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COLLABORATION AND CONTRACT MANAGEMENT IN THE CONTEXT OF OFFSHORE OIL AND GAS CONTRACTS –AN ENGLISH LAW ANALYSIS

PhD Thesis submitted by

Dimitrios Arvanitis

PhD Thesis' Supervisors

Professor Jason Chuah

Dr. Mauro Barelli

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[*]The author is an attorney at law with the Athens Bar Association (Greece). He graduated from the National and Kapodistrian University of Athens Law School and holds an LL.M in International Energy Law awarded by City, University of London. The author can be contacted at Dimitrios.Arvanitis.1@city.ac.uk and Arvanitis.d@hotmail.com.

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ABSTRACT

This thesis provides an English law analysis on collaboration and contract management in the context of offshore upstream oil and gas contracts in light of the Maximising Economic Recovery [hereinafter 'MER'] Strategy. The predominant subject of the thesis is the impact on offshore contracting of the MER Strategy. The thesis firstly considers that the Strategy is not merely another statute to regulate the offshore sector – its impact is of paramount importance because it sets a comprehensive framework for the coming decades until the cessation of operations in the North Sea. The MER Strategy seeks to address the field 'maturity' in the North Sea, which causes high extraction costs and questions the current business and contracting model. Secondly, the thesis focuses on the contracting model and relationship among operators and contractors, i.e. oil and gas companies and the supply chain. This niche area of contract law has been in the spotlight of academics and practitioners for many years, and abundant literature exists focusing on so-called 'risk allocation' clauses. However, the thesis approaches the subject in an original manner: looking beyond the traditional legal standpoint, it introduces the element of 'contract and commercial management' and focuses on the potential of 'collaboration'. It argues that these two elements are key to the future of offshore contracting in light of the MER Strategy. The explanation of where these two terms 'sit' from an academic, practical and taxonomic standpoint is not an easy task. Contract and commercial management is a management-based discipline that goes beyond certain limitations imposed on the role of contract, championed by 'strict' school of thoughts on contract law. It perceives the contract to be mainly a device of 'problem solving' rather than 'failure management'. Collaboration is a notion with great potential for contracting in general – and offshore contracting in particular – which nevertheless brings with it substantial challenges that need to be addressed. Collaboration is a crucial concept in the MER Strategy, and the thesis seeks to ascertain its meaning both within and beyond the context of the Strategy. Most importantly, the thesis explores the legal meaning and ramifications of collaboration, since although it is not a legal term of art, it is 'reflected' on existing doctrinal notions.

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I would like to thank my supervisors, Professor Jason Chuah and Dr. Mauro Barelli, for their invaluable guidance during the writing of this thesis.

I dedicate this work to my parents for all their love and support - I owe everything to them.

I also dedicate this work to the memory of my grandmothers.

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TABLE OF ABBREVIATIONS

ACA	The Association of Consultants Archtects
BEIS	Department for Business, Energy and Industrial Strategy (former DECC)
BS 11000-1	BS 11000-1:2010 Collaborative business relationships - A framework specification (October 2010)
BS 11000-2	BS 11000-2:2011 Collaborative business relationships. Guide to implementing BS 11000-1 (December 2011)
BSI	British Standards Institute
BS ISO 44001	BS ISO 44001:2017 Collaborative business relationship management systems – Requirements and framework (March 2017) Note: replaced BS 11000-1
CBQT	Collaborative Behaviour Quantification Tool
CCoP	Commercial Code of Practice
CCS	Crown Commercial Service
CIPS	Chartered Institute of Purchasing and Supply
CRINE	Cost Reduction in New Era (also known as 'LOGIC' contracts)
DECC	Department of Energy & Climate Change
EOR	Enhanced Oil Recovery
ETF	Efficiency Task Force (Working Group within the Oil and Gas UK)
EY	Ernst and Young
FPSO	Floating Production Storage and Offloading
IBPI	International Best Practice Institute

ICoP	Code of Practice on Access to Upstream Oil & Gas Infrastructure
ICW	Institute for Collaborative Working
JCT	Joint Construction Tribunal
JCT	JCT Constructing Excellence Contract (2006)
JV	Joint Venture
LOGIC	Standard contracts published by Oil and Gas UK
MER	Maximising Economic Recovery Strategy
MODU	Mobile Offshore Drilling Unit
NEC	New Engineering Contract
OGA	Oil and Gas Authority
OGC	Office of Government Commerce
OGUK	Oil and Gas UK (trade association)
PA 1998	Petroleum Act 1998
PCC	ACA Project Partnering Contract
SCES	Supply Chain, Exports and Skills Strategy
SPF	Service Failure Points
UK	United Kingdom
UKCS	United Kingdom Continental Shelf

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CHAPTER 1

THESIS STRUCTURE AND RATIONALE

1.1 INTRODUCTION

The present thesis examines the notions of collaboration and contract management in the context of offshore oil and gas contracts in the United Kingdom [hereinafter 'UK']. The UK offshore oil and gas industry has reached a phase of 'maturity' such that oil and gas exploration and production have become more challenging, and the profit margins have decreased. In order to address this downward spiral, the UK government introduced the Maximising Economic Recovery Strategy [hereinafter 'MER Strategy'] to implement the recommendations of the Wood Review, a report commissioned to address this issue. The MER Strategy challenges the contracting paradigm that the offshore oil and gas industry has been following thus far. It affects both the relationships among operators, as well as the relationship among operators and the supply chain. One of the parameters of the MER Strategy is the element of 'collaboration', which the thesis seeks to explain. Beyond the context of the MER Strategy, however, 'collaboration' is also a nebulous notion in the English law of contract. This thesis explains the notion of collaboration both within and beyond the context of the MER Strategy, and aims at clarifying its commercial and legal dimensions. The thesis argues that the commercial dimension must be disentangled from the legal dimension in order to reach a clear sight of the legal impact.

Furthermore, the thesis utilises the notion of contract and commercial management, both as a methodological approach in terms of the research methodology, as well as a substantive tool that could enhance successful contracting.[1] The evolution of contracting in the construction industry is another dimension that is taken into account, as it offers an elucidating explanation of the evolution of contracting and

[1] The notion of 'contracting' as opposed to the notion of 'contract' and the traditional understanding of the role of contract law is examined in detail in chapter 3.

how it could cross-fertilise offshore oil and gas industry contracting. The following introductory chapter sets out the background information of the UK offshore oil and gas industry; also, it explains the rationale of the decision process regarding the research aims and direction, i.e. the theoretical framework, research question, methodology and significance of the research.

1.2 MAPPING THE CONTEXT OF THE RESEARCH

1.2.1 Background information about the offshore oil and gas industry

The oil and gas industry (on- and offshore) is of paramount importance in many contexts such as the economical, environmental, and (geo) political. As energy sources, oil and gas still account for a significant percentage of world energy consumption.[2] The offshore oil and gas sector in particular accounts for a significant percentage of the global oil and gas production. In the early 2010s, offshore production accounted for 30% of global oil production and 27% of global gas production.[3] In 2014, offshore oil production amounted to 21.5 million barrels per day, representing about 25% of world oil production; offshore gas production amounted to 90 billion cubic feet per day, corresponding to approximately 25% of world gas production.[4] Offshore fields also account for an estimated 20% of the world's oil reserves and 30% of global gas reserves.[5] The offshore industry also represents an important sector for investments adding to growth. The figures eloquently demonstrate the mutli-dimensional importance of the offshore oil and gas industry.

[2]International Energy Agency, 'Key World Energy Statistics' (2015) 28 <http://www.iea.org/publications/freepublications/publication/KeyWorldStatistics2015.pdf>; The figures for world total final consumption in 2013 are 39.9% for oil and 15.1% for natural gas.; See also BP Energy Outlook (2016 Edition) < http://www.bp.com/content/dam/bp/pdf/energy-economics/energy-outlook-2016/bp-energy-outlook-2016.pdf>.

[3]Planete-energies.com, 'A Growing Share of Oil and Gas Production Now Comes From Offshore' (5 February 2016) <http://www.planete-energies.com/en/medias/close/growing-share-oil-and-gas-production-now-comes-offshore>.; See also World Ocean Review, 17 <http://worldoceanreview.com/wp-content/downloads/wor3/WOR3_chapter_1.pdf>.

[4] OECD, 'Shipbuilding and the Offshore Industry' (Working Party on Shipbuilding, June 2015) 8 <http://www.oecd.org/sti/ind/Shipbuilding-and-offshore-industry.pdf>.

[5] Ibid.

