Introduction

Welcome to our Oil & Gas Newsletter.

2014 is proving to be a year of high drama for the UK oil industry. On 18 September the people of Scotland vote on whether Scotland becomes an independent country. This would have huge consequences for the oil business. A few months ago the Wood Review, which proposes a root and branch revolution of the UKCS licensing, was finalised to widespread acclaim. A financial review of Oil & Gas Taxation by the Treasury is pending. A shale gas revolution is also brewing with a new Fourteenth Onshore Licensing Round imminent.

We have done extensive analysis on the Wood Review and we lead with an article by Oil & Gas Partner Uisdean Vass on that subject.

For our second article, we switch to a business analysis of prospects for LNG development in Tanzania and Mozambique, written by international Oil and Gas partner Stuart Carter. As a firm we have huge oil and gas experience in Africa, which is a Continent of intense focus for us.

We then continue our analysis of UK Unconventional and Onshore development, with Planning Partner Kevin Gibbs and Associate Anthony McNamee writing on the recent House of Lords Report and the DECC Consultation on Underground Drilling Access.

Next, Tom Beezer, head of our crack Oil & Gas Litigation Team considers whether English Law has now developed a contractual duty to act in good faith? In this connection he analyses the recent case of Yam Seng Pte Limited v International Trade Corporation.

One of our constant themes is the huge importance of Employment Law to the oil business. In this edition Associate Daniel Fawcett gives an informative overview of the employment rights of workers on offshore installations in the UK Territorial Sea and UKCS.

The UKCS decommissioning business is highly important for us given our blue chip practice advising UK oil companies and oil service companies. We are presently involved in four of the nineteen currently active UKCS decommissioning projects. In our sixth article, Leeds-based Partner Claire Brook looks at the possible impacts of Environmental Impact Assessment Directive 2014/52/EU on UKCS decommissioning.

Lastly, "Oilpatch" will tell you about our recent deals, presentations and events.
Sir Ian Wood’s Review:
A UKCS Game Changer?

On February 25, Sir Ian Wood published his long awaited final report entitled “UKCS Maximising Recovery Review Final Report (Wood Review or Review). The Wood Review, which was commissioned by current UK Oil and Gas regulator the Department of Energy & Climate Change (DECC) appeared in interim form on 11 November 2013. A great deal of work went into the preparation of the Review including interviews with some 40 UKCS licensees representing some 95% of all UKCS production. The Wood Review has attracted support from across the political spectrum including the Scottish Government. The Review has also attracted very substantial support from the industry itself, including the clear endorsement of the industry trade body, Oil & Gas UK. Nearly seventy pages long, with some fifty-two pages of full text, the Review is filled with detailed economic and industry analysis and highly specific proposals for major change in the UKCS licensing regime. Concrete steps to implement the Review including draft legislation, are now in the works. Anyone interested in the UKCS should carefully read the Wood Review.

So what does it say?
The UKCS Situation

For an excellent economic summary of where we are in the UKCS, the Activity Survey 2014 (Activity Survey) published by Oil & Gas UK cannot be bettered. Download from www.oilandgasuk.co.uk. However, we might summarise the position as follows. The first UKCS licensing round occurred in 1964 and our offshore licensing system is thus fifty years old this year. Production from the UKCS peaked in 1999 at over 4 million barrels of oil equivalent (boe) but sharply fell to some 1.4 million boe last year. Indeed production has fallen some 38% in the last three years. However, the better news is that production is levelling out because new projects are coming on-stream.

The UK has been very successful at licensing offshore acreage and indeed the last (27th) Offshore Round was the most successful in history in terms of area licensed. However, the large number of recent licence awards does not involve a large number of obligatory (drill-or-drop) exploration wells. Thus companies are interested in having a look but not so many are willing to commit large risk capital.

The introduction of Supplementary Charge in 2002 and two later increases in the rate of Supplementary Charge were seen as destabilising by the oil industry. However, the more recent advent of the many exemptions from Supplementary Charge has been well received. Indeed, Oil & Gas UK demonstrates that more than half of all last years’ large capital spend was incentivized by Supplementary Charge exemptions.

Last year, capital expenditure on the UKCS amounted to £14.4bn which is the highest number for thirty years. This reflects major development spending but also rising supply chain costs. Current estimates suggest that capital expenditure may fall by 50% by 2016 unless new projects are brought on for development. Rising supply chain costs and lack of available drilling rigs are major concerns.

There is little doubt that the most worrying aspect is that exploration and appraisal rates are at historic lows. As Oil & Gas UK state: “… 2011 and 2013 saw the lowest and second lowest numbers of exploration wells drilled, respectively, since drilling began on the UKCS in the 1960’s”.

