

LEGAL OBLIGATIONS, LIABILITIES, AND RISK ALLOCATION OF PARTIES TO DRILLING CONTRACTS UNDER ENGLISH, EU AND NIGERIAN LAWS

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ABSTRACT:

The evolution that has taken place in the oil and gas mining and extraction industry over the years has been quite phenomenal. When mining and extraction in the oil and gas industry commenced, it was done manually. This later evolved to more sophisticated drilling rigs which soon gave way to Floating Production and Storage and Offloading (FPSO) vessels, and now to Floating Production Drilling Storage and Offloading (FPDSO) vessels. The resultant effect of the evolution that has taken place in the industry, inter alia, is the improved efficiency and massive enhancement in production, but this has not brought about a complete elimination of risks and liabilities as the industry continues to record damages to the environment, loss of equipment, loss of finances and loss of lives.

In this article, the Authours examine the legal obligations of the parties to a drilling contract under the European Union, United Kingdom and Nigerian Laws, and how these laws perceive, regulate and enforce risk allocation between the parties to a drilling contract. Risk in this regard was differentiated from other similar concepts like uncertainty, probability, and hazard, concepts that, though similar to risk and in many cases used interchangeably, have clear distinctions from risk as covered by the laws referred to.

Clearly, legal obligations in the oil and gas sector, particularly as regards risk managements and health and safety and environment, has continued to evolve as new technologies develop and the operational environment changes. For instance, the Piper Alpha, the Montara and the Macondo Golf of Mexico accidents have created new regimes in regulation in both the European Union and the United Kingdom. Although Nigeria has had its fair share of accidents, yet there is no such relationship between changes in operational environments and corresponding change in legal regimes.

The Authours have herein considered the different contractual risk allocation/management options for players in the industry including Indemnity, indemnity and hold harmless, mutual indemnity and mutual hold harmless, exclusion and exemptions, limitation of liability, liquidated damages, and insurance. Also considered by the Authours is the rationale for risk allocation such as industry practices, doctrines of tradition, best knowledge, clay feet, and accountability, as well as legal and economic considerations.

1. INTRODUCTION:

Oil and gas mining and extraction have evolved over the years from manual drilling from moored monohulls, jack - up and semi - submersible platforms to more sophisticated drilling rigs, and even now to modern more enhanced Floating Production and Storage and Offloading (FPSO) vessels.

This latter has also evolved to Floating Production Drilling Storage and Offloading (FPDSO) vessels. All of these innovations have made drilling of crude oil and gas much easier, reduced costs and risks and improved efficiency. Commendable as these developments and improvement are, they have not been able to completely eliminate risks and liabilities as the industry has continued to record risks and liabilities from operations including damages to the environment, loss of equipment, loss of finance and loss of lives.

In order to properly manage exposure to some of these risks, drilling activities have diversified and segmented, allowing for specialization, where a party can take up a part, but critically essential component of the whole process, such as cementing, blowout preventers, casing and wellhead management, equipment supply, mud supply, and so on, including response services, catering, etc. This has also come with it a lot of advancement in drilling contracts in the bid to capture the technical and sophisticated relationships, responsibilities and liabilities which come with the several parties offering several services, as can be seen in the relationship in the Deepwater Horizon Rig off the Gulf of Mexico in the Macondo prospect owned jointly by BP (65%), Anadarko Petroleum (25%) and MOEX Offshore 2007 (10%), and operated by Transocean through a rig built by Hyundai Heavy Industries for Transocean. Halliburton provided specialist cementing services, while Cameron supplied the Blowout Preventer amongst several other services and subservices provided on the Macondo prospect. This shows a glimpse of drilling activities and contracts.

Drilling contracts are contracts that allocate certain risks on a reciprocal basis which includes personal injury, damage to property, certain pollution risks and consequential damages, regardless of fault.¹ Oil and gas exploration and production (E&P) is in all probability, the riskiest in terms of capital intensity, long payback period; technological dependence and a host of legal and environmental compliance requirements. Thus, a drilling contract is one of the most important contracts for an oil and gas operator.² Before a drilling contract is executed, there should be existing licence(s) authorising the exploration and production activities which will correctly spell out the specified acreage allocated for such drilling activities. In Nigeria, licences/leases were granted by the Minister of Petroleum repealed Petroleum Act who was empowered to grant Oil Exploration Licence (OEL), Oil Prospecting Licence (OPL) and Oil Mining Leases (OPL) to successful qualified applicants. The power to grant Petroleum Exploration Licence (PPL) and Petroleum Mining Lease (PML) is retained by the Minister of Petroleum in the Petroleum Industry Act (PIA).³ However, the grant of Petroleum Exploration Licence (PEL) is now the responsibility of the Nigerian Upstream Petroleum Regulatory Commission (NUPRC).⁴

¹ Opus Kinetic People Empowerment, 'Understanding Drilling Contracts' <[² Ibid](https://www.opuskinetic.com/2019/02/understanding-drilling-contracts/#:~:text=The%20drilling%20contract%20is%20one,damages)%2C%20regardless%20of%20fault.> assessed 26 May 2022.</p></div><div data-bbox=)

³ PIA 2021, s 3 (1) (g).

⁴ PIA 2021, s 71 (1).

Drilling contracts are the crux of upstream operational agreements⁵. Parties to these types of contracts are faced with great risks due to the extractive activities in the upstream sector of the oil and gas industry and the complexities of doing business in general⁶. This can be accorded to the regulatory, compliance, operational and social requirements expected to be fulfilled by the parties⁷. By the foregoing, parties to drilling contracts have had to rely on mechanisms for allocating risks in a bid to realize their individual contract objectives, while also ensuring that the risks assumed by the parties are well tailored to be managed by them, considering all relevant factors.⁸

It is no secret that the oil and gas industry is volatile, capital intensive and replete with risks⁹. Hence, contractual risks allocation is negotiated by the parties with the aim of apportioning the risks among the key players to the oil and gas contract¹⁰. Risks need to be predetermined, evaluated, and their consequences understood by parties to a contract; this is essential in managing risks successfully¹¹.

It should be noted that risk allocation is dependent on various factors, such as, the balance of power between the parties, prevailing market/economic conditions, and the affiliation of parties to drilling associations¹². Furthermore, external factors such as the jurisdiction of choice of the parties and the jurisdiction to which the contract is subject to also needs to be considered when allocating risks in drilling contracts.¹³ When allocating risks in an oil and gas contract, two fundamental rules must be considered. Firstly, risks should be allocated to parties best suited to manage them¹⁴. Secondly, risks should be allocated when appropriate to accomplish project objectives¹⁵.

This article will be focused on evaluating the legal obligations, liabilities and risk allocation of parties to drilling contracts under English, EU and Nigerian Laws. It would delve into the conflicts

⁵ Marietta Katheryn, 'Drilling Contracts - Avoiding Misunderstanding' (King & Spalding: Energy Newsletter, 13th February) <<https://www.kslaw.com/blog-posts/drilling-contracts-avoiding-misunderstanding-2>> accessed 3 November 2021

⁶ Ofoegbu Kelechi, 'How Contractual Risk Allocation Provisions of Oil and Gas Contracts Have Been or May Be Interpreted by an English Court – A Case Study of Some Model Offshore Drilling Rig Contracts Developed in the United Kingdom, Canada and the United States of America' (*University of Dundee*, June 2018) <https://discovery.dundee.ac.uk/ws/portalfiles/portal/28644233/Thesis_8_September_2018_Clean_Copy_.pdf> accessed 3 November 2021

⁷ Ibid.

⁸ ibid

⁹ S. C. Dike and Justice Ezechi Chigonu, 'Risk Allocation in the Oil and Gas Industry' [2020] 5(1) *Journal of Private Law* 171 – 197.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ofoegbu Kelechi, 'How Contractual Risk Allocation Provisions of Oil and Gas Contracts Have Been or May Be Interpreted by an English Court – A Case Study of Some Model Offshore Drilling Rig Contracts Developed in the United Kingdom, Canada and the United States of America' (*University of Dundee*, June 2018) <https://discovery.dundee.ac.uk/ws/portalfiles/portal/28644233/Thesis_8_September_2018_Clean_Copy_.pdf> accessed 3 November 2021.

¹³ Ibid

¹⁴ S. C. Dike and Justice Ezechi Chigonu, 'Risk Allocation in the Oil and Gas Industry' [2020] 5(1) *Journal of Private Law* 171 – 197.

¹⁵ Ibid.

and complexities faced by parties in a contract in allocating risks between themselves as well as review existing legislative interventions in risk allocation.

2. CONCEPT OF RISK AND RISK MANAGEMENT:

The concept of risk and risk management in drilling contracts can be viewed as methods adopted by parties to give effect to their contracts¹⁶. This is in keeping with the fact that risks subsist throughout the life cycle of oil contracts and the liabilities and risks associated with these contracts are usually huge¹⁷.

Risk management involves risk identification, analysis, response, and monitoring¹⁸. The following concepts are examined to further understand the meaning of risks in oil and gas contracts:

2.1. RISK & UNCERTAINTY:

Risk is the impact that uncertain events and/or circumstances have on the achievement of goals¹⁹. Risk and uncertainty both relate to the unknown. Although risk and uncertainty are often conceptually used interchangeably, it is necessary to make clear distinction between them. While risk may refer to situations in which probabilities can be identified for possible results, and can be quantified, uncertainty on the other hand, refers to circumstances and situations or events about which there is insufficient information to identify objective probabilities. When the information which are necessary to clearly understand and anticipate developments or changes which may occur in a particular context are either insufficient or unavailable, the situation is termed uncertain.

