"TAQA v Rockrose: A MER Analysis"

The case of TAQA Bratani Ltd v Rockrose UKCS8 LLC, 2020 WL 00265815 (2020) is an important English decision which analyses the nature of the joint operating agreement (**JOA**) and reiterates familiar and largely unsentimental principles of contract construction under English law. The TAQA judge, Judge Pelling, had previously come to similar conclusions in Apache North Sea Ltd v Euroil Exploration Ltd [2019] EWHC 3241 (Comm) (England and Wales), which involved an analysis of the interlinking of a farmout agreement and a JOA[1]. TAQA also includes a useful review of when terms may be implied into commercial agreements.

While this case-note will cover these issues, my main interest lies in the Court's holding and observations regarding what I will broadly refer to as the principles of maximising economic recovery (**MER**). MER is a convenient acronym for the new system of UKCS regulation inspired by the Wood Review of 2014, and composed of certain provisions of the Infrastructure Act of 2015, the Energy Act of 2016 and most particularly, of the MER Strategy (**MER Strategy**) which came into force on 18 March 2016. Additionally, the Energy Act of 2016 laid the statutory basis for the founding of the new UK upstream regulator, the Oil & Gas Authority (**OGA**). The OGA has since published important guidance, such as on third party access (**TPA**) and satisfactory expected commercial return (**SECR**) which amplify our understanding of MER. The concept of MER is nowhere precisely defined, but its heart is to be found in MER Strategy Paragraph 7 (Central Obligation) where it is stated that licensees (and certain others) must "take the steps necessary to secure that the maximum value of economically recoverable petroleum is recovered from the strata beneath relevant UK waters". On 6 May 2020, the OGA launched a public consultation on proposals to revise the MER Strategy. This consultation closed on 29 July 2020 and as of December, 2020 (month of publication of this article), we still await further legislative changes in the MER Strategy.

While the TAQA court spent little time on MER, the MER implications of the TAQA decision are quite interesting. This is the first judicial decision which analyses (albeit somewhat tangentially) the MER regime.

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[1] For this author's take on Apache v Euroil see "A Case-Note on Apache v Euroil: Align your FOA with your JOA!" which is available on request to www.vasspetro.com

1. FACTS

As of 1 January 2019, Marathon Oil UK LLC (**Marathon**), TAQA Bratani Limited, TAQA Bratani LNS Limited (together **TAQA**), Spirit Energy Resources Limited (**Spirit**) and JX Nippon Exploration and Production (UK) Limited (**JX**) were participants in a series of four JOAs and a single unitization unit agreement (**UUOA**) covering what we may refer to as the "**Brae Complex**". The Brae fields were discovered in the late nineteen-seventies and the JOAs date from 1979, though the East Brae UUOA dates from 1990. The licensees held different interests in the various blocks. Marathon had been the operator on Brae since the very beginning.

However, in 2018, Marathon decided to sell out its Brae interests and certain other UKCS interests. TAQA, which held the largest interests in the Brae Complex submitted a bid to acquire Marathon via a share purchase offer, but this bid failed. Instead, Marathon announced that Rockrose Energy Plc (**RRE**) was the winner on 28 February 2019. RRE completed the corporate acquisition of Marathon on 1 July 2019.

Testimony showed that TAQA had for some time taken the view that it was in its best interests to become the Brae operator. TAQA was also disturbed by the prospect of having RRE as operator, given that Brae is a complex, old, infrastructure-heavy field, RRE was not hitherto qualified as operator and (in TAQA's view) RRE was not heavily capitalised, especially given the certain prospect of large decommissioning liabilities. Spirit and JX were to support TAQA in this view.

