

CURRENT PRACTICE

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Contributions to this publication are always welcome and should be sent to the editor at the address below:

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FROM THE EDITOR

Welcome to this edition of Current Practice. Once again we are pleased to hear from a diverse range of jurisdictions and on numerous subject matters. Government interventions, although ongoing around the globe, take a back seat in this issue to legislative changes to effect environmental improvements. Australia has approved the introduction of a carbon emissions trading scheme using a 'cap and trade' model and targeting direct emitters and upstream fuel suppliers. Spain has drafted a new environmental liability law that seeks to incorporate into law a 'polluter remediates' principle which goes further than the familiar 'polluter pays' principle. Additionally we have a feature relating to Renewable Energy Source ('RES') project financing (particularly wind farms) in Greece.

Colleagues in the mining and procurement sectors will be interested in the respective articles submitted relating to the Amerindian (or indigenous) rights of veto with respect to mining projects in Guyana and the brief update relating to Polish procurement law changes.

For commercial lawyers generally we have a report on a recent English High Court decision dealing with that old favourite, 'reasonable' endeavours v 'best' endeavours and for those working in Asia, there is a commentary on the evolving LNG market in that region.

Meanwhile, I have been following the Arctic 'land-grab' with interest. Russia plants a flag on the bottom of the South Pole, Canada immediately moves to beef up a defensive outpost and the United States (which is not a signatory to the UN Convention on the Law of the Sea, that deals with the rights to an extended continental shelf) sends the coast guard to map the Arctic floor off-shore Alaska. Anyone with expertise in this area is welcome to make a contribution for the next issue.

Finally, a reminder that the IBA's Annual Conference is being held in Singapore in October this year. See pages 13-17 for more details.

Many thanks to this issue's contributors.

The views expressed in this publication are those of the contributors, and not necessarily those of the International Bar Association or Petro-Canada.

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AUSTRALIA

Australia proposes federal carbon emissions trading scheme

The Australian Federal Government has endorsed proposals for an emissions trading scheme to commence by 2012. The proposals, outlined in a Task Group report released in June 2007, contemplate a 'cap and trade' emissions trading scheme that would target a broad range of industries, including both the stationary energy and resources sectors.

Background

On 10 December 2006, the Prime Minister of Australia established a Task Group to advise on the nature and design of a workable global emissions trading system. The Task Group report, released following a detailed consultation process, found that Australia should implement an emissions trading scheme (ETS), ahead of a global scheme.

Australia now has two competing ETS proposals, as the Federal ETS proposal follows an earlier announcement by the States and Territories Emissions Trading Taskforce that they would implement a separate scheme by 2010, with or without Federal involvement.

Key conclusions of the report

Cap and trade model

The Task Group recommends a mandatory cap and trade model with a long-term aspirational emissions abatement goal, after the necessary economic modelling and analysis to allow the early identification of a prudent and robust long-term aspirational goal. They commented that Australia is currently on track to meet its Kyoto target of 108 per cent of 1990 levels by 2012. The Australian scheme is scheduled to begin in 2011 (or 2012 at the latest), with an overall emissions trajectory commencing with a series of shorter-term emissions caps set for 2011 to 2020, and indicative medium-term emissions gateways to provide guidance for the likely path of future caps for the period 2021 to 2030. In addition, the scheme allows for periodic recalibration every five years so that new low-emissions technologies can be reviewed and incorporated where desirable.

Sectoral coverage

The approach of the Task Group is to target maximum practical coverage of all sources, sinks and greenhouse gases. Carbon liability is placed on two broad groups. First, direct emitters such as power stations, which can directly manage their entire emissions liability. Secondly, upstream coverage of fuel suppliers (principally non-industrial coal, gas and liquid fuels), which supply energy for other emissions such as transport. Agricultural, land use and waste sectors would be excluded initially.

Permit allocation

The Report includes an innovative proposal to allocate permits on a 'compensatory' rather than 'grandfathering' basis. In contrast to the EU scheme (where firms received an allocation based on historic emissions), an affected firm would receive a free allocation of permits reflecting the value impairment it suffers from the introduction of emissions trading, with periodic auctioning of the remainder to create liquidity and assist price discovery in the market. The impairment is based on the estimated post-tax net present value of future income reductions flowing from the scheme. In respect of existing trade-exposed, emissions-intensive industries, the Report recommended free allocation of permits every five years equivalent to the direct (industrial processes) and indirect (energy and embodied production inputs) post-tax costs. However, new investments in these industries will be allocated permits based only on world's best practice. Over time, this could be calculated as if firms were using world's best practice low-emissions technologies.

Capping the cost

The Report proposes that the penalty for non-compliance, which will effectively set the ceiling price for carbon permits, be set at a relatively low level for an initial period before rising to create a stronger abatement incentive fee in the future. The Report flags a possible initial penalty (or emissions fee) in the order of A\$10 per tonne of CO₂ (approximately US\$8.45 or €3.30). Unlike the current EU scheme there will be no requirement to make good (ie the obligation to both pay a penalty and purchase the shortfall permits on the market). In terms of future banking and borrowing, firms will be permitted to carry forward permits to cover future emissions but will not be able to borrow from future allocations. However, banking will be limited during the initial period when the fee is set at a low level.

Abatement

The Report strongly supports the development of low-emissions technologies and energy efficiency measures as complementary to an emissions trading scheme. It is proposed that abatement action taken before the scheme is introduced be recognised; however, this will not apply to action taken prior to the policy announcement.

Linkages with other national and regional schemes

Capacity, over time, to link to other national and regional schemes is seen as a precursor to a global emissions trading scheme. However, as a truly global emissions trading scheme is not expected in the near future, a 'bottom up' approach based on decentralised, linked regional arrangements is more likely to emerge in the short to medium term. In this context, the Australian Government is currently considering a joint approach with Canada, and is committed to working within the context of APEC.

The Task Group expressed a desire to expand offsets currently recognised under the Kyoto mechanisms to maximise

availability of offsets such as land use, forestry and carbon capture and storage. They also found that quality credits from other official or voluntary schemes should be considered for recognition.

Observations

Two novel features of the proposed scheme will be of particular interest to the energy and natural resources sectors.

First, the proposed compensatory model of permit allocation has been designed to reduce ongoing gaming incentives and reduce the incentive for a firm such as a power station owner to increase its carbon emissions in the lead up to the scheme start (ie in the hope of receiving a higher 'grandfathering' allocation).

However, in implementing this regime, the Government will need to address a number of significant design issues. As the report concedes, the compensatory approach involves significant complexities. For example, how will the future revenues and expenses of a firm or its tax profile be calculated? Likewise, what assumptions should be made about the future carbon price (which is likely to increase) or the efficiency with which increased costs will be passed through to consumers?

Secondly, the Task Group proposes tackling emissions from fuel use in agriculture and transport by imposing permit liability on upstream fuel suppliers. The agriculture and transport sectors are problematic for carbon schemes because, although their total emissions are very significant, they comprise a large number of small emitters and are therefore hard to police. Both sectors are excluded from the EU scheme (although aviation will be covered in the future). The Task Group does not specify precisely which 'upstream fuel suppliers' would be caught by the scheme, but presumably petroleum refineries and even oil and gas producers could be scheme candidates.

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GREECE

Broadened market around EU targets in RES: Greek energy sector

In January 2007, the EU Commission proposed a binding 20 per cent target for the overall share of renewable energy sources ('RES') for the EU by 2020 and a 10 per cent minimum binding target for biofuels as a part of the overall RES target. Member States need to set national targets and to adopt action plans on RES electricity in order for the above politically binding targets to be transferred into legally binding targets.

During the last decade an ever-growing energy market has been created in Greece in relation to projects developed for the generation of power from renewable energy supplies. Investors' interest is focused on wind parks. Wind energy is expected to cover 10 per cent of the 20 per cent RES target for Greece (3rd National Statement for the level of introduction of renewable energy by year 2010, October 2005, Minutes of the 2nd Expert Meeting on National Biomass Action Plan, 13 March 2007). A significant development is expected in the photovoltaic power plants for which the first operational licences have been issued during the last few months.

Foreign investments either by companies that were already active in the energy sector in other European countries (eg Endessa, Enel, EDF) or by private investment funds, usually UK based and specialising in the renewable energy sector, have contributed to this development. As a result a growing number of wind parks have appeared in the Greek landscape and many are under construction, raising a controversy on the environmental impact of these 'green energy' power plants.

Only recently the Greek Government has made endeavours to put into force stricter rules relating to the installation of wind power parks, which have caused anarchy as far as long-term land-planning is concerned. However, the regulations that are planned to be introduced will provoke strong criticism about the interests protected and the observance of free competition rules in the relevant market, which has to a large extent been formed by certain participants.

