Oil and Gas, Natural Resources, and Energy Journal

Volume 4 | Number 1

May 2018

What Does English Law Say About . . . .? And the Winner Is: Book Review of *Petroleum Contracts: English Law and Practice* by Peter Roberts

Norman Nadorff

ONE J

Oil and Gas, Natural Resources, and Energy Journal

VOLUME 4 NUMBER 1

WHAT DOES ENGLISH LAW SAY ABOUT . . . .? AND THE WINNER IS:

PETROLEUM CONTRACTS: ENGLISH LAW AND PRACTICE (Oxford: University Press) by Peter Roberts

Reviewed by NORMAN NADORFF*

> *The one great principle of the English law is to make business for itself*. There is no other principle distinctly, certainly, and consistently maintained through all its narrow turnings. Viewed by this light it becomes a coherent scheme and not the monstrous maze the laity are apt to think it. Let them but once clearly perceive that its grand principle is to make business for itself at their expense, and surely they will cease to grumble.[1]

And make business it has! Especially within the international oil and gas business.

On any given day, legions of transactional lawyers and their commercial-negotiator allies toil and embroil with their counterparts over a madding assortment of complex agreements worth untold billions of dollars. At the end of the day, they typically choose English law to govern their handiwork. Why? Fundamentally, for lack of a better choice. There is no

---

* Special Counsel, Tauil & Chequer Advogados (associated with Mayer Brown); Adjunct Professor of Law, University of Houston Law Center and The Ohio State University Moritz College of Law.

1. CHARLES DICKENS, BLEAK HOUSE 620 (Rev Ed edition, Penguin Classics 2003) (1853).

such thing as "U.S. law" that one could apply to such contracts, and non-U.S. parties are loath to apply the law of any particular U.S. State (i.e. Texas, Oklahoma or Louisiana) for fear of: (i) becoming liable to U.S. jurisdiction; (ii) excessive monetary judgments; or (iii) application of perceptively draconian American doctrines (i.e., strict liability, punitive damages). So why not apply the law of relevant civil law jurisdictions? Many practitioners cite as reasons, the lack of reliable industry precedents (*stare decisis)* or uncertainty concerning the enforceability of the industry's cherished "knock-for-knock" [2] system for allocation of liability among operators and contractors.

So, by default, parties commonly apply English law[3] to their transactions. On the other hand, there are many positive aspects of English law that would make it an attractive choice, even if various viable alternatives existed. English law is known for its centuries-long system of jurisprudence, including in mineral and mining disputes. Establishing and interpreting that jurisprudence is a highly independent and respected judiciary complemented by an efficient and extensive alternative dispute resolution sector. Finally, industry participants widely consider English law to be predictable and transparent, and as Dickens would have it, "business friendly."[4]

Naturally, only a minority of the lawyers who apply English law to their oil and gas contracts are admitted to practice in that jurisdiction. And it would be unrealistic to expect otherwise. Nonetheless, lawyers, especially those trained only in civil law systems, who heedlessly apply English law to complex contracts are potentially playing with fire. However, the related risks, such as unenforceable contractual provisions or legal malpractice claims, can be greatly mitigated by gaining a fundamental knowledge of English law especially as it applies to Petroleum Contract. Happily, Mr. Roberts's comprehensive treatise provides precisely what the doctor ordered in this regard.

This work is actually two books in one: (i) an easily navigable source of basic information for the oil and gas commercial practitioner; and (ii) a remarkably detailed treatise with more case and statutory citations than any academic or litigator could possibly wish for. Thus, the practitioner can pull the book from the shelf (or more likely across the desk) whenever she encounters a new concept or one requiring refreshing from law school days.

---

2. *See* PETER ROBERTS, PETROLEUM CONTRACTS: ENGLISH LAW AND PRACTICE § 13.09 (2d ed. 2016).

3. Or more correctly stated, "The Laws of England and Wales."

4. *See* Dickens, *supra* note 1.

Meanwhile, academics and litigators can use the heavily researched and annotated tome as a head start for more detailed research or case law support exercises. Either way, it is sure to be a time saver and problem solver.

In Chapter One ("English Law and Practice")[5] the author masterfully sets the stage for what is to follow: a well-organized and well-written restatement of those concepts and principles of English law and equity most likely to confront (and confound) the oil and gas legal practitioner or academic. In a most succinct fashion, the Chapter captures the essence of English Law in both its historic and contemporary setting. In particular, it deftly explains the historical difference between law and equity and the contemporary relevance of that distinction.[6] By doing so, it enables the lawyer trained in a civil law jurisdiction to quickly understand the origins, essence and even logic of a legal system perhaps previously shrouded in mystery and misconceptions. And for the common law lawyer it clearly recaps those concepts and principles that have become hazy since law school or perhaps were never fully understood in the first place. The chapter also compares and contrasts civil and common law systems in sufficient detail to highlight their differences and similarities, but without so much detail as to become tedious.[7] Finally, it provides a few other building blocks for the reader, such as a discussion of "contract and tort"[8] as a smooth segue into the remaining, more focused chapters.

Following Chapter Two's essential summary of contract architecture and interpretation under English law[9], it launches into a vital description of the petroleum sector and the types of contracts prevalent in each of its branches (upstream, midstream and downstream).[10] Thus, in a nutshell, a reader unfamiliar with the industry becomes not only conversant with its fundamentals but also with the types of contracts he is likely to encounter as well as their basic content and purpose.[11] Indeed, a thorough reading of this chapter should allow a non-specialist to apply this background to the remaining detailed chapters and to begin discussing and working with petroleum agreements with increased confidence and competence.

