

# Limitations and Possibilities Regarding Environmental Liability for Oil and Gas Companies

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## Who I Am

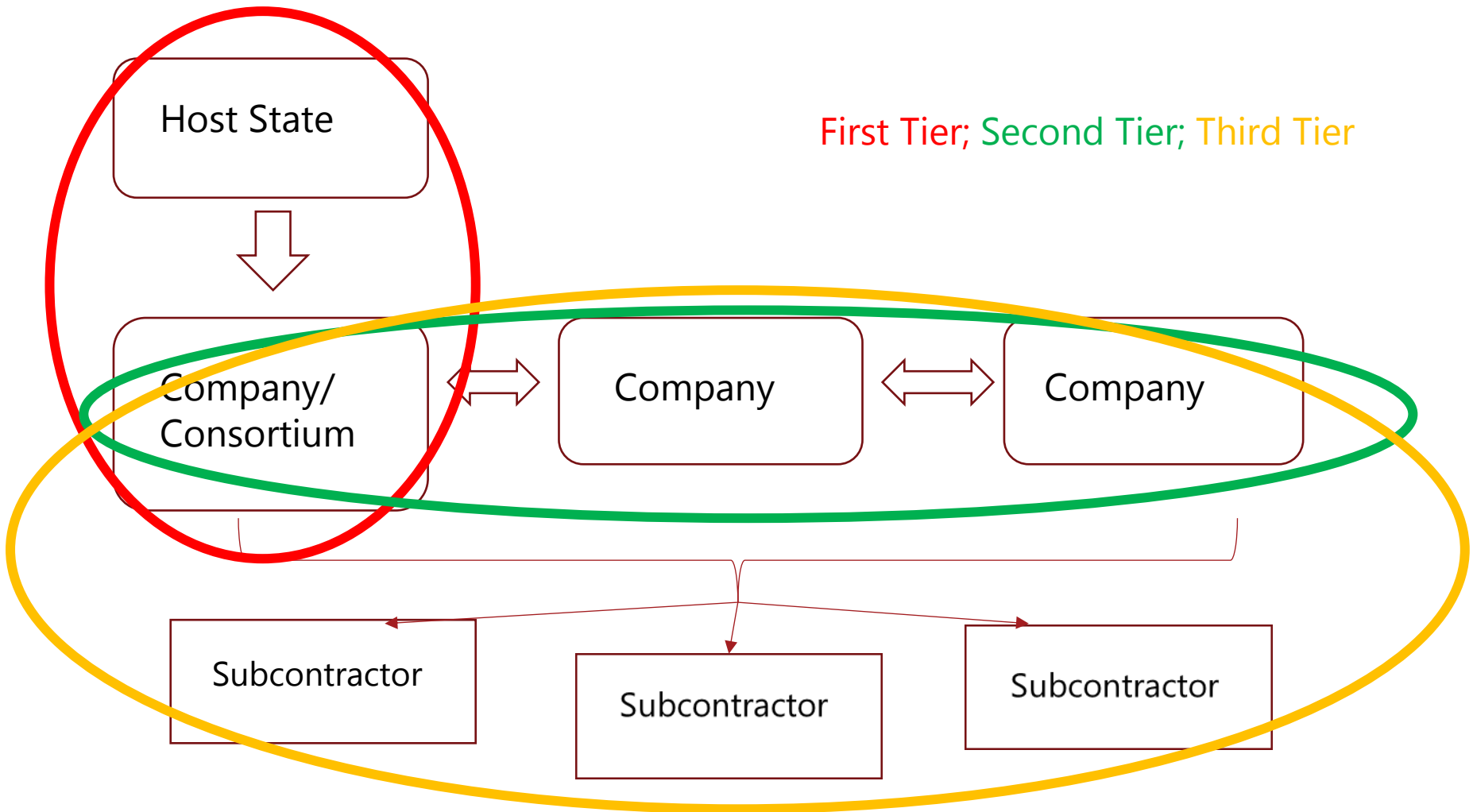
- Romanian born – **Ploiesti**, the Romanian oil & gas city
- LLB – 2003
- MA – 2006
- LLM – 2011
- SJD – 2015
- Marie Curie Fellow – 2019-2021
- Attorney at Law – 2004/6
- Postdoctoral Fellow – 2016
- In house counsel for OMV Petrom and Gazprom



# Why This Topic

- Petroleum – still dominant
- Decommissioning & environmental issues – increased concern
- Host states and international companies – joint yet not always aligned interests
- Allocation of environmental liability – expensive, important
- Third parties – significantly affected
- Practitioners and policy makers – contract and legislative drafting, risk mitigation
- Interaction between regulation and contract
- What if the law and the contract do not match? Could parties minimize or elude environmental liability?