Industry sources confirm that in the renewable energy sector a stable investment environment has been created so far. Only recently the Directive 2001/77 on electricity from RES was implemented into Greek law (Law Number 3468/2006, the 'Renewables Act'). The main scope of this law is to simplify the permit system for RES investments in Greece (ie licensing procedures).

It is strongly argued that the RES energy market in Greece is growing not because, unlike what one would expect, it functions under the rules of supply and demand and in competitive terms, but because it is open from only one side. This means that private enterprises are not prohibited from producing energy from RES following the relevant licence procedures and selling it to the grid. The Hellenic Transmission

System Operator is obliged to buy the power produced for mainland Greece and islands connected to the grid and the Public Power Company ('PPC') for the non-connected islands. There exists no competition regarding the sale of power to the PPC. The terms and conditions of the Power Purchase Agreement ('PPA') between the producer and the off-taker are not under negotiation between the parties, but they are set by the Renewables Act and Ministerial Decisions which govern all the vital issues of the PPA. They regulate the duration of the contract, when payments are to be made and when the obligation to make payments begins. The prices for energy purchased from producers are fixed and are adjusted annually by decision of the Ministry of Development. In addition, the law provides for a ten-year duration of the PPA that can be renewed for a further ten years at the request of the power generator, and for the assignment of the PPA to the project finance lenders. All the above provisions are set to ensure that projects will be bankable.

However, certain risks still exist due to legal provisions that have an impact on renewable energy projects which can cause failure of the financing agreements if they are not reflected properly in the relevant contracts. Contractual provisions in relation to such risks require good knowledge and experience of the Greek legal system owing to the fact that, as is usually the case, they might occur due to facts that do not belong in the sphere of responsibility of either parties.

The most common case is that any interested third party claiming protection of the environment can challenge the operation and installation licence of the project. The true extent of this issue becomes obvious when one takes into consideration that there is no certain time limit expiring at the same date for all third parties that may wish to challenge such a project. The uncertainty caused becomes even more complicated because legal proceedings may last for many years. It usually takes more than two years for a first hearing to take place and a decision to be issued. These legal proceedings influence the performance of project financing agreements and can lead to breach of warranties and covenants undertaken by the borrowers.

Another issue that should be observed by investors relates to subsidies granted by the Greek State for the installation of RES power plants. Greek law provides for subsidies of an amount ranging from 20 per cent up to 40 per cent of the eligible costs depending on the area of the Greek territory where the project is to be developed. Law Number 3299/2004 (as amended by Law Number 3522/2006 which came into force on 1 January 2007, the 'Development Law') contains strict provisions that need to be followed during a certain time period of the life of the project, notably terms of financing or leasing agreements (if applicable), paid-up cash equity, collateral, and operation of the project. Breach of such provisions means that the amount of the subsidy granted will have to be returned entirely or partially.

Under these circumstances certain clauses included in the financing agreements may be activated, such as cross-default, negative pledge and *pari passu* clauses. For this reason, legal and technical due diligence either before the conclusion of the financing agreements or before the acquisition of shares of the

project companies by investment funds not only needs to be comprehensive, as it should be in any case, but also needs to follow specific directions set by experts.

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GUYANA

The Amerindian veto over mining

In April 2006 Guyana enacted a new law, the Amerindian Act, which protects the collective rights held by Amerindian communities and gives Amerindian communities a veto over any mining on their lands.

The Amerindian Act leaves the basic mining regime in place. The Guyana Geology and Mines Commission (GGMC) continues to act as guardian¹ over all minerals, with the power to authorise mining on private lands as well as on lands owned by the State. A miner must obtain permission from the GGMC to do any mining, including exploration and surveying, since the ownership of all minerals remains with the State.

However, in relation to Amerindian communities, the Amerindian Act makes two very significant changes to the mining regime. Under Guyana's previous mining policy, mining was not allowed on Amerindian lands but that policy was not legally binding and could in theory be reversed by the Government at any time. The Amerindian Act now transfers to Amerindian communities the legal power to decide whether to have mining on their lands – a power that native and aboriginal peoples are still struggling for elsewhere. Since Amerindian communities are completely free to say no to mining, they have a veto irrespective of whether the GGMC has issued a permit. The second change is that the Amerindian Act sets minimum standards for any agreement reached between the Amerindian community and the mining entity.

Mining companies working in Guyana will now need to develop new strategies and negotiating skills if they wish to continue mining on Amerindian land.

The mischief to be addressed

In the past some Amerindian communities have allowed mining on their lands but they have run into problems. They have generally acted without legal advice and entered into arrangements which brought them very limited benefits. In some cases village leaders have even made agreements without the full knowledge and consent of their villages.

Amerindian communities have also had two major complaints against mining. The first complaint is damage to

the environment, eg pollution of the rivers that Amerindians depend on for drinking water and for fish. Under the Environmental Protection Act 1996, all Guyanese can obtain injunctions to prevent environmental damage and they are able to claim compensation for such damage. However Amerindian communities have not used the available legal remedies.

The second complaint is encroachment on Amerindian lands by miners. Before the Amerindian Act came into force, government policy did not permit mining on any lands lawfully occupied by an Amerindian community. Lawful occupation was given a wide meaning under section 112 of the Mining Act. It covered all land occupied or used by Amerindians as well as any land necessary for quiet enjoyment by the Amerindians of any Amerindian settlement. It was difficult to know what this meant in practice. The situation was exacerbated by the refusal of some Amerindian communities to allow the Government to demarcate their lands.² Without demarcation it is difficult, if not impossible, to identify the boundaries between Amerindian lands and State lands. Refusal to demarcate also delayed the settlement of Amerindian claims for more land.

The new regime

The Amerindian Act removes much of the confusion that affected relations between the mining sector and Amerindian communities. It also reduces the scope for unfair transactions by making certain terms mandatory such as minimum levels of payment and preferential treatment for Amerindians.

The new rules apply to any miner³ who wants to mine on Amerindian lands or in any rivers, creeks, streams, etc which lie within the boundaries of Amerindian lands. Amerindian lands are now easily identified as those lands which are held by the Amerindian village council under a legal title for the benefit of the Amerindian community.⁴ These titles are absolute and forever and cover relatively large areas.⁵ Mining activities are very broadly defined as including, 'exploration, prospecting, drilling, mining, extracting and appropriating any mineral'.⁶

A miner must first obtain mining permission from GGMC in order to have the State's permission to search for and extract minerals. Once that permission is given, the Amerindian Act requires the miner to obtain the free prior informed consent of the Amerindian village to the mining operations. An Amerindian community has the power at any stage of the negotiations to refuse its consent to mining or simply to terminate the negotiations. *There is no requirement for the community to be reasonable.*

The rationale for this special legal regime is the Amerindian relationship with land. Amerindians claim that land is not a commodity – it is the basis of their lives and culture. The mechanism in the Amerindian Act for settling Amerindian land claims expressly requires the Government to take into account the Amerindian cultural attachment to and spiritual relationship with the land. Amerindian village councils also have law-making power which they can use to protect their lands forever. Thus the Amerindian Act 2006 has to be understood in its cultural, social and political context.

Obtaining free prior informed consent

In order to obtain the free prior informed consent of the village the miner must meet and negotiate with the village. However, the miner does not have a right to enter the village but must first apply for and obtain permission from the village council. A miner who enters Amerindian lands without permission from the village council commits a criminal offence.

Amerindian communities cannot give their free prior informed consent unless they have all the information with which to make the decision. Under section 48 of the Amerindian Act, a miner must give the community a written summary of the proposed mining activities including a non-technical summary, the proposed site, length of time and likely impact. The miner must give the community any other information which they reasonably request. This could include technical mining details and non-sensitive financial information. An important document will be the mining permit since that will enable the Amerindian community to see exactly what legal authority the miner has. Although the Amerindian Act only imposes an obligation on the miner to provide what is 'reasonable', in practice the Amerindian community can refuse to continue negotiations if they do not get the information they want – irrespective of whether their request is reasonable.

The miner must also attend consultations as requested by the Amerindian village. Many Amerindian villages are not accessible by road, only by boat or aircraft. The more consultations that are required, the more expensive the overall cost of getting consent will be. It is therefore in the miner's interests to be as open and transparent as possible from the beginning.

Once the discussions are completed, the miner must obtain the consent of the village (not just the village council). There has to be a formal village general meeting and at least two-thirds of those entitled to be present and vote must give their consent. This provision now ensures transparency in decision-making within the community and protects the miner and the village councils against allegations of impropriety.