Sir Ian Wood’s Proposals
A New Regulator

One of Sir Ian’s key findings is that DECC’s Oil & Gas team is not now fit for purpose. He proposes the creation of an entirely new regulatory authority (New Regulator). He makes the point that in the early 1990’s, DECC’s Oil & Gas team had about 90 employees. Now, with around 300 producing fields, DECC has only about 100. By comparison, the Norwegian Petroleum Directorate has some 220 employees and the (Dutch) Energie Beheer Nederland BV (EBN) has about 100.

Sir Ian believes that the New Regulator should be a body independent from government, partially or wholly funded by industry. One of the goals is to attract highly qualified people as employees so the New Regulator must not be bound by civil service pay scales. Particular importance is being attached to hiring the right CEO.

The New Regulator would essentially inherit all of DECC’s current duties except for HS&E.

While Sir Ian’s remit was offshore in nature, there is clearly a strong argument for extending the New Regulator’s jurisdiction to the UK onshore. However, just as important as the New Regulator’s make-up and jurisdictional scope is its new overall responsibility: to drive and implement Maximum Economic Recovery from the UKCS which is shortened to “MER UK”.

(Activity Survey, page 15). This level of E&A drilling is patently inadequate to inventory the remaining “yet-to-find” prize of the UKCS before much of the province’s critical offshore infrastructure is lost to decommissioning.
MER UK
While MER UK is given no detailed definition in the Wood Review, it is clear that the concept represents in essence “…a holistic approach in regulating exploration, development and production”. (Wood Review, page 15). MER UK as a legal obligation would be included in every existing and future UKCS production licence. It is clear that MER UK would involve licensees being required to take action to facilitate higher production on a field-wide and area-wide basis. For example, on Regional Development strategy: “Operators should be required, where appropriate, to co-operate with the [New] Regulator and with other licence holders in the wider adjacent area on all aspects of field and cluster development, from exploration through to decommissioning, with the overarching aim of maximising economic recovery from clusters of fields as well as from individual fields”. (Wood Review, page 16).

New Powers of Regulator
Access to Information
The New Regulator would have access to any and all UKCS joint operating or technical committee meetings. Additionally, licensees will be required to produce more public data (especially on producing fields) and on shorter deadlines. The rationale is that a better informed New Regulator will be much more powerful, and more transparency will inform the industry and discourage negative behaviours.

New Disputes Powers
The Wood Review finds that “the UKCS is perceived as being one of the most difficult and adversarial legal and commercial basins in the world, disproportionately driven by risk aversion…”. (Wood Review, page 27). The Review proposes that the New Regulator be empowered to resolve disputes within a stipulated timeline through the issuance of a non-binding recommendation. Failure to accept the non-binding recommendation may be construed as a violation of MER UK, potentially leading to warnings, sanctions or even licence cancellation. The Review also proposes that industry be given a year to come up with a scheme to simplify the legal and commercial complexity of UKCS contracting. If industry cannot do this, the New Regulator should proceed to come up with its own solution.

Third Party Access to Infrastructure
In recent years, the average UKCS discovery has been relatively small and therefore most such fields must be tied into existing infrastructure. Negotiating access to such infrastructure, which is owned usually by other licensees, is often difficult. The Review notes: “Both exploration and field development are being badly affected by a lack of anticipated infrastructure availability”. (Wood Review, page 26). The New Regulator will continue to enforce the current ICOP regime, and the licensees’ new MER UK obligations would certainly be relevant here. Interestingly, Sir Ian also proposes that encouragement should be given to specialist infrastructure companies.

Regional Strategy
Related to but distinct from access to infrastructure is the Wood Review’s proposal to require licensees (pursuant to MER UK) to collaborate on regional or play-wide development strategies. As a priority, the Regulator will develop a Southern North Sea regional plan. The goal will be to boost “cluster” type development.

Asset Stewardship
One of the major themes of the Wood Review is that licensees are often failing to properly manage their producing assets. One theme is the falling levels of production efficiency. Another theme is the lack of appropriate investment in brownfields. The Review notes: “Whilst there are some obvious exceptions, in many cases it appears that companies have constrained asset investment and expenditure in a drive to deliver short-term returns”. (Wood Review page 25). The New Regulator will establish production guidelines for each field and will have the power to issue warnings, sanctions and effectuate licence cancellation, if a licensee fails the tests. This is the flipside of MER UK. The stewardship prize is a big one.
The Review also considers how to encourage more use enhanced oil recovery (EOR) and of improved oil recovery (IOR) technologies.

