Legal Issues Concerning Private Equity Investment in Jointly Owned North Sea Midstream Infrastructure

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Abstract

Following a number of high-profile investments by private equity interests in North Sea infrastructure, this article considers the legal obstacles which the terms of the Joint Operating Agreement regulating the relationship of the co-owners to an asset may place on such transactions. These include rights of pre-emption which may arise on any attempt by an original participant to dispose of its interest; the difficulties when the transfer is premised on the private equity interests assuming the position of operator; the issues which may arise when contractual definitions assume an interest of the co-owners in associated oil and gas fields or infrastructure which the investing entity does not meet; and it looks at the assurances which the remaining co-owners may be entitled to seek as a condition of consenting to the transfer.

Introduction

The North Sea industry is increasingly witnessing the changes in the profile of asset ownership previously seen in the onshore US and Canadian and off-shore Norwegian oil and gas industries. Traditional exploration and production (E&P) enterprises have been selling off their midstream infrastructure to acquisition vehicles funded by private equity interests. Transactions have included the sale by BG and BP of a 99% interest in the Central Area Transmission System (CATS) to a vehicle of Antin Infrastructure Partners,[1] by Total of interests in the Frigg UK Pipeline, St Fergus Gas Terminal and the Shetland Island Regional Gas Export System (SIRGE) Pipeline to North Sea Midstream Partners,[2] and by Apache Beryl Ltd to Ancala Midstream of a minority interest in the Scottish Area Gas Evacuation System (SAGE), the Beryl Pipeline and the St Fergus Processing Terminal.[3] More deals of this kind are said to be "in the pipeline".

In the North Sea context,[4] such transactions raise a number of issues where the private equity interests are seeking to acquire the interest of one participant in infrastructure held in joint ownership. Such infrastructure was historically constructed and owned by E&P enterprises for the purposes of transporting hydrocarbons to shore and processing those hydrocarbons through shared facilities. By contrast, for the private equity investor, the interest in the infrastructure is not primarily as a mechanism for bringing its own oil and gas ashore, but as an interest to be "monetarized" through selling its allocated capacity to third party users under Transportation and Processing Agreements.

However, the terms of the Joint Operating Agreements (JOA) on which participants hold and manage interests in offshore infrastructure may present legal challenges to the disposal by an E&P enterprise of its interest in jointly owned infrastructure to private equity interests. These issues were the subject of litigation in relation to one of the private equity deals, in proceedings which generated a number of interlocutory hearings, but were resolved before trial. This article identifies some of the legal issues which may arise in transactions of this kind.[5]

Rights of pre-emption

JOAs frequently contain rights of pre-emption, requiring a joint owner who wishes to dispose of its interest to offer that interest to its co-participants on the same terms as it is willing to sell the interest to a third party. However, to facilitate internal group re-organisations, transfers within the same group as one of the participants (for example a wholly owned subsidiary) frequently do not give rise to a right of pre-emption. This raises the issue of whether it is possible to avoid, to use a neutral phrase, a right of pre-emption by "hiving" the interest in the jointly owned infrastructure off to a subsidiary, and then selling the shares in that subsidiary to a third-party purchaser. Such a structure is known in North American legal circles as a "busted butterfly" transaction.

There are a wide variety of JOAs in use in relation to investment in the North Sea, both in relation to licenses and infrastructure. Some expressly address the possibility of a change in control being used as a mechanism to effect what is economically a sale of the minority interest in the jointly owned infrastructure. For example, the JOA