# The Contractual Nexus



# First Tier – The Vertical Relationship: HGA

- Petroleum operations – risky and detrimental to environment
- HGA - > more complex and regulatory = control
- **Key question: WHO PAYS? + Advance preparation**
- States tend to impose terms & mitigate the risk of insolvency
- Increased (unilateral) changes in decommissioning rules
- Collaboration and cost reduction
- Effectiveness varies: legal system, type of HGA, provisions
- Use of Model HGAs, Model JOAs, regulation, stabilization
- Mandatory state participation - > mandatory JOA = perfect alignment (UK: approval by State secretary; Romania: none)
- Financial guarantees: various degrees and details. Most detailed – DK, UK, vague – Romania)

# Liability Assurance

- Major issue in all jurisdictions: US, UK, DE, RO
- Purpose: **shield tax payers from liability** (may also shield other companies) -> does not remove the risk!
- Various methods and outcomes:
  - US: Bureau of Ocean Energy Management to develop new regulations on liability assurance associated with offshore decommissioning (none so far)
  - UK: no legal provision that says that oil companies must provide decommissioning security -> Policy is instead that decommissioning costs **will be paid out of the revenue from other (still operational) fields** -> where the government has specific concerns about a company's ability to meet its decommissioning costs, then it may require the party enter into a Decommissioning Security Agreement with it (also done via JOA)

## Liability Assurance 2

- **Type:** letter of credit, parent company guarantee, insurance, trust funds
- **Quantum:** based on annual estimate of cost (UK); unlimited (DK)
- **Duration:** until decommissioning is complete & 12 months after.
- Trigger date/event & default mechanism (as clear as possible)
- Careful drafting needed (DK, NO – standard document)
- Agreement on valuation and dispute resolution mechanism (expert determination)
- Annual renewal needs careful management

# Taking Over of Platforms

- Most states provide for infrastructure to become the property of the state at the end of operations: problematic! (DK, RO)
- Also states take over in the case of company's insolvency – problematic! (US – Platform Holly)
- In such situation, the state becomes liable for environmental costs (at least for residual liability)
- What is “returning the site to its pre-existing, natural state”? – should some infrastructure be retained?



# Lack of Industry Standards & Other Issues

- Various national approaches and policies (see Trump)
- Powerful Lobby & Oil Market (cheap oil)
- Case-by-case decisions allow states to exercise discretion (sometimes favouring industry)
- Lack of a standard decommissioning contract & Old and poorly drafted contracts (no decommissioning or security provisions)
- **Confusing rules or no rules** at all! (Asia Pacific, S. America)
- **Overlapping competence** of government agencies (Asia Pacific, Romania) **or no competence** at all

# First Tier – Liability

- Primary liability – title holder(s) – joint and several
- Residual liability – title holder (+owner of installations)
- Historical liability – original and subsequent holders (DK towards the state and other parties; UK – claw back mechanism -> original title holders; Ro – none – only subsequent holder)
- Joint and several. Exception: Romania – allocation of liability via JOA/FOA have the effect of making allocation opposable to the state (questionable in case of third party claims in tort regarding damage in decommissioning)

## Second Tier: The Only Horizontal Relationship

- Covers relationship between the original title holders or between the original title holder(s) and assignees (subsequent farmees)
- Theoretically, a relationship among equals
- State involvement: not as sovereign, but business partner
- Potential issues regarding allocation of environmental liability:
  - a) Stemming from allocation among original parties – operatorship; exclusive operations
  - b) Stemming from allocation among original and subsequent parties – assignment (and withdrawal)