If the village does not give its consent, or if consent is given but the majority is below two-thirds, the mining cannot go ahead. For small and medium-scale mining this Amerindian veto is absolute. The miner cannot challenge the decision. In the case of large-scale mining, it is possible to override the veto but only under strict conditions.

Overriding the Amerindian veto

Section 50 of the Amerindian Act allows the Government to override the Amerindian veto for large-scale mining provided that it is in the public interest to do so. Both the Minister with responsibility for mining (currently the Prime Minister) and the Minister of Amerindian Affairs must declare that the mining activities are in the public interest. The Minister with responsibility for mining must consult the Minister of Amerindian Affairs and set the level of mining tribute to be paid. The miner must give a written undertaking to comply with village council rules and to promptly pay fair compensation for any damage caused by the mining. There

must then be a cooling-off period of 60 days during which the Amerindian village can change its mind and ask for negotiations to be restarted. If there is still no agreement the miner must enter into an agreement with the Minister of Amerindian Affairs which contains terms implied by law (preferential treatment for employment, supply of goods, etc).

Conclusion

The Amerindian Act is a radical step for Guyana and was not lightly taken. It was the result of three years of consultations with Amerindian communities followed by public hearings by an all-party Select Committee of Parliament. This Select Committee also scrutinised and approved each clause of the bill before it was passed by Parliament.

The Amerindian Act has major implications for the mining sector. Now that Amerindian communities control access to minerals on their lands they are free to say no to mining or to set the terms for mining as part of their free prior informed consent. The Amerindian Act sets minimum standards, thereby reducing the scope for Amerindian communities to end up with unfair deals. Companies that operate to higher social and environmental standards should now have a competitive advantage over those that do not.

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Notes

- 1 Mining Act 1989, section 13.
- 2 In one case an Amerindian community settled outside of the land it owned and in an area subject to mining interests.
- 3 Under the Amerindian Act the term 'miner' covers companies and individuals.
- 4 'Village' and 'community' are used interchangeably in Guyana.
- 5 The biggest village is 2,300 square miles belonging to the WaiWai community of about 200 persons.
- 6 Amerindian Act 2006, section 2.
- 7 Melinda is an international lawyer. She has been admitted as a Solicitor (England) and called to the bar as an attorney in Guyana. She was lead consultant to the Government of Guyana on the Amerindian Act 2006.

UNITED KINGDOM

Are your best endeavours always reasonable? A recent case on 'reasonable' versus 'best' endeavours

Contracts in the energy sector often impose an obligation on a contracting party to use its 'best endeavours' or 'reasonable endeavours' (or even some other variant, such as 'all reasonable endeavours') to achieve a particular outcome. The recent High Court decision in *Rhodia International Holdings Limited and Rhodia UK Limited v Huntsman International LLC*¹ sheds some light on the distinction between these different categories of obligation, in the context of an acquisition of a chemicals business in which the parties were required to secure the novation in favour of the purchaser of a key energy supply contract.

This article considers the facts of the case, as well as the key messages to be taken on board by contracting parties faced with the question of whether to give or accept an obligation to use reasonable or best endeavours and what must then be done to comply with such obligations.

Facts

By a Sale and Purchase Agreement dated 27 February 2001 (the 'SPA'), Rhodia agreed with Huntsman to sell its chemical manufacturing business in Whitehaven to a recently incorporated subsidiary of Huntsman. One of the assets of the business was an energy supply contract with National Power (Co-Generation) Limited ('Cogen') under which Cogen supplied power and steam from an on-site Combined Heat and Power facility (the 'CHP Plant') to Rhodia's business. The energy supply contract contained 'take-or-pay' provisions.

Clause 15.1.2 of the SPA imposed obligations on both parties to use reasonable endeavours to obtain Cogen's consent to the novation of the energy supply contract so that the Huntsman subsidiary would become the contracting party in place of Rhodia. It also required Huntsman to supply to Cogen all information reasonably requested by Cogen (including information about the financial position of the Huntsman Group) and, if Cogen reasonably required, to enter into a direct covenant with Cogen to perform and observe the terms of the energy supply contract, in other words to guarantee its subsidiary's obligations.

Pending novation, Huntsman undertook to perform Rhodia's obligations as agent under the energy supply contract (and did in fact do so between March 2001 and March 2004) and to pay all liabilities arising under, or in connection with, the energy supply contract as a result of the non performance or negligent performance of its obligations.

If the novation had still not been completed within six months, Huntsman was entitled to serve notice on Rhodia

to exclude the energy supply contract from the sale of the business assets and terminate its obligations to Rhodia in relation to that contract.

Under the terms of the energy supply contract, Rhodia could assign, novate or otherwise transfer any of its rights and obligations under that contract if it could satisfy Cogen that the proposed assignee was capable of fulfilling Rhodia's obligations and duties under that contract.

Huntsman was initially proactive and approached Cogen for its consent to the novation. Shortly afterwards, Cogen confirmed that, while it had no objection in principle to the proposed novation, since the company accounts for the Huntsman subsidiary were not available at that time (it being a special purpose vehicle recently incorporated to take over the chemicals business with no trading history or financial accounts), Cogen would require a parent company guarantee or similar security from Huntsman. Huntsman refused to provide any such security. When Huntsman provided Cogen with financial information in respect of its subsidiary, the accounts showed a significant inter-company debt, including a £14 million loan secured on the assets of the business. Cogen refused to consent to the novation until the Huntsman subsidiary substantially improved its financial results.

By this stage, Huntsman was considering closing the Whitehaven site and was looking at ways to minimise its liability under its principal/agency relationship with Rhodia with respect to the energy supply contract. Negotiations were not taken further by Huntsman and the novation was not completed.

In March 2004, Huntsman formally withdrew its application to Cogen and gave notice to Rhodia that it no longer intended to perform its obligations under the energy supply contract. At that time, Rhodia had no operational presence at the Whitehaven site and so was not in a position to perform the obligations under the energy supply contract itself. A few days later, the CHP Plant was shut down and has not been in operation since. Later that year, Huntsman announced its intention to close the chemical manufacturing plant.

Cogen commenced arbitration proceedings against Rhodia for unpaid invoices totalling £14.8 million in respect of the supply of steam and electricity under the energy supply contract. Cogen contended that the 'take or pay provisions' required substantial payments to be made for steam and electricity, regardless of whether or not such steam and electricity was actually required and produced.

Rhodia, in turn, issued proceedings against Huntsman, claiming that it had failed to discharge its obligation to use reasonable endeavours to obtain a novation of the energy supply contract (which would have made Huntsman responsible for Cogen's claim), including a failure to provide a guarantee.

Decision

The High Court decided that, by refusing to provide the guarantee reasonably required by Cogen or to explore with Cogen what form of security would be acceptable, Huntsman had failed to use its reasonable endeavours to obtain Cogen's

consent and so was not entitled to exercise the right to terminate its obligations under the SPA in respect of the energy supply contract.

Although this decision turned solely on the meaning of 'reasonable endeavours', the judge, Mr Julian Flaux QC (sitting as a deputy High Court judge), also considered how this differed from 'best endeavours'. He recognised that there was differing judicial opinion on whether best endeavours imposed a greater duty than reasonable endeavours. His view was that as a matter of language and business common sense, the two terms do not mean the same thing. An obligation to use reasonable endeavours is less stringent than an obligation to use best endeavours. Where a number of reasonable courses could be followed to achieve a particular aim, an obligation to use reasonable endeavours probably only requires a party to take one reasonable course, not all of them, whereas an obligation to use best endeavours would require a party to take all the reasonable courses it can. In this context, therefore, the judge acknowledged that there may be no difference between an obligation to use 'all reasonable endeavours' and 'best endeavours'.

The court then turned to considering what reasonable endeavours might entail. While the judge accepted that a reasonable endeavours obligation would not, in general, require a party to sacrifice its own commercial interests, the position was different where a party agrees (as Huntsman did here, to the provision of a direct covenant to Cogen) to take certain specific steps as part of the exercise of reasonable endeavours. In those circumstances, those steps would have to be taken, even if that could be said to involve the sacrificing of a party's commercial interests. Indeed, the judge indicated that had it not been for the specific obligation for a direct covenant from Huntsman, he would probably have found that Huntsman had in fact used reasonable endeavours to procure the novation.

Conclusion

The use of phrases such as reasonable endeavours or best endeavours is common in many energy and other commercial contracts. This case arose in the context of a sale and purchase agreement but has relevance to any contract in which a party is required to use reasonable endeavours to obtain a third party consent or any other outcome. The judge's finding on the difference between reasonable endeavours and best endeavours was obiter, because, as he observed, it made no difference to the outcome of the case. However, as the issue was fully argued in the trial, his findings are of some persuasive authority.

