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Offshore Energy

# Contracts and Disputes

Surveying the law from both sides of the Pond

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# INTRODUCTIONS

- Jeremy Farr
- Clare Kempkens
- Beth Gilman
- Hannah Warren
- Charles Lockwood
- John Sullivan III
- Jason Rudloff

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# AGENDA

## Contracts Session

- Indemnities on both Sides of the Atlantic
- Change Orders – what can possibly go wrong?

Coffee

## Disputes Session

- Attorney Client Privilege – the UK and Texas compared
- The Good, the Bad and the Ugly: Recent cases and issues

Questions and drinks

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# Indemnities on both sides of the Atlantic

Clare Kempkens, Beth Gilman and Hannah Warren

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# INTRODUCTION

- A look at two fundamentally different approaches
- Some key updates in both jurisdictions
- Areas of cross-over and how the approach of one jurisdiction can influence the other

## INDEMNITY SCHEMES ENFORCEABILITY AND APPROACH

- Threshold question: choice of law
  - Federal maritime law generally enforces indemnification agreements
  - State laws (i.e., Texas and Louisiana) have statutes that can void indemnification agreements

# INDEMNITY SCHEMES ENFORCEABILITY AND APPROACH

- The oilfield patch has its own legislation under state law
  - Texas Oilfield Anti-Indemnity Act ("TOAIA"), Tex. Civ. Prac. & Rem Code § 127.003
    - Expressly prohibits indemnification agreements pertaining to a well for oil, gas, water, or a mine for minerals
    - Carve-Outs: JOAs, Mutuality Provisions, Unilateral Caps
  - Louisiana Oilfield Anti-Indemnity Act, ("LOAIA"), La. Rev. Stat. § 9:2780(A)
    - Expressly prohibits indemnification agreements pertaining to a well for oil, gas, water, or a mine for minerals, but does not prohibit indemnification for property damage
    - Broader than TOAIA

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# INDEMNITY SCHEMES ENFORCEABILITY AND APPROACH

- Crucial question—what law applies to a contact for offshore oilfield services to facilitate drilling & production on navigable waters?
- Old Test: *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313 (5th Cir. 1990)
  - Employed a six-factor test to determine whether a contract was "maritime":
    - (1) what does the specific work order in effect at the time of the injury provide?;
    - (2) what work did the crew assigned under the work order actually do?;
    - (3) was the crew assigned to work aboard a vessel in navigable waters?;
    - (4) to what extent did the work being done relate to the mission of that vessel?;
    - (5) what was the principled work of the injured worker?; and
    - (6) what work was the injured worker actually doing at the time of the injury?

## INDEMNITY SCHEMES ENFORCEABILITY AND APPROACH

- *In re Larry Doiron, Inc.*, 879 F.3d 568 (5th Cir. 2018) (en banc)
  - Apache signs MSA with Specialty Rental Tools, with indemnity clause running in favor of Apache and its contractors
  - Larry Doiron, Inc. (LDI), as Apache's contractor, provides crane barge to help Specialty Rental facilitate flow-back operation
  - LDI crane operator strikes and injures Specialty Rental employee, then later seeks indemnity from Specialty Rental pursuant to MSA

## INDEMNITY SCHEMES ENFORCEABILITY AND APPROACH

- New Test: *In re Larry Doiron, Inc.*, 879 F.3d 568 (5th Cir. 2018) (en banc)
- To determine whether to apply maritime law to a contract for oilfield services on navigable waters, ask:
  - Is the contract one to provide services to facilitate the ***drilling or production of oil and gas on navigable waters***; and
  - Does the contract provide or do the parties expect that a ***vessel will play a substantial role*** in the completion of the contract?
- If the answer to each question is “yes,” then maritime law applies

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# MARITIME VS. STATE LAW

| | Drilling & Production of Oil & Gas on Navigable Waters | |
|---|---|---|
| **Vessel Plays a Substantial Role** | Per Se Maritime:<br>• O&G drilling from vessel<br>• P&A underwater pipeline<br>• Supplying submersible drilling barge | Depends on Relation to Drilling & Production:<br>• Lightering services<br>• Wireline services |
| | Depends on Expectation and Use of Vessel:<br>• Offshore construction | Likely Apply State Law:<br>• Engineering Contracts<br>• Contracts for drilling from fixed platform |

