

Legal Considerations in Providing Technology 技术供应中的法律考量

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Pinsent Masons

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关于品诚梅森

- An international full service commercial law firm headquartered in London, with 18 offices across the UK, Europe, the Gulf and Asia
一家提供全方位服务的国际商务律师事务所，总部位于伦敦，在英国、欧洲、海湾地区和亚洲拥有18个办公室
- A team of more than 380 partners, 1,500 lawyers and over 2,500 staff worldwide
在全世界拥有超过380名合伙人、1500名律师和2500多位员工
- Sector insight central to the way we work. The firm supports clients by providing a full range of legal services across a wide range of sectors globally, one of which is Energy
对于各个行业的专业知识是我们提供服务的关键所在。我们在全球范围内的各个行业中通过向客户提供全方位的法律服务协助客户取得成功，能源就是其中之一。
- One of the largest dedicated energy and natural resources teams of any international law firm - a market leading practice combining a wealth of transactional and contentious experience
与任何国际律师事务所相比，是最大且最专业的能源和自然资源法律团队之一 — 在市场上领先，且拥有大量的商事交易和争议解决经验
- Expertise spanning the entire energy spectrum, including upstream and downstream oil and gas, nuclear, power generation, energy management, electricity and gas transmission as well as renewables, carbon capture and storage, gas storage projects and asset decommissioning
专业知识跨越整个能源行业，包括上游和下游油气、核能、发电、能源管理、电力和天然气运输以及可再生能源、碳捕获和封存，储气项目和资产退役

About Pinsent Masons

关于品诚梅森

- Clients include major multinationals, utilities, FTSE / AIM-listed companies and entrepreneurial independents
我们的客户包括知名跨国企业、公用事业公司、FTSE/ AIM上市公司和独立企业家
- Strong network of relationships with energy companies, government and regulatory bodies, industry professionals and the wider financial community, enables us to contribute widely to industry debate and the business of our clients
与能源公司、政府和监管机关、行业专业人士和广泛的金融社区的强大关系网络使我们为业界讨论和我们客户的业务作出广泛贡献
- Winner of Energy & Natural Resources Team of the Year – Legal Business Awards 2014
年度能源和自然资源团队奖项 — 2014年Legal Business Awards

Global Footprint

全球分布

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Our global reach

全球网络

- Numerous international jurisdictions
多个国际管辖区
- Global client base
全球客户位于
 - Africa / 非洲
 - Middle East / 中东
 - Asia / 亚洲
 - North West Europe / 欧洲西北
 - Falklands / 福克兰群岛
 - Ireland / 爱尔兰
- National oil companies
国家石油公司
- Other oil companies
其他石油公司
- Onshore and offshore licences
陆上和海上许可
- UKCS (exporting lessons from a “mature” basin)
英国海洋大陆架(来自一个“成熟”盆地的出口经验)

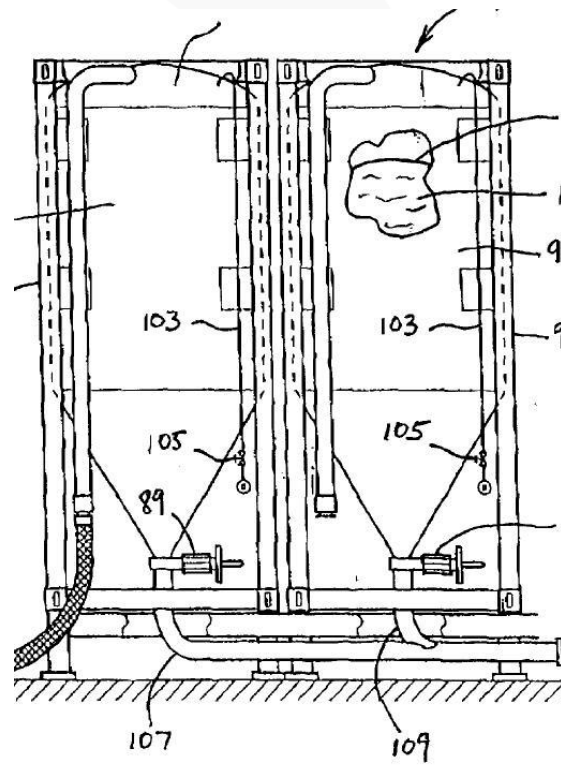
Two legal concerns: 两个法律关注点

- Indemnities for third party IP claims
就第三方知识产权索赔的保障
- Defect claims
缺陷索赔

Indemnities for third party IP claims

对第三方知识产权索赔的保障

- Patent claims are the most common claim we see in the oil & gas space
专利索赔是我们在油气行业遇到的最为常见的索赔
- Patent rights last 20 years maximum
专利权最多持续20年
- For new inventions
适用于新发明
- They grant a monopoly, country by country, to prevent others using the invention
每个国家授予发明以垄断权, 以防止其他人使用
- One of our cases: *MI-Swaco v Halliburton*
案件之一: *MI-Swaco v Halliburton*
- Competitors disputing technology over storing and pumping drill cuttings
竞争者之间对存储和抽吸钻屑技术的争议
- The patented tanks are pictured opposite
已授予专利权的容器如图所示



