

LOGIC and BIMCO Decommissioning Contracts

A Practical Comparison



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There is a saying in the UK, that one waits for an age for a bus to turn up and then several arrive at the same time. Well, as it may be with buses, it is also with standard form offshore decommissioning contracts.

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CHARLES WILSONCROFT, EXECUTIVE DIRECTOR, HKA

INTRODUCTION

There is a saying in the UK, that one waits for an age for a bus to turn up and then several arrive at the same time. Well, as it may be with buses, it is also with standard form offshore decommissioning contracts. With an increasing workstream of decommissioning projects and a sizable amount of aging assets requiring removal¹, two key industry bodies have answered the call and drafted their own sets of terms. The question is which of the buses, if either, will the industry board?

Up to this point, parties to decommissioning contracts have utilised a range of bespoke and amended forms of construction contracts and, generally, the publication of specific, standardised forms is welcomed. The offshore decommissioning industry is unique in its challenges, constraints and issues, however it holds a great deal of similarity and overlap with other aspects of offshore works, including transport & installation and wreck removal.

The first of the new standard forms was published by LOGIC, named the General Conditions

of Contract for Offshore Decommissioning in December 2018. This was closely followed by the BIMCO DISMANTLECON in September 2019. Users of other standard forms published by these two well-known entities will recognise the formats utilised by each. The LOGIC form is closely aligned with its construction contracts, whereas the BIMCO form uses the WRECKSTAGE form as its base. The different bases of contracting model have resulted in two very different standard decommissioning standard forms.

This paper provides a comparative overview of some of the key aspects of the two standard forms of contract.

The two forms utilise a differing standard of capitalisation. The LOGIC form capitalises full words (e.g. CONTRACTOR) whereas the BIMCO form capitalises the first letter only (e.g. Contractor). For the purposes of this paper, contract terms have all been capitalised in the BIMCO form for ease of reading.

¹ It is estimated that, in the next ten years, the North Sea will see the decommissioning of 2,624 wells, equating to approximately 1.2 million tonnes of topsides and 660,000 tonnes of subsea structures (*"Decommissioning Insight 2019"* OGUK, 2019)

A detailed review, however, identifies some noticeably distinct differences between the two, with significant shifts in allocation of risk between the parties.

GENERAL

What is immediately noticeable at any brief review is that both forms utilise much of the same terminology. For example, both use Contractor, Company, Technical Information, Assumptions, Variations, Worksite, Facility, Transferring Material and Incorporated Material. This is notable in that both forms recognise well-used and understood terms within the oil and gas sector, and therefore between them have created an element of standardisation within the decommissioning standard forms.

It is also clear to see that the two contracts, or at least one following the other, have been drafted with cognisance of each other, with both utilising some clauses and provisions almost word-for-word. The author understands this is partly due to both drafting committees being partially made up of the same members. This again brings an aspect of standardisation to the forms and pulls into question the benefit and need for two such forms where perhaps one would suffice. A detailed review, however, identifies some noticeably distinct differences between the two, with significant shifts in allocation of risk between the parties.

What is also noticeable is that both forms are drafted in relation to the decommissioning and removal of structures (i.e. topsides and subsea structures) rather than the decommissioning of the well heads themselves. Whilst not a hindrance to usage in itself, this may be found to limit the application of the standard forms in instances whereby the Company and Contractor wish to contract on a “complete” basis, including decommissioning the well, topsides, substructure and related pipelines in one package. If such an arrangement is required, the two standard forms addressed herein would need substantial amendment to allow their use.

REPRESENTATIVES

Both forms require the Company and Contractor to appoint representatives, both of which can delegate any of their authority in writing to the other party. Neither party representative has the power to waive the other party of any obligations under the contract.

At Clause 5(d) and 5(e) the BIMCO form provides that the Company may appoint a Marine Warranty

Surveyor (“MWS”) and that the Contractor is obliged to provide reasonable information to satisfy requests from the MWS. The LOGIC form does not include such a provision. This is a key omission from the LOGIC form, given the lift and transportation nature of decommissioning projects and the almost likely requirement for a MWS by the Company’s insurers.

PROVISION OF WORKS/SERVICES AND CONTRACTOR OBLIGATIONS

Under the LOGIC form the Contractor is obliged to provide all management, supervision, materials (except as to be provided by the Company), equipment, plant, consumables, facilities and other things, temporary or permanent, necessary as specified or inferred in the Contract. The Work means all work required to be carried out within the Contract. The Contractor shall carry out the Work with due care and diligence, and skill of an experienced contractor.