The Exploration Problem
Tax Incentives?
Oil and Gas Taxation was not on the remit of the Wood Review but taxation is central to the whole UKCS situation. The Review notes that Holland and Norway do things differently. In Holland, the state takes a 40% share in all Oil and Gas ventures and hence funds exploration to the tune of 40%.

In Norway, on the other hand, the state provides guaranteed direct tax relief on exploration costs even if the licensee has no production. Given the high Oil and Gas tax in Norway, this means that the state funds exploration costs to the tune of 78%. Loan finance can be raised against this refund.

The Wood Review has encouraged a re-think of UK Oil and Gas Tax and a new Fiscal Review is pending.

Stimulate New Seismic Acquisition
The Review suggests that Government might finance new seismic and sell it on to industry on commercial terms.

Status of Wood Review
An Interim Advisory Panel (IAP) on Wood Review implementation led by Sir Ian Wood and including representatives from DECC, HMT, Competition & Markets Authority, Oil & Gas UK and other stakeholders has been formed. Its first meeting was held on 16 April. DECC is currently working on the structure of the New Regulator, with a view to establishing a shadow body. Legislation to implement the Wood Review is pending. Clearly Government and Industry are determined that the Wood Review will actually be implemented.

Reflections
The New Regulator
Sir Ian makes fairly compelling arguments for the creation of a New Regulator. There is no doubt that DECC is under-staffed, under-funded, under-powered and under-informed. Undoubtedly, the New Regulator needs to attract top industry talent and its focus should entirely be on UKCS oil and gas. Sir Ian is also right that a much better informed New Regulator will automatically be more powerful (for information is power) and more transparency will also lead to better licensee behaviour. However, a better informed New Regulator will obviously have to guard much more sensitive information.

MER (UK)
Perhaps the most radical aspect of the Wood Review is that it is proposed to alter all existing licences to require licensees to abide by MER UK. This powerful and overriding new duty is not well defined in the Review, but it clearly underlies a range of new obligations, such as enhanced stewardship of petroleum fields, third party access to infrastructure and clustering. At Page 2 of the Review, Sir Ian states: “The additional powers are not designed to force operators to invest…” While that may be true in the literal sense of operators not being forced to write cheques, it is clear that failure to abide by MER UK must open recalitrant licensees to private and public warnings, loss of operatorship and ultimately loss of licence. This means a major change in the terms of licences and (perhaps separately) major new regulatory powers for the New Regulator.

Tax Incentives?
Tax incentives, particularly for exploration and appraisal are the disembodied ghost of the Wood Review. The biggest desired change of all is more exploration or, should we say, more successful exploration. By calling for a tri-partite approach between the New Regulator, HMT and Industry, Sir Ian clearly prioritises the critical tax element of any future regime. He has also initiated a debate between those who laud the impressive results of the current piece-meal system of exemptions and others who want a simpler lower tax regime. We should also remember how important a part EOR is in the whole picture. Widespread adoption of EOR will be key to securing the Stewardship prize.

General
At its most essential the Wood Review has asked industry and UK and Scottish governments a fundamental question: “Given where we are on the UKCS journey, are you willing to take every reasonable practicable step to maximize our economic recovery?”  The answer would appear to be “Yes” and, in the Review, Sir Ian outlines his vision of a positive future with very considerable detail. It is for now largely up to the organs of the UK Government to create the institutions and enact the legislative regime required to realise the future envisaged by the Wood Review.

Recent News
On 12 June, Chief Secretary to the Treasury the Rt Hon Danny Alexander announced that the New Regulator will be called the “Oil and Gas Authority”. Its headquarters will be in Aberdeen. A search process has begun for the new CEO of the Oil and Gas Authority.

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LNG From East Africa
- How the Odds Are Stacked

How much gas?
Vast amounts. Mozambique alone is estimated to have gas reserves of up to 150 trillion cubic feet (TCF) and Tanzania potentially as much as 50 TCF (Petroleum-Economist). But in a global economy where commodity prices, consumer demand and ‘timing to market’ are crucial, there is no guarantee that even these amounts can be commercialised in the foreseeable future. However, for both countries the prize is great. In an article written by Nadia Kogdenko “East Africa: The Newest LNG Frontier” according to the Mozambique Natural Gas Master Plan the country could potentially earn up to US $5.2 billion per annum by 2026 from LNG exports, creating over 70,000 jobs in the gas sector. If fully monetised, Tanzania could also expect a large inflow of revenue into its treasury.

Where’s the Demand?
Although both Tanzania and Mozambique are forecast to have strong economic growth, there is no possibility that either could hope to consume such quantities of gas if produced at the maximum economic rate, which is the business model that investors and oil companies alike will use.