Therefore, from the foregoing, the key element in distinguishing between risk and uncertainty is probability, which refers to a particular phenomenon or event to occur under well-defined conditions. Thus, in a state of uncertainty, a set of conditions and factors are unidentifiable and unpredictable in terms of occurrence and evolution, even where they can be identified or predicted, they are highly unstable. Their probability is said to be zero. However, the state of risk is when an economic probability is greater than zero, but less than one.²⁰

While risk may be eliminated, uncertainty cannot be eliminated completely, no matter how complete the risk management strategy may be. Due to the capital intensive, risk and liabilities involved in oil and gas drilling contracts as the project goes through its various phases, the levels

16 Ofoegbu Kelechi, 'How Contractual Risk Allocation Provisions of Oil and Gas Contracts Have Been or May Be interpreted by an English Court – A Case Study of Some Model Offshore Drilling Rig Contracts Developed in the United Kingdom, Canada and the United States of America' (University of Dundee, June 2018) <https://discovery.dundee.ac.uk/ws/portalfiles/portal/28644233/Thesis_8_September_2018_Clean_Copy_.pdf> accessed 3 November 2021.

17 S. C. Dike and Justice Ezechi Chigonu, 'Risk Allocation in the Oil and Gas Industry' [2020] 5(1) Journal of Private Law 171 – 197.

18 Wan M. Zulhafiz, 'On the Contractual Risk Allocation in Oil and Gas Projects' [2017] The Law review 168-193.

19 Ofoegbu Kelechi, 'How Contractual Risk Allocation Provisions of Oil and Gas Contracts Have Been or May Be interpreted by an English Court – A Case Study of Some Model Offshore Drilling Rig Contracts Developed in the United Kingdom, Canada and the United States of America' (University of Dundee, June 2018) <https://discovery.dundee.ac.uk/ws/portalfiles/portal/28644233/Thesis_8_September_2018_Clean_Copy_.pdf> accessed 3 November 2021.

20 Sominoa-Valeria Toma, Mioara Chitita, and Daniela Sarpe, "Risk and Uncertainty" [2012] 3 Procedia Economics and Finance 975 – 980 <Risk and Uncertainty | Elsevier Enhanced Reader> accessed 30/11/2021

of risk and uncertainty rise²¹. In managing uncertainty, it is better to reduce it wherever it is cost-effective to do so, mainly by collecting more and better information and making this available and cheap to the decision makers. If these uncertainties and risks are well managed, such risks and uncertainties would decline²².

2.2. RISK & PROBABILITY:

Probability is the likelihood that a certain risk event would occur. Most people understand probabilities from a coin tossing game. There are only two possible outcomes: heads or tails, and when you ask most people the probability of tossing up heads, or tails, it is easy – 50% or ½. However, this reasoning in this is based on the assumption that the coin must be fair, so that heads and tails are equally likely.²³

Probabilities are evaluated by counting a wide variety of situations. The probability of an event occurring therefore, is the number of outcomes in that event divided by the total number of possible outcomes. This of course, is possible where the outcomes are equally likely. Where the outcomes have been altered, then the probability of an outcome cannot be determined by counting. For instance, a coin has two sides – a head and a tail, and a die has six sides – 1-6. The possibility of tossing a head of a coin is ½ and the probability of tossing a 2 of a die is 1/6. If the coin is altered by creating two heads or two tails, or where the die has been altered by removing some numbers and adding others, then the probability of tossing a head (in the case of the die where the coin has been altered to remove the head) or tossing a 2 (in the case of the die where 2 has been removed or added) can no longer be determined by counting.

There is nevertheless a way of estimating that probability – by tossing the coin a large number of times and counting the number of heads, or tossing the die a large number of times and counting the 2s. If you toss the die 100 times and observe 30 2s, then your best estimate of the probability of a 2 on one toss becomes 30/100 or 3/10.

In terms of a drilling contract, probability can be best understood as the likelihood that a party to a contract would be required to bear the economic burden of the consequences of an event²⁴. Consequent upon the foregoing, the probability of any risk materialising can be calculated if all the outcomes can be specified, and even where these cannot be specified, then it is essential that an assessment of the outcomes of previous actions.

2.3. RISK & HAZARD:

The Trades Union Congress (TUC) of the United Kingdom approaches the distinction between risk and hazard by stating that “A hazard is something that can cause harm, e.g. electricity,

21S. C. Dike and Justice Ezechi Chigonu, 'Risk Allocation in the Oil and Gas Industry' [2020] 5(1) Journal of Private Law 171 – 197.

22 Ibid.

23 Matthew J. Hassett, Donald G. Stewart, “Probability for Risk Management” [2013] 2nd Ed. Department of Mathematics and Statistics, Arizona State University, Actex Publications, (8) 29

24 Ibid.

chemicals, etc. Hazard is a potentially damaging physical event, phenomenon and/or human activity, which may cause loss of life or injury, property damage, social and economic disruption or environmental degradation.²⁵

Disasters are triggered by hazards. Hazards have the potential of creating or causing harm to people, property or environment. A risk is the chance, high or low, that any hazard will actually cause somebody harm²⁶. While risk is a computable probability of loss, a hazard only has the potential to cause negative consequences, but if and to what extent these consequences will become reality is dependent on the vulnerability of the element at risk.²⁷ The occurrence of a hazard causes a disaster, which entails that a potentially negative consequence has become a reality. The basic characteristics of a hazardous event include: magnitude (only occurrences which exceed some common level of magnitude are extreme); Duration (the length of time over which a hazardous event persists from onset to peak period); Areal Extent (the space covered by the hazardous event); Speed of Onset (length of time between the first appearance of an event and its peak); Spatial Dispersion (the pattern of distribution over the space in which its impacts can occur); and Temporal Spacing (the sequencing of events, ranging along a continuum from random to periodic).

By the foregoing, a risk that develops into a negative outcome is probably due to a hazard, but not every hazard will equate into a risk especially if the risk is managed properly²⁸.

25 S. Schneiderbauer and Daniel Ehrlich, "Risk, Hazard and People's Vulnerability to Natural Hazards: a Review of Definitions, Concepts and Data" 2004, Researchgate, European Commission Directorate-General Joint Research Centre <EUR_21410_vuln.pdf> accessed 02/12/2021

26 Ibid.

27 Schneiderbauer et al, *ibid*, pg. 10

28 Ibid.

3. PETROLEUM FIELD LIFE CYCLE AND DRILLING CONTRACT:

A petroleum field goes through different phases in its search for hydrocarbons, and drilling is at the fore front of this process²⁹. The drilling process enables hydrocarbons exploration, appraisal, development, and production value chain. Although the phases of a drilling lifecycle are not set in stone, there are however, some critical activities that can be categorized as the lifecycle phases. These include: Gaining Access, Exploration, Appraisal, Development, Production, Decommissioning, and Post- Decommissioning.

3.1. PHASES OF A PETROLEUM LIFE CYCLE:

3.1.1 GAINING ACCESS:

This phase is the decision - making stage. In other words, it is the stage in which operators and co-venturers decide on the area to pursue in their quest for hydrocarbons³⁰. The first legal issue that presents itself with venturers at this stage is the issue of ownership. An operator must first decide who owns the hydrocarbons and who to submit itself to in order to seek the requisite permission and to gain the needed access. In Nigeria, all mineral resources are owned by the Federal Government of Nigeria³¹, whereas in the UK, although it is still an ongoing debate as to who owns the oil resources, international law vests ownership on the UK Government.³² Underlying ownership is not a frequently litigated issue in Nigeria. In the UK, judicial decisions regarding ownership relates more to onshore conveyance issues, often predating modern Petroleum Law. For instance, the case of *Mitchell v. Mosley*³³, and *Lonsdale v. Attorney-General*³⁴ relate to historic land conveyance issues. More modern cases on land conveyance issues include *Lonsdale v. A-G Straddles*³⁵, and *Bocardo SA v. Star Energy*³⁶.

The grant of access is usually by way of license to search, bore and get, or in more modern terms, 'explore, develop and produce'.³⁷ In Nigerian, it is by way of Oil Exploration License (OEL) which allows the licensee to explore for oil. This is however no more in practice today as the current practice involves seismic data gathering, which is then made available for consideration by

29 Ofoegbu Kelechi, 'How Contractual Risk Allocation Provisions of Oil and Gas Contracts Have Been or May Be interpreted by an English Court – A Case Study of Some Model Offshore Drilling Rig Contracts Developed in the United Kingdom, Canada and the United States of America' (University of Dundee, June 2018) <https://discovery.dundee.ac.uk/ws/portalfiles/portal/28644233/Thesis_8_September_2018_Clean_Copy_.pdf> accessed 3 November

30 Ibid.

31 Sec 44(3) *Constitution of the Federal Republic of Nigeria 1999*; Sec 1, Petroleum Act 1969

32 Greg Gordon, John Paterson and Emre Usenmez, "Oil and Gas Law - Current Practice and Emerging Trends" 2ns Ed. [2011] Dundee University Press, pg. 5

33 *Mitchell v Mosley* [1914] 1 Ch 438

34 *Lonsdale v Attorney-General* [1982] 1 WLR 887

35 *Earl of Lonsdale v Attorney-General* [1982] 1 WLR 887; 3 All ER 579

36 *Bocardo SA v Star Energy* [2008] EWHC 1756 (High Court); [2009] EWCA Civ 579 (Court of Appeal); [2010] UKSC 35 Supreme Court

37 Marc Hammerson, "Upstream Oil and Gas – Cases, Materials and Commentary" [2011] Globe Business Publishing, pg. 32

prospective prospecting licensees³⁸. The UK oil and gas license habendum model clause states that: “the Minister... hereby grants to the licensee exclusive license and liberty ... to search and bore for and get petroleum”. In the EU, ownership rights are accorded by the *EU General Assembly Resolution 3281 (XXIX)*.³⁹ Specifically, the Energy Charter Treaty provides that “The Contracting Parties recognize state sovereignty and sovereign rights over energy resources. They reaffirm that these must be exercised in accordance with and subject to the rules of international law.”⁴⁰

In arriving at the decision, parties explore a range of factors such as the potential for finding hydrocarbons in commercial quantities, the regulatory framework and socio-political stability of the host country⁴¹. The more prospect a given area has, the more likely operators and co-venturers will bid for it and the more willing they would be to pay an amount that reflects the perceived value attached⁴². It is safe to say that without this phase, there would be no petroleum oilfields to be discovered, or projects to be developed by exploration and production companies⁴³.