Within the BIMCO contract the Contractor is obliged to carry out the Services. The Services include: the method of work, schedule of key dates and all relevant operational details or proposed craft, equipment and personnel to be used. As with the WRECKSTAGE contract upon which the BIMCO form is based, and differently to the LOGIC form, the method of work forms part of the obligation of the Contractor.

This means any impact on the method of work, either within the liability of the Contractor or the Company, is itself a cause of action for the other party. This positioning of the method of work is fundamental to the basis of the risk allocation within the BIMCO form and provides security to the Contractor. However, it also provides inflexibility if the method requires changing for the Contractor’s own ends. Under the LOGIC form the Contractor is free to amend its method of work appropriately to suit its own requirements (within the constraints of the Contract).

The BIMCO contract requires the Contractor to work with “due care” and in accordance with the Agreement, Annexes, Applicable Law and “good industry practice”. In practice there does not appear to be significant difference between the Contractor’s liability in this respect.

INSTRUCTION

Under both forms, the Contractor is obliged to comply with instructions issued by the Company Representative insofar that such instruction does not cause a danger to personnel, property or, in the BIMCO form only, the environment. Interestingly, the drafting of the LOGIC form provides that such instruction cannot “cause a hazard to safety”. This is a very broad constraint and could be widely interpreted. Any decommissioning projects will have a significant number of hazards which are managed in varying ways. One could argue then that almost any instruction to carry out a change could introduce a new “hazard”. The drafting of the BIMCO form appears more precise in this respect.

Under the LOGIC form, the Contractor is obliged to comply with an instruction. If the Contractor can demonstrate it has incurred delay and/or additional cost, then the Company shall issue a Variation. The BIMCO document provides greater support to the Contractor at Clause 2(d), stating that if the instruction constitutes a Variation then it is not obliged to comply with such until a Variation Order is agreed.

This provision of the BIMCO contract may not be palatable to the Company, which may see this as leading to protracted delays and formal disputes. Under Clause 25(a)(i) any dispute relating to a Variation shall be referred to adjudication. Company’s awarding under the BIMCO may be keen to amend these provisions.

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TECHNICAL INFORMATION, ASSUMPTIONS AND RELY UPON INFORMATION

The forms both deal with Technical Information and Assumptions, however the BIMCO form has the addition of Rely Upon Information, which sets it apart. The Technical Information (and Rely Upon Information in the BIMCO form) comprise data and documents supplied by the Company. Under both forms, Assumptions are assumptions made by the Contractor when formulating its tender and which are enshrined within the respective contracts once formed.

Under the LOGIC form, at Clause 12.2, both parties acknowledge that the scope of Work, Programme and Contract Price have been based on both the Technical Information and the Assumptions being correct. Somewhat differently to this, the BIMCO form, at Clause 2(a) states that the parties agree that the “Services” are based on the Assumptions, Rely Upon Information and Technical Information. Perhaps importantly, there is no mention of the price being based upon these items. “Services” is defined in the BIMCO form as including the method

of work, the schedule of key dates and operational details of staff and craft. While it may be reasonable to follow the natural thought that the price is based on connecting such to the supplied information and Assumptions, the specific omission of price in 2(a) could cause problems when pursuing a claim for changes to the contract price under the BIMCO form.

Under the LOGIC form, all information issued by the Company to the Contractor is defined as Technical Information. This information is taken to be a reasonable representation of the Facility. Under Clauses 7.1 and 12.3 the parties are to inform each other if the Technical Information and/or Assumptions are factually incorrect or deficient. Under Clause 7.1 the Contractor may also inform the Company if there are discrepancies between the Technical Information and the Assumptions. Any such errors, deficiencies or discrepancies entitle the Contractor to a Variation.

The BIMCO document treats this information somewhat differently. In addition to Technical Information the form includes Rely Upon Information, both of which are supplied by the Company. If the Rely Upon Information is shown to be incorrect or inconsistent, and it impacts the Services, the Contractor is entitled to submit a Variation Order, likewise with the Assumptions. The Contractor is only entitled to a Variation for errors, discrepancies or deficiencies in the Technical Information if the relevant information is issued after the signing of the Agreement and the Contractor has notified the Company of such within both 14 days of the commencement of the offshore execution and within 21 days of receipt of the information. This appears somewhat contrary to Clause 4(b) which provides that the Contractor does not change the Services due to Technical Information unless the parties agree a Variation Order. These provisions do not sit neatly together at initial reading, and it is not clear quite the intent and status of the Technical Information. This is further reinforced by the specific provision of Rely Upon Information.