This case by no means resolves all the uncertainty surrounding the difference between reasonable and best endeavours. However, it does confirm what is commonly assumed by many – that reasonable endeavours is a less rigorous obligation than best endeavours and that a reasonable endeavours obligation may be discharged by exhausting just one of a number of possible solutions, whereas best endeavours requires all avenues to be explored and exhausted. The decision suggests that the obligation to use

reasonable endeavours does not, as a matter of course, require a party to 'sacrifice' its own commercial interests (except where that party undertakes to follow certain specified steps, in which case, the fulfilment of such steps is mandatory, even if it prejudices that party's commercial interests). Unfortunately, there is no corresponding discussion on the best endeavours obligation. It therefore remains unclear whether or not best endeavours could also have this effect.

Parties agreeing to comply with such provisions should do so with care, as it is often difficult to establish whether such clauses have been complied with at the time the issue arises between the parties. It is only after extensive investigation of the evidence and the exercise of a considerable degree of hindsight that the issue may become clearer, making this potentially a risky and expensive process for all concerned.

In order to attain a greater degree of certainty, anyone relying on a contracting party to use its reasonable or best endeavours to perform would be prudent to specify in the contract the actions the other party must take in using those endeavours, whenever possible. The relevant party will then be bound to take those actions and the question of whether those actions are contrary to that party's commercial interests will not arise. Equally important for anyone undertaking to use reasonable or best endeavours to perform is to expressly specify in the contract those actions which it would not be expected to pursue, for example, in respect of any contract novations, that it would not be required to provide a parent company guarantee or other financial security.

In the context of a business sale and purchase transaction, it is common practice to include provisions in the SPA in respect of the novation of the key contracts and oblige both parties to use their reasonable endeavours (or indeed a variation on this obligation along the lines already discussed above) to accomplish the novation(s). The financial standing of the assignee would be of paramount interest to the counterparties of such key contracts who may often require the assignee to provide a guarantee from a parent company where the assignee's own financial standing is considered to be uncertain or deficient. Accordingly, purchasers should be careful in expressly agreeing in the SPA to provide a group company guarantee in these circumstances, particularly where their group policy on the provision of such group company guarantees dictates otherwise (Huntsman in fact cited its own group policy as the reason for its inability to provide a parent company guarantee).

Finally, one can only speculate whether the outcome would have been different had the Huntsman subsidiary, as opposed to Huntsman International, been chosen as the contracting party in the SPA.

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Note

1 [2007] EWHC 292 (Comm).

Poland

New public procurement law*

On 11 June 2007, the law on public procurement changed. The most important changes are:

- increasing the threshold value of procurements to which the new law will apply from €6,000 to €14,000 (applying a simplified procedure to thresholds taken from the EU Directive);
- in procurements below the threshold of €137,000 (where organised by governmental agencies) or €211,000 (where organised by municipalities), removing the contractor's rights to file complaints challenging decisions on protests and to appeal to courts against arbiters' rulings and allowing them only to file a protest which will be considered by the contracting authority;
- replacing the teams of arbiters with professional adjudicating panels of the National Chamber of Appeal whose members will be independent and will be bound only by the provisions of law;
- allowing bidders to complete the bidding documentation not only with documents concerning themselves but also with documents concerning supplies, services or public works offered by them;
- allowing the contracting authority in tenders under competitive dialogue procedures to offer a financial reward to unsuccessful participants whose submissions contain ideas which are then used as the basis for other bids.

For further information please contact:

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Note

* This article first appeared in CMS Cameron McKenna's free on-line client publication 'Law-Now'.

Spain

Draft environmental liability law (Ley de Responsabilidad Medioambiental)

Introduction

The draft Law intends to meet the Constitutional mandates on environmental protection and adjust the contents of Spanish domestic law to the requirements of Directive 2004/35/EC of April 21.

The Law will implement to the largest possible extent the 'polluter remedies principle', a principle that goes beyond the scope of the 'polluter pays principle', insofar as the main goal of the law is to return the natural resources damaged by an economic or professional activity to their original status on an objective liability basis, that is, even if the damage was caused (i) in the absence of any administrative breach or (ii) by actions or activities respectful of the applicable regulations. Public budgets are not to suffer the burden of the contaminating activity.

The main features of environmental liability are thus its unlimited and objective nature.

Background

Until recent years, the Spanish legal regime continued to be based on the traditional general civil liability principles of fault or negligence, without prejudice to the first inroads into objective liability that were first implemented in the Legislation on Toxic and Dangerous Waste and also, after the enactment of Law 10/1998 on Waste, with regard to Contaminated Land.

Once enacted, this Law will become the key legal instrument in the fight against contamination capable of causing 'environmental damage', as defined by the Law.

Analysis

The Law brings in very clear and detailed definitions (in line with the Directive) with a view to facilitating the identification of the damaging actions encompassed by the Law. In looking at these definitions, it can be readily seen that not any damage to any natural resource would fall under the scope of application of this Law but only such damage encompassed by the defined concept of 'environmental damage'; that is, damage to waters, land, coasts, river, flora and fauna (including the habitats of native species). The so called 'traditional damage', that is, damage to individuals and their wealth (other than wealth made up by natural resources) is not encompassed by the Law.

In addition, not all damage to protected environments will immediately result in environmental liability. The Law can only apply in the event of material actual or threatened damage to the relevant natural resource. In the case of soil, the concept

of damage also includes the significant risk that adverse effects on human health may occur.

Finally, the scope of the Law is expressed through the three main elements: (i) the kind of economic or professional activity concerned; (ii) the type of measures that the operator must adopt; and (iii) the nature of the specific liability which the operator may incur. It is therefore possible to identify three different characteristics of interest.

First, the general objective liability regime is described in current Article 3 of the draft Law, whereby operators developing any economic or professional activity listed in Annex III of the Law and causing environmental damage or a threat thereof will be bound to adopt the preventive, avoidance or remediation measures foreseen in the Law, while being also bound to report the damaging effects to the authorities.

The liability derived from this norm is reinforced by the legal assumption that the listed economic or professional activity actually caused the damage or threat whenever due to the characteristics of the activity or the way in which it was developed it is likely that it may have caused it.

The operator of a facility developing a listed activity must file a report describing the actions it intends to apply to remediate the damage and the authorities will approve and prioritise the different relevant actions in accordance with the priorities and criteria set forth in the Law. The authorities are called to monitor and control compliance with the approved remediation programme.

The operators of listed activities must provide financial guarantees that the damage that their activities may cause will be actually remediated. The Law leaves up to the regional authorities to determine the level of the required guarantees, which can be put up in the form of (i) insurance policy; (ii) bank bond; or (iii) the implementation of a 'technical reserve' in the balance sheet in the amounts required, backed up by investments in State guaranteed securities or investments.

The list of activities in Annex III is significant and could encompass a large and not closed number of walks of life, to the extent that some of the activities are not directly identified but are included by reference to activities subject to control under other laws. For example, activities requiring an Integrated Environmental Permit (IPE) under Annex I of Law 16/2002 on Integrated Environmental Permits. Among the activities so listed in Annex III of the draft Law we can mention:

- (i) waste management in general, including but not limited to transportation and landfilling or USW and toxic waste;
- (ii) management of waste from mineral extractive activities;
- (iii) the confined use of genetically modified organisms;
- (iv) transportation of toxic and dangerous waste;
- (v) discharges into surface or underground waters requiring permits under the legislation on the Hydraulic Public Domain;
- (vi) the manufacture, use, storage, transformation, bottling and release of dangerous substances and preparations, phytosanitary products, biocides, etc;
- (vii) the operation of a facility requiring permits under the Atmospheric Pollution regulations and others.

With regard to remediation of contaminated land, the draft Law refers to the principles on Contaminated Land in Chapter V of Law 10/1998 of April 21 on Waste and its implementing Royal Decree 9/2005 of January 14, specifically setting forth that the remediation principles foreseen in these regulations (ie the criteria and priorities for remediation) will be applied within the framework thereof. It is of particular interest to read certain wording that could lead to construing that the law acknowledges that it may be sometimes impossible to return the soil to its original status, thus advocating for actions that would assure that the substances, preparations or organisms causing the damage are eliminated, controlled or reduced in such a way that the contaminated soil shall cease to be a threat to human health or the environment.

Secondly, the Law implements a broader kind of liability that applies to any environmental damage or threat caused by economic or professional activities, regardless of whether the activity is listed in Annex III or not. In this case, the liability is limited to adopting measures that are either preventive in nature or aimed at avoiding further contamination in those cases where contamination is caused by fault or negligence.