3.1.2 EXPLORATION:

Once access is granted to the decided area via the petroleum authorisation, evidence of hydrocarbon deposits beneath the surface of the earth are then searched for by⁴⁴ petroleum geologists⁴⁵ and geophysicists⁴⁶. In other words, geological and geophysical surveys are conducted on the prospective area, usually lead by either visible features on the surface of the earth, such as oil seeps, or seismic surveys⁴⁷.

Previously, under the Nigerian Petroleum Act, the right to explore for petroleum is granted by the Minister pursuant to Section 2(1) of the Petroleum Act,⁴⁸ now, it is granted by the NUPRC under the PIA.⁴⁹ Usually, the rights granted are non-exclusive and several persons may be issued licenses in respect of the same area. The activities which the licensee has right to conduct under an

38 Ken Etim and Stella Duru, “Conducting Oil and Gas Activities in Nigeria” [2016] pg. 2 CMS Cameron McKenna LLP <Conducting Oil & Gas Activities - Nigeria.PDF> accessed 03/12/2021

39 Charter on Economic Rights and Duties of States

40 *Energy Charter Treaty of the European Union (with Incorporated Trade Amendment) and Related Documents* (updated 14th July, 2014) Part IV (Miscellaneous Provisions) Article 18 (Sovereignty over Natural Resources) para. 1

41 Ibid 21.

42 Ibid 21.

43 Ibid 21.

44 Ofoegbu Kelechi, 'How Contractual Risk Allocation Provisions of Oil and Gas Contracts Have Been or May Be Interpreted by an English Court – A Case Study of Some Model Offshore Drilling Rig Contracts Developed in the United Kingdom, Canada and the United States of America' (*University of Dundee*, June 2018) <https://discovery.dundee.ac.uk/ws/portalfiles/portal/28644233/Thesis_8_September_2018_Clean_Copy_.pdf> accessed 3 November 2021.

45 They specialise in the exploration and development of petroleum reservoirs.

46 They specialise in the physical properties and processes of the earth and space environment.

47 Ibid.

48 Under section 2 of the *Petroleum Act*, a Nigerian citizen or company incorporated in Nigeria may be granted an oil exploration license to explore for petroleum. This license must not exceed twelve thousand nine hundred and fifty kilometers in area. See also Regulation 2(1) *Petroleum (Drilling and Production) Regulations 1969*

49 PIA 2021, s 71 (1).

exploration license consists of “a preliminary search by surface, geological and geophysical methods, including aerial surveys but excluding drilling below 91.44 metres.”⁵⁰

When the seismic survey results have been analysed and evaluated, the operator then makes the decision to drill an exploration well to enable them validate the survey findings⁵¹. It is at this very stage that a drilling contractor is hired for its services thereby creating an avenue for the utilisation of a drilling contract.

3.1.3 APPRAISAL:

In this phase, the operator is tasked with determining whether the hydrocarbons discovered is in commercial quantity that can be exploited economically. It is important to note that some operators make the decision to jump straight from the exploration phase to the production phase to hasten production and recoupment of their investments. However, there are a lot of risks involved with this decision, especially in relation to the estimation of the total quantity of the find – the reserves – and the production facilities required⁵².

In order to truly know the volume of the reserves, technical requirements, opportunities and threats surrounding producing the hydrocarbons economically, additional wells may be required to be drilled, thereby, needing the services of a drilling contractor, once again, necessitating the need for a drilling contract⁵³.

3.1.4 DEVELOPMENT:

This phase births the commissioning of the feasibility study whose purpose is to determine the technical and economic strategy to be adopted in producing the hydrocarbons⁵⁴. In this phase, a detailed Field Development Plan (FDP) which contains information on the surface and subsurface facilities, operation and maintenance philosophy, resource requirements, and the budget for implementation will be drafted by the operator⁵⁵. This document is significant for engaging stakeholders including the government, regulators, investors, and financial institutions, who are key players in the implementation and approval plan⁵⁶. Once approved, detailed design of the

⁵⁰ Yinka Omorogbe, “Oil and Gas Law in Nigeria! [2001] Malthouse Law Books, pg. 21

⁵¹ Ofoegbu Kelechi, 'How Contractual Risk Allocation Provisions of Oil and Gas Contracts Have Been or May Be interpreted by an English Court – A Case Study of Some Model Offshore Drilling Rig Contracts Developed in the United Kingdom, Canada and the United States of America' (*University of Dundee*, June 2018) <https://discovery.dundee.ac.uk/ws/portalfiles/portal/28644233/Thesis_8_September_2018_Clean_Copy_.pdf> accessed 3 November 2021.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ofoegbu Kelechi, 'How Contractual Risk Allocation Provisions of Oil and Gas Contracts Have Been or May Be interpreted by an English Court – A Case Study of Some Model Offshore Drilling Rig Contracts Developed in the United Kingdom, Canada and the United States of America' (*University of Dundee*, June 2018) <https://discovery.dundee.ac.uk/ws/portalfiles/portal/28644233/Thesis_8_September_2018_Clean_Copy_.pdf> accessed 3 November

facilities and procurement for the required construction materials can be commenced by the operator⁵⁷.

3.1.5 PRODUCTION:

This phase is the one in which the hydrocarbon crude oil and gas are obtained in tradeable quantities. The FDP's maintenance philosophy guides the production phase in ensuring that the hydrocarbon is safely evacuated for onward sale⁵⁸. This phase also includes the build-up period whereby the production streams are brought on stream in a structured manner⁵⁹. The second sub-phase involved in this phase is the plateau period, which indicates the optimality of the producing wells in line with expectation and technical predictions⁶⁰. The last sub-phase is the decline period, which indicates the decline period of the well. This may either be because the wells have reached its reserves limit or because of technical difficulties, or impracticality to continue flowing the well⁶¹.

3.1.6 DECOMMISSIONING:

This phase happens when the net cash flows turns negative, due to the fact that the wells are no longer flowing at optimal level. Therefore, it becomes uneconomical to continue to flow it⁶². Hence, the field will be decommissioned, along with the production infrastructure⁶³. This leads to the plugging and abandonment of the wells⁶⁴.

Decommissioning awareness started with the plan of Shell to dump Brent Spar in deep Atlantic waters, which sparked protests from environmental groups and European governments.⁶⁵ While decommissioning and abandonment may be used synonymously, abandonment presents a sense of absconding from liability, which is a direct opposite of government attitude and intention which, as Marc Hammerson has argued, involves removal, disposal (not in their strict sense) which are considered options available under international rules.⁶⁶

3.1.7 POST - DECOMMISSIONING:

This involves the removal of the production infrastructure upon decommissioning with the goal of restoring the environment to its previous existing state⁶⁷.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Marc Hammerson, 33 *ibid*, pg. 437

⁶⁶ Marc Hammerson *ibid*.

⁶⁷ Ofoegbu Kelechi, 'How Contractual Risk Allocation Provisions of Oil and Gas Contracts Have Been or May Be interpreted by an English Court – A Case Study of Some Model Offshore Drilling Rig Contracts Developed in the United Kingdom, Canada and the United States of America' (*University of Dundee*, June

3.2 DRILLING OPERATIONS:

Drilling operations are the backbone of drilling contracts. They incorporate all the required activities parties are to undertake to drill⁶⁸. Drilling operations require the operator and contractor to divide responsibilities in order to complete a successful drilling⁶⁹. These responsibilities include: the provision of the drilling unit, preparing the location and accepting the drilling unit, providing and maintaining the drilling and other ancillary equipment, providing personnel and catering services, and conducting drilling operations⁷⁰.

3.2.1 PROVISION OF THE DRILLING UNIT:

This responsibility is to be taken by the operator and he must ensure that the specifications of the drilling rig are accurate and correctly understood by the parties⁷¹. In carrying out this responsibility, the operator is to take into account the well design, depth of the well to be drilled, the subsea and geotechnical conditions of the well location, safety considerations, etc.⁷²

3.2.2 LOCATION PREPARATION AND ACCEPTANCE OF THE DRILLING UNIT:

The operator is responsible for inspecting the rig and procuring the testing of critical equipment on board prior to accepting the equipment's as fit for purpose⁷³. Furthermore, the operator has to ensure that the location is prepared to receive the drilling unit⁷⁴. The operator is also strapped with the responsibility of undertaking a seabed survey of the proposed location⁷⁵.

3.2.3 PROVISION AND MAINTENANCE OF DRILLING AND OTHER ANCILLARY EQUIPMENT:

Both the operator and contractor are responsible for providing different equipment for the drilling operations. In most cases, the responsibility for providing equipment is not restricted to those that should be provided by the operator and contractor, but extends to the equipment of their subcontractors and other invitees.⁷⁶ Also, in certain instances, the operator requires the contractor to provide equipment for which the operator pays. Although the operator reimburses the contractor

2018) <https://discovery.dundee.ac.uk/ws/portalfiles/portal/28644233/Thesis_8_September_2018_Clean_Copy_.pdf> accessed 3 November

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵Ofoegbu Kelechi, 'How Contractual Risk Allocation Provisions of Oil and Gas Contracts Have Been or May Be interpreted by an English Court – A Case Study of Some Model Offshore Drilling Rig Contracts Developed in the United Kingdom, Canada and the United States of America' (*University of Dundee*, June 2018) <https://discovery.dundee.ac.uk/ws/portalfiles/portal/28644233/Thesis_8_September_2018_Clean_Copy_.pdf> accessed 3 November

⁷⁶ Ibid.

for such specific equipment, the drilling contract does not regard it as belonging to the class of operator group equipment, and the contractor retains responsibility for them.⁷⁷

PROVISION OF PERSONNEL AND CATERING SERVICES:

Both the operator and contractor are responsible for mobilising competent, trained, qualified and experienced personnel to support the drilling operations. Usually, the operator brings key personnel like the company man, geologist, and mud engineer, while the contractor mobilises personnel such as the installation manager, roughneck and derrick man, driller, and tool pusher⁷⁸.