[1] See *http://www.antin-ip.com/media/our-news/antin-infrastructure-partners-agrees-acquire-central-area-transmission-system-cats* [Accessed 9 July 2018].
[2] See *https://www.total.com/en/media/news/press-releases/uk-total-sells-north-sea-midstream-assets-ps585-million* [Accessed 9 July 2018].
[3] See *http://www.ancala.com/news/ancala-midstream-completes-acquisition-of-interest-in-scottish-area-gas-evacuation-system* [Accessed 9 July 2018].
[4] The different contracting structure in some jurisdictions, e.g. Canada, with upstream JOAs for wells, fields and gathering systems, and separate Construction, Operating and Ownership Agreements for midstream assets, may lessen these problems elsewhere.
[5] *Apache Beryl Ltd v Marathon Oil UK Ltd* [2017] EWHC 2258 (Comm); [2017] EWHC 2462 (Comm) and [2017] EWHC 2504 (Comm).

considered in *Texas Eastern Corp v Enterprise Oil Plc*[6] was supplemented by a Memorandum of Understanding which "came about because it was envisaged that that the company could get round those rights of pre-emption by selling the share capital of the operator rather than the operator's interest in the licensed area". Similarly, the model JOA produced by the Association of International Petroleum Negotiators (AIPN)[7] separately addresses the concept of "Change in Control" which is drafted in very wide terms, covering "direct or indirect" changes in control "through a single transaction or series of related transactions".

However, a great many JOAs do not. Sometimes, it is clear that this is deliberate. For example, there is no such provision in the Oil and Gas UK model JOA, and the accompanying Guidance Notes state in relation to rights of pre-emption that "change of control of an existing participant by way of share purchase is not covered".[8] In JOAs which do not expressly address this issue, and where the issue is not made clear in factual matrix material, is it possible to effect the sale of the interest to private equity interests without triggering a right of pre-emption by hiving the assets down to a subsidiary and then selling shares in the subsidiary?[9]

There is English authority which might suggest that, if the parties have not themselves expressly closed off the possibility of change of control being used to circumvent pre-emption rights, the court will not do it for them. In *McKillen v Misland (Cyprus) Investments*,[10] Moore-Bick LJ observed of a similar argument that "the parties could have agreed that a transfer of control, even one effected by such informal means, should be sufficient to trigger the rights of pre-emption, but they did not do so". In Canada, in *Northrock Resources, a Partnership v ExxonMobil Canada Energy*,[11] the Court of Appeal for Saskatchewan refused to apply pre-emption rights to a "hive down" to a subsidiary and sale, holding that, if the parties had intended the rights of first refusal to apply to change-of-control transactions, they would have said so, although Canadian authorities accept the possibility that the duty of good faith recognised in Canadian contract law[12] may lead to a different outcome if the desire to avoid the right of first refusal is the motive for structuring the transaction as a hive-down and sale.[13]

In addition, there may be other provisions of the JOA which distinguish between transfers to a company in the same group as an original participant and to a third party—e.g. a threshold credit requirement for new participants or an obligation that they provide security for decommissioning obligations. The argument that these provisions can be circumvented by a "hive down" and on-sale structure is more challenging. It was noted by Hargrave J in *Beaconsfield Gold NL v Allstate Prospecting Pty*[14] in Australia that pre-emption rights reflected "the importance of the identity, financial capacity and reliability of the participants in a joint venture". Considering a contract which had addressed change in control at one level, he rejected a suggestion that it could be circumvented by effecting that change at a higher level when "the commercial effect of the … transaction … would be identical if there was … an event which … would trigger [rights of pre-emption]". For the same reasons, Pritchard J in *Santos Offshore Pty Ltd v Apache Oil Australia Pty Ltd*[15] noted that "the courts have recognised that there is a need for caution in adopting a construction which would restrict their [pre-emption rights'] operation or which would permit their application to be avoided". While a failure specifically to address the change of control mechanism will make the argument that a pre-emption right exists in such circumstances much more difficult, it may not be fatal.

