing area of law that will be subject to significant scrutiny and change in the coming years since the nature of the work will inevitably generate a significant number of legal problems. To mitigate the possibility for potential disputes, careful drafting and allocation of risks in the contract together with insurance can undoubtedly make a difference and help to avoid complications for the parties involved in the future.

Appendix 1

ABOUT THE AUTHORS

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Tom Walters worked for a naval architecture practice on the south coast of the United Kingdom for two years before retraining as a lawyer and joining HFW in 2002 as part of the shipping department, working in the admiralty and crisis management team. He has worked on various complex technical cases in the offshore oil and gas industry, dealing with construction disputes, decommissioning and disposal of marine assets, insurance claims, towage disputes, contractual disputes involving pipe lay vessels, and the salvage of offshore assets in various jurisdictions around the world. Tom is a member of the Royal Institution of Naval Architects, was part of the BIMCO drafting subcommittee for DISMANTLECON (the standard form offshore dismantling contract) and is a member of the Society of Underwater Technology, participating in the Salvage and Emergency Subsea Response subcommittee.

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