Unlike the LOGIC form, therefore, the BIMCO form does not give the Contractor the benefit of risk regarding issues with the Technical Information issued prior to entering into the Agreement, and therefore forming part of the basis of the Services. In the opinion of the author, the manner by which the LOGIC form addresses such is clearer and simpler, with the overriding premise (as clearly identified within the guidance notes accompanying it) that the Contractor is not deemed to take on the risk of any information supplied by the Company. The BIMCO form seems to unnecessarily over-complicate matters and blur the lines of risk sharing and responsibility in this respect.

PROGRAMME

The LOGIC form is prescriptive regarding the Programme and addresses its updating and management in a manner somewhat aligned to construction contracts. Clause 11.1 requires the Contractor to produce a detailed work plan in accordance with the Schedule of Key Dates. The Contract goes on to explicitly state that the Programme shall be utilised as the basis for reporting, scheduling and forecasting the Work.

The Programme is to be updated with progress and Variations. The contemporary updating and management of the Programme suggests the Contract envisages a prospective form of delay analysis, albeit this is not expressly stated therein.

The BIMCO contract addresses the Programme in more high-level terms. Firstly, the Programme is a contract document, included in Annex I. Clause 20(a) provides that the Contractor shall update the Programme to show any deviation to the critical path as a result of “such adjustments” to the Programme, presumably this relates to adjustments resultant of the Contractor’s updates. As the Programme is a contract document it would be expected that any change to the Programme, whether on the critical path or not, should be addressed and updated accordingly, with any contractual entitlement thereto. It is also open as to when and how Variations are to be applied and updated within the Programme.

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VARIATIONS

The standard forms define Variations in different ways. The BIMCO document states such as:

1. Any modification to the Services, including additions, substitutions, alterations in quality, form, character, kind, position, dimension, level or line on which the Services are based;
2. Re-programming or re-scheduling required; or
3. Modification due to any inconsistency.

The LOGIC form defines such as:

1. An instruction to the Contractor in accordance with Clause 14.1; and
2. An adjustment to the Schedule of Key Dates and/or Contract Price to which the Contractor is entitled.

As a result, the BIMCO form provides greater ability for the Contractor to claim a Variation than with the more constrained approach of the LOGIC document. Further, the LOGIC definition requires both a change to the Schedule of Key Dates and/or Contract Price “to which the Contractor is entitled” and an instruction issued under Clause 14.1. It is not clear whether the intent is that such a change in the Schedule or Contract Price is specifically caused by the matter under instruction, or whether it can be independent.

The Company may issue an instruction which can include the re-programming of Work and re-scheduling resources under Clause 14.1 of the LOGIC form. The Contractor is obliged to comply with Company instructions, save insofar that such instruction requires Work within 500m of permanent oil and gas production facilities and pipelines. In such an event, the Contractor is not obliged to comply until a Variation has been agreed and the Contractor’s liabilities have been limited in respect of the relevant permanent assets.

While the LOGIC contract requires the Contractor to carry out an instructed Variation (work first,

argue later principle) the BIMCO form, at Clause 6, provides that the parties will use reasonable endeavours to agree a Variation Order before a Variation is carried out, and within 14 days of the issue being notified. There is not, therefore, a unilateral entitlement on the Company to issue a Variation without the Contractor’s buy-in. The implications of this are clear for any experienced contract user; while providing some commercial comfort for the Contractor it may constrain the ability of the Company to direct Variations as it requires.

Under the LOGIC form, Clause 14.5 sets out that “any” Variation is to be valued either using rates and prices for Work of a similar nature and carried out in similar conditions. Where there is no appropriate rate or price, “fair valuation” shall be utilised i.e. resources at cost, reasonably incurred, plus reasonable overhead and profit. Interestingly, Clause 14.6 addresses “cost” Variations i.e. failure of Company to provide access etc. In such circumstances the Contractor is entitled only to its cost with no profit. This could be seen to be in conflict with Clause 14.5 which states “any” Variation is to be valued using rates, prices or fair valuation.

While the general “low risk to the Contractor” type of ethos is understood, it is debatable how effective and practical this provision is in achieving the required goals.