## Second Tier: The Only Horizontal Relationship

- **Issues arising from operatorship** – the environmental liability of the operator – generally limited to the operator's share in the JOA/HGA, assuming it is a party;
- third tier related obligations: choice of subcontractors
- **Issues arising from assignment (historical and residual liabilities)** – new party jointly liable with the original parties. DK – transferor is secondarily liable; Ro – new party fully subrogates the original party who eludes liability towards the state → parties establish more stringent rules by JOA.
- **Issues arising from withdrawal (historical and residual liabilities)** – conditional. State may require proof of restoration or upfront payment of restoration costs → JOA parties try to curb the right to withdraw: party remains liable for historical liabilities and must provide security

## Second Tier: The Only Horizontal Relationship

- **Issues arising from sole operations** – limited to parties who undertake operations (within JOA), but irrelevant in regard to liability under HGA
- (exception: Romania's permission of allocating areas and liability for environmental damage caused in that area)
- **Abandonment Agreement** – UK and DK – what if a JOA party refuses to sign the AA? Could it avoid decommissioning operations liability?

# Additional (General) Issues

- (Type of) contract for decommissioning
- Uncertainty regarding the state of the structure
- Ownership of the structure
- Management of waste
- Indemnities and insurance
- Delay and liquidated damages
- Co-operation with others
- Payment and dispute resolution
- Termination
- Defects correction

## Type of contract

- Construction? (fulfil obligation under license)
- Service? (not best effort, but physical result)
- Modification? (unknown status of existing installation)
- Purpose: total/partial removal (Company – interested in HOW, contractor – interested in Profit)
- Key values:
  - Minimize safety exposure
  - Decommission safely and at minimum cost
  - Meet legal and environmental obligations
  - Protect reputation and minimize future liabilities

# Risks in Decommissioning Contracts

- Causes: length of contract period; factors not identified from start
- Typical risks: physical condition of asset, structural integrity, chemical contamination, ground conditions
- Unknown factors:
  - a) known/unknown status
  - b) known/unknown consequence of given status
- Balance risk vs. incentive
  - Information (from company) v investigation (contractor)
  - Fair allocation of risks: for unknown parameters (not too generous); (contractual) regulation must establish sufficient incentive on contractor to operate effectively)
- Allow for variation (use nuanced terms and criteria)



# Uncertainty regarding the state of the structure

- Built drawings may not exist, may have been lost or destroyed
- Alterations to the installation may not have been adequately captured
- Accident and/or weather conditions may have altered the physical condition of the installation
- Some early decommissioning contracts demonstrate the danger of contractor providing a fixed price job in those circumstances
- A marked reluctance, on the contracting community, to enter into contracts on such terms
- Methodology used – technical information and assumptions

# Indemnities and consequential loss

- Does a decommissioning contract require same approach to indemnities and consequential loss as a service contract?
- "Yes"
- Seems correct in the context of indemnities for people, property, pollution

# Delay and liquidated damages

- Query – is this needed?
- Decommissioning comes at end of life of field – “no production delay, no urgency”
- Has been included, and I think rightly – there may be time constraints particularly when regard is had to the overall suite of contracts
- May be working to Regulator's deadline
- Another contractor may be waiting to take the structure e.g. a heavy lift vessel
- Onshore disposal yard may have allocated capacity based on the structure arriving during a particular window

## SUMMING UP

- Decommissioning and environmental liability:
  - Complex task
  - Unanticipated challenges
  - Political and social scrutiny
  - Substantial risks
- Require good laws and contracts:
  - Foreseeable regime
  - Shielding parties from costly discussions
  - Govern a very large and long-lasting international market
  - No initiative to develop a standard term of decommissioning contract
  - Joint challenges call for joint efforts

# Conclusions

- Regulation and contract should be aligned
- Non-alignment enables (regulatory) arbitrage
- Parties use JOA to better allocate liability and to protect themselves from opportunistic behavior, where national law allows it
- States should retain the possibility to amend and update standards regarding environmental protection
- In tort, special rules should be created to ease burden of proof for aggrieved parties

THANK YOU FOR YOUR  
ATTENTION!

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