As it happened, relevant JOA provisions created an opportunity for TAQA. The various JOAs had similar or identical provisions on operator removal. Quoting from the (representative) Block 16/7a JOA the operator removal provision was as follows:

> "Change of Operator
>
> 19.1 Operator may be discharged:
>
> (a) at the end of any calendar month by the Operating Committee giving not less than ninety (90) days notice to it, provided that in respect of any vote of the Operating Committee on any such discharge under this Article 19.1 (a) the voting interest of the Participant which is the Operator and the voting interest of any Participant which is an Affiliate of the Operator shall be ignored and the required percentage figure shall be One hundred percent (100%) of the total votes available to the remaining Parties; or
>
> (b) [In the case of various acts of default, insolvency or Operator selling a majority

> of its interests - Operator may be removed by Operating Committee immediately based on "passmark" majority of remaining Parties]; or .....
>
> 19.3 Subject to Article 19.5, the Operator may resign ..."

On 6 June 2019, an Operating Committee removed (**Removal Decision**) Marathon from operatorship under Article 19.1 (a). TAQA, Spirit and JX (**TAQA Parties**) unanimously voted for removal as required by Article 19.1 (a).

The TAQA Parties proceeded to bring suit against RRE for declaratory judgement that the Removal Decision was valid and effective.

2. ARGUMENTS OF THE PARTIES

The TAQA Parties relied on the language of the JOAs and traditional English rules of contract construction.

RRE opposed the suit for declaratory judgement. It argued that the TAQA Parties could only exercise their express powers to remove the Operator under the JOAs, if such a decision was taken in good faith, and not capriciously or arbitrarily. Such a decision, in other words, could only be taken "in the best interests of the operation of the Block or Blocks in question". TAQA Judgement, Para 2, page 1. Accordingly, RRE argued that the JOAs must be read to include implied terms of good faith, fairness and equity.

RRE cited two trains of authority for its implied terms theory. Firstly, it cited authorities represented, by the case, among others, of Braganza v BP Shipping [2015] UKSC 17, which provided for implied terms of good faith and an absence of arbitrariness, capriciousness, perversity and irrationality. Braganza is a Supreme Court decision. Secondly, RRE cited an alternative line of cases, represented by Yam Seng Pte v International Trade Corp [2013] 1 All. E.R. (Comm) 132 which provided for similar equitable implied terms "arising from the mutual trust, confidence and loyalty said to arise in long term joint venture and similar agreements". TAQA Judgement, Para. 30, page 9. These latter types of long-term contracts are referred to as "**relational contracts**"

Given that the JOA provisions on Operator removal were subject to such implied terms, RRE argued that the Removal Decision was in fact motivated by various improper reasons, and that hence the Removal Decision was invalid[2].

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[2] As we shall see, the Court held that as a matter of law, the removal provisions of the JOAs were not qualified by implied terms. However, the Court did consider whether there would have been any factual grounds to establish a finding of improper conduct/ motivations assuming that implied terms were to be read into the JOAs. It was requested to undertake this analysis by the TAQA Parties and RRE on the basis that a superior court might find that the Court's decision on whether or not to recognise

3. HOLDING OF THE COURT

3.1. Judge Pelling cited eight key principles of construction of contracts under English law which he had laid down only weeks earlier in Apache. The eight principles are as follows:

(a) A court must construe the wording of a contract in its "documentary, factual and commercial context";

(b) A court can only take into account such facts or circumstances as were known by both contracting parties at the time the contract was executed;

(c) The language of the contract will be crucial in its interpretation, because the parties are in control of the contractual language and must be deemed to have focused on the issue;

(d) If the contractual language is unambiguous, then the court must abide by it;

(e) If the language is unclear, the court can depart from the natural meaning and adopt a different meaning which reflects what a reasonable person might conclude that the parties, with their actual and presumed knowledge, would have meant;

(f) If there are two possible constructions, the court should adopt the construction which is "consistent with sound business sense";

(g) If a contract has been drafted by sophisticated professionals, the principal element in the judicial interpretation will be textual unless "a provision lacks clarity, or is apparently illogical or incoherent"; and

implied equitable terms was wrong. In fact, more than half of the Court's judgment is taken up by the very interesting legal and factual analysis of whether the TAQA Parties could have been found to have acted improperly assuming the existence of implied terms. TAQA Judgment, Paras 64 - 125, pages 21 - 44. That particular analysis is not the subject of this article.