It might be thought that the right of pre-emption is of little consequence in the current context. The reason E&P enterprises are willing to sell their interests in offshore infrastructure, and private equity willing to buy them, is often said to be because the return on capital expected by those investing in E&P is generally much higher than that expected from private equity, who look for a secure and steady return rather than the substantial but volatile returns inherent in oil and gas exploration. While the right of pre-emption exists to allow the remaining E&P participants to lock out an undesirable joint venture partner at a price which leaves the seller whole, the departing participant may feel confident that the remaining E&P participants would not exercise a right of pre-emption which would involve them in assuming the private equity role. However, there are tactical disadvantages to the departing E&P enterprise in complying with pre-emption provisions even where they do not expect the right to be exercised, not least the obligation to disclose the full terms of the proposed deal to their co-owners for them to make an informed decision on pre-emption, information which might prove very valuable to those participants in negotiating other elements of the exit package: for example as to what financial security should be sought or might be available, for the future performance of the transferee's obligations. For this reason, the consequences of a failure to follow pre-emption provisions when they apply are important. On one analysis, the ability to sell part of a common

[6] *Texas Eastern Corp v Enterprise Oil Plc* unreported 21 July 1989.
[7] APIN 2012 Model International Joint Operating Agreement.
[8] *Oil and Gas UK Joint Operating Agreement Guidance Notes*, January 2009, para.23.1.1.
[9] The Apache Beryl transaction involved Apache Beryl serving notice of its intention intended to transfer its interest to a wholly-owned subsidiary and then to sell that subsidiary: *Apache Beryl Ltd v Marathon Oil UK Ltd* [2017] EWHC 2258 (Comm) at [4].
[10] *McKillen v Misland (Cyprus) Investments* [2013] EWCA Civ 781; [2014] B.C.C. 14 at [134]. See also *McKillen v Misland (Cyprus) Investments Ltd* [2012] EWCA Civ 179; [2012] B.C.C. 575.
[11] *Northrock Resources, a Partnership v ExxonMobil Canada Energy* [2017] SKCA 60.
[12] *Bhasin v Hrynew* [2014] 3 S.C.R. 494.
[13] *GATX Corp v Hawker Siddeley Canada Inc* (1996) 1 O.T.C. 322 and *Glimmer Resources Inc v Exall Resources Ltd* (1997) 39 O.T.C. 215.
[14] *Beaconsfield Gold NL v Allstate Prospecting Pty* [2006] V.S.C. 320 at [31]–[33], [52].
[15] *Santos Offshore Pty Ltd v Apache Oil Australia Pty Ltd* [2015] W.A.S.C. 242 at [45].

interest is a conditional right, one such condition being compliance with any pre-emption provisions.[16] On this analysis, failure to comply with the pre-emption provisions would invalidate the transfer. An alternative interpretation is that a failure to follow the pre-emption procedures does not invalidate any transfer, but gives a cause of action in damages for any loss which has followed or at best a right to seek injunctive relief to prevent the transfer. If no remaining participant would have taken advantage of the pre-emption opportunity if offered, there are likely to be no damages at all, and injunctive relief may not be available in the absence of any evidence of a serious possibility of the right of pre-emption being exercised. The AIPN 2012 Model International JOA hints at various possible consequences of a failure to comply with the pre-emption provisions. Article 12.1A provides that any transfer will "only be effective if it satisfies the terms and conditions of Article 12.2", which article sets out the procedures applicable to pre-emption. While this might support the condition precedent analysis, the form offers alternative options for the parties when identifying the consequences of non-compliance: an agreement that relief by specific performance is appropriate, or a liability in liquidated damages. Where none of these options are available, the remaining participants might still refuse to enter into the novation agreements required to effect the transfer under the LOGIC Master Deed.[17] However, if the transfer was not itself invalidated by the failure to follow the pre-emption process, and the remaining participants do not in fact have any desire to operate the pre-emption procedure, they might find themselves exposed to a claim for damages or an application for specific performance if they refuse to give effect to the transfer.

The question of which interpretation is correct will turn on the wording of the JOA, and the manner in which the provisions addressing the service of a notice of an intention to transfer, and the obligation to give information for the possible exercise of a pre-emption right, are structured.