Globally the picture is more positive. The US Energy Information Administration (USEIA) in their International Energy Outlook for 2013 give the reference case for World GDP increasing on average between 3.5% and 4.6% per annum between 2010 and 2040. It predicts that over the same period the global annual demand for gas will rise from 132 TCF in 2010 to 185 TCF. Much of this demand will come from Japan (its nuclear industry unlikely ever to recover fully from the shock of Fukushima), India, China and South-East Asia all of whom rely heavily on LNG imports. Geographically East Africa is ideally placed to supply LNG to these markets.

What and where is the competition?
Unfortunately for Tanzania and Mozambique there is a lot and it comes in all shapes and sizes. Although, according to Wood MacKenzie, LNG from East Africa should be cheaper than that from Australia (US$7 per MMBTU compared with US$11 MMBTU), such advantage is wiped out by arriving late. Australia should bring on stream Queensland-Curtis, Gladstone and Australia Pacific LNG in 2015 and Gorgon and Wheatstone will follow on thereafter. Other competition will come from the US, now reaping the benefits of a rampant shale gas industry, which anticipates being in a position to export LNG as early as 2015. Canada and Russia equally have plans in the pipeline. Mozambique couldn’t hope to bring LNG on stream before 2018 and Tanzania before 2020. Closer to home, there are a number of LNG projects planned in Africa which if they all succeeded would add 84.1 million tonnes per annum of LNG to the World Market.

Other issues for investors to consider are the race by countries to diversify supply. India and China’s demand for LNG may plateau, even diminish as their own shale gas projects come on stream and renewable technology brings down the cost of green energy, making it an attractive alternative. China’s energy hunger will have been in part satiated by its recent decision to buy 38 billion cubic metres (BCM) per year starting 2018 from Gazprom at a price reputed in an April report by Reuters to be in a range between $10-$11 MMBTU. This would be delivered by the as yet-to-be-built ESPO pipeline where deliveries could rise to 60 BCM per year.

What’s the outlook for Mozambique and Tanzania?
Mozambique and Tanzania are described as being locked in a race to get the first LNG plant up and running on the east coast, or in the case of Mozambique, off the east coast as current investors, Anadarko and Eni, favour a floating LNG plant. And whilst Mozambique may currently appear more politically stable than Tanzania, whose politicians continue to bicker over constitutional reform, the existence of commercial quantities of oil in-country might mean Mozambique takes its eye off the ball, handing the advantage to Tanzania who has sought to encourage deep-water exploration by a reduction in its royalty rate from 12.5% to 7.5%. Also, with the recent announcement that Statoil and BG Group, whose interests lie in Tanzania, have now signed heads of agreement with the government possibly to take forward an LNG development, the advantage in the race may already have swung to Tanzania. However, as neither country can afford the massive investment required for an LNG plant both must attract foreign capital. This will prove challenging as neither country is investment grade and both face strong competition from other projects around the World. Mozambique is at least trying to address some of the problems by introducing new energy and mining laws that will set up a clear regulatory and taxation environment but we question whether this will be enough to tempt investors. Tanzania will also need to introduce a unified investment legislative code if it is to attract foreign capital.
House of Lords Report – Shale Gas

We are entering a period of potentially significant change for the extractive industries in the UK. The UK Government has recently launched its Consultation on proposals for Underground Access for the Extraction of Gas, Oil and Geothermal Energy. Shortly after this, the new Infrastructure Bill was introduced into the House of Lords. Further, Key Recommendations were tabled by a recent Committee Report (endnote 1) comprising:

- a new Cabinet Committee under the Chancellor to action the commitment to “go all out for shale”;
- streamlining of the regulatory structure;
- Government to promote the economic benefits of shale, while reassuring the public that with the correct framework any environmental risks are low; and
- Industry to engage with communities, meticulously observe regulations and build on its community benefit schemes.

The Government is pushing forward with the proposals at speed. While the Infrastructure Bill does not yet contain the legislative provisions to amend the access rights regime, these may well (subject to the outcome of the consultation), be included as Government amendments as the Bill progresses through Parliament.