The drafters of the Law acknowledge that this broader kind of liability is unique to Spanish legislation and goes beyond the scope of the Directive being received.

Finally, the law enforces a regime of *strict liability* that applies to any economic or professional activity causing or threatening to cause damage to certain protected environments. The novelty with regard to the Directive resides – once again – in the expanded scope of application of this regime. The Directive restricts itself to applying this kind of liability to protected habitats and species while the draft Law expands the scope of application also to land and waters, thus increasing the level of protection over and above the levels of the Directive.

In line with the Directive, the same Article 3 identifies certain situations and activities that are excluded from the scope of application of the Law as well as those cases where damage caused by diffuse contamination may trigger environmental liability. In turn, Article 4 of the draft Law puts the time limit (*prescripción*) of liability at 30 years from the moment when the causing emission, event or incident took place.

The draft Law also intends to tackle the consequences from concurring legal regimes that may overlap in time and geographical application. The Law shall not apply to redress the non-environmental damage that individuals may suffer in their personal wealth or rights but provides that where the private damage is actually subject to redress under the Law, then the affected parties may not claim for further damages in a different forum.

The Law acknowledges that environmental liability may coexist with liability stemming from administrative breaches or criminal offences, thus declaring that indemnifications from either of them are compatible, subject to the operation of procedural rules intended to avoid conflicts of authority or jurisdiction.

As usual in these kinds of matters in Spain, the authority to enforce the law (and the possibility of expanding the subjective scope of application to other activities or persons) lies with the

Autonomous Regions, but without prejudice to the authority that the central government retains with regard to the protection of State owned coasts and waters.

Comments

The contents of the draft Law may be changed during the Parliamentary process, but the economic and legal impact that the new rules will have are anyway obvious. As usual, it is reasonable to expect different levels and ways of enforcement in the different regional jurisdictions.

It will be of interest to see how the Law will be received and implemented at regional level, where we do not discount the fact that an overlapping of jurisdictional authority or rules may exist.

The contents of the draft Law are obviously much broader than the above sketchy description, where we have tried to describe only the main basic framework and its possible impact. We shall be pleased to expand or comment on any aspect of this future environmental liability regime that may be of interest to readers.

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SAVE THE DATE!

Section on Energy, Environment, Natural Resources and Infrastructure Law

Biennial Conference 2008

28–30 APRIL 2008, COPENHAGEN

This popular IBA conference will address topics such as:

- wind power in the Baltic
- moving beyond the carbon economy
- protecting investors in Russia
- LNG imports and gas storage in Europe
- mining and indigenous people's rights
- the international resurgence of the nuclear power industry
- Nordic water concerns
- the impact of China in Africa

There will also be a number of social events for delegates to enjoy.

Further details and booking information will be given in due course.

New markets for Asian LNG

With the changing LNG commercial landscape, the US market is becoming increasingly attractive for Asian LNG. The traditional world of LNG contracts has had to evolve quickly and respond to the opening up of this new market and the commercial peculiarities which it entails.

This article briefly outlines the factors contributing to the changing LNG commercial world and highlights three key areas for consideration in the context of the sale of LNG into the US market.

A changing LNG market

One of the key factors in the evolution of the LNG market is the steady erosion of the compartmentalisation of that market. The world of LNG was once very predictable. The buyers were predominately Asian utilities buying Indonesian or Australian LNG under relatively rigid long-term supply arrangements. The US was an infrequent buyer of LNG, relying instead on its abundant domestic gas supplies and extensive pipeline network. Little available surplus LNG production, generally low Henry Hub prices in the US and the significant steaming time to the then four (now five with Excelerate Energy in operation) regasification terminals on the US eastern seaboard, were all significant entry barriers to the US market.

Times have certainly changed. US domestic gas production is in sharp decline. Most of the US basins have been thoroughly explored and developed and although large numbers of wells are being drilled in the US, most are proving to be dry. Crude prices appear to have moved for the foreseeable future into a new range and Henry Hub pricing has moved in parallel. Despite the uncertainties of Henry Hub pricing (certainly when compared to the comfortable predictability of crude-linked S-curve pricing models), the US is an attractive new market for the new Asian-Pacific and Middle Eastern LNG projects such as Tangguh, Sakhalin 2, Yemen LNG and Greater Gorgon. As these projects continue to move towards commercial production, the small quantities of free LNG in the market – shutdowns in Nigeria and the North West Shelf and the continuing production decline of the Indonesian Arun and Bontang plants have led to a frequently very tight market – were often being taken in 2005/06 to the US.

These factors have led US buyers to plan numerous regasification projects to serve the US market. Not all of the twenty-something potential projects will ever receive an LNG shipment and, interestingly, the latter part of 2006 has seen US buyers being priced out of the market by Japanese and Korean buyers, who are prioritising security of supply above all other factors and are willing to spend US\$9–10 per MMBtu. It remains to be seen whether the US market can sustain such pricing. However, it is absolutely clear that LNG will fulfil an increasingly large share of US energy requirements and, in the long term, the US market will be a strong factor in the dynamics of the LNG world.

With the US market becoming an attractive destination for Asian (as well as Middle Eastern) LNG, the remainder of this article focuses on three key areas for consideration by sellers into the US market, namely:

- issues concerning the LNG heating value;
- the collateral support required from LNG buyers and sellers; and
- the disconnect between upstream and downstream force majeure.

These issues highlight some of the differences which traditional LNG sellers, who market their LNG in the Asian market, will need to address when selling their LNG into the US market.

Heating value

The quality of LNG (ie the amount of energy generated by combustion) is characterised by the Higher Heating Value ('HHV') which is the standard measure used for commercial transactions. The US gas market has traditionally operated with gas which has a lower HHV than has usually been the case in sales to Asian LNG buyers. Sellers into the US market will be considering the basic chemical composition of their feedgas and how much of the longer chain hydrocarbon molecules (the 'NGLs') within that feedgas will have to be 'dropped out' in the liquefaction process. There may well be technical process issues for particular sellers as they try to meet both Asian specifications as well as US specifications with essentially one stream of LNG production. The range of HHV which is acceptable to both buyers will be small, and LNG producers will need to be wary of their product going off-spec. Buyers may be entitled to refuse cargoes if the HHV specification is too high, but more likely there will be discounts imposed on the price for the seller in that situation which will affect a liquefaction plant's economics.

Collateral support

In US deals, the buyer will generally take the volume risk (through take-or-pay) and the seller will take the price risk because pricing formulas tend to be based on unmitigated exposure to Henry Hub. This is in contrast to Asian LNG deals where the buyer usually takes both volume risk and price risk (albeit moderated in traditional models by an S-curve pricing formula which imposes a maximum and minimum price). Another important distinction is that US buyers are often single-purpose vehicles which either act as an LNG wholesaler or else operate the regasification plant (often as a toller). Even if not a single purpose vehicle, the buyer will still be exposed to the volatility of a gas market which is priced using Henry Hub. The US buyer may well have no assets other than its offtake contracts and, if not merely tolling, its regasification terminal. Even if the US buyer owns its regasification terminal, it may be still under construction and financed using structures which give priority to the project finance lenders to the regasification

plant rather than its LNG creditors. In contrast, the archetypal Asian LNG deal involves a Japanese or Korean power utility with a strong balance sheet and long-term stable demand deriving from its position in a regulated market.

As a result, in many deals supplying LNG into the US, security arrangements for contractual performance will be required from the buyer. Market evidence would tend to suggest that the rule of thumb for such supporting security is often about US\$1 billion for every million tonnes per annum (mtpa) of LNG which is to be supplied.

In turn, US buyers may often demand reciprocal collateral support from the seller citing the following reasons:

- the risk that the buyer will collapse if the seller fails to deliver LNG deliveries to it, and it is unable to meet its own obligations;
- the buyer is exposed because of reservation of capacity at the regasification terminal, and in the transportation network, and the liquidated damages which arise as a result of breach of those terminaling or transportation arrangements;
- the buyer's lenders will often demand that supply risk to the project be mitigated by seller support; and
- the LNG seller may well be a classic upstream unincorporated joint venture involving a disparate group of sellers with often radically different credit ratings, and the buyer may well wish to avoid having to go through the potentially painful process of suing such a group.

The success of these arguments will depend on the particular factors at play in the negotiation, and many stronger sellers have said they would reject out of hand a request for a letter of credit or parent company guarantee.