Securing the operatorship

Some private equity investments in midstream offshore infrastructure look to levy synergies through the common management of multiple assets, managing costs and maximising revenue. To do this, they will generally wish to acquire the operatorship under the JOA, the position which gives day-to-day control and management of the asset. However, there are real difficulties in making the acquisition of the role of operator a condition of the deal, even when the current operator is the E&P enterprise seeking to exit from the venture.

First, there is a basic chronological difficulty. Under most JOAs, it is only when the private equity group has already become a co-owner that it will be eligible for appointment to the position of operator, and in a position to seek a vote on a change of operator at a meeting of the operating committee. The transaction may, therefore, have to be complete before the position of operatorship can even be contended for, still less achieved.

Secondly, the appointment of the operator is invariably a matter settled by the votes of the co-owners, the respective weight of their votes being proportionate to their interests. Whereas there may be some rights which the remaining co-owners have in relation to the proposed transfer the exercise of which is qualified by obligations of good faith, rationality or the absence of a collateral purpose (for example the right to require reasonable assurances as to the transferee's capacity to perform the obligations it will be assuming to its co-owners discussed below), the right to vote on the appointment of an operator is not such a right. Rather it is suggested that it is the nature of an "absolute contractual right"[18] which the holder can exercise for its own selfish interests. The exercise of such vote could not, it is suggested, be impugned on the basis that it had been exercised for reasons entirely unconnected with the suitability of the candidate for the position of operator including, for example, as a source of leverage in commercial negotiations with the private equity interests.

Where the E&P enterprise is the present operator, it retains some counter-leverage of its own. The remaining participants may not wish themselves to take on the position of operator, and if the departing co-owner serves notice of an intention to resign, the bluff of the remaining co-owners may be called. However, in the absence of a remaining co-owner wishing to assume the role of operator, the current operator may be required by the JOA to serve out a significant notice period before they are able to give up the operatorship. With much to play for, and lose, on both sides, the dynamics of the negotiations on this issue are likely to be complex and difficult to predict.

Difficulties with definitions

As noted above, the JOAs regulating North Sea infrastructure in common ownership are likely to have been drafted on the unspoken assumption that the co-owners of the assets would themselves hold interests in the fields from which oil and gas were to be transported, or interested in other crucial infrastructure which intersects with the asset which is the subject of private equity interest. This might comprise the oil or gas reservoirs which the infrastructure serves, intermediate pipelines or the facilities where the oil or gas comes ashore. The JOA may use definitions for the purpose of

[16] cf. the debate in *IBM v Dalgleish* [2014] EWHC 980 (Ch); [2014] Pens. L.R. 335 at [372] and [2017] EWCA Civ 1212; [2018] Pens. L.R. 1 at [29].
[17] See *http://www.logic-oil.com/master-deed* [Accessed 9 July 2018]. In current North Sea practice, consent to transfers is sought by submission of a novation in the form of an execution deed under the Master Deed with a request it be executed: *Oil and Gas UK, Joint Operating Agreement Guidance Notes*, January 2009, para.23.3.
[18] The description is that of Jackson LJ in *Mid-Essex Hospital Services NHS Trust Ltd v Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200; [2013] B.L.R. 265 at [83], [91]–[92]. On suggested criteria for identifying "absolute contractual rights" see David Foxton QC, "A Good Faith Goodbye" [2017] L.M.C.L.Q. 360.

particular provisions which pre-suppose a role for the co-owners which the private equity special purpose vehicle cannot fulfil.

It might be argued in these circumstances that such definitions are not prescriptive, imposing obligations which a co-owner must meet, but simply descriptive of the position when the JOA was originally concluded. However, this argument is challenging. Even recitals to a contract may be held to create obligations,[19] and the case for a definition having this effect appears stronger. Further, it will be relatively easy in a North Sea JOA to support the obligation construction by pointing to some commercial benefit which the common owners of North Sea infrastructure may derive from a requirement that each of them (and hence their co-owners) should have an interest in connected infrastructure or oil and gas resources. These might ensure a shared interest and outlook in the operation of the infrastructure, the greater creditworthiness which will come from ownership of other assets, or a track-record in and accumulated expertise of offshore oil and gas transportation.

