The evolution of offshore construction contracts: where are we now and what does the future hold?

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Nature and background of offshore construction contracts
Historical context

• Offshore / subsea construction contracts: the construction of fixed or floating infrastructure and facilities and moveable offshore vessels and units

• Common features: (i) directed towards the regulation of complex and often substantial construction projects; (ii) concluded between international parties; and (iii) physically undertaken across different overseas jurisdictions

• There are three distinct areas from which the framework of these contracts has been distilled:
  • construction contracts
  • shipbuilding contracts
  • charterparties
Construction contracts

- A substantial body of English contract law grew out of disputes arising from onshore construction contracts.
- Modern construction contracts are complex animals containing detailed provisions in relation to:
  - payment and valuation of work
  - extensions of time
  - variations and
  - the roles of third parties
- Two forms of contract commonly used in the offshore sector are closely associated with this model:
  - the forms published by the International Federation of Consulting Engineers (or FIDIC)
  - the forms published by LOGIC
Construction contracts: FIDIC

• Originally based on a land based construction and engineering contract produced by the Institution of Civil Engineers

• Primarily intended for use in connection with international construction projects often with heavy engineering aspects

• Intended for use as a re-measurement contract

• Increasingly applied to offshore/subsea construction projects particularly in relation to fixed plant and structures and across both the oil and gas and renewable sectors – and in particular offshore wind
Construction contracts: LOGIC

• Oil and gas industry standard contracts developed originally under the CRINE initiative

• There are a number of forms including the general construction edition and marine construction edition – last updated in 2003 and 2004 respectively

• The LOGIC forms are very common in the offshore sector

• The marine construction edition is used in particular in connection with field development work, including subsea construction, pipelaying and the installation of offshore structures for example by heavy lift vessel

• The LOGIC forms are also used in connection with the renewables market and more recently in connection with decommissioning projects
Shipbuilding contracts

• Shipbuilding also of influence on English contract law
• In contrast to traditional construction contracts, shipbuilding contracts are much more closely aligned to contracts for the sale of “goods”
• Dominated by the form produced by the Shipbuilders' Association of Japan, or SAJ
• First published in 1974 and predominantly in connection with standard commercial shipbuilding projects
• Since then it has been applied to a range of increasingly complex projects such as:
  • offshore support vessels
  • offshore drilling units (jack-ups, semi-submersibles, drillships etc) and
  • specialist production units (FPSOs, FLNGs, CPFs etc)
Charterparties

- More closely aligned with the shipping industry

- Distinct from the previous two categories – do not provide for physical construction

- Charterparty forms have developed as vessels have carried out increasingly specialised activities

- BIMCO’s “SUPPLYTIME” form – first published in the 1970s.
  - born out of a need to create a standard set of terms to govern the use of OSVs
  - last updated in 2005
Thoughts on choice of contract

- FIDIC
  - impact of weather
  - treatment of unknown seabed conditions
  - knock for knock indemnity regime

- LOGIC
  - more naturally suited to offshore work
  - but less suited to a complex engineering projects

- SAJ – suited for use in connection with the construction of offshore drilling and production units – but some amendment necessary

- SUPPLYTIME – important to ensure that the provisions in these agreements are consistent with the obligations assumed elsewhere
Offshore construction contracts: future trends
Decommissioning: context

• A substantial market in the UKCS – but there are difficulties as decommissioning is not a revenue generator

• Could more decommissioning have been undertaken during the downturn?

• The market is not helped by the absence of an industry accepted contract that deals with the uncertainties present in this type of work

• LOGIC forms currently used but not ideal
Decommissioning: the “future” standard forms

- There are now two new forms of contract in the final stages of drafting by LOGIC and BIMCO

- It is understood that both will address a number of the uncertainties

- However three issues stand out as potentially problematic:
  - well plug and abandonment work
  - unforeseen site conditions
  - limitations on liability
Smart contracts working in blockchain

- Smart contracts – a set of computer transaction protocols that execute the terms of a contract automatically based on a set of conditions

- Blockchains:
  - decentralised technology or a distributed digital ledger
  - transactions are recorded anonymously in blocks
  - can be put to use in the context of a variety of transactions including private business transactions

- Smart contracts in the offshore sector?

- Possible drawbacks:
  - the technology and the process are still relatively untrusted
  - apportionment of risk and liability
  - enforcement
Subsea UK: Back to the Future of Subsea

Andreas Dracoulis is a partner and disputes lawyer helping clients resolve problems in the energy, shipping and construction sectors. Andreas mostly advises on international projects ranging between the construction of offshore units and ships, upstream exploration and production and major infrastructure works. He has represented clients in international arbitrations conducted under many of the commonly used rules and in the English courts. He holds a postgraduate Master’s degree in construction law and dispute resolution and is also a co-author of the chapter on Offshore Vessel Construction Disputes within Global Arbitration Review’s Guide to Energy Arbitrations (Second Edition). Andreas is a recommended lawyer in the 2019 edition of The Legal 500, Legalease, which reports that Andreas is a “key name” in international arbitration and is “building an excellent reputation for careful case management” in shipping.

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Thank you