Accessing the Shale

Access to shale is complicated by the nature of land ownership in the UK where the landowner’s permission would be needed to extract shale. If permission is denied, compulsory acquisition may be possible but the ancillary rights procedure is not fit for purpose. The Committee recommends that legislation be amended to ensure that subsurface drilling for oil and gas can go ahead without undue delay or cost, as contained in the recently published Consultation on Underground Drilling Access. This Consultation makes the radical proposals outlined below for shale gas and oil:

- Unfettered right of underground access to land below 300 metres (circa 1000 feet) from the surface to companies exploring and/or extracting oil, gas or geothermal energy.
- Payment in return for Access: Government supports the industry’s voluntary offer for a payment system to involve a £20,000 one-off payment to an agreed community body for each unique lateral (horizontal) well that extends by more than 200 metres laterally.
- Voluntary notification system for the community through the same industry voluntary agreement as the payment above, rather than set out in statute. The notifying company would outline matters such as the relevant area of underground land, coupled with details of the payment that will be made in return for the access.

Incentives and Public Engagement

Identification of economically recoverable reserves is a key issue that cannot be addressed until enough exploratory wells are drilled and production tested. Based on the evidence heard, the Committee was of the opinion that large scale
production will not take place until the next decade – unless immediate and effective action is taken. The snail’s pace of exploration is partly attributed to issues of public acceptability, although the support of ministers and potential for community benefits are noted as positives. But ministers do not support proposals to enshrine community benefit schemes in legislation, preferring a “legally binding commercial transaction”.

Environmental Impacts
The environmental impact of shale gas development in the UK is not seen as a potential block on the industry; it is the planning or regulatory regime which may constitute such a hurdle. Any risks to groundwater from methane or waste water entering aquifers is considered by the Committee to be ‘very low’, so long as independent monitoring ensures that wells are properly constructed and sealed. Controls introduced by DECC to mitigate the risks of seismic activity meant that the Committee stated that:

“there should be no risk that seismic activity caused by hydraulic fracturing would be of sufficient magnitude to constitute any risk to people or property.”

Impacts on health were also viewed to be low provided there was proper regulation. However, the Report stresses that legitimate and exaggerated fears must still be taken seriously, and tackled by industry and government.

The Regulatory Regime
The regulatory system is summarized in the report and was noted to be a “world class set of regulations” by some witnesses. The Secretary of State for the Environment and the Environment Agency noted plans to standardise some permits but the Committee doubted that these could happen without further change to the overall framework.

The slow progress of exploration to date appears to be in part due to the planning and permitting process but also from the Environment Agency being on a “learning curve” which is resulting in bureaucratic complexity and diffusion of authority.

Impact of the Government Announcements
The Consultation on access and an Infrastructure Bill present an opportunity for many of the Committee Report’s recommendations to be given legislative effect. The Second Reading of the Infrastructure in the House of Lords is took place on 18 June 2014 and the results of the Consultation should come out soon.

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End Notes
(1) The Economic Impact on UK Energy Policy of Shale Gas and Oil (Report) on 8 May 2014
(2) Planning Guidance for Shale Gas Developments in England:
Commercial contracts and the duty of good faith

Historically English Courts have been reluctant to imply a duty of good faith into commercial contracts. The Courts have only implied a duty of good faith into specific contractual relationships (for example in partnership and insurance contracts). Duties of good faith are owed by those in a fiduciary relationship and can exist as the result of an expressly agreed contractual term.

Other jurisdictions around the world recognise the principle that contracting parties owe each other a duty of good faith in the performance of their contractual obligations. Such a duty can be found in the commercial codes of most civil law jurisdictions and the Courts of other common law jurisdictions.

The decision in Yam Seng Pte Limited v International Trade Corporation [2013] that a duty of good faith could be implied into commercial contracts suggests that the position of English law is changing, bringing it more in line with foreign jurisdictions; however, caution should be exercised.

Yam Seng claimed that ITC breached an implied term that the parties would deal with each other in good faith. The basis for this claim were allegations that ITC provided false information that it knew Yam Seng would rely on in the marketing of products and authorised sales by third parties in the domestic markets covered by the distribution agreement at a lower retail price than the agreed duty free retail price.

In his judgment Leggatt J held that a contractual duty of good faith could be implied into commercial contracts and implied a contractual obligation of honesty, stating that "[a]s a matter of construction it is hard to envisage any contract which would not reasonably be understood as requiring honesty in its performance".

He extended this implied term to include an obligation to comply with "other standards of commercial dealing which are so generally accepted that the contracting parties could reasonably be understood to take them as read without explicitly stating them in their contractual document" and that the observance of such standards are key aspects of good faith.

The final aspect of good faith described by Leggatt LJ was a party’s fidelity to bargain. Leggatt LJ noted that contracts can never expressly provide for every event that might happen and in circumstances not specifically provided for, contractual language must be given a reasonable construction which promotes the values and purposes expressed or implicit in the contract.