In comparison to onshore oil and gas production, offshore exploration and production is much more complex.[6] Briefly, the most significant differences are the level of the technical challenges, the high-risk high-reward nature, and the complex supply chain, which in turn necessitates sophisticated commercial and contractual relationships.[7] Recent technological advancements have allowed oil and gas extraction from fields previously believed to be unexploitable, such as deep- and ultra-deepwater and heavy oil.[8] The exploration and production of oil and gas ('upstream' operations) is only the first stage in an equally complex value chain running up to the final distribution of petroleum to end-consumers. [9] The thesis focuses on the commercial and contracting phenomena of the upstream phase.

1.2.2 Tides of change: The offshore oil and gas industry in transition

The offshore oil and gas industry is currently facing major challenges. Sector revenues decreased rapidly in 2015, reflecting the impact of reduced capital expenditures by oil and gas companies.[10] The most pronounced declines were experienced by companies in the services, asset, and equipment categories, with respective revenue falls of 15, 12 and 9 percent.[11] On top of this hardship, the costs of exploration and production are expected to rise even further.[12] A further major factor which needs to be taken into account is the cost of decommissioning, which must also be factored into the final extraction costs in the UKCS. The Oil and Gas Authority has recently estimated a range of the total cost of decommissioning in the UKCS –

[6] For the technical differences between onshore and offshore oil and gas production, see Joseph Hilyard, *The Oil & Gas Industry: A Nontechnical Guide* (PennWell 2012); For a general introduction to the industry: Samuel A. Van Vactor, *Introduction to the Global Oil & Gas Business* (Penn Well 2010); James G. Speight, *Handbook of offshore oil and gas operations* (Elsevier 2015); For a general overview see also Offshoreenergy.dk, 'Offshore Book Oil & Gas' (3rd edn, 2014) <http://www.offshoreenergy.dk/Files/Filer/Publications/OffshoreBook_2014.pdf>.

[7] Adedeji B. Badiru, Samuel O. Osisanya, *Project Management for the Oil and Gas Industry: A World System Approach* (CRC Press 2013)

[8] For more information about deepwater operations see William L. Leffler, Richard Pattarozzi and Gordon Sterling, *Deepwater Petroleum Exploration & Production: A Nontechnical Guide* (2nd edn, PennWell 2011).

[9] Andrew Inkpen and Michael H. Moffett, *The Global Oil & Gas Industry: Management, Strategy, and Finance* (PennWell 2011).

[10] McKinsey & Company, 'Quarterly Perspective on Oil Field Services and Equipment' (August 2015) <http://www.mckinsey.com/client_service/oil_and_gas>.

[11] Ibid.

[12] OECD, 'Shipbuilding and the Offshore Industry' (Working Party on Shipbuilding, June 2015) 4 <http://www.oecd.org/sti/ind/Shipbuilding-and-offshore-industry.pdf>.

although several scenarios have been taken into account – from £44.5bn to £82.7bn in 2016 prices.[13] One of the thorniest issues regarding decommissioning is the distribution of the costs among the stakeholders; however, decommissioning is an important and niche subject in its own right and a detailed examination is not within the thesis' scope.

In light of those challenges, the industry has responded with cost-cutting measures, which resulted in extensive layoffs and cancellation of new investments and current projects.[14] Market analysts pointed out that 'since oil prices started falling late last year, oil companies have demanded and received significant price discounts from all suppliers'.[15] However, a report by Wood Mackenzie suggests that 'extracting lower prices from vendors does not always result in commensurate reductions in total costs'.[16] However, after the spasmodic first reactions, the industry must develop more efficient short and mid-term strategies in order to adapt to the new environment. There have been discussions and reports by major consultancies, trade associations, universities and industry institutions, which have proposed changes at all possible levels: operational, technical, financial, and legal.

The first level that came under closer scrutiny by the industry is project management. The trend in project management is to achieve 'integrated project delivery',[17] which

[13] Oil and Gas Authority, 'UKCS Decommissioning 2017 Cost Estimate Report' (29 June 2017) 3 <https://www.ogauthority.co.uk/media/3815/ukcs-decommissioning-cost-report-2.pdf>.

[14] Nick Cunningham, '27 Billion Barrels Worth Of Oil Projects Now Cancelled', (Oilprice.com, 14 January 2016) < http://oilprice.com/Energy/Crude-Oil/27-Billion-Barrels-Worth-Of-Oil-Projects-Now-Cancelled.html>.

[15]David Yager, 'Should Oil Field Services Companies Stand Their Ground More?' (Oilprice.com, 2 October 2015) < http://oilprice.com/Energy/Energy-General/Should-Oil-Field-Services-Companies-Stand-Their-Ground-More.html>.; an interesting quote by the author in the same article is that 'the adversarial love/hate relationship between oil companies and their suppliers is broken. Success will follow if we fix it.'

[16] Ibid.

[17] A Deloitte oil and gas report defines integrated project delivery as having '[evolved] beyond traditional contractual models that emphasize a two-party, owner-contractor relationship to integrate the full range of project participants, including owners, engineers, contractors, and major suppliers, into project teams. These integrated teams are generally more capable of managing changing circumstances whilst minimizing commercial conflicts than conventional two-party relationships. Engaging participants from project inception to final closeout also helps them to understand better the project. The preferred contracting strategy in this method aligns participants' commercial objectives with the project's success as well as weighs collective team performance against individual performance.';Deloitte, 'Oil and Gas Reality Check 2014: A look at the top issues facing the oil and gas sector' (2014) 20 <http://www2.deloitte.com/content/dam/Deloitte/ru/Documents/about-deloitte/Oil_and_gas_reality_check_2014.pdf >.; The same findings are repeated in the 2015 Deloitte Reality Check Report, 'Deloitte, Oil and Gas Reality Check 2015: A look at the top issues facing the

means that project players (operators, contractors, sub-contractors) should work closely throughout the project lifecycle. Collaboration is closely linked and can be seen as a prerequisite for integrated project delivery. In a study of the Australian oil and gas market, EY concludes that the three most important factors for project success are: (a) innovation, (b) improved competitive positioning, and (c) collaboration.[18] A follow-up study in 2014 reiterates the previous results and the importance of collaboration and stresses the fact that a significant percentage of industry players regarded 'contract constraints' as one of the major barriers to success.[19]

A second observation is the rising importance of standardisation at the technical level. A recent report from Deloitte identifies the lack of standardisation as one of the main reasons for project delays and cost overruns.[20] The industry has taken steps to improve standardisation at the operational level. For example, major industry players have inaugurated a joint-industry project to establish new international standards for offshore oil and gas projects by formalising common and global best practices for components and equipment, thus minimising the number and variety of

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oil and gas sector' (2015) <http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Energy-and-Resources/gx-er-oil-and-gas-reality-check-2015.pdf>.

[18] The report defines collaboration as 'the ability of the various players in the industry to design 'healthy, dynamic and resilient interconnected networks', capable of mobilising the right resources, at the right time, to execute and innovate as barriers emerge'; EY, 'Delivering a step change in organisational productivity: Findings from the Australian Oil & Gas Productivity and Innovation Survey' (May 2013) 7 <http://www.ey.com/Publication/vwLUAssets/Delivering_a_step_change_in_organisational_productivity/$FILE/Delivering_a_step_change_in_org_prod.pdf >.

[19] 'In our first productivity study, "contract constraints" emerged as a barrier to success. In our second study, we asked additional questions about contracts in order to identify how they might help or hinder productivity. The result: 32% of respondents cited 'contract constraints' as barriers to productivity, making it one of the most prevalent barriers in the study. Of these constraints, 'scope changes in projects' and 'inequitable risk sharing' stood out as key concerns. A number of our interviews suggest that poorly-designed contracts tend to contribute to an environment of distrust and inflexibility, resulting in a negative impact on innovation and collaboration. (…) Rather, there is a real need to critically and regularly review the portfolio of contracts being managed by a firm. The review should allow, where necessary, changes to contract management practices, changes to contract terms and even changes to contract types.', see EY & UQ Business School, 'Adapt to win: How Australian oil and gas companies improve productivity in challenging times' (April 2014) <http://www.ey.com/Publication/vwLUAssets/EY_-_Oil_and_Gas_Productivity_report_Adapt_to_win/$FILE/EY-oil-gas-adapt-to-win-report.pdf >.

[20] 'There are myriad reasons for these overruns (…). Less benign factors exist as well, including (…) an insistence on customizing each project rather than looking for ways to standardize', see Deloitte, 'Oil and Gas Reality Check 2015: A look at the top issues facing the oil and gas sector' (2015) 18 <http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Energy-and-Resources/gx-er-oil-and-gas-reality-check-2015.pdf>.

requirements.[21] The same is the case with the standardisation for subsea equipment.[22] The thesis draws attention to the fact that standardisation should not only take place at the technical and operational level, but also in the wider commercial and contractual process, which accounts for a significant portion of the costs and overall performance of a project.