3.2.4 CONDUCT OF DRILLING OPERATIONS:

The contractor is responsible for ensuring that the drilling operations commence in accordance with the operator's drilling programme as agreed by the parties⁷⁹. Failure may result in a breach of the drilling contract for which the contractor may be liable at the suit of the operator⁸⁰. Furthermore, the contractor has the responsibility of providing the operator with daily drilling reports in order to demonstrate that the drilling operations are being carried out in line with the operator's approved drilling programme⁸¹.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Ibid.

4. LEGAL OBLIGATIONS AND LIABILITIES:

4.1. GENERAL NATURE OF LEGAL OBLIGATIONS AND LIABILITIES:

The nature and risks of drilling activities have evolved and continue to evolve. These risks have transformed in such a way that one party's failure could fundamentally affect the other party/parties' successes. This means that where any party is unable to properly manage its contract, there is a likelihood that such failure will lead to the collapse of another contract between one of the parties and a different party, a situation which is typical to all commercial transactions, and particular to the oil and gas industry, while causing a chain reaction of environmental, health and safety, financial and other regulatory issues with huge cost implications.

A good example of this risk situation could be seen in oil rig disasters, such as the Piper Alpha, the Montara and the Macondo. The Macondo exploratory well, off the Gulf of Mexico blew out, causing a number of explosions and fire which raged for two days. At the time of the incident, the Macondo well was being drilled by Deepwater Horizon Drilling Vessel, which was owned by Transocean, but leased out to BP, who was the Operator of a joint venture with itself, Anadarko and Mitsui (through its subsidiary MOEX). BP hired Halliburton (through its subsidiary Sperry Sun) as its cement contractor for the well drilling. The Deepwater Horizon also had a Blowout Preventer, which was designed by Cameron.⁸²

The main cause of the blowout was traced to the 'failure of a cement barrier in the production casing string' which allowed hydrocarbon to flow up the well through the riser and onto the rig.⁸³

The effect included a six month moratorium on all deep-water offshore drilling on the Outer Continental Shelf and introduction of stringent new regulations made by the US Government, over 70 lawsuits filed by fishermen, property owners, area businesses, municipalities, seafood processors and recreational users against BP, Transocean, Halliburton and Cameron; environmental and safety violation notices issued by US Regulators against BP, Transocean and Halliburton; a multi-billion dollar suit by BP against Transocean, Halliburton and Cameron. BP agreed to a 7.8 billion Dollar deal to settle 100,000 claims by individuals and businesses for claims covering personal economic, business, property and medical claims, in addition to a Clean Water Act penalty of 5.5 Billion Dollars (plus interest), 8.1 Billion Dollars for natural resources damages, up to 700 million dollars to address injuries to natural resources that are unknown, 600 million dollars for other claims (including claims under False Claims Act, royalties and reimbursement of natural resources damages assessment costs), and 4 Billion Dollars in criminal fines. There was also an agreement which requires BP to pay approximately \$5.9 Billion to the states and local government entities, all together over \$20 Billion.⁸⁴

⁸² Chidi Egbochue, "Reviewing 'knock for knock' indemnities following the Macondo Well blowout" *Construction Law International* Volume 7, Issue 4, January 2013, page 2

⁸³ *ibid*

⁸⁴ Wendy Laursen, "Winners and Losers in Deepwater Horizon Payout", *the Maritime Executive*, 2016. <https://www.maritime-executive.com/article/winners-and-losers-in-deepwater-horizon->

It is worthy of note that this singular mistake or failure on the part of the cement contractor on the well drilling, the US government banned offshore drilling activities, a decision which had detrimental effects on other energy and oil field services companies. These few cases, among others, provide a clear description of what obligations parties to oil and gas production may have regarding the environment, health and safety of lives and property, as well as other related issues. These cover both regulatory obligations and other contractual issues.

Consequently, oil and gas operations and drilling contracts in particular have attracted a lot of regulatory and compliance obligations, many of which parties usually allocate via contract, while others have strict liability on the parties jointly and severally. Chief among these liabilities is the liability for Health, Safety and Environmental compliance obligations.

4.2. REGULATION OF HEALTH AND SAFETY:

Generally, parties to a drilling contract are required among other things, to protect the environment by taking steps to preserve air and water quality, shield human, animal and plant life from harmful effects of the drilling activities, as well as mitigate any nuisance potentially arising therefrom.

At the international sphere, a number of provisions have been enacted to ensure protection of lives and the environment. One of these is the United Nations Convention on the Law of the Sea 1982. Article 194 of this convention provides for the measures to prevent, reduce and control pollution of the marine environment.⁸⁵ In 1992, the United Nations Framework Convention on Climate Change was signed at Rio De Janeiro which introduced the Precautionary Principle in managing pollution and its effects on climate change. This principle entails that each participating member would take precautionary steps and measures to mitigate the causes and anticipate impacts of climate change, such that activities which threaten or cause serious or irreversible damage to the environment can be restricted or even prohibited before there is absolute scientific certainty about their effects.⁸⁶

In the UKCS, the *UK Continental Shelf Act of 1964* was made as a way to ratify the United Nations Convention on the Continental Shelf of 1958 which more or less conferred sovereign rights in the continental shelf on the coastal states. This 1964 Act however had no robust provision for health and safety until the *Petroleum (Production) (Continental Shelf and Territorial Sea) Regulations of 1964*⁸⁷ which provided that “the licensee shall comply with any instructions from time to time given by the Minister in writing for securing the health, safety and welfare of persons employed in or about the licensed area”.⁸⁸

[payout#:~:text=BP%20has%20been%20ordered%20to,the%20course%20of%2016%20years.](#) Accessed 11 October, 2020

⁸⁵ Article 194 authorizes states to take measures to prevent, reduce and control pollution of the marine environment, ensure that activities under their jurisdiction are conducted as not to cause damage by pollution, and ensure to deal with all sources of pollution of the marine environment.

⁸⁶ Yinka omorogbe *ibid*, at pg. 131

⁸⁷ SI 1964/708

⁸⁸ Schedule 2, Clause 18

The inadequacy of these provisions became evident following the collapse and sinking of the Sea Gem⁸⁹ in December 1965, taking with it thirteen lives.⁹⁰ This tragedy ignited a new prescriptive regulatory phase in the UKCS initiated by the *Mineral Workings (Offshore Installations) Act* 1971 which incorporated recommendations from the Sea Gem Enquiry,⁹¹ and later the *Health and Safety at Work, etc. Act* 1974 which covered most health and safety issues in the UKCS until the Piper Alpha⁹² disaster of 6th July, 1988.

Following the Piper Alpha disaster, the UK delved into a goal setting regime with regulations which require the players in the industry to set health and safety goals, and to meet those goals, of course with minimum expectations. The first of these regulations is the *Offshore Installations (Management and Administration) Regulations* 1995,⁹³ followed by the *Offshore Installations (Prevention of Fire and Explosion, and Emergency Response) Regulations* 1995,⁹⁴ then the *Offshore Installations and Wells (Design and Construction, etc.) Regulations* 1996,⁹⁵ etc. These regulations heralding the goal-setting (now permissioning) regime was flawed on several grounds, and in response, the *Offshore Installations (Safety Case) Regulations* was made in 2005 and finally the *Health and Safety (Offenses) Act* 2008. However, following the Deepwater Horizon accident off the Gulf of Mexico (Macondo), the UK set up the Oil Spill Prevention and Response Advisory Group (OSPRAG). Nevertheless, at the EU level, both the European Parliament and the European Commission have shown legislative action in this regard through the European Parliament resolution of 7th October 2010 on the EU *Action on Oil Exploration and Extraction in Europe*, and the *European Commission communication SEC (2010) 1193 final*.⁹⁶

In Nigeria, accidents leading to health and safety risks are also prevalent. Many of these are not reported in the mainstream media with instant and extensive administrative and regulatory intervention, and so responses with the aim of reducing or eliminating these accidents are not as robust, either. To enumerate a few of these accidents, we have to mention the Funiwa No. 5 Well blow-out of 17th January, 1980 five miles off the Niger Delta, which ignited on 29th January, 1980.⁹⁷ On 28th April, 1989, the Santa Fe Al Baz blew out and ignited while drilling off the Nigerian coast, killing the derrickman and four other crew members.⁹⁸ A Helicopter crash in 2000 offshore Nigeria killing eight Nigerian workers,⁹⁹ and in 2001, a work plate sank while working off the Niger Delta killing eleven Nigerians.

⁸⁹ A jack-up drilling rig which discovered the first commercial gas field in the UKCS in April 1965

⁹⁰ Greg Gordon, John Paterson and Emre Usenmez, "Oil and Gas Law – Current Practice and Emerging Trends" 2nd Edition, 2011, Dundee University Press, pg. 191

⁹¹ Ibid, pg. 193

⁹² On 6th July 1988, the Piper Alpha production platform was destroyed by a series of explosions and fires, killing 167 men. See also Lord Cullen, *The Public Inquiry into the Piper Alpha Disaster* (Cm 1310, 1990). Para. 1.1

⁹³ This was amended by the Offshore Safety (Miscellaneous Amendments) Regulations 2002 (SI 2002/2175)

⁹⁴ SI 1995/743

⁹⁵ SI 1996/913

⁹⁶ Greg Gordon *et al*, *ibid*, pg. 228

⁹⁷ IncidentNews – Office of Response and Restoration: Funiwa No. 5 (January 17, 1980)

⁹⁸ Le Tourneau: Rig Guide- Ai Baz

⁹⁹ Sulaimon Salau, 'Bringing Absolute Safety into Nigeria's Offshore Oil Exploration' Business Services-Energy Report (17 August, 2011) The Guardian Nigeria

Shortly, on 20th July, 2013, dozens of people were burned alive on board of offshore supply vessel which exploded in Abuloma Jetty, Port Harcourt during welding works. The fire continued till the following day and there was no fire - fighting response, with about thirty persons believed to have been consumed in the fire. The vessel, during the welding operations was carrying supplies of fuel to offshore oil facilities.¹⁰⁰ On 26th May, 2013, the Tug Jackson 4, a vessel operated by Chevron Nigeria Limited (CNL) capsized and sank off the Nigerian coast in the area of Single Buoy Mooring (SBM) 3, a loading point 30km offshore in the Escravos area of Delta State, Nigeria. Out of the total crew of twelve, only one, a cook, survived.¹⁰¹ There is an estimated 1866 accidents, 344 fatalities, and 2001 casualties within the period, of which more than 50% of the victims are unskilled labourers.¹⁰²