However, I cannot resist the temptation to consider one particular holding. Testimony showed that in the run-up to the Removal Decision, TAQA had entered into a secret agreement with Spirit and JX to cap the costs payable by Spirit and JX arising from any transition of the Brae operatorship from RRE to TAQA. The Court held:" There is no reason why, as between two or more participants, there should not be a local agreement between them for the sharing between them of some or all of the costs otherwise due under the terms of the JOA from one or both of them". TAQA Judgment, Para.114, page 39. The cost-capping agreement did not affect RRE financially and had no impact at a JOA finance level. It nonetheless had a material (if not decisive) effect on the decision of Spirit and JX to support the Removal Decision. In this case there was mere silence about the existence of the cost-capping agreement. What if an Operator entered into material secret agreement with one of a number of co-venturers or even a third party and failed to disclose this at a material vote on joint operations?

Under TAQA, JOA participants do not owe one another a fiduciary duty (assuming a partnership exclusion) but do they owe one another a duty of care of any kind?

(h) A court should not reject the natural meaning of a provision merely because "it appears to be a very imprudent term for one of the parties".

Applying these principles, the Court found that it was clear that JOA Article 19.1(a) provided for an unqualified termination right on the part of TAQA Parties. A sophisticated commercial agreement like a JOA will principally be interpreted by textual analysis. The natural and ordinary meaning of Article 19.1 (a) was that it is an at-will termination provision. This conclusion was supported by review of Article 19.1 (b) which allowed the non-operators to terminate immediately on a passmark (i.e. non-unanimous) vote in case of operator default. That made sense. At-will termination, as opposed to termination for cause, should require a unanimous vote. with notice. The parties, the Court opined, well knew how to write removal provisions to fit differing circumstances. If good faith had been required in the Removal Decision, the parties could easily have provided for it, and an unqualified right to remove the Operator was wholly consistent with the nature of the JOA. In particular, JOA Article 6.1 provided that "each representative on the Operating Committee shall act solely on behalf of the Party whom he represents and not on behalf of the Participants as an entity" And JOA Article 18.2 provided that it is the "express purpose and intention of the Parties that this Agreement shall not be construed as creating any partnership or association...". That excluded any kind of fiduciary duty. Finally, the Court found that there was no convincing evidence of any standard industry practice on Operator removal at the time the JOAs were drafted and negotiated. TAQA Judgement, Paras. 33-43, pages 10-13.

3.2 The Court then helpfully set down (TAQA Judgment, Para. 27, pages 8-9) five principles governing implication of terms into a detailed commercial agreement. These are as follows:

(a) Terms will be implied only in cases where this is necessary to make the contract function or where such a term simply has to be present;

(b) It is necessary but not sufficient that the term sought to be implied seems fair or appears to be a term which would have been agreed to by both contracting parties had it been suggested to them during negotiations;

(c) Any implied term analysis requires a review of the scope and meaning of the agreement;

(d) Construing the language of the contract and the consideration of implying additional words are two separate processes; and

(e) In most cases, the textual wording of the contract must first be interpreted in order to ascertain whether the sought-for implied terms contradict the express terms of the contract.

The Court re-iterated that no term can be implied into a contract if it is inconsistent with an existing

express term. It also noted that particular care should be taken before implying terms into "a sophisticated and professionally drawn and negotiated agreement between well-resourced parties". TAQA Judgment, Paras 28 - 29, page 9.

3.3 The Court then considered whether it was possible that an unqualified termination power in a commercial contract, such as the JOA, could be constrained by implied terms. The Court began by observing: "First, given my conclusions concerning the meaning and effect of the express terms of the JOAs, it is difficult to see how [equitable] _ terms could be implied into the agreement". TAQA Judgement, Para. 45, page 13. Express terms of the JOA seemed to negate the possibility of the existence of the kind of implied terms argued for by RRE.