The BIMCO form contains no such provisions for the valuation of Variations. This provides greater flexibility for both parties to reach agreement but could lead to disagreement over the most appropriate method to use e.g. whether to apply rates, whether the Contractor is entitled to profit etc.

This is in stark contrast to the LOGIC form which requires that, should the Contractor consider it is entitled to a Variation, it must issue a request and substantiation “without delay” under Clauses 14.7(a), (b) and/or (c) otherwise it forfeits its entitlement (subject to the discretion of the Company). While the author considers in many jurisdictions this clause may not be enforceable, it shows the intent of the drafters – a very different position to that in the BIMCO contract.

Clause 14.7(e) of the LOGIC form provides that the Company shall make adjustments it considers “fair and reasonable”. The LOGIC document provides little assistance to the Contractor with regard to agreeing a Variation at the time, very much shifting the balance of risk back towards the Contractor, with the only recourse being the dispute resolution process and the obligation to carry out the Variation.

Turning back to the BIMCO form, in the event the parties cannot agree to both the principle and valuation/effect of a proposed Variation Order within the 14 allocated days in Clause 6(b) then either party has the right to refer the matter to adjudication. Notwithstanding the author’s comments on how the BIMCO contract addresses adjudication (set out in the “Disputes” section below) this provision is likely to stall matters rather than expedite them. While adjudication is a relatively fast dispute resolution process it is still a minimum of 28 days from the issue of the referral, which can be 7 days from the Notice of Adjudication. It is very likely that the parties will not be able to agree both the principle and valuation/effect of a Variation and so it is quite possible that a string of adjudications be put in place, which could have detrimental effect. While the general “low risk to the Contractor” type of ethos is understood, it is debatable how effective and practical this provision is in achieving the required goals.

FORCE MAJEURE

Both forms define and allow for force majeure on similar terms (albeit the BIMCO form does not expressly include “maritime disasters”). Within the LOGIC form, the Contractor is entitled to time but not cost if such an event occurs.

Under the BIMCO form, however, the situation is somewhat more protective to the Contractor. In a force majeure event, the Contractor is entitled to both time and cost. In addition, if any resultant standby is instructed by the Company, and such standby exceeds the period agreed in the Contract, the Contractor is entitled to demobilise. All cost

related to such demobilisation and subsequent re-mobilisation are also entitled to the Contractor.

Further still, in the event of a force majeure demobilisation, the Contractor is only obliged to re-mobilise under an agreed revised programme and Variation. While there may be an implied obligation to return, there is no express timescale within which this should occur and therefore could leave the Company significantly exposed in the event it requires a re-mobilisation. The Contractor, in submitting a new schedule, can also take into account completion of others works, similar to the provisions of Clause 14(d).

SUSPENSION

Both forms allow suspension by both the Company and Contractor for various reasons, however both address the consequences in different ways. Clause 16 of the LOGIC form provides that the Company can suspend for convenience or for proper execution or safety of the Work or persons. In addition, the Company can issue a notice of default which, if the Contractor does not remedy, then the Company may suspend.

Under Clause 16.8, once the contractually pre-agreed period for suspension has been met (defined in Appendix 1 to Section I of the LOGIC form) the Contractor may serve the

Company a notice requesting recommencement within a 14-day period is permitted. If no such recommencement is permitted, the suspended work is treated as being omitted or terminated.

In addition, Clause 14.6(e) of the LOGIC form provides that the Contractor shall be entitled to a Variation in the event of a non-Contractor default suspension.

The BIMCO form adds more detail and specific provision in respect of suspension. On a similar basis to the LOGIC form, Clause 15(a) of the BIMCO contract allows suspension for Contractor default, proper performance or safety, or for convenience of the Company.

Clause 15(d) sets out that, after a suspension other than due to default by the Contractor, resumption by the Contractor is subject to the Contractor's other commitments. Further, in the event of a non-fault suspension the Contractor is entitled to its costs, including demobilisation and subsequent mobilisation costs, all subject to the Contractor's other commitments.

Clearly these provisions in the BIMCO form are beneficial to the Contractor. As similar allowances are not included in the LOGIC document this is likely to be a serious consideration of contractors, given the in-demand nature of lifting vessels utilised in decommissioning projects.

PAYMENT

Both forms have similar provisions regarding invoicing and payment, including the ability for the Company to part pay invoices for disputed amounts.