# INDEMNITY SCHEMES ENFORCEABILITY AND APPROACH

- What can you do?
  - Contract clearly – Memorialize parties' expectations as to the extent a vessel will be used

    *See In re Larry Doiron, Inc.*, 878 F.3d 568 (5th Cir. 2018) (en banc) (focusing on the "nature and character of the contract" and the parties' expectations at the time of contracting)
  - Leverage Mutual Indemnity Obligations

    *See Ken Petroleum Corp. v. Questor Drilling Corp.*, 24 S.W.3d 344, 350 (Tex. 2000) (holding that when parties agree in writing to a mutual indemnity obligation supported by liability insurance coverage, amount of coverage need not be specified in agreement but recovery is limited to lower amount of insurance); *see also Liberty Mut. Fire Ins. Co. v. Axis Surplus Ins. Co*., No. A-16-CA-00870-SS, 2017 WL 6420920, at *4 (W.D. Tex. Dec. 14, 2017) (citing Ken Petroleum Corp., and holding that "the lowest common denominator of insurance coverage between the parties [to a mutual indemnity obligation] will control.").

# INDEMNITY SCHEMES
# GROSS NEGLIGENCE AND EXEMPLARY DAMAGES

- The Texas Civil Practice and Remedies Code
- Gross negligence clearly defined
  - An act or omission "(A) when viewed objectively from the standpoint of the actor at the time of its occurrence involves ***an extreme degree of risk***, considering the probability and magnitude of the potential harm to others; and (B) of which ***the actor had actual, subjective awareness of the risk involved***, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others." Tex. Civ. Prac. & Rem. Code § 41.001(11).
- Plaintiff must prove by "clear and convincing" evidence

## INDEMNITY SCHEMES
## GROSS NEGLIGENCE AND EXEMPLARY DAMAGES

- Under maritime law, the Fifth Circuit has defined gross negligence as "**harm willfully inflicted or caused by gross or wanton negligence**." *Becker v. Tidewaters, Inc.*, 586 F.3d 358, 67 (5th Cir. 2009) (quoting *Todd Shipyards Corp. v. Turbine Serv., Inc.*, 674 F.2d 401, 411 (5th Cir. 1982)).

# INDEMNITY SCHEMES
# FINES AND PENALTIES

- Under Texas law, it's less clear…
- TXSC has not addressed the issue.

*See Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653 (Tex. 2008) (Hecht, J., concurring) (acknowledging it's "an issue on which [the Texas Supreme Court] has expressed no opinion," but suggesting that such indemnification schemes may be against public policy); *see also Atlantic Richfield Company v. Petroleum Personnel, Inc.*, 768 S.W.2d 724 n.2 (Tex. 1989) (expressly declining to decide whether indemnity for one's own gross negligence or intentional injury is permissible, but noting that "[p]ublic policy concerns are presented by such an issue that have not been argued or briefed by the parties.").

- Appellate court holdings are a mixed bag.

*Compare Valero Energy Corporation v. The M.W. Kellogg Construction Company*, 866 S.W.2d 252, 258 (Tex. App.—Corpus Christi 1993, writ denied) (holding in a case with sophisticated parties who heavily negotiated the contract at issue that an agreement providing prospective indemnity for gross negligence did not offend public policy), *with Hamblin v. Lamont*, 2013 Tex. App. LEXIS 14875, at *5 (Tex. App.—San Antonio December 11, 2013, no pet. h.) (invaliding indemnity provision on fair notice grounds but also stating, "[m]oreover, we question whether public policy would prevent Lamont from 'prospectively contractually exculpat[ing himself] with respect to intentional torts' even if the indemnity provisions contained the specific language.").