1.2.3 The Wood Review and the redesigning of the UK offshore oil and gas strategy

The UK has a long history in the energy sector[23] and in offshore oil and gas exploration.[24] Today, the UK part of the North Sea is still the most important offshore oil and gas province in the EU[25] and an important oil and gas field at a global level, due to the level of experience and technology sophistication.[26] However, it is widely acknowledged that the industry has long been facing major challenges, such as a decrease in production efficiency and increased costs due to the maturity of the fields, which, alongside the low oil price, led to the unsustainable situation of more being 'spent on UK offshore oil and gas operations than was earnt from production'.[27]

The multi-dimensional challenges alarmed the UK government, which responded by commissioning Sir Ian Wood to redesign the UK offshore strategy, the result of which was the Wood Review. In June 2013, the UK government appointed Wood to conduct

[21] Offshore-mag.com, 'EPC giants, classification societies sign offshore engineering standardization agreement' (18 May 2016) < http://www.offshore-mag.com/articles/2016/05/epc-giants-classification-societies-sign-offshore-engineering-standards-agreement.html>.
[22] Offshore Magazine, 'Industry moves subsea processing toward standardization, consistency' (Offshore Magazine, 11 March 2015) <http://www.offshore-mag.com/articles/print/volume-75/issue-3/subsea/industry-moves-subsea-processing-toward-standardization-consistency.html>.
[23] Greg Gordon, Aileen McHarg and John Paterson, 'Energy Law in the United Kingdom' in Martha Roggenkamp, Catherine Redgwell, Anita Ronne and Inigo Del Guayo (eds), *Energy Law in Europe* (OUP 2016)
[24] For the history of the UKCS see Alex Kemp, *The Official History of North Sea Oil and Gas: Vol. I: The Growing Dominance of the State* (Routledge 2011); Alex Kemp, *The Official History of North Sea Oil and Gas: Vol. II: Moderating the State's Role* (Routledge 2011); see also Norman J. Smith, *The Sea of Lost Opportunity: North Sea Oil and Gas, British Industry and the Offshore Supplies Office* (Elsevier 2011); For a perspective from the Oil and Gas UK trade association see Oil and Gas UK, *Britain's Offshore Oil and Gas Book* (2013) < http://oilandgasuk.co.uk/product/britains-offshore-oil-and-gas-book/>.
[25] EU Offshore Authorities Group, 'Offshore oil and gas production in Europe', <http://euoag.jrc.ec.europa.eu/node/63>.
[26] For facts and figures of the UK oil and gas industry see Oil and Gas UK, 'Economic Report 2015' 6-9 <http://oilandgasuk.co.uk/economic-report-2015.cfm>.
[27] Ibid, 5.

an independently led review of UKCS oil and gas recovery, specifically looking at how to maximise the economic recovery from the remaining North Sea oil and gas resources. The final report, published in February 2014, identified as one of the roots of the problem that the 'light touch regulation applied in the early days of large fields and large operators, must now be evolved to take account of a basin with over 300 fields, much smaller new discoveries, many marginal fields and much greater inter dependence in exploration, development and production'.[28] The Review made four main recommendations, including the establishment of a new and adequately-resourced regulator (the Oil and Gas Authority)[29] tasked with the development of a 'cohesive tripartite approach' among itself, the Government (HM Treasury), and industry. The Wood Review received wide acceptance from industry and regulators[30] alike, and the Government accepted all recommendations[31] and committed to take the necessary administrative steps to implement them through the provisions of the Infrastructure Act 2015 and the Energy Act 2016.[32] Moreover, the Infrastructure Act 2015 created an obligation on the Secretary of State to produce a strategy for enabling the objectives to be met. The Strategy, after being put out to consultation by the Government,[33] came into force in March 2016.[34] There is no doubt that analysing the content of the MER UK Strategy will monopolise the interest of industry professionals for some time in order to decode its full meaning. For the purposes of

[28] Sir Ian Wood, 'UKCS Maximising Recovery Review: Final Report' (24 February 2014) 5 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/497727/UKCS_Maximising_Recovery_Review_FINAL_72pp_locked.pdf>. [hereinafter 'Wood Review Final Report'].

[29] The Oil and Gas Authority is the Regulator which will oversee the implementation of the Wood Review recommendations and the MER Strategy. For further information see <https://www.gov.uk/government/organisations/oil-and-gas-authority>.

[30] The Health and Safety Executive (HSE), the regulatory body that oversees safety regulation, issues a report on its strategy that is also aligned with the Wood Report; HSE, Offshore Oil and Gas Sector Strategy: 2014 to 2017 (March 2014) <http://www.hse.gov.uk/offshore/offshore-oil-and-gas.pdf>.

[31] 'Government Response to Sir Ian Wood's UKCS: Maximising Economic Recovery Review' (July 2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/330927/Wood_Review_Government_Response_Final.pdf>.

[32] Department of Energy & Climate Change, 'The Energy Bill 2015/16' <https://www.gov.uk/government/publications/the-energy-bill-201516>.

[33] Department of Energy & Climate Change, 'Maximising Economic Recovery of Offshore UK Petroleum: Draft Strategy For Consultation' (18 November 2015) <https://www.gov.uk/government/consultations/maximising-economic-recovery-of-offshore-uk-petroleum-draft-strategy-for-consultation>.

[34] Department of Energy & Climate Change and Oil and Gas Authority, 'Maximising economic recovery of UK petroleum: the MER UK strategy' (18 March 2016) <https://www.gov.uk/government/publications/maximising-economic-recovery-of-uk-petroleum-the-draft-mer-uk-strategy> [hereinafter 'MER UK Strategy'].

the thesis, however, the main focus is the obligation in the Strategy to collaborate, and its potential impact on offshore contracting.

1.2.4 The current offshore oil and gas contracting model

In the context of the thesis, the terms 'contract' and 'contracting' have separate meanings: according to the traditional definition, a contract is 'an agreement giving rise to obligations which are enforced or recognised by law'.[35] 'Contracting', on the other hand, is not a term of art, but rather is generally used to signify the process of negotiating, signing and administering a contract from the beginning to the end of its lifecycle. Efficient contracting is especially important in complex industries such as the oil and gas industry. For example, Boston Consulting Group reports that the 'value leakage' observed in the oil and gas supply chain can be addressed by more efficient contracting practices.[36] For this reason, the research focuses on the contracting practice in the offshore industry. The section below briefly analyses the dominant contracting paradigm in the offshore sector. Then, modern developments in contracts and contracting are discussed to provide a comprehensive picture of wider developments that could potentially improve the offshore contracting practice.

From a contractual point of view, the offshore industry developed from an early stage tailor-made contractual practices that were – and still are – innovative compared to other areas of the English law of contract. For example, the offshore industry developed the so-called 'mutually hold harmless indemnification system' for personal injuries and property damage (known as the 'knock-for-knock' model).[37] The knock-for-knock model has been upheld by the English courts, and judicial dicta summarises its function as 'a crude but workable allocation of risk and responsibility'[38] and 'a market practice that has developed to take account of the peculiar features of offshore

[35] G.H. Treitel, *The Law of Contract* (14th ed., Sweet & Maxwell 2015) 1-001.

[36] Boston Consulting Group, 'E&P Supplier Contracts: Where Does All the Value Go?' (22 July 2015) <https://www.bcgperspectives.com/Images/EandP-Supplier-Contracts-July-2015_tcm80-193220.pdf>.; 'We believe that the challenge of value leakage is one that E&P companies can address, but it will require them to rebalance their focus in their supply-chain efforts. Specifically, they will have to assign less urgency to the design of ever-more sophisticated contracts and incentives and spend more time improving basic contract framing, supervision, and management practices.'

[37] Further analysis about case law regarding 'knock for knock' and other risk allocation clauses is provided in chapter 3.

[38] *Smit International (Deutschland) GmbH v Josef Mobius GmbH* [2001] CLC 1545.

operations'.[39] This example serves to highlight the importance of the contractual mechanisms that have been developed to suit the needs of a complex industry.