In the aspect of regulations, Nigeria has not done badly either. The repealed *Petroleum Act*¹⁰³ empowered the Minister to make regulations necessary for among other things, providing for general matters relating to license, including safe working and reporting of accidents,¹⁰⁴ with powers to enforce including to revoke a licence under certain conditions, including non-compliance with “good oilfield practices.”¹⁰⁵ Now, under the PIA, the powers of the Minister are enumerated under s. 3 of the Act. He is also empowered to revoke licences and leases under s. 3 (1) (h) of the PIA. The grounds for revocation are spelt out in s. 96 of the PIA. One of the grounds for revocation of a licence/lease by the Minister, is failure to conduct petroleum operations in accordance with good international petroleum industry practices under the provision of the Act or other relevant legislations.¹⁰⁶ Good international petroleum industry practices has been defined as those uses and practices that are, at the time in question, generally accepted in the international petroleum industry as being good, safe, economical, environmentally sound and efficient in petroleum operations and should reflect standards of service and technology that are either state-of-the-art or otherwise appropriate to the operations in question and should be applied using standards in all matters that are no less rigorous than those in use by petroleum companies in global operations.¹⁰⁷

The 1969 Regulations introduced the Offshore Safety Permit under Section 44 which categorized offshore staff into 4 groups: A – Divers and underwater workers; B – Permanent Offshore workers (working offshore for 3 months or more in a year); C – Temporary Offshore workers; and D – Visitors to offshore facilities.

¹⁰⁰ Maritime Bulletin (n 23) ibid

¹⁰¹ Maritime Bulletin: Tug Jackson 4 Sinking Update, Nigeria (May 28, 2013)

¹⁰² WF Dublin-Green, JN Nwankwo & DO Irrechukwu, 'Effective Regulation and Management of HSE Issues in the Petroleum Industry in Nigeria' (1998) Society of Petroleum Engineers-SPE 46726-MS Conference Paper, SPE International Conference on Health, Safety, and Environment in Oil and Gas Exploration and Production, 7- 10 June, 1998, Caracas, Venezuela

¹⁰³ Petroleum Act, 1969, CAP 350 LFN 2004

¹⁰⁴ Petroleum Act, 1969, Section 9(2) (a)(b)(c)

¹⁰⁵ Schedule 1, Section 24(1) Petroleum Act, 1969

¹⁰⁶ PIA 2021, s 96 (1) (a).

¹⁰⁷ PIA 2021, s 318, Interpretation section.

Other relevant regulations are the *Factories Act*,¹⁰⁸ the *Nigerian maritime Administration and Safety Agency Act 2007*.

4.3. REGULATION OF ENVIRONMENTAL OBLIGATIONS:

The industry is replete with environmental regulations. The EU relevant provision in this regard is the European *Council Directive 92/43/EEC*¹⁰⁹ which provides for the conservation of natural habitats and of wild fauna and flora, and the EU *Council Directive 79/409/ECC* on the conservation of wild birds. From these Directives, the UK enacted the *Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001*¹¹⁰ designed to ensure the protection of specific habitats and species from the potentially harmful activities of offshore industry.

This was preceded by the *Offshore Petroleum Production and Pipe-lines (Assessment of Environmental Effects) Regulations 1999*¹¹¹ which consolidates the existing European Union mandatory¹¹² obligation to conduct environmental assessments of any proposed offshore oil and gas activity. There are also the *Food and Environmental Protection Act 1985* and the *Coast Protection Act 1949* which have provisions with permitting requirements which must be met by prospective surveyors and shallow drillers, and which are expected to reduce environmental risks if met.¹¹³

The UK *Offshore Installations (Emergency Pollution Control) Regulations 2002* grants the UK government certain powers of intervention in the event of an accident involving offshore installations so as to prevent and reduce possible pollution. This is similar to the *Offshore Petroleum Activities (Oil Pollution Prevention and Control) Regulations 2005*, which went further to ban the discharge of oil, except in accordance with a permit.¹¹⁴

Specifically regarding drilling activities, the UK enacted the *Offshore Chemical Regulations 2002* which prohibits the discharge of offshore chemicals except in accordance with a permit granted by the Secretary of State,¹¹⁵ while the *Offshore Petroleum Activities (Oil Pollution Prevention and Control) Regulations 2005* is made to reduce the quantity of hydrocarbons (particularly produced water) discharged during offshore operations, introduced a permitting system for oil discharges, while strengthening the powers of inspection and investigation into such discharges.¹¹⁶ Other obligations are introduced to reduce atmospheric emissions from petroleum activities.¹¹⁷

¹⁰⁸ *Factories Act*, CAP F1 LFN 2004. This has specific provisions regarding cleanliness, ventilation, sanitary convenience, etc. see Part II (Health-General Provisions).

¹⁰⁹ Article 4(2)

¹¹⁰ SI 2001/1754

¹¹¹ SI 1999/1360

¹¹² Under the EU Directive 85/337/EEC (as amended by Council Directive 97/11/EC)

¹¹³ Greg Gordon *et al*, *ibid*, pg. 255

¹¹⁴ Regulation 3(1).

¹¹⁵ Regulation 3(1), and Regulation 4(1) to be read jointly.

¹¹⁶ See Regulations 3(1) and 12(1)(a) & (b).

¹¹⁷ *Merchant Shipping (Prevention of Air Pollution from Ships) Regulations 2008* SI 2008/2924, amended by the *Merchant Shipping (Prevention of Air Pollution from Ships) (Amendment) Regulations 2010* SI 2010/895 Regulation

In Nigeria, reliance is mostly on international conventions for environmental pollution control. This is not to say that national laws do not exist. However, many of these national laws draw from ratification of existing international conventions, including the *Stockholm Convention* of 1972,¹¹⁸ the *World Charter for Nature*, 1982,¹¹⁹ the *Rio Declaration* 1992,¹²⁰ the *Vienna Convention* of 1985,¹²¹ the *New York Convention*,¹²² the *Brussel Convention* and *London Protocol*,¹²³ etc.

The Rio Declaration introduced the ‘precautionary principle’ under which activities which threaten serious irreversible damages can be restricted or prohibited. In Nigeria, many of the intentions of these international protocols have been integrated into local laws. The Petroleum Act provides an omnibus pollution prevention under Regulation 25 of the *Petroleum Regulations of 1969*. These are further consolidated by the *Federal Environmental Protection Agency Act 1988*. Specifically, the *National Environmental Protection (Effluent Limitations) Regulation 1991*, the *National Environmental Protection (Pollution Abatement in Industries and Facilities Generating Wastes) Regulations 1991*, and the *Waste Management and Hazardous Waste Regulations 1991* all regulate the discharge of toxic or polluting wastes into the environment. Additional liabilities are imposed by the *Environmental Impact Assessment Act* (which requires an assessment of the negative impact of projects before they are implemented and adequate preparation for the reduction or elimination of such impacts), and the *Harmful Wastes (Special Criminal Provisions) Act* which criminalises the indiscriminate and unapproved discharge of harmful wastes into the environment.

2(1); the *Offshore Combustion Installations (Prevention and Control of Pollution) Regulations 2001 SI 2001/1091* Regulation 2, 3, 4(1), 5(3), 7(3); *National Emission Ceilings Regulations 2002* which provides a permitted amount per year which must not be exceeded.

¹¹⁸ Declaration of the United Nations Conference on the Human Environment (Stockholm, 16 June 1972).

¹¹⁹ United Nations General Assembly Resolution 37/7 and Annex: World Charter for Nature (28 October 1982)

¹²⁰ The Rio Declaration on Environment and Development (Rio de Janeiro, 13 June 1992)

¹²¹ Vienna Convention for the Protection of the Ozone Layer (Vienna, 22 March 1985)

¹²² United Nations Framework Convention on Climate Change (New York, May 9 1992). Others are the Montreal Protocol on Substances that deplete the Ozone Layer 1987 (Amended London 27-29 June 1990: Nairobi 19-21 June 1991; Copenhagen 23-25 November 1992); the Kyoto Protocol to the UN Framework Convention on Climate Change (Kyoto, December, 1997)

¹²³ International Convention on Civil Liability for Oil Pollution Damage (Brussels 29 November 1969) and Protocol (London, 19 November, 1976), etc.

5. CONTRACTUAL INTERVENTIONS AND RISK ALLOCATION:

5.1. CONTRACTUAL INTERVENTION STRATEGIES:

5.1.1 INDEMNITY:

Indemnity is a contractual agreement between two parties. In this arrangement, one party agrees to pay for potential losses or damages by another party. In a legal sense, it may also refer to an exemption from liability for damages.¹²⁴ It has been defined by Black's Law Dictionary as a duty to make good any loss, damage or liability incurred by another, or the right of an injured party to claim reimbursement for its loss, damage or liability from person who has such duty.¹²⁵ Indemnity clauses are used specifically for transferring and reassigning liability and will usually appear as a mutual promise. Indemnity clauses usually establish a positive duty to protect against or to pay or reimburse a claim for damages; such as paying compensation following an oil spill¹²⁶ or any other damage or liability that may arise from the contract.

To indemnify means: (i) to restore the victim of a loss, in whole or in part, by payment, repair, or replacement; (ii) to save harmless; to secure against loss or damage; or to give security for the reimbursement of a person in case of an anticipated loss falling upon him; and (iii) to make good; to compensate; or to make reimbursement to one of a loss already incurred by him.¹²⁷

Indemnity Clause therefore is pronouncement in an agreement between the contracting firms which hitherto provides for security of the parties in the case of any eventualities.¹²⁸ Indemnity can be divided into two forms, viz: the indemnity and hold harmless clause and mutual indemnity and hold harmless.