# INDEMNITY SCHEMES FINES AND PENALTIES

- Under Maritime law, public policy and deterrence is limiting factor.
- Per *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, MDL 2179 (E.D. La. January 26, 2012), a party may be indemnified for its own gross negligence (pending express language of contract, sophistication of parties, and mutuality of risk), but party ***may not*** be indemnified for:

  Gross Negligence (Punitive Damages)

  Willful Misconduct / Intentional Torts

  Civil Fines & Penalties (e.g., CWA, OPA)

  Criminal Fines & Penalties

# INDEMNITY SCHEMES ENFORCEABILITY AND APPROACH

- Nothing special about oil & gas
- Knock for knock well recognised
- Freedom of contract (but note the cases on clear wording and proper interpretation)

➢ The relevant question is not normally whether you ***can*** exclude/indemnify but whether on a proper interpretation you ***have done so***

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# INDEMNITY SCHEMES - UCTA

- Policy based – aimed at consumers, parties with unequal bargaining power. Consumer protection now largely elsewhere.
- Does UCTA actually apply?
- It is of no (or restricted) application to:
  - Contracts governed by English law only through choice
  - International Supply Contracts
  - IP
  - Insurance
  - (save for Section 2(1)) salvage, towage, charterparties, carriage of goods

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# INDEMNITY SCHEMES - UCTA

If UCTA applies then two key sections, 2 (Negligence) and 3 (Contract) apply to "exclusions" and "restrictions" and therefore potentially to indemnity schemes

| | |
|---|---|
| S.2.1 | prohibits exclusion of liability for negligence for death or personal injury (but fear not….!) |
| S.2.2 | requires that all other exclusions of liability for negligence are "reasonable" |
| S.3 | prohibits the exclusion of liability for breach unless it is "reasonable" but only where one contracting party deals on the other's written standard terms of business. |
| S.6 | prohibits the exclusion of liability for breach of certain provisions of the SoGA |

# INDEMNITY SCHEMES
# FINES AND PENALTIES

- Unlikely as a matter of English law that a party can be indemnified for fines and penalties
- Public policy, not statute based
- Sliding scale of certainty depending on how egregious the conduct/the crime is

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# INDEMNITY SCHEMES
# FINES AND PENALTIES

| | |
|---|---|
| Criminal fines and penalties | |
| Civil fines and penalties | |
| Wilful Misconduct | |
| Gross Negligence (punitive damages) | |

# INDEMNITY SCHEMES
# GROSS NEGLIGENCE…AND…?

- No equivalent to the Civil Practice and Remedies Code
- Came over …but without the structure
- No enhanced standard of proof
- No punitive damages (only contractually agreed implications follow)

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## AN INTERESTING QUESTION?

If punitive damages (perhaps for GN) are payable in the US, can they be recovered under an English law indemnity?

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# Change orders – what can possibly go wrong?

Jeremy Farr

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# INTRODUCTION

This session looks at some of the pitfalls we come across in change order provisions and how English law can be expected to deal with them.

# COMMON THEMES

- Is the work additional?
- Has an instruction been given?
- Can a contractor refuse an instruction?
- What work can an employer omit?
- Is there an implied promise to pay for additional work?
- Is strict compliance with time limits and dispute escalation procedures necessary?
- Is there truly an ‘absolute’ discretion?
- When does the prevention principle operate to make time at large?

# WORKSCOPE

- Original Scope of Work – what is extra?
  - Is it described or “reasonably to be inferred”?
  - Is the commitment to build a thing which does a job or to perform particular work?
  - How much design responsibility is the contractor undertaking?
  - Is there a responsibility to meet codes or class?
- Are the entitlements to variations back to back up the contract chain?

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# THE RIGHT TO VARY

- Without a specific right to vary – the only way to change the workscope is for the parties to agree
- A unilateral right to vary is common in land based construction/engineering contracts
  - "An instruction under Clause 14.1(a) will constitute a Variation. When required by the Company, on receipt of any such Variation, the Contractor shall proceed immediately as instructed even though the amount of any adjustment to the Contract Price and/or Schedule of Key Dates may not have been determined"

  [LOGIC General Conditions of Contract for Construction clause 14.1(b)]
- More limited in shipbuilding e.g. SAJ
  - Unless a change is compulsory and required by Class or another regulatory body, the builder is only obliged to make the change if the change itself, or an accumulation of changes, does not adversely affect the builder's planning or program in relation to its other commitments and provided further that the buyer first agrees to alterations in the Contract Price, the Delivery Date and other terms and conditions of the Contract and Specifications occasioned by or resulting from such modifications and/or changes