However, the forms do differ. The BIMCO contract provides that amounts are irrevocably earned when due. The LOGIC form does not contain such robust protection for the Contractor.

The LOGIC document requires, under Clause 17.5, that an invoice must include a schedule of amounts which the Contractor considers it is entitled but has not received payment. These items are limited to those notified under Clauses 14.3 and/or 14.7 and should include estimates of costs with supporting documentation.

Further, the LOGIC form sets out that the Contractor is not entitled to payment of any invoice issued outside the time specified in Appendix 1 to Section I – Form of Agreement. This is a period baselined at the Completion of the whole Work (albeit that any such payment shall be at the discretion of the Company).

The payment provisions again show a leaning of advantage from the Company to the Contractor under the BIMCO form as opposed to the LOGIC form.

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COMPLETION AND DELIVERY

The manner by which the forms address completion is starkly different. The LOGIC form is drafted in the manner of a construction contract and its roots in the LOGIC construction forms can be easily seen. Clause 28.1 states that the Contractor can apply for a Completion Certificate when the Work is “substantially completed” and has passed any required final testing. While the carrying out of testing is readily verifiable the measure of a decommissioning project being “substantially” complete may prove difficult to determine.

The principle of substantial completion is more easily understood with installation and construction work, often described as having a facility which provides beneficial use and free of material defects. Such a definition, or something like, does not easily sit with a contract to remove a facility.

Upon the application for a Completion Certificate, the Company has 30 days (unless otherwise set out in the Contract) to issue a Certificate or a notice of defects. The matter of defects again does not sit neatly with decommissioning projects, not least in relation to the removal of an asset (albeit there will no doubt be certain provisions in place regarding the “capping off” of assets, grouting or seabed replacement, for example). The LOGIC form does not identify between defects of a material nature or not, and the crossover between the Work being “substantially completed” (i.e. not fully completed) and having non-material defects present is not clear.

The BIMCO form, which has its genesis in the WRECKSTAGE contract (a wreck removal contract) as opposed to a construction form (as with LOGIC), deals with completion in a more simplistic manner. Clause 17(a) provides that the Contractor’s obligations cease upon delivery of the Facility, or the final part thereof, at the Place of Delivery (as specified in the Contract). This reflects the “lift and shift” nature of decommissioning projects and should provide less ambiguity than a measure of “substantial” completion.

When the Contractor considers all requirements have been met it requests the completion certificate. Within 12 hours, the Company responds either by issuing the certificate or by rejecting with reasons. The only recourse if the Company does not comply is through the dispute resolution procedure set out in Clause 25. There is no discretionary provision upon the Contractor and so this stands as a stark requirement for the Company to ensure compliance.

Further, Clause 17(c) confirms that, should the delivery be delayed by a governmental or other authority outside the Contractor’s control, it is entitled to its cost as a result. It is questionable whether this clause overlaps in part with the force majeure provision of Clause 14(a)(ii) being “any government requisition, control, intervention, requirement or interference”. Clause 14(d) entitles the Contractor to the relevant delay rates in the Contract. This could run contrary to the entitled to “cost” under Clause 17(c). This clause would benefit from amendment to remove any possible ambiguity.

DELAY DAMAGES

Much like the construction contract upon which it is based, the LOGIC form provides for liquidated damages in the event of a Contractor delay to Completion at Clause 34.1. It may strike users as an interesting and indeed novel inclusion, given the generally “open ended” nature of works after demobilisation is completed which, presumably, is the consideration in the BIMCO form (which has no such liquidated damages provision).

While the need for liquidated damages may not be immediately obvious, the general position is that, should the Contractor fail to complete by the Contract

date (as amended) the Company would be entitled to damages for this breach. Under the BIMCO form, these damages would be unliquidated i.e. the actual effect incurred. In the event of such a breach, the Company, while liable to prove such breach, would be entitled to recover costs such as its own management, vessels, charges from receiving facilities, other contractors and beyond.

It therefore may be in the interests of a Contractor to negotiate the inclusion of a liquidated damages clause into the BIMCO form to have security of its liability in the event of its culpable delay.

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DISPUTES

Both contracts include dispute escalation procedures as is common in such offshore agreements. The LOGIC form has an 80-day procedure (from Notice of Dispute), moving up from the Representatives, through the appointed persons and culminating with “Senior Executives”. If the parties have not reached agreement within the 80-day procedure they may agree to resolve using Alternative Dispute Resolution.