An inconvenient definition of this kind is likely to create a contractual roadblock to the departing co-owner and private equity investor's ambitions. Whatever obligations the remaining co-owners may owe, they are unlikely to embrace an obligation to vary the terms of the very contract to which the private equity vehicle wishes to adhere.

Reasonable assurances

JOAs may also impose a requirement for "reasonable assurances" to be given as to a new participant's ability to perform its obligations under the agreement. In particular, as was the case in *Apache Beryl Ltd v Marathon*,[20] the giving of such "reasonable assurances" may be a precondition to the transfer of the property and contractual rights under the JOA becoming effective. This is also the position under the APIN 2012 Model International JOA.[21] In the new and changed landscape of private equity investment in the North Sea, such provisions are likely to be of heightened interest and significance since the former model of what was described as a "club" of international oil and gas majors running the common assets for their mutual benefit is expected to give way to new structures where existing participants will be asked to accept special purpose vehicles, often incorporated offshore or owned by offshore companies, as their contractual counterparties.

For fiscal reasons or to maximise economic returns on capital, special purpose vehicles of this type are of often of no more financial worth than that derived from their partial ownership of the common assets and their interest in revenue under any TPA agreements they conclude. They do not have international oil and gas groups standing behind them and, whilst they are plainly entering the venture in order to operate the assets successfully over a long period with a view to making a profit, there may be concerns that their interests are not fully aligned with the existing participants, who are also producers.

Any debate about "reasonable assurances" is therefore likely to focus on the ability of the new special purpose vehicle counterparty to meet its potential financial obligations under the JOA and also its technical ability. The APIN 2012 Model International JOA includes two options for matters on which the remaining participants may require "reasonable satisfaction": as to the transferee's "financial capability", including its ability to perform its payment obligations", and as to its "technical capability".[22] Similarly the Oil and Gas UK model JOA provides for the withholding of consent to a transfer if the "financial responsibility and technical capability" of the proposed transferee have not "been adequately demonstrated".[23] While issues concerning a special purpose vehicle's technical capability can probably be overcome by appropriate sub-contracting arrangements, the issue of financial capability will tend to give rise to two separate lines of enquiry: (i) will that new party be able to meet its obligations when the infrastructure is operating as normal? and (ii) does that new party have the ability to withstand and deal with the consequences of unexpected shutdowns and system failures or a major catastrophic event? The first of these questions is likely to be answered by the financial projections and analyses that any responsible private equity investor will have made before moving forward with the investment. Ex hypothesi, the investor will be committing to the investment because its own projections show that more than sufficient revenue will be generated under the TPAs to service the financial obligations under the JOA (and to make a profit on top). Even here, however, there may be a range of projections, some assuming other oil or gas developments which will both come on stream and use the relevant infrastructure for transmission onshore. If the issue of "reasonable assurances" proceeds to litigation, and a range of different projections emerge on disclosure, there is likely to be fertile scope for dispute.

It is the second line of enquiry (ability to withstand shutdowns and catastrophic events) that is likely to be particularly contentious. Should parent company guarantees be given and, if so, in what amount, and for how long? To what extent will funds be retained in the company that becomes party to the JOA (and potentially the operator) and to what extent will they be passed up the corporate structure as dividends, including to service loan repayments (since the investment is likely to have been funded by loan finance higher up the corporate structure)? What are the likely financial consequences of a shutdown for two weeks or for three months or of a

[19] Sir K. Lewison, *The Interpretation of Contracts*, 6th edn (Sweet and Maxwell, 2017), para.10-15.
[20] The relevant clause was quoted in *Apache Beryl Ltd v Marathon Oil UK Ltd* [2017] EWHC 2462 (Comm) at [2].
[21] APIN 2012 Model International JOA art.12.2.D.2.
[22] There are similar provisions relating to a Change in Control: cl.12.3.B.
[23] APIN 2012 Model International JOA art.23.2.

major pipeline failure? Is the purchase of insurance a sufficient answer, and if so, what assumptions should be made about the time it will take to pay any claim, and the prospect of the insurer challenging coverage?[24] Questions such as these are ripe for debate and do not admit of a single "right" answer.