# THE IMPORTANCE OF AN INSTRUCTION

- The contractor needs an instruction to carry out the varied work to maximise its chances of being able to claim for that work
- In what form?
  - In writing
  - On designated VOR forms
  - But, e.g. LOGIC does not prescribe other than “in writing”
  - Comments on drawings?
  - Correspondence and MOMs?
  - Site instructions
  - *Bluewater Energy Services BV v Mercon Steel Structures BV and others* [2014] EWHC 2132 (TCC)

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# THE IMPORTANCE OF AN INSTRUCTION

- Avoid a situation where the client can say it had a right to consider and reject the changed work but the contractor gave it no real chance to do so
- An instruction is not the same thing as permission to do something
- An instruction can be WP to the parties' positions – you can (and often should) say "*We believe this to be additional work, we recognise you disagree and this will need to be resolved but WP to both parties' positions please instruct us whether or not to proceed with the work*"

# THE FORMALITIES

- The instruction needs to be in writing, from the correct representative, as part of the official numbered correspondence.
- If it doesn't fulfil the contract formalities it is not a contractual instruction.
- When seeking that instruction the contractor should try to ensure that it has provided all the information which is reasonably needed/available in order for its client to decide what it wants to do – not doing so could cause trouble later.

# REFUSING AN INSTRUCTION

- Under a standard form engineering/construction contract, e.g. LOGIC, refusing an instruction can lead to termination
  - *Bluewater v Mercon*
- But under a standard shipbuilding contract, e.g. SAJ, the builder is not obliged to proceed until the parties have agreed the terms, although beware if the change is compulsory:

> "*In the event that, after the date of this Contract, any requirements as to class, or as to rules and regulations to which the construction of the VESSEL is required to conform are altered or changed by the Classification Society or the other regulatory bodies authorized to make such alterations or changes, the following provisions shall apply:*
>
> > *(a) If such alterations or changes are compulsory for the VESSEL, .., the BUILDER shall thereupon incorporate such alterations or changes into the construction of the VESSEL, provided that the BUYER shall first agree to adjustments required by the BUILDER in the Contract Price, the Delivery Date and other terms and conditions of this Contract and Specifications occasioned by or resulting from such modifications and/or changes….*"

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# REFUSING AN INSTRUCTION

# REFUSING AN INSTRUCTION

- Tension between the builder's likely contractual obligation to deliver a vessel which complies with Class and regulatory requirements and the builder's right not to make compulsory changes without the consequences being first agreed
- Resolving the contractual "limbo"
  - Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848 (Comm)
- Rescission of contract by buyer pursuant to an express right due to failure to achieve sea trials by a contractually specified date
  - Compulsory changes from UK Maritime and Coastguard Agency
  - Builder's argument, that buyer was not entitled to rescind because time was at large due to the operation of the prevention principle as there was no mechanism to resolve the limbo, failed thanks to a broader interpretation of the contract as a whole
  - "*it is inherently unlikely that the parties would have intended there to be such a "limbo", particularly in an obviously foreseeable situation such as a failure to agree an adjustment*"

# EXERCISE OF RIGHT TO OMIT WORK

- Contractor has not only the duty to carry out the work but also the corresponding right to be allowed to complete the work which it has contracted to perform
- So provisions depriving the contractor of that right must be construed carefully
  - The correctness of the exercise of the right to instruct the omission of work will be determined objectively by reference to whether the right is used for a purpose envisaged by the contract (*Abbey Development Limited v PP Brickwork Limited [2003] EWHC 1987)*
  - Reasonably clear words are required if the work is to be removed in order to have it performed by someone else – not a route to get out of a bad bargain by having the work done by someone at lower cost
    - FIDIC expressly excludes omission of work if that work is to be transferred to others to perform; LOGIC is silent
  - Similarly where the employer wishes to omit work to avoid paying for a contract it can no longer afford (*Stratfield Saye Estate Trustees v AHL Construction Limited* [2004] EWHC 3286 (PCC))

# IMPLIED PROMISE TO PAY FOR EXTRA WORK

- Work done which falls outside the defined work in the contract
  - Separate contract for the additional work (*Blue Circle Industries v Holland Dredging Co* [1987] 37 B.L.R.40)
  - Payment on a quantum meruit basis in restitution