The main function of an offshore services contract, apart from defining the scope of work and price/remuneration, is to function as a 'risk allocation' mechanism among the operator of a field and the contractors hired to deliver specialised services. Each party tries to secure its interests by carefully drafting certain key clauses of the contract: the so-called 'risk allocation' clauses. In a nutshell, the risk allocation process includes allocating risk to the party best able to control it, with the rationale that this party is generally best placed to reduce the likelihood of the risk eventuating. Moreover, a combination of limitation of liability, exclusion of liability and indemnity clauses is used to cover liability for negligence, breach of statutory duty and breach of contract, for events such as: death and personal injury, property loss or damage, loss or damage to third parties and environmental liability.[40] Eminent practitioners and academics have written about the peculiarities of offshore contracting and have analysed the relevant case law.[41]

Although in theory, the industry accepts the maxim that 'risk should lie with the party best able to control/bear it', very often each party tries to transfer the potential liability to its counterparty, with the final outcome reflecting most of the times the respective bargaining power of each party. This practice has been criticised as a 'risk transfer' culture which ultimately does not mitigate risk effectively. A report on the Australian construction market offers a succinct critique of risk transferring: 'the traditional risk management strategy adopted by clients has been to transfer as much of this risk as possible to others. (…)However, this strategy often fails, creating an adversarial climate, a high level of commercial disputation, time and cost overruns

[39] *Caledonia North Sea Ltd v London Bridge Engineering Ltd* [2002] 1 Lloyd's Rep 553, HL.
[40]For a brief overview see Wilson Sharon, 'Contractual Allocation of risk in upstream oil and gas projects' (2008) Energy Source 3, 5.
[41] The necessary literature on this subject includes the following titles: Baris Soyer and Andrew Tettenborn (eds), *Offshore Contracts and Liabilities* (1st edn, Informa Law 2015); Peter Roberts, *Petroleum Contracts- English Law and Practice* (1st edn, OUP 2013); Greg Gordon, John Paterson and Emre Üşenmez (eds), *Oil and Gas Law: Current Practice and Emerging Trends* (2nd edn, Dundee University Press 2011); Simon Rainey, *The Law of Tug and Tow and Offshore Contracts* (3rd edn, Informa Law 2011); Anthony Jennings, *Oil and Gas Exploration Contracts* (2nd edn, Sweet & Maxwell 2008); Anthony Jennings (ed), *Oil and Gas Production Contracts* (1st edn, Sweet & Maxwell 2008); David Sharp, *Upstream and Offshore Energy Insurance* (2nd edn, Witherby Insurance 2008); Stuart Beadnall and Simon Moore, *Offshore Construction: Law and Practice* (Informa Law 2017)

and overall poor performance.(…) Given the adversarial nature of relationships, it may be in the contractor's interest to allow a problem to unfold rather than to deal with it positively'.[42] In the UK industry, the main standard form contracts are LOGIC contracts, which also criticise the practice of risk transferring.[43] However, despite the aim set out in the Guidance Notes, in practice, LOGIC contracts are closer to the culture of risk transfer than the culture of collaboration and joint risk management.

Despite the critique on the culture of risk transfer, the contracting model of the industry is generally perceived to have served the needs of the industry reasonably well so far. Thus, the thesis does not seek to disregard the contracting model in its entirety, but rather to focus on how it can adapt to include the new requirements set out by the MER Strategy.

1.3 THEORETICAL FRAMEWORK OF THE RESEARCH

Having discussed background information about the offshore oil and gas industry and the recent changes in the commercial environment, the hypothesis and the underlying assumptions of the research may now be articulated. As previously mentioned, the oil and gas industry in general, and the offshore industry in particular, are in a transitional phase. Three trends are drastically changing the business environment: (a) the current and – in the foreseeable future – low oil price, (b) a strong project management preference for collaboration and integrated project delivery, and (c) a strong preference by regulators (at least in the UK) for collaboration among the industry players.

The first factor, the oil price, is traditionally one of the most – if not the most – important element that shapes the oil and gas industry. Oil price is notoriously

[42] Australian Constructors Association, 'Relationship Contracting: Optimising Project Outcomes' (1999) 8 < http://www.constructors.com.au/wp-content/uploads/1999/02/Relationship-Contracting-Optimising-Project-Outcomes-1999.pdf>.

[43] LOGIC, 'General Conditions of Contract for Services On- and Off-shore' (3rd edn, March 2014); See Guidance Notes 1 < https://www.logic-oil.com/content/standard-contracts-0>; 'What did or does this process achieve? For many who have worked with this arrangement over many years the belief is that it achieves very little. Risk is not managed or allocated where it can most appropriately be borne, rather it is pushed from one party to another depending on prevailing market conditions. Additional insurance costs can result and contract costs may be increased due to uncertainties and/or contingencies being added.'

difficult to predict, and estimations from even acknowledged institutions vary significantly. In the basic scenario from the International Energy Agency [hereinafter 'IEA'], the market is set to rebalance at $80/bbl in 2020, with further increases in price thereafter.[44] However, IEA also foresees oil prices remaining 'lower for longer' as the second most probable scenario.[45] Whichever the case might be, the oil price is likely to remain low for at least the foreseeable future, which means that the industry needs to develop a short-term strategy. However, in the case of the UKCS, the oil price challenge is further amplified by other factors: field maturity and high extraction costs, low level of investments, and cancellation of projects, to name a few. Therefore, even if the market rebalances by 2020 as IEA estimates, a long and challenging way lies ahead, and oil price will undoubtedly apply pressure to the UK offshore oil and gas industry.

The second factor is the trend in project management towards integrated project delivery, which means that the various stakeholders of a project (operator, contractor and sub-contractors) must work closely both at the commercial and operational level. This trend in turn impacts the overall structure of a project, an important part of which is the legal and contractual architecture. Since collaboration is closely linked and can be seen as a prerequisite for integrated project delivery, legal practitioners will soon be confronted with the challenge of understanding and applying collaborative contracting models.

The third factor is the strong regulatory preference for collaboration in the UKCS. The cornerstone role of collaboration in the Wood Review and the MER Strategy renders the understanding of the legal and contractual ramifications of collaborative models a necessity. It may also be said that if the MER Strategy proves to be successful, it could provide impetus for industry collaboration in other common law countries with offshore production, which means that the subject matter of the thesis might not be necessarily confined in the UK context in the future.

[44] IEA, 'World Energy Outlook 2015', 3 <http://www.iea.org/publications/freepublications/publication/WEB_WorldEnergyOutlook2015ExecutiveSummaryEnglishFinal.pdf>.
[45] Ibid.,4

In light of the above factors, the research argues that collaborative contracting models are the optimal mid- to long-term strategy for the offshore oil and gas industry. This observation is even timelier for the UKCS and needs to be considered also as a short-term strategy due to the regulatory requirements. The thesis does not regard collaboration as a panacea and does not dismiss the accumulated knowledge and experience of the traditional adversarial approach. The main reason for the chosen approach is that the trend at the operational and project management level is towards integrated project delivery. Experience has shown that legal services follow – or should follow – the needs of commercial and business realities. The commercial realities consequently raise academic and doctrinal questions, e.g. what is the nature and how can collaboration be applied in a contractual context; therefore, this issue needs to be dealt from an academic viewpoint as well.

1.4 RESEARCH QUESTION AND EVALUATIVE FRAMEWORK

Given the context and approach of the research, the research questions/aims may now be delineated:

1. To explain the meaning of ‘collaboration’ within and beyond the context of the MER Strategy.
2. To explain the notion of ‘modern contracting’ and ‘contract and commercial management’ and argue that offshore oil and gas contracting in the UK should follow this contracting paradigm, which is also aligned with the MER Strategy.
3. To ascertain the meaning of ‘collaboration’ in the English law of contract and explain its relevance to UK offshore oil and gas contracting.

This section sets out the evaluative framework of the research, i.e. the criteria used to assess ‘success’. The traditional legal approach is that the main role of the contract is to offer ‘certainty and predictability’ in order uphold the intention of the parties. The thesis argues that in order for a contract to successfully achieve this aim, ‘clear wording’ and ‘good drafting’, which are the main tools in the arsenal of the traditional approach, are insufficient. Without opposing the self-evident importance of the aforementioned factors, every clause may eventually be subject to judicial

interpretation during litigation. One elucidating example from the offshore contracting context is the notoriously difficult demarcation of the scope of exclusion clauses for consequential loss. Even after thorough analysis of case law and contract doctrine by experienced practitioners, the conclusion is often that 'clearer wording' or 'better drafting' is required.[46] However, it is submitted that this is a futile quest due to the inherent doctrinal difficulties of abstract legal terms, especially when combined with an adversarial business relationship.