5.1.2 INDEMNITY AND HOLD HARMLESS CLAUSE:

The oil and gas industry routinely uses the terms, 'indemnify', 'hold harmless' and 'indemnify and hold harmless.' For instance, the oil and gas industry's attempt to put in place a contractual risk allocation regime between offshore contractors who would not otherwise have a contractual relationship, known in the industry as the Indemnity and Mutual Hold Harmless (IMHH)., The Deed is formally entitled the "Mutual Indemnity and Hold Harmless Deed." The use of mutual hold harmless provisions within the industry's contracts is common practice. In fact some

¹²⁴

Investopedia,

'Indemnity'

[<https://www.investopedia.com/terms/i/indemnity.asp#:~:text=Indemnity%20is%20a%20contractual%20agreement,damages%20caused%20by%20another%20party.&text=With%20indemnity%2C%20the%20insurer%20indemnifies,business%20for%20any%20covered%20loss.>](https://www.investopedia.com/terms/i/indemnity.asp#:~:text=Indemnity%20is%20a%20contractual%20agreement,damages%20caused%20by%20another%20party.&text=With%20indemnity%2C%20the%20insurer%20indemnifies,business%20for%20any%20covered%20loss.>) assessed 3 November, 2021.

¹²⁵ Immix Law, 'What is Indemnification?' <https://immixlaw.com/what-is-indemnification/> assessed 3 November, 2021.

¹²⁶ UIO, (2012) 'The Enforceability of Indemnity Clauses for Oil Pollution Liability in Offshore Petroleum Contracts' *Faculty of Law, University of Oslo*. p 8.

¹²⁷ Black's Law Dictionary, 6th Ed, p 769.

¹²⁸ S. C. Dike and J E Chigonu, 'Risk Allocation in the Oil and Gas Industry' (2020) (5) (1), *Journal of Private Law*. p. 184.

operators have their own version of the IMHH. These are, however, limited to specific contracts or companies and as a result an industry scheme was developed.¹²⁹ Furthermore, the primary objective of the industry mutual hold harmless deed is to address the contractual gap that traditionally exists between contractors working on the UKCS with regard to the allocation of liability.¹³⁰

In *Farstad Supply As v. Enviroco Ltd*,¹³¹ the Supreme Court held that the clause whereby the owner of a vessel under charter agreed to “indemnity and hold harmless” the charterer against all liability resulting from loss of or damage to the vessel was not a pure indemnity clause but a mixed provision containing elements of indemnity and exclusion. Whether it operated as an indemnity or exclusion will depend on whether the clause sought to determine was to bear responsibility for “third party response” (In which case the clause would be an indemnity) or whether it resolved direct exposure to the other contracting party (in which case it would be an exclusion). On the facts of the case in question, the owner had suffered damage to his own property. The case was therefore seen by the Supreme Court as one of “direct exposure”, hence the clause was, on this occasion, to be seen as an exclusion of liability clause.¹³²

5.1.3 MUTUAL INDEMNITY AND MUTUAL HOLD HARMLESS CLAUSE:

A mutual indemnity is sometimes also called a “reciprocal indemnity”, a “cross - indemnity” or a “knock to knock” indemnity, and is a contractual devise where the parties with the one hand give and with the other hand take an indemnity in respect of a species of loss which, if the indemnity is to avoid circularity, must not be identical to each other, but which are usually closely related. A mutual indemnity therefore differs from a simple indemnity, where one party has the burden of giving the indemnity (acts as indemnifier) and the other party has the benefit of being indemnified. In a mutual indemnity, each party is simultaneously both an indemnifier (in relation to one species of loss) and the indemnified (in relation to different, but related, specie of loss). In the oil and gas context, it is usual for the parties to enter into not just mutual indemnity provisions but into mutual indemnity and hold harmless clauses.¹³³

5.1.4 EXCLUSION AND EXEMPTION CLAUSES:

Generally, there is freedom of contract so parties to a contract are free to include an exclusion and exemption clause in their contract. An exclusion clause is one which excludes or restricts a party's contractual liability, whether by imposing time limits for instituting claims, narrowing or qualifying definitions of loss, restricting parties' recourse to rights or remedies, or curtailing the application of the rules of evidence or procedure.¹³⁴ The purpose of an exemption clause is to

¹²⁹ LOGIC, ‘Governance for Standard Industry Solution: IMHH’ <<https://www.logic-oil.com/imhh>> assessed 13 May 2022.

¹³⁰ Ibid

¹³¹ (2010) UKSC 18, (2010) SCLR 379.

¹³² S. C. Dike and J E Chigonu, at 185.

¹³³ S. C. Dike and J E Chigonu, at 186.

¹³⁴ Allen & Overly, ‘Interpretation of Exclusion Clauses’ (2016) <<https://www.allenoverly.com/en-gb/global/news-and-insights/publications/interpretation-of-exclusion-clauses>>assessed 4 November, 2021.

exclude or limit liability. For example, it is common in contracts to exclude liability for losses arising out of breach of contract, to limit liability to cases of wilful neglect or to introduce a clause limiting the time within which claims can be submitted.¹³⁵ The effect of an exclusion clause is that it would release a party from responsibility for loss arising from an identified risk in respect of any risks arising from the contract.¹³⁶ The difference between an exclusion clause and an indemnity clause is that the exclusion clause may entirely remove liability for the party who seeks for such exclusion.¹³⁷ Its effectiveness therefore does not really depend on the financial position of the other party.¹³⁸

An exemption clause can only be enforceable if it is incorporated into the contract as a term and if it covers the loss it was designed for.¹³⁹ Where the clause in question was a mutual exclusion clause that two parties of equal bargaining power had negotiated and agreed to, the Court of Appeal placed great emphasis on the obligation of the courts to give effect to contractual language agreed between commercial parties, particularly in light of *Arnold v. Britton*,¹⁴⁰ the court confirmed that even where parties have bound themselves to onerous obligations, an interpretation that reflects what the parties actually agreed to is to be preferred.¹⁴¹

5.1.5 LIMITATION OF LIABILITY:

A liability clause may apportion the responsibility for remedying losses arising out of an act of the benefiting party but at the same time put a cap on it. The cap may be on the basis of a predetermined portion of the loss or a fixed sum.¹⁴² Parties can agree to limit their exposure in respect of the extent of the economic consequences that they are willing to take responsibility for in the event that a specified risk event occurs. The Courts usually recognize this approach and apply the *contra proferentem* rule less rigorously, as they generally prefer parties to limit their liability rather than exclude it entirely.¹⁴³

In offshore drilling contracts, similar to most commercial contracts in the oil and gas sector, the contractors almost always request for a limit on their financial liability. Exemption clauses do not offer as much protection to the contractor because the costs which can be directly attributable to the loss occasioned by a risk event can be inexorably higher than the contractor can bear, and even

¹³⁵ J Chitty and H. G. Beale, *Chitty on Contracts* (30th edn, Sweet & Maxwell 2008) para 14.

¹³⁶ *Farstad Supply AS v Enviroco Ltd* [2010] UKSC 18; [2010] SLT 884.

¹³⁷ W M Zulhafiz, “Enforceability of Knock-for-Knock Indemnities in Oilfield Service Contracts in Thailand”, The Fifth International Conference on Advancement of Development Administration 2016–Social Science and Interdisciplinary Studies (The 5th ICADA 2016–SSIS) held on May 26–28, 2016 at National Institute of Development Administration (NIDA), Bangkok (2016).

¹³⁸ L Koffman and E Macdonald, *The Law of Contract* (Oxford University Press, 2010), p 158; S Geoffrey, *Law of Obligations and Legal Remedies* (London Routledge, 2013).

¹³⁹ G Treitel, *The Law of Contract* (13th Ed Sweet & Maxwell 2011) 237 para 7.

¹⁴⁰ *Arnold v Britton* [2015] UKSC 36.

¹⁴¹ Allen & Overy, ‘Interpretation of Exclusion Clauses’ (2016) <<https://www.allenoverly.com/en-gb/global/news-and-insights/publications/interpretation-of-exclusion-clauses>> assessed 4 November, 2021.

¹⁴² V Ataka, ‘Risk Allocation in Oil and Gas Contracts by Way of Indemnity, Exclusion & Limitation Of Liability’ <<https://www.slideshare.net/ataka1/risk-allocation-in-oil-and-gas-contracts>> pg 14 assessed 4 November, 2021.

¹⁴³ *Ailsa Craig Fishing Co v Malvern Fishing Co Ltd and Securicor (Scotland) Ltd* (1983) 1 W.L.R. 964; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* (1983) 2 AC 803.

then, might be open to challenge. A cap on financial liability thus represents a valuable means of ensuring that the contractor's exposure is not indeterminate.¹⁴⁴ Where parties have equal bargaining strength, the party that accepts the limitation of liability is deemed to understand that he bears the residual risk of the remainder of the economic consequences of the occurrence of the relevant risk event. It is then up to that party to take appropriate steps to manage, mitigate and/or prevent the risk event from occurring, steps which may include taking out insurance to cover that eventuality.¹⁴⁵

In a fixed limited liability, parties are made to provide a specific amount outside for risks or eventualities when they finally occur. Usually, fixed liability serves as a compromise for the parties where no mutual hold harmless indemnity or exclusion of consequential losses is agreed upon. While the fixed liability contemplates on certain substantial amount to be set aside, proportional or proportionate limitation deals with the limitation of parties' liability to the proportion of their participation in the contract.¹⁴⁶

5.1.6 LIQUIDATED DAMAGES:

Contract parties can allocate risk by pre - determining the consequences of a breach of contract by prescribing both the mechanism to be adopted and/or quantum of damages to be paid in the event of a breach of contract. In this way, parties are able to quantify the economic consequences of the occurrence of the risk event upfront, and can take adequate measures to prevent the risk event from occurring or ensure their ability to bear the risk if the adverse event occurs. This approach is also adopted to avoid the tedium of proving the actual extent of damage which justifies a specified amount of money as damages.¹⁴⁷ When risk is allocated in this manner, this is referred to as *liquidated damages*.¹⁴⁸ It has been held by the courts that specified and quantifiable property stated as being transferrable upon breach of contract can also be termed as liquidated damages.¹⁴⁹ The modern formulation for determining whether a specified amount equates to liquidated damages, is traced to the guidelines laid down in *Dunlop Pneumatic Tyre Co v. New Garage and Motor Co.*¹⁵⁰ Essentially, a clause will be termed as liquidated damages if it represents a genuine pre - estimate of the loss that will be incurred upon a breach of the contract,¹⁵¹ and is basically a 'calculation' of the components of the loss presumed to be suffered by the innocent party, which the latter party is entitled to as compensation in accordance with the contract.¹⁵²

¹⁴⁴ O Kelechi, *How Contractual Risk Allocation Provisions of Oil and Gas Contracts Have Been or May Be interpreted by an English Court – A Case Study of Some Model Offshore Drilling Rig Contracts Developed in the United Kingdom, Canada and the United States of America* (2018 University of Dundee) p227.