A further issue which may well arise is the request for a reasonable assurance as to the new entrant's ability to meet its share of decommissioning liabilities once the infrastructure is taken out of service. Under the Petroleum Act 1998 Pt IV, these fall in the first instance on the owners of the infrastructure, almost certainly on a joint and several basis. If the new entrant special purpose vehicle proves unable to meet its share at the relevant time, there is likely to be a greater burden on the other participants. Determining what would constitute a "reasonable assurance" on this issue is another fraught question. There are different levels of decommissioning which might be required, the cost of each of which will itself be inherently uncertain, and the time when the obligation will arise will also be inherently uncertain. Finally, there are also a range of views as to how security for those liabilities should be provided.[25] In addition to potential disputes between the new entrant and remaining participants as to what would constitute "reasonable assurances", there is another issue which may arise. Under the Petroleum Act 1998 s.34, the secretary of state can, if necessary, look to *former* owners of the infrastructure to contribute to the decommissioning costs. This has been described by the Department of Business, Energy and Industrial Strategy as a "measure of last resort".[26] However, if the exiting participant has been sufficiently concerned about the possibility of "clawback" to require the private equity special purpose vehicle to provide security for it, this would provide very strong forensic material for the remaining participants in support of any argument that they require as good or better security in respect of their joint liability with the new participant.

In respect of all of these questions, from a legal perspective, the courts are entering the realm of contractual discretions, that is a situation where one party has been given a decision-making power under a contract but is required to exercise that discretion within certain legal constraints. In particular, it is, on the face of it, for the existing participants to decide whether "reasonable assurances" have been given or not (i.e. the assurances must be such as appear reasonable to them). To a commercial lawyer, it is plain that, in circumstances such as those, the existing participants cannot act arbitrarily or capriciously in refusing their consent. Thus, at a minimum, the decision-making power of the existing participants must be circumscribed on *Wednesbury* grounds. The authorities in this area are well-known and were reviewed by the Supreme Court in *Braganza v BP Shipping Ltd*.[27] One of the clearest statements of the application of this kind of *Wednesbury* review in a commercial context is that of Brooke LJ in *Ludgate Insurance Co Ltd v Citibank NA*,[28] who said:

> "It is very well established that the circumstances in which a court will interfere with the exercise by a party to a contract of a contractual discretion given to it by another party are extremely limited. We were referred to *Weinberger v Inglis* [1919] A.C. 606; *Dundee General Hospitals Board of Management v Walker* [1952] 1 All E.R. 896; *Docker v Hyams* [1969] 1 Ll. R. 487; and *Abu Dhabi National Tanker Co v Product Star Shipping Co Ltd* [1993] 1 Ll. R. 397 (*The Product Star*). These cases show that provided that the discretion is exercised honestly and in good faith for the purposes for which it was conferred, and provided also that it was a true exercise of discretion in the sense that it was not capricious or arbitrary or so outrageous in its defiance of reason that it can properly be categorised as perverse, the courts will not intervene."

If that is the only standard of review to be applied, it will be difficult for the investor to challenge the decision of the existing participants that reasonable assurances have not been given. Provided that the existing participants have put forward a cogent and reasoned explanation of their position and are acting in good faith and not for some ulterior motive (for example a desire to "kill the deal"), the court should not, on a true *Wednesbury* review, interfere with the determination that they have made.