3.4 However, the Court conceded that authorities are developing the scope to import implied terms into commercial agreements. As alluded, RRE's first implied terms argument rested on the Braganza line of authorities. Braganza was a case in which a senior merchant seaman disappeared mid-ocean on a tanker owned by BP Shipping Limited (**BP**). The body of the seaman was never recovered. BP had to make a decision on whether to pay his widow a pension. If the cause of death had been suicide, then BP would not have been required to pay a pension. Where, as in this case, the cause of death was unknown (and unknowable) BP had a discretion in deciding on what was the cause of death. BP decided that the death was a suicide, and that hence no pension was required to be paid. The widow of the dead seaman brought suit for payment of pension.

The Supreme Court majority found that BP's finding of suicide was not justified by the evidence. The Court held that a party, like BP, which is required to take a decision which will impact (positively or negatively) either on itself or another contracting party has an inherent conflict of interest. In order to prevent contractual abuse in such cases, courts imply a duty on the part of the decision-making party not to act arbitrarily, capriciously or unreasonably. Braganza Judgment, Paras 17-20, page 5. Mrs. Braganza prevailed in her legal action.

The TAQA Court distinguished Braganza and its supporting authorities on the basis that Braganza deals with a situation in which a contracting party which requires to make a contractual decision must choose from a range of options and that that decision-making party must take into account the interests of both itself and the other contracting party. Typically, Braganza will apply in an employment-type situation. In the case of TAQA, there was an absolute and unqualified discretion of the decision-making parties to decide something (Removal Decision) and they were not required to take RRE's interests into account.

3.5 The Court then looked at the second line of authorities advanced by RRE, namely that of Yam Seng and "relational contracts". The case of Yam Seng involved the interpretation of a distribution agreement entered into between a Singapore-based company and an English company to supply various Manchester United – branded fragrances to a range of Asian markets. The eight-page distribution agreement was written by the contracting parties without benefit of legal advice on

either side. The business relationship between the parties went from one disaster to another, and finally Yam Seng brought suit, claiming breach of contract and misrepresentation involving multiple lines of business. Counsel for Yam Seng argued that the skeletal distribution agreement must be held to incorporate implied terms of good faith dealing, not supplying false information and not undercutting duty free goods supplied under the distribution agreement.

Delivering the judgment of the Court, Mr. Justice Leggatt agreed with Yam Seng that a duty of good faith dealing can be implied into commercial contracts if the presence of such a term can be assumed to be present and is necessary for the efficacy of the contract. Relational contracts, according to Justice Leggatt, are those which "**require a high degree of communication, cooperation and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements. Examples of such contracts might include some joint ventures, franchise agreements and long-term distributorship agreements**". The Yam Seng distribution agreement fitted the "relational contract" formulation like a glove.

In rejecting the implied terms arguments from Yam Seng, the TAQA Court accepted that the Brae JOAs could indeed arguably be "relational contracts" in principle. However, unlike the skeletal distribution agreement of Yam Seng, the Brae JOAs explicitly provided for the Removal Decision and terms cannot be implied into a commercial contract if these asserted implied terms would conflict with existing unambiguous contractual language. TAQA Judgement, Para. 56. page 17.

4. COURT'S OBSERVATIONS ON MER

4.1 As part of RRE's "relational contract" argument, RRE called on the support of the MER Strategy. Specifically, MER was cited to show that an implied duty of collaboration should be read into the JOAs.

RRE emphasised the "... need for collaboration between joint ventures for the purpose of maximising the economic recovery of UK petroleum". TAQA Judgement, Para. 60, page 18. The Court rejected the reasoning from the MER Strategy on three grounds.

