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Oil & Offshore

The Norwegian Government has since 1965 requested licensees on the Norwegian Continental Shelf to provide a parent company guarantee for the obligations they may incur in relation tothe petroleum activities. The authority to make such a request is presently found in Section 10-7 of the Act 29 November 1996 No. 72 relating to petroleum activities ("PAA"). The Government uses a model guarantee text that has been unaltered since 1979. In recent months this parent company guarantee has been the subject of both dispute and development. In this newsletter, we highlight the key issues and the possible implications.

1. THE GOVERNMENT VS SKEIE

- THE LIMITS OF THE CURRENT MODEL GUARANTEE

On the 11 November 2017 the District Court of Oslo ruled on the scope of a guarantee issued on the 14 March 2008 by Skeie Technology AS («Skeie Technology») as security for the obligations of its subsidiary E&P Holding AS («EPH») relative to EPH's petroleum activities ("Guarantee"). The Guarantee was in the form of the model guarantee.

The Government sought to impose the Guarantee against Skeie Technology for the payment of an unpaid claim against EPH for return of wrongfully received tax refunds.

The parties agreed that the relevant provision of the Guarantee was:

"The undersigned Company hereby undertakes financial liability as surety for the following obligations which may arise for Skeie Energy AS in connection with the operations of these companies concerning exploration for and exploitation of subsea natural resources, including storage and transportation by any means other than by ship, on the Norwegian Continental Shelf.

> *a) The obligations which the above-mentioned companies have assumed or may assume to the Norwegian State, a Norwegian municipality or other Norwegian public institution."* [1]

The question the District Court had to decide was if the scope of the Guarantee included tax claims.

When construing the Guarantee the Judge applied the common principles of contractual interpretation. The Judge found, considering the plain meaning of the wording of the Guarantee, that on the face of it, it did not cover a claim for repayment of wrongfully received tax refunds.

The Judge especially emphasised the meaning of the word "exploration" and concluded that the word refers to a factual activity such as exploration drilling, consequently excluding purchase and analysis of seismic of which the claim for repayment is founded on. It seems that the court in its analysis of the word did not consider the definition used in the PAA. Further to this the Judge also made a distinction between an Exploration Licence and a Production Licence and reflected that the Guarantee was issued relative to a Production Licence and thus excluded exploration per se.

The Judge also put emphasis on the use of the phrase *"obligations which the above-mentioned companies have assumed or may assume"*. Considering that the word "assume" denotes a positive act, the Judge concluded that it could not be argued that EPH had "assumed" an obligation to repay the wrongfully received tax refund.

The Judge continued by considering other relevant factors such as the legal foundation for the Guarantee, the purpose behind the guarantee requirement, the preparatory work of the PAA, legal commentators etc. The purpose of the guarantee requirement, i.e. that the parent, being the beneficiary from the activity, should be put in an equal position as the subsidiary, is considered by the District Court, which concludes that this relates solely to the petroleum activity as such and not obligations that arises out of the petroleum activity.

Having considered all the relevant factors the Judge concluded that there was nothing in these additional sources that altered the understanding of the plain meaning of the text of the Guarantee.

"It may therefore be safe to assume that the government may more vividly use the authority granted in Section 10-7 of the PAA to require guarantees for future potential obligations"

The conclusion of the District Court that the Guarantee does not apply to repayment of wrongfully received tax refunds, is based on a specific evaluation of the relevant factors. However, the case includes some interesting remarks of a more general nature which highlights that the scope of the guarantee is limited. Furthermore and perhaps more interesting is the concession granted by the Government in the case preparation; prior to the main proceedings the Government accepted that the obligations of the guarantor is no more than what is set out in letter a) and b) of the guarantee and that the subsequent paragraphs are not creating any independent obligations on the guarantor. Consequently, the government has effectively reduced the potential scope of the guarantee and settled an issue of uncertainty.

The decision of the District Courthas has been

appealed by the Government. However, the case itself indicates quite clearly that the guarantee is limited in scope. It may therefore be safe to assume that the Government may more vividly use the authority granted in Section 10-7 of the PAA to require guarantees for future potential obligations.