Importantly, following analysis of the authorities, Leggatt J held that a contractual duty of good faith could be implied and that the content of the duty to perform a contract in good faith is dependent on context.

Leggatt J in Yam Seng described the test to determine whether a party has breached the implied duty to act in good faith as being an objective one, namely, whether in the particular context the conduct in question would be regarded as commercially unacceptable by reasonable and honest people. This test is dependent on issues of fact (varying from case to case) and not law and will be judged in relation to the presumed intention of the parties.

Judgment

In the context of the distribution agreement the judge held that it was clearly implied that ITC would not knowingly provide false information on which Yam Seng was likely to rely and that ITC would not authorise sales in the domestic market that undercut the agreed duty-free retail prices.

Leggatt J held that ITC had not authorised the undercutting of the duty-free prices but that ITC was in breach of "the implied duty of honesty" in their dealings. The Court identified further breaches by ITC and held that Yam Seng had been entitled to terminate the distribution agreement and was entitled to damages for misrepresentation.

Yam Seng Pte Limited v International Trade Corporation [2013]

International Trade Corporation (ITC) granted Yam Seng the exclusive right to distribute Manchester United branded fragrances and toiletries across 42 duty free centres in Asia. Yam Seng terminated the distribution agreement citing persistent breaches of the distribution agreement.
The impact of Yam Seng
At this juncture it is difficult to determine the exact impact of Yam Seng on English Law. Yam Seng was cited in Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd [2013], however, it should be noted that the decision in Mid Essex Hospital Services NHS Trust was not based upon the principles of Yam Seng. The analysis of the Court merely referred to the analysis of the historical position contained in Leggatt J’s judgment and refused to imply a duty of good faith into the commercial contract, preferring to suggest that parties wishing to enforce such a duty should draft express terms.

Parties entering into long term contracts should be aware that (following Yam Seng) the Court can imply a duty of good faith and fair dealing into commercial contracts and should carefully consider how their actions would be judged by the objective test were a dispute to arise.

Offshore Workers and Employment Rights
In this article we would like to take a brief look at the extent to which employment relationships involving UK firms and offshore workers are impacted upon by UK employment law. As a UK employer there are a number of important issues for you to consider. This is a more complex and less clear topic than one might at first think. By “offshore workers” we mean workers employed on fixed installations on the UKCS.

Background to offshore workers
Offshore workers are often highly remunerated and rewarded and may not therefore be particularly inclined to raise employment law issues or pursue claims. Additionally, a large number of offshore workers are engaged as self-employed contractors and/or supplied to the operators of offshore installations by agencies. This, in turn, means that they are unlikely to have direct employment law rights against the organisation they are doing work for on a day-to-day basis.

In many areas of industry, contractors who are described as being self-employed could potentially be held to be employees if they were to bring a claim to an Employment Tribunal asserting that they have employment rights. This is because the Tribunals will look beyond the terms of a contract at how a relationship operates on a day-to-day basis. If, for example, a company has a significant degree of control over a contractor and the contractor is not at any financial risk then the contractor may be held to be an employee. Given the degree of control that is often necessary in the oil and gas industry, there is a risk of contractors potentially establishing employee status.

Whilst not all employment rights apply to offshore employees or workers, they do have a wider range of rights than one might at first think and it is also unclear whether certain other rights apply to them. We have set out some commentary on this below. Additionally, where offshore workers are not genuinely self-employed, it is advisable to think about what rights they may have if any disputes arise.

Rights offshore workers clearly have
The starting point is that, whether an offshore worker is a contractor or an employee/worker, he or she will be able to enforce any rights that he/she has been given by contract. This would mean that the contractor or employee could bring proceedings to enforce rights to notice periods or pay and benefits granted by the contract.

The majority of UK statutory employment law is described as ‘extending’ to England, Wales and Scotland. It is not wholly clear but it is likely that this means someone must be employed on the land mass of Great Britain to be under the relevant legislation. However, certain employment rights have been expressly extended to offshore workers by legislation.

The rights that have specifically been extended to offshore workers include:

- Rights in relation to being represented by a recognised trade union;
- A right to bring an unfair dismissal claim if, and only if, the dismissal relates to activity connected to trade union recognition;
- Rights to rest periods and paid annual leave under the Working Time Regulations (with certain modifications);
• Rights in relation to discrimination at work under the Equality Act 2010; and

• The right to be automatically enrolled in a pension scheme.

The most important rights to be aware of on a day-to-day basis are those in relation to working time and rights not to be discriminated against.

With regard to working time, offshore workers are not subject to the same restrictions on night work or rest periods as onshore employees. However, employers are required to give them compensatory rest if possible and they have the same rights to paid annual leave as other employees. The 48 hour working limit applies to them with certain exceptions.