4.1.1 Firstly, the Court concluded that the MER Strategy, which took effect on 18 March 2016, could not possibly have qualified contracts which had been negotiated and executed over thirty-five years before. RRE argued that the JOAs were executed subject to future regulatory developments; citing the complex telecommunications case of British Telecommunications Plc v Telefonica O2UK Limited [2014] UKSC 42; [2014] 4 All ER 907. But the Court distinguished British Telecoms observing that in that case a pricing formula was altered because of a regulatory change. The parties had known that this kind of regulatory change was possible when they signed the original contract.

On the other hand, the Court held that the Brae JOAs were not "...subject to alteration in that manner or to any requirement that the terms of [the JOAs] or the exercise of such terms should be subject to the control of the statutory regulator." **In other words, the OGA (and earlier regulators) had no regulatory role over JOAs, at least not those entered into prior to 18 March 2016**.

4.1.2 Secondly, the Court held that there is no authority allowing an implied term to be imputed into a "relational contract" based on "post-contractual practice ... or a post-contractual statutory mechanism other than one expressed to apply to contracts entered into prior to the enactment of the relevant statute". TAQA Judgement, Para. 59, page 18. The Court stated that there are no special rules of implied term doctrine that govern relational contracts.

4.1.3 Thirdly, the Court considered and rejected the crux of RRE's MER argument which was that a holistic reading of the MER Strategy reflects: "... the importance in the UKCS oil and gas industry of collaboration, co-operation and straight forward dealing between licence holders. Such features chime with and support each of the defendant's implied terms". TAQA Judgement, Para. 60, page 18 (quoting from RRE Submission). In the Court's view the MER Strategy did not apply to "JOAs or decision-making under them or the removal of an Operator..." TAQA Judgement, Para 61, page 18. The Court pointed out that the MER Strategy Para. 28 duty to collaborate is a duty directed to reduce costs or maximise recovery. It is not a duty to collaborate for its own sake, especially when the JOA is express that parties are not required to vote in the best interests of the joint venture. Thus, the Court held that MER was irrelevant to the Removal Decision.

4.2 In this section of the judgement, the Judge also looked at some expert testimony by RRE's expert Mr. Mason. The Judge found that there was no industry practice at the time of drafting and executing the JOAs that would have limited a party's explicit right to remove an operator without cause. One particularly telling exchange was as follows:

TAQA Counsel: "And whilst collaboration is no doubt desirable, at the end of the day parties in this industry will try to promote their own interests, won't they, and that is normal commercial behaviour?"

Mr. Mason: "**The parties will try and promote their commercial interests or support - defend their commercial interests, yes**" [emphasis supplied by Court in quote]

TAQA Judgement, Para. 61, page 19 (quoting trial testimony)

5. REFLECTIONS AND COMMENTS

5.1 Overall, the lesson from both the TAQA and the Apache decisions is that drafting oil and gas contracts is a demanding, commercial and unsentimental business.

5.2 The Court's decision that the MER Strategy could not be used to imply "collaborative" terms into the Brae JOAs, as possible "relational" contracts, was, in my view, correct. A 2016 legal regulation cannot be adduced to imply terms into contracts dating from 1979. Another clinching reason was that collaboration under MER simply had no traction (**lack of traction argument**) with the Removal Decision. This would have been valid even if the JOAs had been executed in 2019 (rather than 1979). In order to utilise the MER Strategy as a vehicle to imply contractual terms, there would have had to have been some convincing argument that the appointment of TAQA as Operator (or the removal of RRE) would necessarily have increased costs or lowered economic recovery. But no argument to that effect seems to have been made. **However, to the extent that the Court's decision ("...MER is not concerned with JOAs or decision-making under them...") can be read to say that matters arising under a JOA can in principle never involve MER considerations, I would strongly disagree. Operator decisions, or joint operating committee decisions may often involve matters directly bearing on MER**.

5.3 In one sense, the lack of traction holding kills the MER argument but there is much about what the Court says about MER that is very interesting or even controversial beyond lack of traction. Let us assume, for purposes purely of analysis, that the Removal Decision did violate the MER Strategy. Where would that take us?