2. NEW PCG REQUIREMENTS IN CORPORATE TRANSFERS

Notwithstanding the above mentioned court case; the government through the Ministry has now started to demand that the seller in corporate transactions issues a guarantee for future abandonment and removal cost.

The first indication of such a requirement can be found in the preparatory paper for the PAA where it was stated that the government may in the event of a sale of shares in an E&P company request that the seller issues a guarantee for future abandonment and removal cost. This was later reiterated in a letter to the Norwegian Oil and Gas Association in November 2016. Such guarantees have not been requested previously in transactions on the NCS, but have in 2017 been implemented as a condition in share transactions.

As referred to in the preparatory papers to the PAA the shift in policy can be attributed to the gradual exit from the NCS of the subsidiaries of the oil majors and the change to smaller independent companies and private equity backed enterprises.

In support of the policy change a new model parent guarantee ("MPG") has been developed by the Ministry. It is assumed that the MPG will form the basis for future conditions and it has already been put to use in the most recent share transactions on the NCS.

Through the MPG the Ministry requires that the Seller must guarantee payment of the abandonment and removal cost that is attached to the licenses held by the seller´s subsidiary. The MPG relates to all licences and assets held by the company in question that existed at the time of the share transfer and will cover all such cost until all of the relevant facilities have been decommissioned.

The "beneficiaries", according to the MPG, are the other licensees, existing and future, and the State.

Considering that the primary obligated parties for abandonment and removal cost are the licensees at the time of abandonment and removal, it is not surprising that the MPG constructs the guarantee obligation as a subsidiary obligation where the seller first becomes liable to pay at such time as the licensee has defaulted on it´s payment obligations in relation to abandonment and removal cost.

In the event there has been intervening transactions, claims under the guarantee must first be made against the last seller and then onwards to the next in the line of transactions.

"The immediate consequence of the change of policy is that a "clean exit" from the NCS most likely no longer is possible"

The immediate consequence of the change of policy is that a "clean exit" from the NCS is most likely no longer possible. Companies exiting the NCS may now have to rely on indemnities and appropriate security arrangements from the buyer to create a "clean exit". It should be expected that the concept of decommissioning security agreements as seen in asset sales will be extended into share purchase transactions.

It may be argued that the responsibility according to the new MDG already is covered through the scope of the parent company guarantee requested by all licensees for the obligations they may incur in the petroleum activities. The fact that the Ministry finds that an additional guarantee is required, may be in recognition of the fact that the wording of the current parent company guarantee does perhaps not cover what the government initially intended it to cover. The creation of the MDG can thus be seen as a recognition of some of the issues addressed in the case between Skeie and the Government.

RECENT HIGHLIGHTS

- Assisted Hess Corporation in the USD 2 billion sale of Hess Norge to Aker BP ASA.
- Assisted in the establishment of Edge Petroleum AS, including the USD 500 million funding received from Elliott Management Corporation
- Assisted Nabors Industries Inc. in the acquisition of Robotic Drilling Systems AS
- Assisted BNP Paribas and DNB Bank (as lenders) in connection with Point Resources AS' acquisition of ExxonMobil's operated activities on NCS
- Acted as head of the debt negotiation committee, debt settlement committee and later administrator of the bankrupt estate Reinertsen AS which also included completing a business transfer of the oil and gas activities to Aker Solutions ASA
- Assisted DNB Bank ASA as agent and the lenders to Aker BP ASA in connection with Aker BP ASA's USD 4 billion senior secured credit facility
- Assisted Magseis ASA in private placement of NOK 340 million
- Assisted Boa IMR AS in arbitration regarding the shipyard's obligations related to a shipbuilding contract
- Represented the Teekay Group subsidiary Logitel Offshore in litigation against Sevan Marine
- Tax advisor to several oil and offshore companies

OIL AND OFFSHORE EVENTS

24.1.2018 Digital Security in the petroleum industry: Data attacks and offshore insurance
Location: Arntzen de Besches` premises at Bygdøy Allé 2, 0257 Oslo
Register online before the 22nd of January 2018 - www.adeb.no/seminar

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