¹⁴⁵ Ibid 228.

¹⁴⁶ S. C. Dike and J E Chigonu, at 193.

¹⁴⁷ H McGregor, *McGregor on Damages* (17th Ed Sweet & Maxwell 2003) p. 424.

¹⁴⁸ W R Anson et al, *Anson's Law of Contract* (Oxford University Press 2010) p. 785.

¹⁴⁹ *Jobson v Johnson* (1989) 1 W.L.R. 1026, CA.

¹⁵⁰ (1915) A.C. 79, at 86–88

¹⁵¹ *Clydebank Engineering Co v Don Jose Ramos Yzquierdo y Castaneda* (1905) A.C. 6, at 19.

¹⁵² O. Kelechi, at 229.

5.1.7 INSURANCE:

The nature of oil and gas well drilling business is one that exposes operators and drilling contractors to great risks. Some of these risks are foreseeable, while some are unforeseeable. A drilling contract usually contains extensive provisions on insurance to guard against the potentially huge potential losses.¹⁵³

The insurance clauses attempt to allocate responsibility and liability for accidents resulting in the above to the insurer. Majority of drilling contracts require the drilling contractor to procure/maintain adequate insurance covering the contractor for the duration of the drilling contract.¹⁵⁴ It is during negotiations that associated risks will be allocated to the parties therefore, parties must take negotiation seriously to ensure they are well guarded.

Under the Master Service Agreements, Consultants and Service Contractors are required to carry out a minimum amount of insurance coverage on the following: a) Commercial General Liability; b) Excess Liability; c) Workers Compensation and Employer's Liability; d) Automobile Liability; e) Professional Liability; f) Equipment/Property; and g) Watercraft (where applicable) and Control of Well (where applicable).¹⁵⁵

Importance of Insurance

1. The insurance provided by the contractor is primary to any other coverage in favour of the indemnified parties, at least for the risks and liabilities assumed by the contractor.¹⁵⁶
2. Being named an additional insured is an affirmative protection that gives the additional insured direct rights under the policy of insurance. Additional insureds generally have the same rights to coverage as a named insured.¹⁵⁷

5.2. RATIONALE FOR RISK ALLOCATION:

5.2.1. INDUSTRY PRACTICE:

Rationales for risk allocation have arisen from long and sustained practice within the oil and gas industry. Although this practice has not emanated from any written convention or agreement, the global nature of its adoption and/or application lends credence to its existence and relevance. Like any other practice that is not backed by force of law, it remains of persuasive character, and

¹⁵³ C. W. SMALLING, 'Drilling Contract' <https://cwilliamsmallinglaw.com/global_pictures/2g_Drilling_Contracts.pdf> assessed 3 November, 2021.

¹⁵⁴ Ibid.

¹⁵⁵ G Rubel, (2013) 'Insuring the Oil & Gas Industry' *Texas Surplus Lines Association* <https://cdn.ymaws.com/www.iidallas.org/resource/resmgr/imported/Oil_Gas_Presentation_Dallas_IAT_version.pdf> assessed 3 November, 2021.

¹⁵⁶ M Jone, 'Offshore and Onshore Drilling Contracts' (2011) <<https://cdn.ymaws.com/www.iiah.org/resource/resmgr/imported/Offshore%20and%20Onshore%20Drilling-%20Part%201%20Contr.pdf>> assessed 3 November, 2021.

¹⁵⁷ Ibid.

contract parties are at liberty to ignore it and allocate risks *inter se* as they deem fit. Also, even when contract parties seem to have adopted the practice, there is no evidence of any documentation which attributes the manner of risk allocation to any practice. Given the private nature of contracts and contracts negotiations, unless parties actually reflect the underlying philosophies of the contract terms in the drilling contract, rationale in specific contexts can only be a matter of conjecture.¹⁵⁸

5.2.2. DOCTRINE OF TRADITION:

The doctrine operates on the premise that risk for designated personnel, equipment and procedure is usually assigned to the contractor, leaving the other obligations/risks to be allocated between the parties by negotiation, in the absence of which any unallocated risk will default to the operator.¹⁵⁹ Thus, it is customary, for instance, to expect that the drilling contractor would supply the drilling unit, together with most of the crew required to carry on the drilling operations, while the operator would furnish the drilling mud, coring equipment, storage tanks, testing and completion services, as well as the requisite equipment.¹⁶⁰ In the same vein, whichever party was responsible for providing any equipment or personnel traditionally bore the risks associated with that provision.¹⁶¹

5.2.3. DOCTRINE OF BEST KNOWLEDGE:

This doctrine stipulates that risk should be allocated to the contract party who is most knowledgeable about the specific risk, and better placed to avoid legal action ensuing therefrom.¹⁶² The thrust of the doctrine is to avoid legal action that arises from lack of knowledge about the specific risk subject - matter and, by so doing, eliminate, or at least reduce, the uncertainty that ordinarily characterizes risk.¹⁶³ The cost of allocating risk to a party who lacks requisite knowledge about the subject matter or responsibility can be very dire. In *Callon Petroleum Co v. Big Chief Drilling Co*,¹⁶⁴ the responsibility and risk of ensuring a sound location were allocated to the operator, who procured the services of a third party for this purpose. However, the contractor unilaterally altered the location approved by the operator, resulting in a significant increase in the cost of the directional drilling. It was held that the contractor had, by that action, assumed the risk of ensuring a sound well location, which it had failed to do, and was thus responsible for bearing the economic consequences of the failure to do so.¹⁶⁵

¹⁵⁸ O Kelechi, at 261.

¹⁵⁹ M D Rankin and D R Richardson, 'The Offshore Drilling Contract-Operator and Contractor Perspectives,' (1983) *IADC/SPE 1983 Drilling Conference*, New Orleans, Louisiana, February 20–23, Texas, USA: Society of Petroleum Engineers, 1– 8, at p 3.

¹⁶⁰ O L Anderson, 'The Anatomy of an Oil and Gas Drilling Contract' (1989) *Tulsa LJ*, p 395

¹⁶¹ O Kelechi, at 262.

¹⁶² M D Rankin and D R Richardson, at 3.

¹⁶³ O Kelechi, at 263.

¹⁶⁴ 548 F.2d 1174 (5th Cir. 1977).

¹⁶⁵ *Supra*.

5.2.4. **DOCTRINE OF CLAY FEET:**

This doctrine stipulates that the contract party who is under a legal obligation to perform or refrain from performing an act, the breach of which would attract legal action and/or sanction, should bear the economic consequences of the occurrence of the legal action or imposition of the sanction.¹⁶⁶ The doctrine's premise is that a legal obligation cannot be outsourced or transferred. Legal obligations are typically imposed by statute or other subordinate legislation, together with the sanctions applicable upon a breach, which would usually be targeted at the obligor.¹⁶⁷ In *Persimmon Homes Ltd v. Ove Arup and Partners Ltd*,¹⁶⁸ it was held that contractual releases will be enforced for breaches of statutory duty if the parties express that intent. Provided the contractual provisions are clear, then the courts will enforce that as being the agreed risk allocation method of the parties.¹⁶⁹

5.2.5. **DOCTRINE OF ACCOUNTABILITY:**

The doctrine focuses on the contract party in control of the process that gives rise to legal proceedings, and states that this party should be allocated the risk of the occurrence of the harmful event emanating from the process.¹⁷⁰ Most drilling contracts make it an obligation of the contractor to comply with lawful instructions issued by the operator. This puts it beyond contention that the operator is the directing entity, which may be the reason why contractors seek to allocate the majority of the risks to it (the operator) and only accept for themselves (the contractors) the remainder of the risks that they traditionally own and for which they can obtain insurance.¹⁷¹

5.2.6 LEGAL AND ECONOMIC CONSIDERATIONS:

This focuses on the optimality of risk allocation with the aim of ensuring that risk is allocated in the most efficient way possible in the circumstances.

- A. **Party Able to Bear the Risk:** The party who is best able to bear a given risk is the party who can bear it cheapest.¹⁷² The capacity to meet the exigencies of the occurrence of an adverse event is paramount from the contractor's perspective, which is why, for instance, they tend to reject being allocated the risk of blowouts, cratering, pollution emanating therefrom, or any other well control events. The rationale remains their lack of capacity to deal with the economic consequences of these events when they occur.¹⁷³

- B. **Overall Efficiency Rationale:** This rationale is premised on the assumption that a party that has the capacity to mitigate risk volatility, given the breadth of their assets or investment

¹⁶⁶ M D Rankin and D R Richardson, at 3.

¹⁶⁷ O Kelechi, at 265.

¹⁶⁸ (2017) EWCA Civ 373.

¹⁶⁹ O Kelechi, at 265.

¹⁷⁰ Ibid.

¹⁷¹ Ibid 268.

¹⁷² R A Posner, 'Some Uses and Abuses of Economics in Law' (1979) *The University of Chicago Law Review*. p 44.