- Not available to a contractor who has failed to comply with the contractual change order mechanism (*S&W Process Engineering v Cauldron Foods Limited* [2005] EWHC 153 (TCC))

# TIMING AND ESCALATION

- Timing matters – failure to follow contract procedure and obey contract time limits can lose the contractor the right to be paid.
- If there are requirements for meetings of contract reps and senior management then document any meetings as part of formal project correspondence with reference to the particular provisions and ensure all formalities are complied with. Failure to do so can delay the right to go to arbitration and might mean a time limit is missed.
  - English law will enforce the strict letter of such provisions (e.g. *Gard Shipping v Clearlake Shipping* [2017] EWHC 1091 (Comm))
  - Compliance with each stage of a mandatory dispute escalation process will act as a condition precedent to the next stage and all stages must have been completed before the dispute can be referred to arbitration or the courts (see e.g. *Channel Tunnel group v Balfour Beatty Construction* [1993] AC 334)

# EXERCISE OF DISCRETION

- Mercon must "immediately commence and thereafter continuously proceed with action *satisfactory to Bluewater* to remedy such default"
- Held: Not to be construed by reference to an objective standard
- But, there were limitations on the ability of Bluewater to come to a decision as a decision-maker, as a matter of necessary implication by concepts of
  - honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality (*Socimer International Bank Limited (in liquidation) v Standard Bank London Limited* [2008] EWCA Civ 116)
- Bluewater's exercise of its discretion was proper

# IS A VARIATION AN ACT OF PREVENTION?

- Mr Justice Hamblen in *Adyard* summarised the prevention principle as follows:
- "*(1) In a basic shipbuilding contract, which simply provides for a Builder to complete the construction of a vessel and to reach certain milestones within specific periods of time, the Builder is entitled to the whole of that period time to complete the contract work.*
- *(2) In the event that the Buyer interferes with the work so as to delay its completion in accordance with the agreed timetable, this amounts to act of prevention and the Builder is no longer bound by the strict requirements of the contract as to time.*
- *(3) The instruction of variations to the work can amount to an act of prevention.*
- *However, as Jackson J stated in the Multiplex v Honeywell case, the prevention principle does not apply if the contract provides for an extension of time in respect of the relevant events. Where such a mechanism exists, if the relevant act of prevention falls within the scope of the extension of time clause, the contract completion dates are extended as appropriate and the Builder must complete the work by the new date or pay liquidated damages (or accept any other contractual consequence of late completion)….*"

# IN SHORT

- Clarity of thought and drafting are critical with clear and workable processes
- Follow those processes carefully
- Respect the time limits for notification
- Respect the dispute escalation provisions
- Document it all through official project correspondence
- Learn from the experience of other projects in dispute

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# Attorney-Client Privilege

Charles Lockwood and John F. Sullivan III

# INTRODUCTION

- What is privilege
- Why are we talking about it
- Fundamentals under English law
- Fundamentals under Texas law
- Examples - how the approaches of the English courts and Texas courts compare

# WHAT IS PRIVILEGE?

- A substantive legal right which acts as a shield against the disclosure of communications in legal proceedings
- “a fundamental human right”
- Necessary for:
  - public interest, and
  - the administration of justice

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# PRIVILEGE UNDER ENGLISH LAW

## Legal Professional Privilege

Legal Advice Privilege

Litigation Privilege

# LEGAL ADVICE PRIVILEGE

- Confidential communications
- Between a Lawyer and Client (or intermediate agent of either)
- For the purpose of seeking or providing legal advice or assistance

# LEGAL ADVICE PRIVILEGE

- Who is a lawyer?
  - All members of legal profession plus lawyer's employees properly supervised by qualified lawyer
- Who is the "client"?
  - Restrictive interpretation
  - Only those individuals authorised to seek or receive legal advice

# LITIGATION PRIVILEGE

- Confidential communications
- Between any of a client, its lawyer and a third party
- For the dominant purpose of litigation
- Litigation must be pending or reasonably contemplated

# ATTORNEY-CLIENT PRIVILEGE IN TEXAS

- Federal Law
  1. a confidential communication
  2. made to a lawyer or his subordinate
  3. for the primary purpose of securing either a legal opinion, legal services or assistance in a legal proceeding

See, *S.E.C. v. Microtune, Inc.*, 258 F.R.D. 310, 315 (N.D. Tex. 2009).