This futility informs the thesis' emphasis on the potential application of commercial and contract management to offshore contracting. In complex, project-based industries, the contractual process and underlying business relationship can be equally important to, if not more important than, the content of the clauses themselves. In addition to the difficulty of drafting clear contracts, authors have pointed out that the notion of legal certainty is elusive or even unnecessary.[47] However, even if it is supposed that an offshore contract can offer an acceptable degree of certainty and predictability to the parties regarding their rights and obligations, the problem of risk transfer still exists. Therefore, it is submitted that a proactive contractual process that focuses on project success is more fit for purpose than a defensive contract strategy designed to address the ramifications after a project failure.[48] In this case, the immediate question that arises is what constitutes 'project success'. The thesis adopts the traditional criteria in the literature of project management: cost, time, and performance.[49] It should be noted that there is academic debate in the project

[46]Chris Kidd, 'Consequential Loss Exclusion Clauses in Offshore Contracts' in Baris Soyer and Andrew Tettenborn (eds), *Offshore Contracts and Liabilities* (1st edn, Informa Law 2015) 130; 'Clearer standard form wordings would certainly help, and it is hoped that in considering any further revisions to their standard forms, particularly the widely used SUPPLYTIME, BIMCO will be able to set the offshore oil industry on the right course even if it does reduce the future fees of lawyers who have been grappling with such issues for so long. More judicial guidance from the higher courts would also help resolve the confusion.'

[47] For a more theoretical discussion on this matter, see Ofer Raban, 'The Fallacy of Legal Certainty: Why Vague Legal Standards May Be Better For Capitalism and Liberalism' (2009-2010) 9 B.U. Pub. Int. L.J. 175.

[48] For example, PwC pointed out in a 2014 report that large capital projects in the oil and gas sector have demonstrated poor capital efficiency and project performance. The report proposes three 'activity segments': resourcing and capabilities, planning and organizing, and managing for success and risks, as shown in the table below. Notably, almost all of the actions depend more or less on the functions of the contractual architecture. See Brian J. Campbell, Douwe Tideman, Hinne Temminck Tuinstra, 'Large capital projects in the oil and gas sector: Keys to successful project delivery' (2 October 2014) 10 <http://www.strategyand.pwc.com/media/file/Large-capital-projects-in-the-oil-and-gas-sector.pdf>.

[49] Lavagnon A. Ika, 'Project Success as a Topic in Project Management Journals'(2009) Project Management Journal Vol. 40, 6–19. The author has conducted a literature review on the topic of

management discipline about what these criteria are/should be, which however lies outside the scope of the research.[50]

1.5 METHODOLOGY AND DELIMITATION OF THE RESEARCH

1.5.1 Explanation of the selected methodology and research methods

The starting point for research methodology is the explanation of the terms 'methodology' and 'method' in the context of the thesis, as their precise meaning can be ambiguous.[51] The term 'methodology' is properly perceived as broader in meaning than the term 'method'. The definition of 'method' in the Oxford Dictionaries is 'a particular way of doing something',[52] whereas a 'methodology' is 'a set of methods and principles used to perform a particular activity'.[53] Therefore, the thesis attributes to 'methodology' the role of the overall strategy in examining the subject matter, whereas the term 'research method' signifies the specific tactics serving that strategy.

It is also submitted that 'methodology' is conceptually closer to the theoretical framework, i.e. the background assumptions and hypothesis of the research, than 'method'. The methodological approach of the thesis is a combination of a doctrinal analysis of English contract law, with an interdisciplinary angle from management disciplines related to the study of contracts and contracting[54] - specifically contract management and project management.[55] The research utilises this interdisciplinary angle not with the aim to replace the legal standpoint, but rather to 'inform' the legal perspective through the lenses of contract and project management.

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project success and its criteria using articles published between 1986 and 2004 in the Project Management Journal (PMJ) and the International Journal of Project Management (IJPM). The analysis provides an overview of the literature on the concepts of project management success, project success, success criteria and success factors.

[50] Ibid.

[51] Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (1st edn, Routledge 2013) 2

[52] Method <http://www.oxforddictionaries.com/definition/learner/method>.

[53] Methodology <http://www.oxforddictionaries.com/definition/learner/methodology>.

[54] J. Collis and R. Hussey, *Business research: a practical guide for undergraduate & postgraduate students* (4th edn, Palgrave Macmillan 2013).

[55] For further information on legal research methodologies, see Mark Van Hoecke (ed), *Methodologies of Legal Research* (Hart Publishing 2011); Caroline Morris and Cian Murphy, *Getting a PhD in Law* (Hart Publishing 2011).

The research focuses on English law as the subject matter is offshore contracting in the UKCS in light of the MER UK Strategy. Notably, English law is a popular governing law of choice within the offshore oil and gas industry, even for parties with no direct relation to the UK. English law is commonly perceived to be commercially sophisticated as it is 'flexible, pragmatic and commercially minded, and seeks to uphold the freedom of the parties to contract and to behave as they see fit (…)'. [56] The thesis uses the referencing system of the 'Oxford University Standard for Citation of Legal Authorities' ('OSCOLA').[57]

1.5.2 Methods and sources

The research method is primarily library-based. It is beyond the thesis' scope to conduct empirical or primary, interview-based research. Such a task would be beyond the capacity of a single researcher, and additionally, the offshore oil and gas industry is 'secretive' with sensitive issues such as internal contracts or contracting processes. To compensate for the lack of empirical insight, the thesis includes a wide spectrum of sources, such as reports and studies regarding the offshore industry conducted by competent entities such as major consultancies, industry and trade associations, and academic institutions. The main research sources are publications from the industry, government, regulators and international (energy) institutions, and naturally, legal and academic sources:

(a) Industry sources: the research considers publications from energy consultancies, law firms, trade associations, research institutions, oil companies, and services providers. Conclusions are drawn primarily from the publications produced by the most influential consultancies – the so-called 'Big Four' auditors,[58] as well as the 'Big

[56] Peter Roberts, *Petroleum Contracts: English Law and Practice* (1st edn, OUP 2013) 3; Although the first part of the quote is indisputable, the statement 'without implication of legal notions of good faith or conscience' is not as straightforward since these issues have been often arisen in awards.
[57] OSCOLA (4th edn, Hart Publishers 2012) <https://www.law.ox.ac.uk/sites/files/oxlaw/oscola_4th_edn_hart_2012.pdf>.; In the present thesis the last access date for all sources is 20th July 2017.
[58]The 'Big Four' auditing consultancies are generally thought to be Deloitte, PwC, EY, and KPMG (ordered according to their revenues in fiscal year 2014). Although their core business is auditing, there is a strong trend in the last years to expand into consulting services as well, therefore their reports can provide further insights to the oil and gas industry that are not confined to only accounting or tax matters, see Harriet Agnew, 'Big four auditors extend reach into consultancy' (Financial Times, 8

Three' strategy consultancies.[59] Publications from other market players are also factored in.[60] Inclusion of so many industry sources in a legal thesis may be unconventional; however, this is not only an original, but also necessary, angle. Understanding and analysing the evolving commercial trends in the industry is crucial because the trends ultimately impact the contracting practice. Ascertaining these trends cannot become possible by citing the viewpoint of only a few market players. Yet, if the majority of the industry players supposedly share the same views, then this could offer a strong indication to rely on.

Another source is the publications of law firms specialised in the energy sector, with a preference towards the firms that have a dedicated oil and gas and/or construction practice. Furthermore, there are various trade associations active in the offshore oil and gas industry that publish authoritative reports, standard form contracts, and industry best practice guides.[61] Finally, publications from research institutions that conduct independent research and produce reports about the energy industry, are taken into account. The International Contract and Commercial Management Association (IACCM) is a leading example of a body that fertilises the industry with useful reports and surveys.[62]

(b) Governments and International (Energy) Institutions: The thesis includes extensive publications from the UK Government on the offshore sector, such as the Wood Review and the MER Strategy and its accompanying documents. The publications from the UK Government in the field of contract management are used

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March 2015) <http://www.ft.com/intl/cms/s/0/0614433e-c586-11e4-bd6b-00144feab7de.html#axzz3lAdIxHQT>.

[59] The 'Big Three' strategy consultancies are: McKinsey & Company, The Boston Consulting Group and Bain & Company (ordered according to their revenues in fiscal year 2013).

[60] These consultancies include: Douglas Westwood, which specialises in the offshore energy industry and provides proprietary reports on market forecasts, trends, and supply and demand in various offshore sectors such as well services, drilling services, offshore support vessels (OSV's), etc.; Wood MacKenzie; and Booz Allen Hamilton. It should be noted that Douglas Westwood publishes many proprietary reports that are not publicly available.

[61] The most important trade associations are: Oil and Gas UK (OGUK) <http://oilandgasuk.co.uk>.; International Marine Contractors Association (IMCA) <http://www.imca-int.com>.; International Union of Marine Insurers (IUMI) <http://www.iumi.com>.; International Association of Drilling Contractors (IADC) <http://www.iadc.org>.; Association of International Petroleum Negotiators (AIPN) < https://www.aipn.org>.; International Association of Oil and Gas Producers (IOGP) <http://www.iogp.org>.; A more detailed presentation about the scope and functions of each of these organisations follows in the respective parts of the main analysis.