Indemnities for third party IP claims

对第三方知识产权索赔的保障

- We also frequently see claims for breach of confidence
我们也经常遇到因违反保密义务而引起的索赔
- May arise from contract, employment relationship or where objective reasonable person would have realised the information was being given in confidence
可能因合同、劳动关系或客观理性的人士本应知晓提供的信息是保密的而引发的索赔
- Possible 3rd party liability
潜在的第三方责任
- Defence if the information has already entered the public domain by lawful means
可采取的抗辩: 信息已通过合法的方式进入公共领域
- Fiduciary/equitable remedies for breach of confidence-one of our cases involved the successful defence of a claim that a patent for a subsea flow completion system was held in trust for the claimant because it emanated from misuse of confidential information-defence of independent creation

对于违反保密义务的信托/ 衡平法上的救济 — 我们曾在一个案件中成功地对一项索赔进行了抗辩: 由于索赔的基础是不恰当地使用保密信息, 我们主张客户是以信托的形式为权利人持有该项“海底流体完井系统”的专利 — 独立发明专利的抗辩

Indemnities for third party IP claims

对第三方知识产权索赔的保障

- Claims for breach of copyright
侵犯著作权的索赔
- May be made for example in relation to software or hard copy procedures or manuals
可能基于软件、纸质程序或手册提出索赔
- For copyright to subsist, work requires to be original-skill, labour and judgment
为了使著作权存续, 作品必须有原创的技能、劳动力和判断
- Copying includes storing by electronic means
复制包括通过电子形式储存
- International protection under the Berne Convention
伯尔尼公约下的国际保护
- We have done numerous cases where employees moving from one oil & gas business to another have taken works of the old employer leading to breach of copyright claims against ex-employee and new employer
从一家油气公司跳槽至另一家的雇员使用旧雇主的“作品”, 从而导致旧雇主以侵犯著作权为由向该雇员和新雇主提出索赔 -- 我们已经参与处理了数个这样的案件



Defect Claims

缺陷索赔

What is a Defect?

何谓缺陷？

- “anything which renders the plant &c. unfit for the use for which it is intended, when used in a reasonable way and with reasonable care”
(*Yarmouth v France (1887) 19 QBD 647*)

“当以合理方式并采取合理谨慎使用工厂时，任何导致该工厂不适用于其本来之用途的事物” (引自*Yarmouth v France (1887) 19 QBD 647*)

Due Skill and Care

恰当技能和谨慎

- Work can be defective even if carried out with due skill and care
即使采取了恰当技能和谨慎，工程仍可能是有缺陷的

Defect Claims

缺陷索赔

Patent Defects

明显缺陷

- Detectable either at practical completion or during a defects liability period
要么在实际竣工时，要么在缺陷责任期内发现

Latent Defects

潜在缺陷

- A concealed flaw which may not manifest itself for many years
一个隐蔽的缺陷可能在长达数年间无法显现出来
- May be able to insure against, but has proven difficult to secure
可能可以对其进行保险，但实践证明很难取得该等保险利益

Defects Liability Periods

缺陷责任期

- Normally 6-12 months but maybe 24+ months where complex machinery is involved
通常是6-12个月，但如涉及复杂的机械，也可能超过24个月

Limitation Period under Law

法定诉讼时效

- Time period prescribed under law to bring legal action for the defects
就缺陷问题启动诉讼时，法定的诉讼时效



Defect Claims

缺陷索赔

Recovering Economic Loss

对经济损失的补偿

- Unless a claim for breach of contract is available, must sue in tort
除非可以就违约进行索赔, 否则必须以侵权为由提起诉讼
- “Special relationship” of proximity with the defendant which imposes a duty of care to protect against economic loss
与被告的相对“特殊关系”将施加保护免受经济损失的谨慎义务

Damages for Defective Works

对缺陷工程的损害赔偿金

- Under a breach of contract, damages are awarded based on “expectation loss”- so the claimant is put so far as is possible by monetary award, in the position it would have been in if the contractual duties had properly been carried out
在违约的情形下, 损害赔偿金是基于“预期损失”而授予的 — 所以申诉人尽可能提出经济补偿, 主张当合同责任被恰当履行时其可以获得经济利益
- Cost of reinstatement, diminution in value, loss of amenity
复原费用、价值降低、便利丧失
- Consequential Loss: loss of profit, management expenses, discomfort and inconvenience
间接损失: 利润损失、管理费用、不适和不便

Contractual Mitigation Mechanisms

合同上的责任减轻机制

- Certain contractual mechanisms to mitigate legal risks will be required for supplier of technology, in particular cutting edge technology
技术供应商(特别是尖端技术供应商)会要求安排某些合同机制以规避法律风险
- Raising the standard for proving breach (no warranty for fitness for purpose)
提高证明违约的标准(对技术的适用性不作保证)
- Limitation of Liability
责任限制
 - Overall cap on liability
总体责任上限
 - LDs for failure to achieve performance criteria subject to cap
未能达到履约标准的违约赔偿金(受限于责任上限)
 - Available remedies (e.g. limited to redesign or rework)
可用的救济手段(例如, 限于重新设计或返工)
 - Exclusion of consequential loss
排除间接损失

Thank you
谢谢



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