The real question is whether it can be established that some heightened standard of review applies. In particular, in the event of a dispute as to whether "reasonable assurances" have been offered, there will be a natural tendency for the proposed investor to wish to serve detailed evidence (including expert evidence) explaining why they have in fact given all the assurances that can reasonably be required in the circumstances and why the existing participants are acting unreasonably in the circumstances by refusing to accept those assurances. The existing participants will no doubt wish to counter with detailed evidence of their own, explaining why they have rejected the assurances that have been offered and affirming the reasonableness of their own position. What is the court to do when faced with detailed rival views of this kind? Does it have to choose which of the rival positions is "reasonable" and which is "unreasonable"? Or can the court determine that the true "reasonable" view is somewhere in between the rival positions?

[24] An issue on which courts have offered conflicting conclusions in the context of security for costs applications: *Harlequin v Kennedy* [2015] EWHC 1122 (TCC); [2015] B.L.R. 469 and *Premier Motorauctions Ltd v PriceWaterhouse Cooper* [2017] EWCA Civ 1872; [2018] 1 W.L.R. 2955.
[25] See B. Holland and M. Davar, "Decommission in the UK continental shelf: decommissioning security disputes" (2016) I.E.K.R. 240.
[26] Department of Energy and Climate Change, *Guidance Notes on the Decommissioning of Offshore Oil and Gas Installations and Pipelines* (December 2017 draft), para.3.23.
[27] *Braganza v BP Shipping Ltd* [2015] UKSC 17; [2015] 1 W.L.R. 1661 at [18]–[29].
[28] *Ludgate Insurance Co Ltd v Citibank NA* [1998] Lloyd's Rep I.R. 221.

This is undoubtedly difficult territory for the court since the judge is effectively being asked to become the decision-maker in a commercial context and to decide for themselves what is "reasonable" in all the circumstances. It might be thought that most judges will have an instinctive reluctance to go down this road when the contract has appointed one of the parties, and not the court, as the decision-maker. There is, however, a line of authority concerned with leases that may be prayed in aid by a party seeking to persuade the court to enter into a more intrusive review of the reasonableness or otherwise of the assurances that had been offered.

In particular, the lease cases deal with stipulations that the consent of a landlord to the assignment or sub-letting of a lease will not be "unreasonably withheld": see *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd*.[29] In this particular context, the courts have imposed what has been described as an "objective" standard of review, which might be thought to encourage the court to step into the shoes of the decision-maker and to make its own assessment of what is reasonable in all the circumstances. However, when the lease cases are examined closely, this is not necessarily the case.

In particular, the lease cases recognise that there is a range of reasonable decisions that can be made and that it is "not necessary for the landlord to prove that the conclusions which led him to refuse consent were justified, if they conclusions which might be reached by a reasonable man in the circumstances …".[30] They also recognise that the decision-maker (i.e. the landlord) is usually entitled to base his decision solely on his own self-interest, albeit that there may be cases where there is such a significant disproportion between the degree of benefit to the landlord and the detriment to the tenant if the landlord withholds his consent to an assignment that it is unreasonable for the landlord to refuse consent.[31]

Thus, the difference between the *Wednesbury* standard of review and the standard of review adopted by the lease cases may actually be quite limited in practice. This limited difference is illustrated by the decision in *Barclays Bank Plc v Unicredit Bank AG*. At first instance, Popplewell J adopted the approach of the lease cases and held that Barclays had acted in a commercially reasonable manner when refusing to consent to the early termination of certain guarantees that had been provided to it by the defendants).[32] The Court of Appeal (Longmore, Patten and Christopher Clarke LLJ) dismissed Unicredit's appeal.[33] Longmore LJ, with whom the other members of the court agreed, referred to the "considerable debate" as to whether the clause was to be regarded as conferring a contractual discretion to be reviewed according to *Wednesbury* principles, as analogous to the lease cases such as *International Drilling* or imposing a requirement to make an objectively reasonable decision. But although Longmore LJ regarded this debate as "interesting" he also noted that it was not "ultimately helpful since the meaning of the clause has to be determined as a matter of construction of this particular contract and in its particular context".[34] Longmore LJ went on to hold that, in relation to the contractual provision at issue, it was the manner of the determination and not the *outcome* that had to be commercially reasonable, that Barclays was entitled to take account of its own interests in preference to Unicredit and that he would regard the standard of review as being *Wednesbury* unreasonableness as per the line of authority exemplified in *Socimer International Bank Ltd v Standard Bank* line of authority.[35]