Force majeure disconnect

Force majeure is a contractual term where a party to a contract is excused from performing an obligation under that contract, or is entitled to suspend performance or claim an extension of time for performance, upon the happening of an event or events which is beyond its control. There may be a detailed list of events or merely a defined class of events within the contract. Non-payment of cash is never considered an event of force majeure. Often there will be detailed notice provisions in order to achieve the suspension of performance which must be followed. Once the particular event or circumstance has ended, then contractual performance should be resumed.

In the upstream component of an LNG project, force majeure provisions will usually be fairly wide-ranging and often bespoke through a process of detailed negotiation. The provisions will usually be anchored by a general description of events or circumstances which are beyond the control of a contractual party acting as a reasonable and prudent operator. The list will be stated to include, but not be limited to, Acts of God, war, terrorism and sabotage, and will usually extend to accident, failure, breakdown of production and delivery facilities and loss of, or damage to, LNG vessels where the LNG is being delivered *ex ship*.

Arguments on upstream force majeure will tend to revolve around issues such as whether host government action and a change in law should be included (particularly when the

selling consortium contains a national oil company which will be regarded by the buyer as part of the government), reservoir risk (but note the overarching obligation on the sellers to act as reasonable and prudent operators in their management of the reservoirs), harbour services provided by contractors at both the loading and the discharge ports and industrial disputes where the debate will revolve around whether a party should really be excused the consequences of its own industrial relations.

In contrast, sophisticated downstream gas markets such as in the US and the UK tend to have very limited definitions of force majeure. Both markets have evolved with a basis in natural gas (as opposed to LNG) where the natural gas is sourced domestically rather than internationally. In both markets, the proportions of LNG are set to grow rapidly but from a very low base. This heritage of natural gas, which has been sourced in low risk and politically secure regimes from a diverse group of fields and suppliers, has led to a very liquid market where gas traders know (and the markets expect) that alternative sources of gas can always be found at a price, and that price risk can be mitigated through hedging. As a consequence, the ability to claim force majeure in relation to the US and UK gas transmission regimes is generally very limited. The NBP 97 standard trading contract in the UK provides a good example: force majeure is strictly limited to a failure in the operation of the independently operated national transmission system and the nomination booking regime.

Contrast LNG. The feedgas for a cargo of LNG will usually be sourced from one gas field, which has to go through an onshore liquefaction plant often in a politically risky area and is dependent on a handful of LNG ships to take it thousands of miles safely to market. LNG is a much riskier business. The upstream feedgas producer may well have an entirely legitimate claim for force majeure in accordance with the feedgas delivery arrangements, but the LNG buyer and shipper into the US or UK transmission system, who has not received his LNG, may be unable to enforce that force majeure claim onto its offtaker. As a consequence the LNG buyer may be faced with charterparty costs and demurrage costs, capacity charges at the regasification terminal and transportation system and balancing charges in the transportation system and an obligation to source substitute LNG, LNG spot or, depending on the liquidity of the downstream gas market, pipeline gas. In a tight LNG market as we currently have, spot LNG cargoes may simply not be available. It may be that only the largest LNG players can reach into their top-hats and produce that extra LNG cargo!

Conclusion

The US market is set to play a greater role on the LNG world map. While this new market presents an exciting new opportunity, LNG sellers must familiarise themselves with the distinctive features of this new market and ensure that these issues are properly addressed in the contractual framework.

Ashley Wright

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Singapore 2007

The IBA's Annual Conference is this year being held in Singapore between 14 and 19 October. Details of the sessions the section will be holding are below and we look forward to seeing you there.

Arbitration in the energy and natural resources industries

Joint session with Arbitration.

Session Co-Chairs

Mark Baker *Fulbright & Jaworski LLP, Houston, Texas, USA; Vice-Chair, Arbitration*

Hunt Talmage *Chandler and Thong-Ek, Bangkok, Thailand; Vice-Chair, Section on Energy, Environment, Natural Resources and Infrastructure Law (SEERIL)*

Guido Tawil *M & M Bomchil, Buenos Aires, Argentina; Vice-Chair, Arbitration; Senior Vice-Chair, Latin American Forum*

The session will consider the use of arbitration to resolve disputes in the energy industry. Speakers will address current procedural and substantive issues of importance, including a review of the Energy Charter Treaty, protection to energy and mining projects afforded by BITs, resolution of inter-state disputes over boundaries or water rights and current contentious issues in the oil and gas industry.

Speakers

Graham Coop *Energy Charter Secretariat, Brussels, Belgium*

Mark McNeill *Shearman & Sterling LLP, Paris, France*

Wendy Miles *Wilmer Cutler Pickering Hale & Dorr LLP, London, England*

Michael Polkinghorne *White & Case LLP, Paris, France*

David W Rivkin *Debevoise & Plimpton LLP, New York, USA; Chair, Legal Practice Division*

Dominic Roughton *Herbert Smith LLP, Tokyo, Japan*

Nancy Turck *International Energy Agency, Paris, France*

Dorothy Ufot *Dorothy Ufot & Co, Lagos, Nigeria; Vice-Chair, Arbitration; Council Member, Legal Practice Division*

Robert Volterra *Latham & Watkins LLP, London, England*

Eduardo Zuleta *Zuleta Acosta Suarez Ibarra, Bogotá, Colombia*

**0930 – 1230 THURSDAY
Room 326, Suntec Convention Centre**

Environment, Health and Safety Law

Chair

Ian Rose *McDermott Will & Emery UK LLP, London, England*

The impact of environmental aspects on real estate projects around the globe

Joint session with the Real Estate Section.

Session Co-Chairs

Bernat Mullerat *Cuatrecasas, Barcelona, Spain; Vice-Chair, Environment, Health and Safety Law*

Carolina Zang *Zang Bergel & Viñes, Buenos Aires, Argentina; Vice-Chair, Real Estate Law*

All over the world, environmental regulation increasingly affects the way that real estate projects need to be developed, whether of an industrial, commercial, touristic or residential character.

Internationally, environmental laws are becoming more and more stringent, by implementing rules that tend to increase environmental liability to all players involved in any type of real estate development or investment. These include water and waste management, as well as land remediation obligations to any new owners of the property, and lender's liability and stakeholders' participation. These are just a few examples of the issues becoming more important for any real estate practitioner to consider during the development and implementation of any real estate transaction.

This session will examine the most recent and typical environmental requirements, from the different perspectives of speakers from Asia Pacific, Europe and the Americas and will describe the best way to approach the different problems that environmental compliance may present.

Speakers

Tzvi Levinson *The Levinson Environmental Law Firm, Haifa, Israel*

Ravi Nath *Rajinder Narain & Co, New Delhi, India; Chair, Aviation Law*

Nicolás Piaggio *Guyer & Regules, Montevideo, Uruguay*

Ho Kin San *Allen & Gledhill LLP, Singapore*

Birgit Spiesshofer *Hengeler Mueller, Berlin, Germany*

**0930 – 1230 WEDNESDAY
Room 304, Suntec Convention Centre**

Renewable electricity and clean development

Joint session with Power Law. See page 16 for details.

1430 – 1730 WEDNESDAY
Room 313, Suntec Convention Centre

Piracy and crimes at sea including pollution liability

Joint session with Maritime and Transport Law.

Session Co-Chairs

Peter Appel *Gorrissen Federspiel Kierkegaard, Copenhagen, Denmark;*
Senior Vice-Chair, Maritime and Transport Law

Claus-Peter Martens *Murawo, Berlin, Germany; Senior Vice-Chair,*
Environment, Health and Safety Law

Even today, piracy is a risk in shipping. Pirates may try to board cargo vessels in order to steal cash, cargo or even the entire vessel or hijack the crew. In the cruise industry, hijackers, and even terrorists, have been known to attack passengers. A well-known risk area where pirates operate is the Malacca Strait, and, with the conference being held in Singapore, the precautions taken in this region to avoid piracy will be examined. Insurance and charterparty implications arising out of the acts of pirates will also be considered. The environmental threats and the liability for oil pollution spills caused by piracy will be closely examined. Finally, a review of threats to cruise ships from hijackers or terrorists will be undertaken.

Speakers

Colin Au, *Singapore*

Derek Hodgson *Clyde & Co LLP LLP, London, England*

Jim Hohenstein *Holland & Knight LLP, New York, USA*

L Chidil Ilogu *Foundation Chambers, Lagos, Nigeria*

Chan Leng Sun *Ang & Partners, Singapore*

Anders Ulrik *Skuld, Copenhagen, Denmark*

0930 – 1230 THURSDAY
Ballroom 1, Suntec Convention Centre

International Construction Projects

Co-Chairs

Edward Corbett *Corbett & Co, Teddington, England*

Peter Wengler-Jørgensen *Plesner, Copenhagen, Denmark*

Constraints in the financing of PPP construction projects in emerging countries

Joint session with the Latin American Forum.