5.4 Notwithstanding the date of execution of the JOAs [1979], the TAQA Parties and RRE were both indisputably bound to implement the MER Strategy on 6 June 2019, as was the OGA[3].

5.5 Is it possible to "contract out" of the MER Strategy? Put it another way, can a MER Party, by mere dint of signing a contract, escape its obligations under the MER Strategy? Or can a UKCS oil company rely on a contract executed before March 18 2016 to excuse itself from complying with the MER Strategy? The MER Strategy lists five circumstances (**Safeguards**) which operate to excuse a MER Party from performing its obligations under the MER Strategy. MER Strategy Paragraphs. 2-6. Entering into a contractual relationship (whether dating from before or after 18 March 2018) is not a Safeguard.

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[3] The TAQA Parties and RRE were oil and gas licensees and clearly bound by the MER Strategy under Petroleum Act Section 9C. Persons bound to carry out the MER Strategy under Petroleum Act Section 9C are referred to as "**MER Parties**". The OGA is required to comply with the MER Strategy under Petroleum Act Section 9B. The OGA is also defined as a "Relevant person", along with everyone listed in said Section 9C, under the MER Strategy itself.

5.6 Does the MER Strategy affirmatively affect executed contracts? This is a tricky question. There are two senses in which this might be true.

5.6.1 **Option 1: <u>The Contract is Actually Amended</u>**

The MER Strategy does not *per se* amend petroleum contracts such as JOAs. It is not impossible that the MER Strategy might be used to imply contract terms into petroleum contracts executed after 18 March 2016 to the extent that any such contract can be considered to be a "relational" contract under the <u>Yam Seng</u> doctrine. But this is not a likely scenario as petroleum contracts are generally sophisticated commercial agreements drawn up with the benefit of legal support. Very often, such contracts, as in the case of <u>TAQA</u>, contain language which would exclude the existence of implied terms.

5.6.2 **Option 2: <u>To Rely on Contractual Rights would Violate MER</u>**

In this scenario, we are not arguing that the contract is amended, but that merely to rely on/enforce its terms would be to act against MER. I believe that this is the way that the MER Strategy principally impacts contracts, no matter their date of execution. There is one situation where this appears to be explicitly reflected in the MER Strategy. MER Strategy Paragraph 17 (b) provides that an owner of offshore infrastructure must, when it cannot cope with demand for use of that infrastructure by itself and third parties, prioritise such "access which maximises the value of economically recoverable petroleum".

Reference should also be made to the latest OGA guidance on TPA (**TPA Guidance**). See: https://www.ogauthority.co.uk/media/5761/oga_third_party_access-may-2019.pdf. As the TPA Guidance makes clear, the OGA will do its utmost to respect the sanctity of prior contracts but it does recognise that "**...there may be situations where existing contractual commitments work against maximising economic recovery and the OGA will consider using its other powers [i.e. sanctions or the initiation of non-binding dispute resolution] under the Energy Act 2016 to seek an improved outcome**". The clear implication is that in the context of TPA, a MER Party may rely on/exercise valid contractual rights and yet violate the MER Strategy[4]. Neither is this situation limited to TPA.

In the original Department of Energy & Climate Change (**DECC**) Consultation entitled "Maximising Economic Recovery of Offshore Petroleum: Draft Strategy for Consultation" (**MER Consultation**) it was stated that "... [the OGA] may find that a ... [MER Party's] contractual provisions place that person ..... in breach of the [MER] Strategy". However, in the same paragraph, it was emphasised that. "... it will always be or the relevant [MER Party] to decide for itself how to deal with [that MER

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[4] TPA Guidance, Para. 67, Footnote 11, page 13

violation] in terms of its contracts". MER Consultation, Part 2, Para. 31. Otherwise valid contractual provisions may therefore violate MER. Ultimately, the OGA enforces MER through the sanctions provisions of the Energy Act 2016.