Uncertainty over unfair dismissal

Unfortunately, as a result of the way in which employment law has developed over the years, there is a lack of certainty over some rights.

For example, the right not to be unfairly dismissed is set out in the Employment Rights Act 1996. There is a power to extend that Act to offshore workers and, as mentioned above, that power has been exercised in relation to unfair dismissal claims where the dismissal relates to trade union recognition.

However, it appears that a 1976 statutory instrument extending a wider range of employment rights to offshore workers remains in force. The effect of this is that the basic right not to be unfairly dismissed may apply to offshore workers and that the same may also apply to other longstanding rights such as in relation to unlawful deduction from wages. There is also at least one reported case in which unfair dismissal claims were successfully brought by offshore workers.

Rights that will not apply

Workers or employees who are working wholly offshore will not usually be subject to the TUPE Regulations because, for a TUPE transfer to take place, there needs to be an organised grouping of employees situated in Great Britain.

Additionally, a number of employment rights introduced since 1996 such as the right to request flexible working and (surprisingly) whistleblowing legislation do not appear to have been expressly extended to employees or workers working offshore.

Other risks

There are a number of cases in which employees working wholly abroad have, for example, been held to have been protected by UK unfair dismissal law because of the specific circumstances of their case. None of these cases have involved offshore workers. Given that there is a specific power to extend employment rights offshore workers and that has been done for some areas of employment law it is unlikely that the Courts or Tribunals would widen the scope of employment protections for offshore workers.

Additionally, where workers spend time doing work onshore as well as offshore there is a significant chance that they will be caught by most UK employment law. It is therefore important to consider this carefully.

Practical advice

It is surprising how little guidance or comment there is on the extent to which UK employment law applies to offshore workers and that may be because of some of the uncertainties referred to above. Given the highly specialised skills of many workers in the sector it will usually be advisable to treat workers fairly and generously and this will often avoid employment law issues arising. However, what is worthwhile noting is that it is not safe to assume that directly engaged offshore employees or workers do not have statutory rights. Caution should therefore be exercised when employment issues arise and take advice if matters appear to be contentious.
Environmental Impact Assessment (EIA) and Decommissioning of Oil & Gas Installations

This article considers the new EIA Directive 2014/52/EU which needs to be transposed in the UK by 2017, and some of its implications for the decommissioning of UKCS assets. Since a decommissioning programme will typically need to be developed up to three years before decommissioning activities take place (or five years in the case of installations derogating from the OSPAR Convention) the changes are likely to affect owners of offshore oil and gas installations seeking approval for decommissioning programmes.

Decommissioning activities and projects

The licensing of projects for the extraction of petroleum and natural gas for commercial purposes and pipelines for the transport of oil and gas has been subject to the EIA process for many years. Whilst some installations coming forward for decommissioning will have been subject to the EIA process during licensing, other will not.

The EIA Regulations that licence the construction of UKCS facilities do not explicitly provide that the process of seeking approval for the decommissioning plan is an activity to which the EIA Directive applies. To date, DECC has advised that applications under the Petroleum Act 1998 should be accompanied by ‘an environmental impact assessment’ before approval of a decommissioning programme can be given by the Secretary of State for Energy and Climate Change.

Decommissioning plans and EIA

Although the European Commission sought to explicitly include “demolition” in the definition of an EIA project during the progress of the draft Directive 01192/EU, the text adopted by the European Parliament does not change the definition of “project”. It does, however, specify that information on demolition phases and demolition works is required where projects are subject to EIA.

There is no doubt that a demolition project can require EIA where it meets the EIA Directive thresholds. The purposive approach to the interpretation of European directives suggests that decommissioning should be regarded as demolition. In other cases the ECJ has concluded that where multi-stage consents are required the EIA process may be required for stages that have not previously been assessed.
Marine licencing and EIA

The decommissioning process involves a number of distinct stages and activities, including wells abandonment, topsides removal and substructure removal. Some of these activities will require a marine licence from the Marine Management Organisation (MMO) under the Marine and Coastal Access Act 2009.

Under the Marine Works (Environmental Impact Assessment) Regulations 2007 (as amended) the MMO is prevented from granting a licence for a regulated EIA activity until the EIA process has been completed.

But the fact that some activities may be subject to the EIA process under another jurisdiction does not avoid the need for the whole project to be considered to determine whether the EIA process should be undertaken.