Session Co-Chairs

Jaime Herrera *Posse Herrera & Ruiz, Bogotá, Colombia; Vice-Chair,*
Latin American Forum

Dick Shadbolt *Shadbolt & Co LLP, Surrey, England*

The panel will discuss issues that affect constituents in PPP projects that seek financing. Such topics include:

- harmonisation of interests: fixed project costs versus protection for price fluctuations (the point of view of the contractor, state entities, financiers and owners);
- credit enhancement mechanisms needed in developing countries (country risk, exchange risk, regulatory risk), alternatives (local currency loans, insurances, cash reserves, pros and cons for contractors, state entities, financiers and owners);
- adequate vehicles to meet objectives of all constituents (bankruptcy risk, contracting flexibility, safe-harbour for developers, shield of political pressures); and
- the role of public entities *vis-à-vis* the financing of PPP projects.

Speakers

Eugenio Besa *Morales Noguera Valdivieso & Besa, Santiago, Chile*
James Harris *Lovells Lee & Lee, Singapore*

Darrell Corner *Jardine Lloyd Thompson Asia, Hong Kong SAR*

Adriano Jucá *Construtora Odebrecht SA, São Paulo, Brazil*

Sindur Mangkoesobroto *PT Nusantara Tunnel Indonesia, Bandung,*
Indonesia

Anthony Marshall *Lovells LLP, London, England*

Keith Martin *IPAc Group, Singapore*

Ivan Mattei *Debevoise & Plimpton LLP, New York, USA*

Lynn Tho *HSBC, Singapore*

0930 – 1230 MONDAY
Room 308, Suntec Convention Centre

EPC contracting in the PPP environment

Session Chair

Tim Reynolds *Constant & Constant, London, England; Chair, Standard*
Forms Subcommittee

This session will depart from the usual discussion of financing PPP to consider the realities of life as a contractor with full engineer-procure-construct responsibility on a PPP project. Among the issues to be considered by an expert panel of speakers are:

- The EPC contractor may be well motivated, but in practice does this lead to completion on time and on budget?
- What has become of the many risks inherent in construction?
- What sorts of disputes arise and how are they resolved?
- What is the impact in practice of the long-term financial interest of the contractor?
- Or do contractors make their money and sell out as soon as possible?

Speakers

George Rosenberg *Corbett & Co, Teddington, England; Chair,*
Contract Law and Regulations Subcommittee

Herfried Wöss *Wöss & Partners SC, Mexico City, Mexico*

0930 – 1230 TUESDAY
Room 312, Suntec Convention Centre

Getting paid – the contractors' challenge

Session Co-Chairs

Thomas P Wilson *Kilpatrick Stockton LLP, Atlanta, Georgia, USA; Chair,*
Construction Management Subcommittee

John Wright *Lane & Partners LLP, London, England; Vice-Chair,*
Construction Management Subcommittee

This session will revisit an enduring problem area that encompasses a range of hardcore topics of concern to construction lawyers everywhere. The panel of speakers will use their vast experience to consider a range of interesting issues, including:

- security for payment: retention of title, liens and other securities;
- disruption: what is it, how to prove it, and how to get paid for it;
- contractor rights and remedies in suspension and termination;
- collecting on dispute board decisions; and
- interest and financing charges.

Speakers

Peter Atkinson *Navigant Consulting, London, England*

Christopher Chuah *WongPartnership, Singapore*

David Kyte *Hill International, London, England*

1430 – 1730 TUESDAY
Room 312, Suntec Convention Centre

Exclusion and limitation of liability in construction contracts

Session Chair

Martin Bridgewater *Herbert Smith LLP, London, England; Vice-Chair, Contract Law and Regulations Subcommittee*

This session will consider the different approaches in various jurisdictions to problems including attempts to cap liability and attempts to exclude or restrict liability for loss of profits, business interruption, tortious liability (where appropriate) and other indirect/consequential losses, and indeed the definition of direct/indirect losses.

The session will consider a case study scenario and a bespoke limitation of liability clause to draw out the key issues in relation to the different types of losses, with speakers from a number of jurisdictions.

Speakers

Stanley Chaney *LMT Avocats, Paris, France*

Marco Dalla Vedova *Dalla Vedova Studio Legale, Rome, Italy; Vice-Chair, Technology Law*

Johan Granehult *Mannheimer Swartling, Malmö, Sweden*

Nicholas Henchie *Mayer Brown Rowe & Maw LLP, London, England*

Roberto Hernandez Garcia *Comad SC, Mexico City, Mexico; Chair, Government Procurement Subcommittee*

Robert Knutson *Corbett & Co, Teddington, England*

Claus Lenz *Lungerich & Lenz, Cologne, Germany; Co-Chair, Dispute Resolution Subcommittee*

Bridget McKinney *Denton Wilde Sapte, Cairo, Egypt*

Keith Phillips *Watt Tieder Hoffar & Fitzgerald LLP, McLean, Virginia, USA*

Manoj K Singh *Singh & Associates, New Delhi, India*

Paul Wong *Rodyk & Davidson LLP, Singapore*

0930 – 1230 THURSDAY

Room 309, Suntec Convention Centre

Latest developments in international construction

Session Co-Chairs

Edward Corbett

Peter Wengler-Jørgensen

This annual session will consider recent developments relevant to practitioners in all areas of international construction law. The areas covered will include:

- new standard forms of contract;
- developments in dispute boards and dispute resolution;
- reports on adopted projects;
- procurement;
- financing structures;
- contract law and regulation; and
- construction management.

The last half hour of the session will be devoted to committee planning and activities such as topics discussed on ICP-Net (the committee's listserv) and articles in *Construction Law International* (the committee magazine).

Speakers

Edward Corbett

Peter Wengler-Jørgensen

1430 – 1730 THURSDAY

Room 307, Suntec Convention Centre

Mining Law

Chair

Patricia Núñez *Núñez Muñoz & Cía Ltda Abogados, Santiago, Chile*

Development and financing of infrastructure for mining projects

Joint session with the Financial Services Section.

Session Co-Chairs

Richard Drummond *Export Credits Guarantee Department, London, England*

Ignacio Randle *Estudio Randle, Buenos Aires, Argentina; Treasurer, Mining Law*

Luis Carlos Rodrigo *Rodrigo Elías & Medrano Abogados, Lima, Peru; Senior Vice-Chair, Mining Law*

This session will analyse in depth two of the most important issues related to big-scale mining projects: financing and putting infrastructure in place. The panel will be based on a hypothetical situation related to a gold mining project located in the Far East.

Speakers

Patrick Garver *Barrick Gold Corporation, Toronto, Ontario, Canada*

Florencia Heredia *Estudio Beccar Varela, Buenos Aires, Argentina; Newsletter Editor, Mining Law*

Jeff Smith *Norton Rose LLP, Singapore*

Ting Ting Tan *Clifford Chance LLP, Hong Kong SAR*

1430 – 1730 MONDAY

Room 205, Suntec Convention Centre

Influence of China and India on the mineral industry

Joint session with the Asia Pacific Forum.

Session Chair

Vivien Chan *Vivien Chan & Co, Hong Kong SAR; Co-Chair, Asia Pacific Forum*

Patricia Núñez

During the last few years, China's and India's economic growth has had an important impact on the prices of minerals. The panel will explore the way in which such economic growth has actually impacted the prices of minerals; which minerals felt the most impact; whether such impact has been material to the increase in the prices of minerals; and whether China's and India's influence will continue in the future. A general overview of the current economic conditions in the Chinese and Indian markets will be discussed.

Speakers

Peter Arthur *Anglo American South Africa Ltd, Johannesburg, South Africa; Website Coordinator, Mining Law*

Roberto Fortunati *Fortunati y Lucero Abogados, Buenos Aires, Argentina*

Li Lan *Beijing General Research Institute of Mining and Metallurgy, Beijing, China*

Shivpriya Nanda *J Sagar Associates, New Delhi, India*

0930 – 1230 TUESDAY

Room 313, Suntec Convention Centre

Security of tenure

Joint session with Oil and Gas Law.

Session Co-Chairs

Emad Khalil *Jones Day, Singapore*

Peter Leon *Webber Wentzel Bowers, Gauting, South Africa; Vice-Chair, Mining Law*

Security of tenure is generally regarded as second only to geology in determining the viability of new mining or oil and gas projects. Does resurgent resource nationalism in Latin America and Africa mark a throwback to the new international economic order of the 1970s, or is it merely indicative of a more assertive state? What can natural resources companies do about protecting their assets from expropriation or fiscal measures having similar or equivalent effect? A distinguished panel from the developing and the developed world will examine this topic and suggest possible solutions from a mining and an oil and gas perspective.