---

5. Roberts, *supra* note 2, §§ 1.01–1.133.
6. *Id*. §§ 1.32-1.39.
7. *Id*. §§ 1.40-1.42.
8. *Id*. §§ 1.43-1.45.
9. *Id*. §§ 2.01–2.36.
10. *Id*. §§ 3.01–3.15
11. *Id*. §§ 3.16–3.31.

With the sturdy winds of Chapters 1-3 behind their sails, the remaining chapters lead the reader on a fascinating journey through the many legal concepts and principles that impact and govern the countless petroleum contracts (and related disputes) that apply English law. These include most notably: (i) Equitable Rights and Remedies[12]; (ii) Impossibility and Impracticability of Performance[13]; (iii) Contract Damages[14]; (iv) Liability Allocation[15]; and (v) Transfers of Interest.[16] Throughout, the author points out both opportunities and pitfalls presented by each, in particular as they relate to the petroleum industry.

This tome should not be thought of as just a rich repository of finer points of English law as it relates to oil and gas. Rather, the end-user will likely keep it handy as a go-to source for any variety of situations in which a primer, or refresher, is required in order to provide quick counsel or embark on a detailed analysis. The best way to demonstrate this utility is to share a few of its specific passages dealing with:

Privity of Contract

> Under the common law doctrine of privity of contract a contract generates rights and obligations only between the parties to the contract. A third party will be a stranger to that contract and consequently a contract cannot purport to confer a benefit on a third party which is enforceable by that third party directly against the contracting parties, nor can the contracting parties purport to enforce an obligation directly against a third party. These principles will hold true even if the contract expressly attempts to confer a benefit on the third party or if the third party knows of the obligation to which it is purportedly subject.[17] Although seemingly grounded in logic, a strict application of the doctrine may sometimes lead to injustice. . . . To remedy this[,] the English courts have occasionally sought to allow evasion of the doctrine by some novel means.[18]

12. *Id*. §§ 7.01–7.135.
13. *Id*. §§ 10.01–10.140.
14. *Id*. §§ 11.01–11.118.
15. *Id*. §§ 13.01–13.126.
16. *Id*. §§ 14.01–14.132.
17. *Id*. § 6.19 (footnotes omitted).
18. *Id*. § 6.20 (footnotes omitted).

In this vein, Mr. Roberts discusses in detail how the Contracts (Rights of Third Parties) Act 1999 significantly modified this doctrine and coaches the reader on how to effectively deal with its provisions in order to avoid unanticipated results.[19]

Take or Pay

> The 'take or pay' mechanism is a popular device in contracts for the sale and purchase of petroleum . . . . It operates in the seller's favour, in order to guarantee a certain flow of revenue from the buyer. This may be a purely economic device in its own right but it is also relevant in funding the costs of developing petroleum project infrastructure. A high capital cost will often be a consequence of creating the necessary infrastructure for any petroleum commercialization project and petroleum producers (and their lenders) have typically been reluctant to develop significant projects without the comfort of a long-term purchase commitment from a creditworthy petroleum buyer in order to underpin their investment. Similar principles apply in respect of 'ship or pay' (or 'send or pay') commitments entered into by users of petroleum transportation infrastructure in favour of the infrastructure owner.[20]

As many sad sellers of natural gas have realized, a "take or pay" clause is ultimately only as good as its enforceability. The relevant Sections of the book provide an excellent introduction to the intricacies involved in such determination.

Time of the Essence

> Occasionally in petroleum contracts the phrase 'time is of the essence' (or some variation thereof) is deployed. This phrase is often used inexpertly and without real regard for the consequences of doing so. The consequence of using this phrase depends on whether it is to be applied by implication under English law or whether it comes into existence expressly under the terms of a contract.[21]

---

19. *Id.* §§ 6.23–6.36.
20. *Id.* § 8.53.
21. *Id.* § 16.99.

> A time of the essence clause is of value where the parties intend that a failure of one party to comply with a term of the contract regarding the time for performance of an obligation should give the innocent party the right to elect to terminate the contract, regardless of the magnitude of the breach or whether the innocent party has suffered a loss[22] . . . .
>
> If a time of the essence clause is to be used in a contract along with a liquidated damages provision . . . care needs to be taken that the two provisions work together. If it is intended that time is to be of the essence, and also that liquidated damages should be payable where such a clause is relied upon by the innocent party to terminate the contract, the clause must make it clear that the liquidated damages provision will survive termination of the contract . . . .[23]

In short, the drafter of an English law contract should avoid stipulating that "time is of the essence" unless thoroughly familiar with the meaning and possible consequences of the expression.

Conclusion

Petroleum Contracts[24] provides the seasoned petroleum lawyer, as well as the general practitioner, with a detailed, yet practical guide to the intricacies of English law as it applies to Petroleum Contracts. The book should prove particularly useful for lawyers from civil law backgrounds, as it weaves seamless explanations of petroleum concepts within the context of common law. While no book can serve as a substitute for a firm grounding in English contracts law when applying it to petroleum transactions, *Petroleum Contracts*[25] goes a long way in bridging knowledge gaps in this area. The author of this Review only wishes that Mr. Robert's treatise had existed when he began working in this area decades ago. Rest assured, however, that it will always be at arm's length henceforth.

---

22. *Id*. § 16.100.
23. *Id*. § 16.113.
24. *See* Roberts, *supra* note 2.
25. *Id*.