Upon reaching the 80-day period, the parties may refer the matter to the Courts or, notably, adjudication.

The BIMCO form has a similar, but greatly reduced escalation procedure. Upon the Notice of Dispute, the parties have 14 days for the Representatives to reach agreement. If none is reached, then “Executive Directors” from each party shall meet. If no agreement is forthcoming within 28 days of the Notice of Dispute either party may issue a Notice of Adjudication. This is a very short timescale for agreement and each party should be aware of the potential for the other to launch an adjudication without further notice.

As an additional point, the BIMCO form at Clause 25(a)(i) states that, any disputed or denied Variation requests shall be referred to adjudication. The mandatory nature of this provision, circumventing the escalation procedure, may not sit well with users, especially the Company. As a result, the author considers this clause is likely to be amended to remove such an obligation. The intent, however, is clear regarding the pro-active manner by which the principle of Variations be settled during the currency of the Contract.

The inclusion of adjudication as a form of dispute resolution is one of the most notable aspects of both standard forms. This is interesting given the lack of such in the offshore sector in general. Indeed, statutory adjudication (the legal right of a party to a “construction contract” to refer any dispute to adjudication at any time) in the UK is expressly excluded for work in the offshore oil & gas and energy sectors in the Construction Act².

Given the lack of statutory support (most decommissioning projects are expressly omitted from the Construction Act), and the inexperience of parties to decommissioning contracts in

the use and administration of adjudication (which brings its own specific sets of constraints and issues which are required to be handled by experienced practitioners), it is likely that these provisions will be included with caution by users. Indeed, it would not be surprising to see these provisions removed in favour of the more well-trodden path of management escalation followed by arbitration.

The manner by which the contracts deal with adjudication warrants comment. Both incorporate the Scheme for Construction Contracts (the “Scheme”) taken from the Construction Act, with the only amendment changing references to “the construction contract” to “this CONTRACT” or “this Agreement” for the LOGIC and BIMCO forms respectively. So far so simple. The LOGIC form is then silent, leaving the Scheme to address both the appointment of an adjudicator and the administration of the process. The guidance notes provided with the LOGIC form state that the parties may wish to pre-agree an adjudicator or nominating body in the CONTRACT. This is generally an advantageous principle as it gives the parties some certainty in this respect.

2 Housing Grants, Construction and Regeneration Act 1996, as amended by the Local Democracy, Economic Development and Construction Act 2009

Indeed, it would not be surprising to see these provisions removed in favour of the more well-trodden path of management escalation followed by arbitration.

The BIMCO form, however, does not address the matter so simply. Whereas Clause 25(a)(vi) invokes the Scheme, the following Clause 25(a)(vii) expressly provides for the appointment of an adjudicator. Specifically, the clause provides that the referring party (that which requires “evaluation”) shall provide three proposed adjudicators. This itself could give rise to problems as the form goes on to require that such proposed names must be experienced in adjudication for offshore works of a similar nature. Given the immature nature of adjudication in this market it may prove problematic to source three suitably qualified adjudicators who are available to act. The contract is silent on situations where three nominees cannot be put forward.

Working on the basis that three nominated names can be provided, the responding party has 14 days from the Notice of Adjudication to accept one of the proposed adjudicators. This provision contradicts the specific requirements of the Scheme, whereby the referring party must submit its referral to the appointed adjudicator within seven days of the Notice of Adjudication. Thereafter the 28-day adjudication process commences. If the parties take longer than seven days from the Notice of Adjudication to agree on the adjudicator and for the referring party to issue the referral (as allowed for within the Contract but not the Scheme) the explicit timescales of the Scheme have been breached and the Scheme therefore becomes inoperable.

This issue is not insurmountable but requires amendment from the standard form; either to the timescales in Clause 25(a)(vii) or the period for submission of the referral within the Scheme.

The BIMCO form progresses to set out that, in the event the responding party does not agree to one of the three proposed names, the Chairman of TeCSA will nominate one of those three named people. This brings two further problems. The first is one of potential for abuse of the process. The referring party could provide names of three adjudicators it knows may be sympathetic to it and which the referring party reasonably reject as a result. The default position, however, is that one of these three must be nominated ultimately, leading to the potential for bias and protracted challenge. The second problem is that it is unlikely that TeCSA would agree to nominate any adjudicator not on its own panel.

It is apparent, therefore, that an unamended BIMCO form is not suitable for use with regard to its standard adjudication provisions. Care should be taken if using the BIMCO form so that appropriate adjustments can be made.