Speakers

Fernando Aguirre *Bufete Aguirre, La Paz, Bolivia*

Alex Cull *Norton Rose LLP, Singapore*

Alan Gourley *Crowell and Moring, Washington DC, USA*

Peter Leon

Peter Roberts

0930 – 1230 WEDNESDAY
Room 314, Suntec Convention Centre

Oil and Gas Law

Chair

Peter Roberts *Centrica Energy, Berkshire, England*

Who is to blame? Allocating liability in upstream project contracts

Session Chair

Peter Roberts

This session will address the following issues:

- the models for the equitable allocation of risk in upstream project contracts – mutual hold harmless, guilty party pays and other liability allocation regimes;
- how to draft an effective cross-indemnity structure to ensure risk allocations are effectively structured;
- liability allocation models in standard contracts;
- the application of effective clauses limiting or excluding liabilities; and
- the role that insurance can play in structuring effective risk allocations – and the inevitable limitations of insurance.

Speakers

Toby Hewitt *Herbert Smith LLP, Jakarta, Indonesia*

Quentin Loh SC *Rajah & Tann, Singapore*

Ashley Wright *Ashurst, Singapore*

0930 – 1230 MONDAY
Room 306, Suntec Convention Centre

Security of tenure

Joint session with Mining Law. See page 15 for details.

0930 – 1230 WEDNESDAY
Room 314, Suntec Convention Centre

The bottom of the barrel? The prospects for refineries in Southeast Asia

Session Chair

Alex Cull

This session will address the following:

- strategic outlook – the growth of, and the prospects for further growth of, oil and gas refining and processing capacity in Southeast Asia;
- a summary of the legal, regulatory and environmental issues associated with operating existing refinery and processing projects and developing new projects;
- the financing of new refinery and processing projects – what are the sources of funds, the financing structures, the risks and how are the risks mitigated?
- the prospects for the greater integration of refinery and processing capacity in Asia – at the corporate level and through greater inter-regional governmental cooperation (eg the intervention of ASEAN).

Speakers

Emad Khalil

Kelvin Wong *Allen & Gledhill LLP, Singapore*

1430 – 1730 WEDNESDAY
Room 312, Suntec Convention Centre

Power Law

Co-Chairs

C Baird Brown *Ballard Spahr Andrews & Ingersoll LLP, Philadelphia, Pennsylvania, USA*

Carlos Umaña *Brigard & Urrutia, Bogotá, Colombia*

Renewable electricity and clean development

Joint session with Environment, Health and Safety Law.

Session Co-Chairs

C Baird Brown

Ian Rose *McDermott Will & Emery UK LLP, London, England; Chair, Environment, Health and Safety Law*

Renewable electricity generation can promote economic growth while helping to reverse global-warming trends. This programme will explore the role of renewable electricity in both developed and developing economies. Topics include:

- available and emerging technologies and their suitability in varying geological and institutional circumstances;
- the role of distributed renewable resources in electricity markets, in a centrally dispatched grid and beyond the reach of the grid;
- renewable electricity under the Kyoto Protocol and the EU Emissions Trading Scheme (ETS): Joint Implementation (JI) and Clean Development Mechanism (CDM) projects;
- other regulatory and policy regimes that hinder and assist renewable electricity, including emissions reduction schemes and electricity regulation; and
- issues affecting the financing of renewable electricity facilities including state support.

Speakers

Nicholas Brunton *Henry Davis York, Sydney, New South Wales, Australia*

Ed Feo *Milbank Tweed Hadley & McCloy, Los Angeles, California, USA*

John Kettle *Mason Hayes + Curran, Dublin, Ireland; Vice-Chair, Public Law*

Owen Lomas *Allen & Overy LLP, London, England*

Christopher Tung *Malleson Stephen Jacques, Hong Kong SAR*

1430 – 1730 WEDNESDAY
Room 313, Suntec Convention Centre

Manipulation of electricity markets

Session Chair
Carlos Umaña

Modern wholesale electricity markets have been superimposed on transmission grids designed primarily for monopoly service territories. Because of transmission congestion, the need to generate electricity at the time of use, and highly inflexible consumer demand, local or regional monopoly power can easily arise at times of peak demand. Poorly designed markets, such as the initial California markets, exacerbate these problems. This programme explores:

- structural and market design issues that provide the ability and incentive to manipulate markets;
- the market design and regulatory response; and
- the unintended consequences.

Speakers

C Baird Brown

Mark Carkeet *Minter Ellison, Brisbane, Queensland, Australia*

Gonzalo Delaveau *Guerrero Olivos Novoa y Errázuriz Ltda, Santiago, Chile*

Lothar Ende *Heuking Kühn Lüer Wojtek, Hamburg, Germany*

1430 – 1730 THURSDAY

Room 309, Suntec Convention Centre

Water Law

Chair

John Crothers *Gide Loyrette Nouel, Paris, France*

Procuring water projects in Southeast Asia with particular reference to China and India

Joint session with the Asia Pacific Forum.

Session Chair

Mark Lane *Pinsent Masons, London, England; Council Member, Energy, Environment, Natural Resources and Infrastructure Law Section*

The need for more water, wastewater and desalination plants is becoming more acute year by year driven by population growth and climate change, amongst other things. Nowhere is the need greater than in Southeast Asia, including India and China. This session will focus on the drivers behind this massive and growing market, some of the key opportunities, risks and challenges involved, and how they can be addressed in the project documentation drafted for these projects.

Speakers

Nadine Ganesan *Gide Loyrette Nouel, Beijing, China*

Sujain Talwar *Economic Laws Practice, Mumbai, India*

Jiangang Wang *Jun He Law Offices, Beijing, China*

0930 – 1230 MONDAY

Room 313, Suntec Convention Centre

Private ownership of water

Session Chair

John Crothers

'Russia to allow acquisition of water bodies for private ownership'

(Headline in *Pravda*, 19 February 2004)

Farmers who share the water in underground aquifers throughout the western United States know that the aquifers are being exhausted faster than they can be replenished. By contrast, if each farmer had a share of the water that was his / her own, his / her conservation efforts would be rewarded since he / she could sell the rights to any unused water to other water users. The reckless waste and abuse of commonly owned (or unowned) resources has been dubbed the 'Tragedy of the

Commons' by economists and is a problem that is evident in some form in almost every area of public policy (National Center for Policy Analysis). 'Water flows uphill to money and power.' (Californian proverb quoted in Mason's Water Yearbook). This session will examine the pros and cons of private ownership of water rights, looking at world practice and at the results on prices, availability to consumers and conservation.

Speakers

Olobunmi Fayokun *Aluko & Oyeboode, Lagos, Nigeria*

Mary Ellen Hogan *Holme Roberts & Owen LLP, Los Angeles, California, USA*

Martin Schellenberg *Heuking Kühn Lüer Wojtek, Hamburg, Germany*

1430 – 1730 MONDAY

Room 313, Suntec Convention Centre

Incentive based mechanisms in the water and wastewater sectors/risk sharing in water projects: contractual versus regulatory

Session Chair

Linda Evans *Clayton Utz, Sydney, New South Wales, Australia*

The water sector typically 'trails the field' in the reform of utilities with high levels of public sector involvement and little relationship between prices and costs and prices and consumption. As water becomes more scarce and governments become increasingly reluctant to fund infrastructure, something has to give. The old models don't have a high enough level of business orientation to make the sector attractive to investors. This session will focus on ways in which this can be addressed, looking at contractual and regulatory models for efficient pricing and achieving the right risk/reward balance.

Speakers

Gesner de Oliveira Filho *R Estados Unidos, São Paulo, Brazil*

Brian Fisher *CRA International, Canberra, Australian Capital Territory, Australia*

Mark Lane

1430 – 1730 TUESDAY

Room 313, Suntec Convention Centre

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Regulating Energy and Natural Resources

Editors: Barry Barton, Alastair Lucas, Lila Barrera-Hernández, and Anita Rønne

Democratisation, globalisation, and increased environmental awareness have had a profound impact on the regulation of industry in the energy and natural resources sector. This book, a co-publication with Oxford University Press, analyses the changes in character of the way this industry is regulated, and seeks to make connections with theoretical perspectives on regulation as a major part of the modern legal system.

- Analyses changes in industry regulation and makes interconnections with theoretical perspectives
- Examines a wide range of alternatives to traditional regulation
- Written by an international group of contributors, with case studies from the Netherlands, the USA, Singapore, New Zealand, and the UK
- Looks at the topical controversies of non-state actors and globalisation

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