5.7 If the Removal Decision had violated the MER Strategy, would the TAQA Parties have violated a direct legal duty to RRE and the OGA or only to the OGA? The MER Strategy and the Energy Act 2016 are silent on to whom the MER Parties owe their duty to comply with the MER Strategy. Clearly, the MER Parties owe a duty to comply with MER to the OGA. But do they owe a similar MER duty to other UKCS oil companies, to oil service companies or even to the public at large? The better view is that MER Parties do not owe a direct duty to comply with MER to other MER Parties or to third parties. If the opposite were true, MER Parties might simultaneously have conflicting contractual and administrative rights and duties vis a vis one another. There would be no way to prioritise such conflicting rights and duties.

5.8 If we take it as being correct, as I argue that we should, that oil companies do not owe one another a direct legally enforceable duty to comply with the MER Strategy, can we conclude that the MER Strategy has no role in contractual and commercial dynamics between oil companies? The answer is certainly not. Firstly, if Oil Company A feels that it is suffering prejudice because Oil Company B is acting contrary to the MER Strategy, there is nothing to stop Oil Company A from informing the OGA and seeking to involve the OGA. In such circumstances, the OGA might bring regulatory pressure on Oil Company B or the OGA could initiate non-binding dispute resolution or even trigger sanctions proceedings. Just as importantly, in the case where an operator is in violation of MER, the operator would be acting contrary to [standard form] Oil & Gas UK JOA Clause 6.2.2 which requires the Operator to "conduct the Joint Operations in compliance with the requirements of the Acts, the Licence and any other applicable Legislation". The Oil & Gas UK JOA definitions of "Act" and "Legislation" clearly cover the MER Strategy.

Neither can a joint operating committee take a decision which is violative of law, even if that decision is taken by an otherwise valid passmark vote. It might seem trite to observe that an operator cannot act in violation of legislation such as HS&E, environmental law and competition law. Why is MER different? The MER Strategy, of course, is not different in qualitative terms from these laws, but in terms of substance it impacts the whole range of commercial petroleum matters of importance to MER Parties, and often in ways difficult to be sure of in the abstract.

5.9 In its judgement, the Court noted that the OGA, as regulator, had not shown interest in the Removal Decision. TAQA Judgement, Para. 58, page 18. This is an interesting observation and it chimes with my own experience of the OGA. The OGA is very reluctant to interfere with private contracts. Nonetheless, the OGA's operating practice cannot be used to interpret the legal meaning of the MER Strategy.

5.10 The Court's decision to quote (with apparent approval) the testimony of Mr. Mason to the effect that talk of collaboration between oil companies is all very well but commercial *realpolitik* always wins out in the end sits uncomfortably with the continual demands by the OGA and others for increasing collaboration across the industry.

5.11 The TAQA case leads one to ponder the contentious legal relationship which exists between freedom of contract, on the one hand, and regulatory duty, on the other. The case would have been a more useful legal precedent if it had not been so clear that the Removal Decision could not possibly have infringed the MER Strategy.

5.12 Finally, one might reflect that the JOAs which supported the TAQA Removal Decision contain provisions which would be rare in modern JOAs. The current Oil & Gas UK JOA provides for forced operator removal only for cause, insolvency or diminution of Percentage Interest. JOA Clause 5. A joint operating committee vote on removal is done by a regular passmark vote which includes the Percentage Interest of the operator. The Association of International Petroleum Negotiators model contract JOA contains an option to allow removal of an operator solely by the votes of non-operators. I have not seen such an option being put to use. With such an unusual removal clause as existed in TAQA, any operator would find its position to be tenuous indeed.

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Uisdean Vass has over 35 years experience practicing oil and gas law in the UK and throughout the World. He is qualified to practice in Scotland and in Louisiana and has worked in many different aspects of the oil business. Mr. Vass is involved in giving advice on the new MER regime in the UK and he also advises governments on regulatory matters. The heart of his practice lies in advising oil companies on licensing and doing deals, whether through farmouts, asset sales or corporate sales.