Environmental Impact Assessment Reports

The newly termed “environmental reports” (no longer environmental statements) will also need to report on resource efficiency and sustainability, biodiversity protection, climate change and consideration of the vulnerability of projects to major accidents and/or natural disasters, including flooding, sea level rise and earthquakes; all of which could be particularly relevant to offshore oil and gas decommissioning programmes.

The increasing focus on habitats and species is emphasised through the requirements for specified measures to avoid, prevent, reduce and, if possible, off-set significant adverse effects on the environment.

The increasing extent of economic development activity within the Marine environment is also reflected through recognition that EIA should take into account the technologies proposed to be used as part of the regulated activity, e.g. seismic surveys using active sonar.

Currently, only those alternatives considered by a developer are required to be outlined in an Environmental. Consideration of alternatives for decommissioning activities in the UKCS is not required save in respect of OSPAR Decision 98/3, which prohibits the dumping and leaving wholly or partly in place of offshore installations unless derogation can be granted to provide for the option of leaving jacket footings or concrete structures in specified circumstances. Such exceptions can only be granted if a comparative assessment and consultation shows that there are significant reasons why an alternative disposal option is preferable to complete removal.

Screening and Scoping

The screening process is strengthened to ensure that it is only those projects that are likely to have significant effects on the environment that are subject to EIA.

Other changes to be introduced include:
- a greater focus on the scoping process;
- a requirement that the experts involved in the preparation of an EIA report should be qualified and competent;
- the need for the decision-maker to ensure that it has sufficient expertise in the relevant area to undertake the examination required and to satisfy itself that the information provided by the Developer is complete and of a high level of quality.
- a requirement that mitigation and compensation measures are proposed and implemented

a requirement that appropriate procedures are introduced for the monitoring of significant adverse effects on the environment resulting from the construction and operation of any project.

Conclusion

Directive 2014/52/EU will require changes to be made to the existing UK regulatory and policy approach to EIA. Changes to the scope of Environmental reports, consideration of alternatives, mitigation, compensation and monitoring will have implications for resourcing the preparation of decommissioning programmes for activities in the UKCS that are relevant now.

DECC’s Offshore Environment Unit will be concerned with implications across a range of regulatory regimes, so active engagement at both sector and project level can influence those aspects of the Directive’s transposition that lie within the discretion of the Government.

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Team News

• Oil & Gas Partner Paul McGoldrick led a team acting for Tullow Oil on the disposal of its interests in the Schooner and Ketch fields to Faroe Petroleum.

• Oil & Gas Partner Paul McGoldrick and Corporate Senior Associate Joe Lewis acted for the management of MPX Energy in their buy-out from Sorgenia (and minority shareholders) of the entire issued share capital in MPX Energy Ltd.

• Corporate Partner Jamie Pass led a team from both the Newcastle and Aberdeen offices who advised NVM Private Equity on its investment in Armea and Nexus AB, oil and gas technology businesses based in Aberdeenshire.

• Oil and Gas Partner Uisdean Vass returns to Louisiana State University in September to assist with his alma mater’s new Energy programme.

• Responding to growing interest in UK Unconventional and Onshore activities, a group of Bond Dickinson Partners, led by Uisdean Vass and Kevin Gibbs, have put together a half-day training programme on this subject. The main point is that onshore oil and gas (especially shale gas and coalbed methane) is different and requires the support of specialists in property and planning who have no role offshore.

  Contact Barbara Polson at barbara.polson@bonddickinson.com and 0845 415 6106 if you are interested in this training.

• On 5 June, Uisdean Vass launched the publication of the twentieth Aberdeen Chamber Oil & Gas Survey (which we sponsor). For a link to the survey click here. In support of the launch, Uisdean was interviewed on various Scottish radio and television channels. On 9 June he was the sole interviewee for the oil industry on Sky News special “100 days to go” programme on Scotland. Click here to see his interview.

• In April and May, Uisdean and Stuart Carter presented “The FOA: A Quick Canter Through” to African, Asian and Russian Oil Scout Organisations in London.

• On 12 June, Associate Laura Petrie gave a breakfast presentation to members of Aberdeen Chamber of Commerce on the “Two North-Easts”. Laura spoke on the major links between the oil service and engineering businesses of the North East of Scotland and the North East of England.

• Paul Stockley, in his capacity as Newsletter Editor on the Oil & Gas Committee of the International Bar Association (IBA) is putting together an international oil and gas newsletter with contributors from across the world, ahead of the IBA’s main conference in Tokyo in October.

Events

• On 1 May Uisdean Vass gave a presentation on the nature and implications of the Wood Review to a large group of our clients and contacts in London. If you are interested in discussing the Wood Review with Uisdean please contact him directly at uisdean.vass@bonddickinson.com

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