[62] The publications of IACCM will be explained in detail in chapter 3.

extensively. 'International Energy Institutions' refers to institutions that influence the market, such as the IEA and OECD.[63]

(c) Academic and legal sources: the core literature on contract law and the offshore industry in a UK context have already been referred to. Aside from books, the research also incorporates articles from eminent UK and international journals on oil and gas law and contract law.[64] The existing literature mainly provides a doctrinal analysis of contract law regarding the peculiarities encountered in offshore contracting practice. Although this 'black letter law' analysis is necessary and forms the starting point for every academic and professional studying this field, there are under-researched, yet necessary angles, which are not covered by current literature.

1.5.3 Delimitation of the research scope

Since the subject matter of the research is complex and multi-dimensional, it is important to delimit the scope in relation with the disciplines of law, management and economics. In respect of the legal dimension, it is important to highlight that the research focuses on private rather than public law. This fact is stressed because the recent literature regarding the offshore oil and gas industry focuses on the regulatory developments following the Deepwater Horizon accident in the Gulf of Mexico. After the incident, the regulatory models have been thoroughly scrutinised not only in the US, but in almost every other developed country with offshore production, including the UK.[65] The research also does not include examination of regulatory and statutory

[63] OECD, 'Shipbuilding and the Offshore Industry' (Working Party on Shipbuilding, June 2015) <http://www.oecd.org/sti/ind/Shipbuilding-and-offshore-industry.pdf>.; OECD, 'Offshore Vessel, Mobile Offshore Drilling Unit & Floating Production Unit Market Review' (Working Party on Shipbuilding, 17 December 2014) <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=c/wp6(2014)13/final&doclanguage=en>.

[64] International Energy Law Review (I.E.L.R.); Journal of World Energy Law & Business (JWELB); Oil, Gas & Energy Law (OGEL); Journal of Strategic Contracting and Negotiation (JSCAN); Construction Law Journal (Const. L.J.); International Business Law Journal (I.B.L.J.); Journal of Business Law (J.B.L.); European Review of Contract Law (E.R.C.L.); European Business Organization Law Review (E.B.O.R.).

[65] For a complete overview of the various models and philosophies (prescriptive model, goal-oriented or performance-based model) which includes the regulatory changes and the experts' opinions following the Deepwater Horizon blowout, see Preben Hempel Lindøe, Michael Baram and Ortwin Renn, *Risk Governance of Offshore Oil and Gas Operations* (Cambridge University Press 2015); The UK follows the so-called 'safety case' model based on the recommendations of the report by Lord Cullen after the Piper Alpha disaster; see Cullen, The Hon. Lord W. Douglas, *The public inquiry into the Piper Alpha disaster* (H.M. Stationery Office 1990). For the history and current state of the

instruments on licensing, health and safety, environmental law, and technical requirements of the offshore industry. In regard to management literature, the thesis does not overextend to include specialised management sub-disciplines such as enterprise project management or inter-organisational theory. Similarly, it also does not include specific literature on supply chain management and logistics of the offshore industry. Finally, within the economics dimension, the thesis does not employ a law and economics analysis, which is a popular approach when examining contracts in a commercial context. It is submitted that this approach has a limiting structure unsuited to the needs of this research.[66] Furthermore, the research does not follow a 'contract economics' analysis, which is essentially an economic discipline using mathematical and statistical models to choose the appropriate contract mechanisms in order to maximise profits or cost reduction for a company.[67]

A further necessary clarification is the scope of what is included under the term 'offshore oil and gas contracts'. This term often refers to government-to-business contracts, which can take various forms.[68] The research however focuses on business-to-business contracts signed between the industry players of the offshore industry: oil companies, service contractors, and sub-contractors. Contracts concluded between license holders and their co-venturers for the exploitation of a field (joint venture agreements) are not covered, although they are included in the spectrum of business-

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regulatory regime in the UK see J. Paterson, 'Health and Safety at Work Offshore' in G. Gordon, J. Paterson, E. Usenmez (eds), *Oil and Gas Law: Current Practice and Emerging Trends* (Dundee University Press 2011); See also J. Paterson, 'The Significance of Regulatory Orientation in Occupational Health and Safety Offshore' (2011) 38 B.C. Envtl. Aff. L. Rev. 369; J. Paterson, 'Health, safety and the environment' in E.G. Pereira (ed), *The Encyclopaedia of Oil and Gas Law: Upstream* (Globe Law and Business 2014) 219. For a critique of the UK 'safety case' model see Rena Steinzor, 'Lessons from the North Sea: Should 'Safety Cases' Come to America?' (2011) 38 B.C. Envtl. Aff. L. Rev. 417 <http://lawdigitalcommons.bc.edu/ealr/vol38/iss2/10>.

[66] For an overview of contract law regarding this approach, see Robert B. Cooter and Thomas Ullen, 'An Economic Theory of Contract Law' in Robert B. Cooter and Thomas Ullen (eds), *Law and Economics* (6th edn, Pearson 2013).

[67] See for example, Kenneth S. Corts and Jasjit Singh, 'The Effect of Repeated Interaction on Contract Choice: Evidence from Offshore Drilling' (2004) 20 The Journal of Law, Economics, & Organization.

[68] There are many legal forms that these types of agreements can take: concessions (license for exploration and production to a company under certain terms), productions sharing agreements or contracts (PSA's or PSC's), service contracts (the company is hired as contractor by the host government) and joint ventures (between company and host government). For further information about company-host government contracts, see Frank C. Alexander, 'Production Sharing Contracts and Other Host Government, Contracts' (March 2005) 3 OGEL; King & Spalding, 'An Introduction to Upstream Government Petroleum Contracts: Their Evolution and Current Use', (2005) OGEL <http://www.ogel.org/article.asp?key=1730>.

to-business agreements.[69] This is because joint venture agreements are negotiated between companies with - in principle - aligned interests, despite the fact that each venturer tries to promote its interests in internal contractual relations. On the contrary, a contract between a company and a contractor is essentially a contract between two entities with *prima facie* opposing interests, which creates the tensions described thus far in the thesis.

The scope of the research includes contracts from the engineering, construction, and marine services sector because they share common characteristics with regard to their general structure and risk allocation clauses. Other types of contracts commonly used in the offshore industry are unitisation agreements, tie-in agreements, farm-in/out agreements, and confidentiality agreements; these contracts also fall within the scope of 'offshore oil and gas contracts', however they do not share common characteristics with the services contracts described above. Finally, the thesis will not include the issue of decommissioning; despite its importance and current momentum, it is a 'niche' contract subcategory with each own peculiarities, within the already perceived as 'niche' area of offshore oil and gas contracts. This subject is important and could be the subject of a research in its own right, however it is beyond the scope of the current thesis.[70]

1.6 ORIGINALITY AND SIGNIFICANCE OF THE RESEARCH

1.6.1 The academic dimension

Collaboration has always been a neboulous area in the English law of contract. Traditionally, it has been associated with other legal terms such as good faith (a rather complex term as well), relational contracts, and other forms of partnering. Therefore, the aim of ascertaining the meaning of collaboration could potentially be the subject of a separate legal research. However, the thesis does not analyse this issue in abstract, but in the specific context of offshore oil and gas contracting. This is an interesting approach, not only for the purposes of the the offshore oil and gas industry,

[69]For further information see *Peter Roberts and Andrews Kurth, Joint Operating Agreements: A Practical Guide* (3rd edn, Globe Law and Business 2015).
[70] See section 5.3 on 'areas for further research' for the potential research directions on this subject.

but for the wider academic literature, because it is necessary to examine this question against the backdrop of a specific business context.

A further observation with regard to the originality of the research is that oil and gas law is a relatively under-researched subject from an academic and legal perspective. This can be attributed to various factors, e.g. oil and gas law is perceived as a practical field with no 'academic' value. A more practical reason is that academics specialised in this field often work in-house for companies, and they have limited time and restrictions on the information they can share.

However, the thesis submits that the field of offshore oil and gas law poses interesting challenges from an academic point of view and can contribute significantly to the legal discipline. For example, the practical meaning of collaboration in English contract law, its interconnection to the notion of relational contracts and good faith, and the clarification of the concepts of partnering and alliancing are important legal issues to which the thesis aspires to make modest contributions. Furthermore, the thesis also introduces an interdisciplinary element that should inform how contract law functions; namely, that due account should be given to the potential of contracts as (project) management tools in project-based industries. Offshore oil and gas contracting is an appropriate field for such a practical application. In this way, offshore contracts could – in addition to their traditional role of offering certainty and predictability – contribute proactively to the overall success of complex projects.