It is, therefore, likely that, whichever standard is being applied, the existing participants are entitled to base themselves fairly and squarely on what they believe is reasonably required by way of assurance that the new entrant will be able to perform its obligations when deciding whether "reasonable assurances" have been given. Whilst there may be a wider government policy objective in encouraging fresh investment in ageing North Sea infrastructure, it is difficult to see why existing participants, responsible to their own stakeholders, should in any sense be bound to prioritise that policy objective or even to take it into account in making their determination as to whether reasonable assurances have been offered. It is equally difficult to see why, even applying the supposedly more stringent standard of review in the lease cases, the court should be drawn into substituting its own views and judgments for those of the existing participants.

Ultimately, however, an investor who feels strongly about the investment is likely to argue that, whatever standard applies, the stance taken by the existing participants is so unreasonable that the court's power of review is engaged. Hence, in practice, if the matter is contested, it will be difficult to avoid reams of contested evidence on matters such as the likely income to be derived from TPA revenue, the predicted financial impact of unexpected shutdowns or catastrophes and indeed the financing structure that the investor has put in place (which will feed into the question of whether there is any obligation or likelihood that funds will be retained in the special purpose vehicle company that will become the contractual counterparty to the existing participants). All the existing participants can do is to ensure that their objections to any new counterparty are based on a reasoned analysis of its ability to withstand the potential financial pressures of shutdowns and catastrophic events.

[29] *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] Ch. 513; [1986] 2 W.L.R. 581.
[30] *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] Ch. 513 at 520, Proposition 4.
[31] *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] Ch. 513 at 520, Proposition 6.
[32] *Barclays Bank Plc v Unicredit Bank AG* [2012] EWHC 3655 (Comm); [2013] 2 Lloyd's Rep. 1.
[33] *Barclays Bank Plc v Unicredit Bank AG* [2014] EWCA Civ 302; [2014] 2 Lloyd's Rep. 59.
[34] *Barclays Bank Plc v Unicredit Bank AG* [2014] EWCA Civ 302; [2014] 2 Lloyd's Rep. 59 at [14].
[35] *Barclays Bank Plc v Unicredit Bank AG* [2014] EWCA Civ 302; [2014] 2 Lloyd's Rep. 59 at [15], [16] and [20]. *Socimer International Bank Ltd v Standard Bank* [2008] EWCA Civ 116; [2008] Bus. L.R. 1304.

Conclusion

The investment by private equity interests in North Sea infrastructure has been welcomed by many, freeing up cash for E&P enterprises to undertake further exploration and drilling work, and helping drive down operating costs. Supporters of these deals argue that they help achieve the "right assets right hands" policy which the Oil and Gas Authority have identified as crucial to the national policy of Maximising Economic Recovery.[36] Whatever the economic or fiscal benefits of such transactions, legal issues will inevitably arise because they involve a very different economic model from that assumed when the JOAs regulating the ownership of such assets were drafted. The legal pioneers who created those agreements might never have envisaged that an interest in midstream infrastructure could become a saleable asset of interest to entities not engaged in E&P and who were not interested in the oil and gas assets which the infrastructure was intended to serve or to which it is connected. As a result, it is inevitable that there will points of friction when seeking to fit the new economic model into the existing legal framework. The lesson is that those seeking to pour new wine into old battles need to do their legal due diligence, and allow themselves, and their counterparties, sufficient time to negotiate their way around these challenges.

[36] See, e.g. the *OGA Overview* of September 2015 at *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/499160/OGA_Review.pdf* [Accessed 9 July 2018].