# ATTORNEY-CLIENT PRIVILEGE IN TEXAS

- Texas Law
  1. a communication
  2. Made between privileged persons
  3. In confidence
  4. for the purpose of seeking, obtaining or providing legal assistance to the client

# ATTORNEY-CLIENT PRIVILEGE IN TEXAS

- A client has the privilege to refuse to disclose and to prevent any other person from disclosing:
  - confidential communications
  - made for the purpose of facilitating the rendition of professional legal services to the client

# ATTORNEY-CLIENT PRIVILEGE IN TEXAS

- Issues facing in-house counsel
  - Intermingled roles
    - i.e. provide legal advice but also serve as business advisors
    - courts often find that privilege does not exist when in-house counsel served in a business capacity rather than legal
    - No presumption that communications with in-house counsel are privileged

*In re City of Dallas,* No. 05-03-00516-CV, 2003 WL 21000387, at *2 (Tex. App.—Dallas May 5, 2003, no pet.) (mem. op.).

# ATTORNEY-CLIENT PRIVILEGE IN TEXAS

- When representing a business entity
  - ❖ the communication must be between the attorney and the client (or agent) which is the company
  - ❖ The ‘control group’ test used to prevail, but in 1998 Texas amended Rule 503 in order to adopt the *subject-matter test* from *Upjohn*
  - ❖ An employee is considered privileged if the employee
    - (a) has authority to obtain professional legal services or to act on the rendered advice, or
    - (b) makes or receives confidential communication at the direction of the corporation and while acting in the scope of his/her employment

# ATTORNEY-CLIENT PRIVILEGE FOR CORPORATIONS

- Under the control group test, the communications of an employee to the corporation's lawyer are privileged only if the employee "is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney."
- The subject-matter test, however, is comprised of three components
  1. the person making the communication to the attorney must have been an employee of the corporation at the time of the communication;
  2. the communication was made at the direction of a corporate superior in order to secure legal advice from counsel; and
  3. the communication was within the scope of the employee's corporate duties.

TEX. EVID. R. 503(a)(2)(A-B).

# ATTORNEY-CLIENT PRIVILEGE IN TEXAS FOR CORPORATIONS

- Internal Investigations
  - must be done for the purpose of obtaining legal advice or done in anticipation of litigation
    - party seeking to protect materials must show "more than a remote prospect, inchoate possibility, or a likely chance of litigation"

*In re Gabapentin Patent Litig.*, 214 F.R.D. 178, 183 (D.N.J. 2003).

# SCENARIO 1

- Difficult senior employee
  - Bit of a maverick
  - Suspicion not a team player/lack of loyalty to the company
  - co-workers raising complaints/allegations he/she is a liability
- Interviewed by HR Director over allegations of impropriety. No firm evidence.
- Employee leaves; alleges position has become untenable on basis discovered complaints/by co-workers; alleges a witch hunt in relation to a deal that went sour.

# HOT TOPIC!

- Director of the SFO v Eurasian Natural Resources Corp. Ltd – Court of Appeal
- Litigation Privilege
  - Whether legal proceedings were in reasonable contemplations was a question of fact.
  - Legal advice to avoid/settle reasonably contemplated proceedings covered by LP.
- Legal Advice Privilege
  - Narrow meaning of “client” remains

# SCENARIO 2

- Potential major incident
  - Fire at a facility/on an oil rig
  - Personal injury, property damage
  - Sub-contractors on-site
- Investigation into incident
- External lawyers retained to assist with investigation

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# The Good, the Bad and the Ugly

A quick fire survey….

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# THREE HOT TOPICS – AT SPEED

- Key recent developments/practice points
- A very quick run through, more available on request!

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# HOT OFF THE PRESS:
# *ARCADIS V. AMEC (BCS) – COURT OF APPEAL OCTOBER 2018*

- The dangers of starting work before the contract is signed.

- Good news for contractors, Court of Appeal reversed first instance judgment last month.