1.6.2 The business dimension

The potential for fallout in the offshore oil and gas sector is enormous, as the Deepwater Horizon accident vividly illustrates. A decision issued by the US district court in New Orleans confirms a settlement of BP with the US authorities for civil penalties and damages for over $20 billion.[71] The company had already paid $4.5 billion in 2012 to resolve criminal charges. However, there are still outstanding amounts to be paid for damages suffered by businesses and individuals, which still casts uncertainty on the final costs. It is submitted that one significant contribution of

[71]Ed Crooks, 'US court signs off on BP's $20bn oil spill settlement', Financial Times (5 April 2016) <http://www.ft.com/cms/s/0/ca842362-faee-11e5-b3f6-11d5706b613b.html#axzz460fKd8BJ>.

the research is that it can contribute, to a certain extent, to the overall risk management of the sector, as far as contracting procedure is concerned. Risk management is a widely-used term with different uses; what is meant in this case is that a well-designed contracting architecture can achieve joint risk management, which can reduce the overall risk level and offer value to all stakeholders of an offshore project.

A further contribution of the research is the examination of how a collaborative business philosophy can work in practice. There is no doubt that the strategy of any oil and gas company depends on the business culture and decisions of its top-tier managers. Proponents of 'zero-sum' business strategies[72] always account for a substantial percentage in the industry and this is a fact that no academic research can change. However, the recent trend of the MER UK Strategy towards the efficient exploitation of the remaining North Sea resources through collaboration generates the need for a comprehensive examination of the new business environment. Companies must adapt to this regulatory and statutory obligation. As mentioned above, the literature in the field analyses the doctrinal aspects of English contract law pertaining to offshore contracts, but the ramifications of a paradigm shift towards collaboration have not yet been explored. The analysis of the thesis ought to be considered by both the proponents and sceptics of a collaborative contracting model. Finally, it is submitted that the research may be of interest to the government and regulators. Regulators must also understand the practicalities of offshore contracting in order to facilitate the adaptation of the industry to a collaborative model of exploration and production in the North Sea.

1.7 STRUCTURE OVERVIEW

The introductory chapter has explained the background and rationale of the research. It has demonstrated how the maturity of the UKCS led to a comprehensive redesign of UK's offshore oil and gas strategy, which begun with the commissioning of the Wood Review, and culminated in the establishment of the Oil and Gas Authority and the introduction of the MER Strategy. The current offshore oil and gas contracting

[72] 'Zero-sum is a situation in game theory in which one person's gain is equivalent to another's loss', see Investopedia <http://www.investopedia.com/terms/z/zero-sumgame.asp>.

paradigm is explained and the section concludes that it has a mainly adversarial nature, both at the commercial and legal level. It is demonstrated that the current paradigm has strengths and weakenesses; however, the MER Strategy changed the landscape dramatically and offshore contracting needs to be approached under this prism. This chapter also lays down the methodological tools and rationale of the research. It stresses the interdisciplinary element of contract and commercial management, which the thesis argues can have theoretical and practical value for the discipline of contract law. The chapter sets out the priorities of the thesis and explains why certain areas of the law are excluded, e.g. why the focus is on the private law, rather than public law, dimension of oil and gas contracting.

Chapter 2 focuses on the MER Strategy. It aims to explain the meaning of 'collaboration' within and beyond the context of the Strategy. It is explained that the word is not a term of art, neither for the purposes of the Strategy, nor from a legal standpoint. Therefore, the chapter seeks to ascertain the meaning of 'collaboration' in both contexts. Chapter 3 examines the notions of 'modern contracting' and 'contract and commercial management'. The chapter explains the evolution of these notions in the context of the UK construction industry. Next, the way in which these notions influence offshore oil and gas contracting is also considered. Finally, the chapter argues that the publications and directions of the Oil and Gas Authority can be said to have already established a body of contract and commercial management, which is sector-specific for the offshore oil and gas industry. It is also argued that the BS Standard 11000-1 should be the main document around which the rest of the relevant guides should revolve. Chapter 4 examines the meaning of 'collaboration' in the English law of contract. The chapter approaches narrowly the question within the delimited framework of the research, in light of the MER Strategy. Chapter 5 provides the final conclusions, identifies certain unavoidable limitations of the thesis, and suggests areas for further research in the future.

CHAPTER 2

'COLLABORATION' AND ITS MEANING WITHIN AND BEYOND THE CONTEXT OF THE MER STRATEGY

2.1 CHAPTER INTRODUCTION

This chapter examines the meaning of collaboration within and beyond the context of the MER Strategy. The chapter first provides an outline of the MER Strategy and the role of the Oil and Gas Authority in order to set the framework and context of the subsequent analysis. Naturally, the MER Strategy is a comprehensive framework and therefore the thesis only focuses on the elements that are relevant. Collaboration has different status - in terms of its meaning and legal nature - within the MER Strategy. Its primary status is that of one – out of four – 'required actions and behaviours'. The second main status is that of a separate obligation under the 'Asset Stewardship Strategy'. However, collaboration is also encountered with miscellaneous meanings in other documents published by the Oil and Gas Authority. This chapter explains the various meanings and legal concepts within the MER Strategy and points out certain inconsistencies alleged by the author.

What is of equal – if not more – importance, is the meaning of collaboration in the wider matrix beyond the MER Strategy context. Considering 'collaboration' in a broader sense is necessary for two reasons. Firstly, it provides a comprehensive context for the meaning of collaboration. Secondly, it helps distinguish the project scope/commercial[1] and legal dimensions of the meaning of the term, which is a crucial dimension that the Oil and Gas Authority seems to miss.

The chapter also explains terms such as contract 'model', 'type' and 'strategy'. The terms are frequently used interchangeably in Oil and Gas Authority publications.

[1] The term 'project scope/commercial' signifies the business characteristics of a project, e.g. the overall business strategy, the pricing strategy, marketing strategy etc. The way in which the 'project scope/commercial dimension' is distinguished from the 'legal dimension' is explained later in the chapter.

However, similarly to the point made above, the lack of a distinction between the project scope/commercial and legal dimension of the terms leads to confusion, which this chapter attempts to tackle.

Finally, it should be mentioned that throughout this chapter, the focus is on the meaning of collaboration between operators and contractors, i.e. the industry and the supply chain. It is vital to clarify this point at this initial stage, which is elaborated on in the conclusion: the term collaboration in the MER Strategy refers, and is designed to refer, to collaboration between operators. However, the thesis points out that first, the wording of the Strategy about this matter is not abundantly clear and it could be argued that the supply chain can be included in the MER scope as well in certain instances; second, the focus of the thesis, as stated in the first chapter is the contracting relationship between operators and contractors. The reason is that in project-based industries at least two parties are necessary for the materialisation of a project, the client/operator and the contractor. Moreover, it is the dynamic in this relationship that raises the relevant legal questions regarding the meaning collaboration in the English law of contract, for which much ink is spent on judicial awards each year.

2.2 THE MER STRATEGY AND THE OIL AND GAS AUTHORITY

2.2.1 The MER Strategy

The introductory chapter explained the rationale of the Wood Review and the MER Strategy. Before embarking on an explanation of the details of the Strategy, its overall importance must be first highlighted. The MER Strategy is not merely another policy document to increase productivity or efficiency in the UKCS; its 'lifecycle' mirrors the fate of the lifecycle of the UKCS itself. It is the final legislative platform that will be used until the depletion of the UKCS oil and gas reserves – or, more precisely, until the profit margin for oil and gas operations in the UKCS still exceeds the extraction and decommissioning costs when factored into the final cost. Therefore, the provisions, rationale and peculiarities of the MER Strategy must be understood in depth as it will be the reference point for the next few decades of offshore oil and gas operations in the UKCS. Following consultation and extensive feedback from the

stakeholders, the MER Strategy was brought into force on 18 March 2016.[2] The oil and gas industry has been particularly receptive to the Strategy, as is evident from the comment of the chief executive of Oil & Gas UK: 'The Maximising Economic Recovery (MER) UK strategy will form the cornerstone of the tripartite approach being taken by the new Oil and Gas Authority, HM Treasury and the industry to extraction of the UK's oil and gas resources'.[3]

The Strategy consists of two main documents, the Strategy[4] and its accompanying Impact Assessment.[5] It is founded on several statutory provisions[6]. The MER Strategy spells out the Central Obligation of 'maximising economic recovery', which provides that 'relevant persons must, in the exercise of their relevant functions, take the steps necessary to secure that the maximum value of economically recoverable petroleum is recovered from the strata beneath relevant UK waters'.[7] The idea of 'maximum value' is linked to the 'the expected net value of economically recoverable petroleum from relevant UK waters, not the volume expected to be produced'.[8] To achieve this central aim, the Strategy sets out 'Supporting Obligations' that include exploration, (regional) development, asset stewardship, technology and decommissioning.[9] Both the Central and Supporting Obligations should be read in conjunction with 'Safeguards', which seek to strike a balance between 'business as usual' and the expectation of profit on

[2] Department of Energy & Climate Change, 'Maximising Economic Recovery of Offshore UK Petroleum: Draft Strategy for Consultation', <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/498128/MER_UK_Strategy_government_response_FINALdocx.pdf>.