¹⁷³ O Kelechi, at 270.

relative to the specific risk, should be allocated that contractual risk. It is on this basis, for instance, that contractors bear the responsibility for the economic consequences of any damage to the drilling unit.¹⁷⁴

- C. **Economic Benefit Rationale:** This rationale proceeds on the basis that the contract party that stands to reap the benefit of any specific procedure should be allocated the risk arising therefrom as well. It is underpinned by the theory of *risk* and *reward*,¹⁷⁵ which posits that parties, as rational people, will accept higher risk provided this translates into higher profits, which exceed the cost of capital attendant upon the increased risk.¹⁷⁶
- D. **Foreseeability Rationale:** This rationale posits that risk should be allocated to the party who is best able to foresee the potential adverse events that could occur, and is able to act to avoid the risk events from occurring.¹⁷⁷ Foreseeability rationale is premised on sufficient knowledge and experience of the subject matter covered by the allocated risk, especially relating to procedures, resources, potential pitfalls and challenges. It also presupposes that the contract party possesses adequate resources to prevent the foreseen risk from eventuating, and assumes that the risk is truly foreseeable, as a party can be relieved from the consequences of their breach if the promisee's losses were unforeseeable.¹⁷⁸

¹⁷⁴ Ibid.

¹⁷⁵ M Burke and P Nicholas, 'Risk versus Reward Capital Markets: Indonesia Dispute Resolution,' (2010–2011) (29) *International Finance Law Review* p 25.

¹⁷⁶ Ibid.

¹⁷⁷ P S Atiyah, 'Essays on Contract' (Oxford University Press 1990) at p 36.

¹⁷⁸ *Hadley v Baxendale* (1854) 9 Exch. 341.

6. JURISDICTIONAL INTERVENTIONS:

6.1. ENGLISH LAW

In the United Kingdom, *section 2 of Unfair Contract Terms Act (“UCTA”)*¹⁷⁹ provides that: (1) A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence. (2) In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.

Based on the above, it is important to note that, indemnity and hold harmless clauses pertaining to bodily injury and death could be enforceable in the UK despite the restriction under section 2 of UCTA. This is because the clauses pertaining to bodily injury and death are to be operated in its original function as indemnities against third party exposure. Hence, UCTA is not applicable.¹⁸⁰ In contrast, any part of the clauses which deals with the operator’s property or the property of the contractor, for instance, damage to property owned by that party or consequential loss suffered by it, would be considered as exclusion clauses in the context of direct exposure to the other contracting party.¹⁸¹ Therefore, the parties must ensure that such clause should have fulfilled the reasonableness test under section 3 of UCTA.¹⁸²

6.2. EUROPEAN UNION:

Indirect damages exist in European countries’ laws too. However, in Europe, as a matter of principle, one is never held liable for indirect damages. You cannot be held financially responsible for anything not directly caused by what you did. In Europe, matters like loss of profit aren’t necessarily considered indirect. If it can be proven that it is directly caused any party, it is considered a direct damage, and such party can be held liable. However, for this to be possible parties would need to add specific language in the contract intended to exclude liability for certain types of losses, such as loss of profit, because in the EU, to have the same purpose, the wording of the exclusion clause in the contract would need to be different.¹⁸³ By Article 3.109¹⁸⁴ the parties may agree in advance to limit or exclude their liability for non - performance except where the non - performance is intentional or the limitation or exclusion is unreasonable.¹⁸⁵

¹⁷⁹ UCTA 1977.

¹⁸⁰ W M Zulhafiz, ‘Unfair Contract Terms Act 1977: Does It Provide a Good Model in Regulating Risk Allocation Provisions in Oilfield Contracts in Malaysia?’, (2015) (8) *International Journal of Trade & Global Market* p. 3.

¹⁸¹ W M Zulhafiz, ‘A Comparative Analysis on the Enforceability of Knock-for-Knock Indemnities in Thailand and the United Kingdom,’ (2017) (44) (1) *Journal of Malaysian and Comparative Law* p 39.

¹⁸² Ibid at 40.

¹⁸³ Law office of Grynwaje, “Understanding Liability Limitations in Europe vs. the US” <<https://www.transatlantic-lawyer.com/understanding-liability-limitations-in-europe-vs-the-us/>> assessed 10 November. 2021.

¹⁸⁴ Principles of European Contract Law [Part 1, 1995], <<https://www.jus.uio.no/lm/eu.contract.principles.part1.1995/3.109.html>> assessed 10 November 2021.

¹⁸⁵ Ibid.

6.3. NIGERIA

The enforcement of exclusion and limitation clauses depends on varying events such as the excluding clause being part of the contract. It can either be part of the contract or referred to in the contract as an appendix. It was held in *Enemchukwu v. Okoye*,¹⁸⁶ that a party is bound by a contract signed by him. Thus, the issue of failing to read the portion of a contract containing the exclusion/limitation clause despite being given in the contract, will be of no effect so long as there is no vitiating element.¹⁸⁷ This is to ensure that the other party is aware of the exclusion before entering into the contract.¹⁸⁸ Contracts containing exclusion and limitation clauses can be interpreted through the *contra proferentem* rule of interpretation.

The courts have generally been hostile in the interpretation of exclusion clauses and thus, the rule is that any ambiguous clause/subject of interpretational dispute should be interpreted *against* the interests of the party that requested that the clause is included.¹⁸⁹ Also, it must be noted that an exemption clause cannot avail a party who is in fundamental breach of a contract,¹⁹⁰ or a breach of a fundamental term to rely upon an exemption clause so as to escape liability.¹⁹¹ Furthermore, the position is that the party relying on the exemption clause must show that the other party has been made aware of the exemption clause.¹⁹² The court in *Associated Bus Co. Plc v. Anyanwu*¹⁹³ held that hiding the exemption clause at the back of a receipt cannot put the party adequately on notice of such exemption or exclusion clause.¹⁹⁴

Finally, the Nigerian court has always reiterated the three tests under common law with which an exclusion clause can be effective viz: a) It has been incorporated into the agreement, b) Its wording must cover the liability in question, and c) It must not be prohibited by statute or other law.¹⁹⁵

¹⁸⁶ (2016) LPELR-40027(CA)

¹⁸⁷ *Enemchukwu v. Okoye* supra.

¹⁸⁸ F Okeke, 'Exclusion Clauses: When He Who Pays the Piper Does not Dictate the Tune!!!' <<https://www.mondaq.com/nigeria/contracts-and-commercial-law/954956/exclusion-clauses-when-he-who-pays-the-piper-does-not-dictate-the-tune>> assessed 10 November, 2021.

¹⁸⁹ *MTN Communication Ltd v. Amadi* (2012) LPELR-21276(CA)

¹⁹⁰ *Ezex Courier Services Ltd v. Ugwu & Anor* (2016) LPELR - 41478 (CA).

¹⁹¹ *International Messengers Nigeria v. Pegofor Industries Ltd* (2005) ALL NLR 234.

¹⁹² *Eagle Super Pack Nig. Ltd v. ACB Plc* (2006) LPELR - 980 SC.

¹⁹³ (2020) LPELR-49551(CA).

¹⁹⁴ *Associated Bus Co. Plc v. Anyanwu* supra.

¹⁹⁵ *International Messengers Nigeria v. Pegofor Industries Ltd* supra

7. CONCLUSION:

Drilling activities in the oil and gas industry is a global venture. Although attempts at complete industry regulation of activities are still peripheral, with best practices only available in terms of codes and standards, and in actual cases, lacking in binding force, yet players understand the risks which they face in the event of failure to meet these standards. Apart from International obligations, municipal laws exist which helps to regulate drilling activities with the aim of creating to a large extent, a minimum expectation from the industry players in terms of environmental compliance and health and safety requirements among others.

The UK has evolved through different stages, from the general international rather discretionary and optional provisions, to the recent goal setting regime where players and operators are required to set annual goals which optimise health, safety and environment with minimum standard expectations.

In Nigeria, although with more reliance on international standards, yet there are most specific provisions which outline parties' obligations and risks, in addition to the contractual obligations of the parties.

In managing these risks, the industry is replete with standards, regulatory obligations, common law expectations as well as contractual arrangements. Under contractual arrangements, it is important for parties to be clear as to allocation of responsibilities, bearing in mind that where any tasks remain undone, it may affect operations and impact the business negatively. For instance, in the Macondo disaster, while assessing the issue of policies on conducting negative pressure tests on the well, Transocean stated that BO was responsible for the development and obtaining approval of plans from the Mineral Management Service of the US Department of Interior, while BP claimed that Transocean had this responsibility.¹⁹⁶

Generally, the principle of freedom of contract enables parties to agree on the terms and conditions that govern their relationship, which should be respected and upheld, in as much as they are not unlawful. This is not without its own limitations and challenges. There have been cases in which this principle is denied on grounds of public policy. This can be seen in anti - indemnity clauses or statutes. In the UK, as is the general rule, indemnification for own negligence has been held to not be contrary to public policy, provided the intent was clear contractually.¹⁹⁷ In the US on the contrary, the Texas anti-indemnity statute¹⁹⁸ was an exception to the general rule. In the UK, the court is usually unwilling to interfere in the manner of risk allocation if the bargaining power of parties to a negotiated contract, who have been properly advised, is incomparable.¹⁹⁹

There may also be instances where intervention in contractual provisions may apply where it is clear that the risk has not been efficiently allocated. In efficient allocation, risk is allocated to the

¹⁹⁶ Ofoegbu Kelechi, *ibid* at pg. 139

¹⁹⁷ *Deepak Fertilizers and Petrochemicals Corpn v ICI Chemicals & Polymers Ltd* [1999] 1 All ER (Comm) 69.

¹⁹⁸ Tex. Civ. Prac. & Rem. Code.

¹⁹⁹ See *Cavendish Square Holding BV v Talal El Makdessi* [2015] UKSC 67. See also Ofoegbu Kelechi at pg 156.

party who is best able to bear the risk by diversifying risk more cost - efficiently, or who can best avoid the cost of financial distress if the risk materializes.

In Nigeria, the general attitude of legislation and judicial interpretation is to enforce the terms and letter of the contract. However, the principle of *contra proferentem* in interpretation allows the courts to interpret an unclear provision in a contract against the party who developed it. In the Nigerian oil and gas industry, reliance is shifting more towards the use of standard contracts and clauses, many of which make references to international statutes or other institutional standards which provide more clarity to the parties' relationships.

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