## FORCE MAJEURE – THE ENGLISH WAY

- No standard definition of force majeure under English law
- Is a purely contractual animal
- Up to Parties to define events which constitute FM and their legal consequence

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# FORCE MAJEURE – THE ENGLISH WAY

- Successful reliance on a force majeure clause requires:
  - Circumstances within contractual definition
  - Proof that FM event caused a failure to meet contractual obligations

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## FORCE MAJEURE – THE ENGLISH WAY

- *Seadrill Ghana Operations Limited v Tullow Ghana Limited* [2018] EWHC 1640 (Comm).

- Drafting of FM clauses is key
- FM event must be the sole cause of failure to perform

## FORCE MAJEURE – THE ENGLISH WAY

- *Classic Maritime Inc. v Limbungan Makmur SDN BHD* [2018] EWHC 2389 (Comm).
- "Neither [party]…shall be responsible for failure to supply, load...cargo resulting from: Act of God,…flood…accidents at the mine…or any other causes beyond [the party effected's] control; …provided that such events directly affect the performance of either party…."

# FORCE MAJEURE – THE US WAY!

TEC Olmos LLC et al v. ConocoPhillips.,
No. 18—611 (Tex. 2019)

- Holding
  - Failure to perform under a contract is not excused by a "catch-all" provision in a force majeure clause when the purportedly excusing event is **foreseeable**.
- The provision at issue
  - "Should either Party be prevented or hindered from complying with…this Agreement…by reason of **fire, storm, act of God, governmental authority, labor disputes, war or any other cause not enumerated herein but which is beyond the reasonable control of the party whose performance is affected**, then the performance of any such obligation is suspended…"

# FORCE MAJEURE – THE US WAY!

TEC Olmos LLC et al v. ConocoPhillips.,
No. 18—611 (Tex. 2019)

- How are force majeure clauses construed?
  - "[T]he scope and application of force majeure clauses **depends on the terms of the contract**…However, [courts] may **consider common law rules to 'fill in gaps'** when interpreting force majeure clauses."
- Are market downturns unforeseeable? NO!
- Dissent (Brown, J.)
  - "[T]he Court…reads [the] term [unforeseeability] into a contract that simply is not there."
  - "When a force majeure clause does not explicitly include a requirement that an event be unforeseeable to trigger force majeure protections, we should not read such a requirement into the parties' agreement…"

# CHOICE OF ARBITRATOR

- Impartiality and independence
- Declaration that there are no circumstances currently known to the prospective arbitrator which are likely to give rise in the mind of any party to any justifiable doubts as to his or her impartiality and independence
  - "any current direct or indirect business relationship between an arbitrator and a party"
  - "past business relationships will not operate as an absolute bar .. Unless they are of such magnitude or nature as to be likely to affect a prospective arbitrator's judgment"

  IBA Rules of Ethics for International Arbitration 1987

# CHOICE OF ARBITRATOR

- Non-Waivable Red List
- Waivable Red List
- Orange List
- Green List

[IBA Guidelines on Conflicts of Interest in International Arbitration 2014]

- Appointment by e.g. LCIA Court or ICC Court
  - In practice?
- Contrast approach of Court to removing an arbitrator for apparent bias shown in the arbitration proceedings
  - Halliburton v Chubb [2018] EWCA Civ 817

# CONDUCT OF THE ARBITRATION

- The parties can agree on joint proposals for the conduct of the arbitration
- The Tribunal is obliged to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious conduct of the arbitration
- So can the Tribunal reject the parties' joint proposals?

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# CONCLUSIONS FOR CHOICE OF ARBITRATOR

- Many considerations
  - Experience – as an arbitrator and/or as a senior disputes lawyer
  - Subject matter expertise
  - Understanding of the industry or what may have driven the conduct of the parties – including cultural issues; local methods of work
  - Opinionated (or not)?
  - Robust in support of his or her views, even if in a minority, and persuasive
  - Understanding of the practicalities of disclosure/discovery and willingness to embrace technology to make it less costly
  - Focus on making the right procedural orders for this arbitration, not letting a party get away with delays because of fear of upsetting the recalcitrant party
  - Willing to work hard and not to make orders for the Tribunal's benefit, not that of the parties

K&L GATES