Both standard forms provide for final resolution by way of arbitration (or by legal proceedings in the LOGIC form) or by agreement between the parties.

The BIMCO form recognises the global nature of such projects and foresees its potential use in worldwide markets. As a result, it includes a range of “off-the-peg” arbitration clauses for use in legal jurisdictions including England, USA, Singapore or “the laws of the place mutually agreed by the parties” (Clause 25(e)). The last of these clauses (Clause 25(e)) provides that the parties may agree a jurisdiction during the Contract. The author considers this could lead to unnecessary problems and should generally be defined as an express term within the Contract.

While the LOGIC form allows the parties to agree to pursuing Alternative Dispute Resolution, the BIMCO form at Clause 25(f) specifically provides that one party may refer any dispute to mediation. Clause 25(f)(iii) allows that, should a party reject such requested mediation, this may be brought to the attention of a subsequent Tribunal and such failure to mediate by one of the parties may be taken into account when allocating costs of the arbitration.

The drafting of the BIMCO form appears to provide real choice and pro-active methods of addressing and settling disputes quickly. The uptake of these mechanisms, with or without amendment, may provide an insight into the appetite within the sector for swift and pro-active resolution of issues.

SUMMARY

Both of these new standard contract forms have distinct differences yet a number of stark similarities. As noted, the general feel of the author is that the LOGIC form was drafted with a greater input from owner/operator types of entities, whereas the BIMCO form appears to have had greater input from owner/operator types of entities. As a result, and in broad terms, the BIMCO form shifts aspects of risk and responsibility from the Contractor to the Company compared to the equivalent allocation provided within the LOGIC form. This may be seen to be a defining factor in decision making if the market, which has relatively few contractors with the experience and equipment for such work, has the position of strength when determining what contract form is utilised. This will in turn be defined by the “heat” of the market i.e. whether the forecasted quantities of decommissioning are actually realised.

It may also be considered reasonable to presume, given that it is frequently the party awarding the contract who determines the basic form to be used, owner/operators are perhaps more likely to move towards the LOGIC form over the BIMCO document. Of course, this is in no way set, as it is also the case that many owner/operators have bespoke forms which will be further amended and applied for use in decommissioning works.

The relative complexity of the projects may provide sway to the awarding party, with those requiring more detail, sections, design or interaction perhaps preferring the LOGIC model.

While the LOGIC form is gaining traction in the market, it will be interesting to see whether the BIMCO contract can edge its way in. It was drafted as a result of interest from users in the industry, but only time and experience will tell. The key take-away point is that the growing decommissioning sector now has two standard forms, which cannot be a bad thing. Perhaps it is beneficial for two buses to come along at once if there is a queue of passengers waiting to get on...

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Charles is a Chartered Civil Engineer with over 19 years' experience in the construction industry. He also holds a Master's Degree in Construction Law, is a Member of the Institution of Civil Engineers and a Member of the Chartered Institute of Arbitrators.

Charles' current role involves pre- and post-contact services; working with contractors and client organisations to ensure successful project commercial outcomes. Such services include contract drafting and review, contract and change management, programme management, claims management/advice related to claims for extensions of time, prolongation and disruption, dispute resolution including handling adjudications, final account settlement and expert witness assistance in international litigation and arbitration.

Charles is experienced in all manner of contract dispute procedures, including negotiated settlements, mediation, conciliation, adjudication, arbitration and litigation, both in the UK and overseas. He has working knowledge of numerous standard construction contract forms including NEC, ICC (with Network Rail standard amendments), FIDIC, ICE, LOGIC and BIMCO.

Throughout his career, Charles has predominantly worked on civil engineering, heavy engineering and infrastructure schemes, including; process plants, rail, piling works (on-shore and off-shore), water frameworks, pipelines, canal works, highways, dock construction, shipbuilding and maritime works and structures including offshore wind, dredging, reclamation, drill & blasting, FPSO mooring & hook up, platform decommissioning and salvage. In focusing on the off-shore construction and maritime sector, Charles has gained substantial experience in the associated risks and claims relating to matters such as design development and change control, departures from planned method of working, ground conditions, the interaction of multiple contractors, major supply issues (including fabrication and design interaction and responsibility), weather and sea-condition/tidal issues.

Charles has written numerous papers and tailored in-house and external seminars on contracts and contractual matters, both in the UK and overseas.