[3]Oil & Gas UK, Comment of chief executive Deirdre Michie on 18 November 2015, <http://oilandgasuk.co.uk/oil-gas-uk-welcomes-energy-secretarys-launch-of-mer-uk-strategy-consultation-as-consistent-with-progressive-decarbonisation/>.

[4] Oil and Gas Authority, 'The Maximising Economic Recovery Strategy for the UK' (18 March 2016) <https://www.OilandGasAuthority.co.uk/media/1022/mer_uk_strategy.pdf>..

[5]Oil and Gas Authority, 'The Maximising Economic Recovery Strategy for the UK: Impact Assessment' (18 March 2016) <https://www.OilandGasAuthority.co.uk/media/1043/20160308_-_mer_uk__strategy_-_impact_assessment_-_signed_by_minister.pdf>.

[6]Infrastructure Act 2015 (c. 7) Part 6 s. 41 <http://www.legislation.gov.uk/ukpga/2015/7/pdfs/ukpga_20150007_en.pdf>.; Energy Act 2011 c. 16 Part 2 Chapter 3 <http://www.legislation.gov.uk/ukpga/2011/16/pdfs/ukpga_20110016_en.pdf>.; Energy Act 2016 <http://www.legislation.gov.uk/ukpga/2016/20/pdfs/ukpga_20160020_en.pdf>.; Petroleum Act 1998 <http://www.legislation.gov.uk/ukpga/1998/17/pdfs/ukpga_19980017_en.pdf>.

[7]Oil and Gas Authority, 'The Maximising Economic Recovery Strategy for the UK' para 7 <https://www.OilandGasAuthority.co.uk/media/1022/mer_uk_strategy.pdf>.

[8] MER Strategy, 5

[9] Oil and Gas Authority, 'The Maximising Economic Recovery Strategy for the UK' paras 10-22.

the one hand, and the public interest of ensuring the maximisation of the UKCS resources on the other.[10]

Furthermore, certain 'Required Actions and Behaviours' are introduced, which should also inform the realisation of the Central Obligation. These actions and behaviours include timing, collaboration, cost reduction and actions where relevant parties decide not to ensure maximum economic recovery.[11] Collaboration is only one of the four required actions and behaviours, which in turn is only one parameter to be taken into account. In terms of 'hierarchy', collaboration is certainly less important than the Supporting and Central Obligation. If this is the case, then why is the issue of collaboration so heavily emphasised in this thesis? In a sentence, collaboration might be a relatively minor issue within the context of the MER Strategy, but it has a wider significance for contracting between operators and the supply chain. If two parties opt for a collaborative business relationship, then the legal meaning of collaboration must be ascertained. Therefore, although collaboration is not the main parameter within the MER Strategy, it has a more far-reaching impact on contracting beyond the Strategy.

The MER Strategy also provides for the development of 'Regional Plans' and 'Sector Strategies'. The 'Asset Stewardship Strategy' is of particular interest as it envisions a separate duty of collaboration. The Asset Stewardship Strategy and the Supply Chain Strategy are relevant to the thesis and are detailed in the following sections.

2.2.2 The role of the Oil and Gas Authority

The Oil and Gas Authority is a government company mainly funded by an industry levy, [12] per one of the key recommendations of the Wood Review. The Oil and Gas Authority is independent from the UK Ministry dealing with energy matters – formerly the Department of Energy & Climate Change (DECC), and now Department for Business, Energy and Industrial Strategy (BEIS). Oil and Gas Authority considers

[10] Ibid. paras 2-6.
[11] Ibid. paras 27-29.
[12] Oil and Gas Authority, 'About Us' <https://www.OilandGasAuthority.co.uk/about-us/what-we-do/>.

its primary aim to be to 'regulate, influence and promote' the MER Strategy.[13] The main philosophy of the Oil and Gas Authority, which supervises the application of the MER Strategy, is to be a 'light touch' regulator and work closely with the industry to understand its needs. This approach aligns with the Wood Review recommendation for a 'tripartite co-operation' among industry, government and the Oil and Gas Authority.

The fact that the stated intention of the Oil and Gas Authority is to be a 'light touch' Regulator should not be confused with the role of a 'paper tiger' regulator. The Oil and Gas Authority has explicit authority to proceed with sanctions, which may vary significantly in their scope. The Energy Act 2016 specifies the rationale behind the Oil and Gas Authority's mandate to take action.[14] The sanction arsenal of the Oil and Gas Authority includes: enforcement notice, financial penalty notice, revocation notice, and, the most extreme of the measures, an operator removal notice. The justification for the sanctions procedure and the calculation of the financial penalties are set out in detail by the Oil and Gas Authority.[15]

2.3 THE NOTION OF 'COLLABORATION' WITHIN THE MER STRATEGY CONTEXT

2.3.1 Collaboration as a 'required action and behaviour'

Collaboration was identified as a 'key issue' already in the Wood Review. The Review suggested that one of the six 'key issues' which the new model should take into account was 'the need for far greater constructive collaboration between

[13]Oil and Gas Authority, 'Oil and Gas Authority Overview 2016' (20 October 2016) 5 <https://www.OilandGasAuthority.co.uk/media/2825/Oil and Gas Authority-overview-october-2016.pdf>.

[14] Energy Act 2016, sections 42 to 60: (a) a duty imposed under section 9C of the 1998 Act to act in accordance with the Strategy for enabling the Principal Objective to be met; (b) a term or condition of an offshore licence; and (c) a requirement imposed on a person by or under the 2016 Act which is sanctionable in accordance with Chapter 5 of the 2016 Act, <http://www.legislation.gov.uk/ukpga/2016/20/contents/enacted>.

[15] Oil and Gas Authority, 'Sanction Procedure' <https://www.ogauthority.co.uk/media/2985/oga_sanction_procedure_r.pdf>.; Oil and Gas Authority, 'Financial Penalty Guidance' <https://www.ogauthority.co.uk/media/3488/420387-oga-financial-penalty-guidance-28.pdf>.

operators'.[16] It is therefore interesting to note how this recommendation was expressed in the final MER Strategy. The relevant provision on collaboration reads:

> 'Collaboration – When considering how to comply with obligations arising from or under this Strategy relevant persons must:
>
> a. where relevant, consider whether collaboration or co-operation with other relevant persons and those providing services relating to relevant functions in the region could reduce costs, increase recovery of economically recoverable petroleum or otherwise affect their compliance with the obligation in question;
>
> b. where it is considered possible that such collaboration or co-operation might improve recovery, reduce costs or otherwise affect their compliance with obligations arising from or under this Strategy, relevant persons must give due consideration to such possibilities; and
> c. co-operate with the Oil and Gas Authority'.[17]

Before analysing this provision, it should be noted that the changes to the Petroleum Act 1998 made by the Infrastructure Act 2015 impose an obligation on relevant persons to comply with the principal objective. The principal objective expressly includes a reference to collaboration. In other words, the obligation to collaborate appears not only in the MER Strategy but, after the Infrastructure Act amendments, appears in the Petroleum Act 1998 itself at 9A (1) (b).[18]

In order to understand the meaning of this provision, it is necessary to identify the various elements. The first issue relates to 'relevant persons' and what is expected of them. These relevant persons then 'consider whether collaboration or co-operation with other relevant persons and those providing services relating to relevant functions in the 'region' could assist in the application of the Strategy. The definition of the relevant persons is not as straightforward as suggested by the reference in the MER

[16] Wood Review Final Report, 5.
[17] Ibid. 6-7.
[18] This clause has not been yet introduced in the text of the Petroleum Act 1998 in the official Legislation archive, see <http://www.legislation.gov.uk/ukpga/1998/17/section/9>.; However, it does appear in the 'View outstanding changes' option in the previous website and it is the amendment 'Pt. 1A inserted by 2015 c. 7 s. 41' due to be inserted in the main body of the text.

Strategy annex: ‘relevant persons means the Oil and Gas Authority and the persons listed in section 9C of the Petroleum Act 1998 at the date this Strategy is laid in Parliament’. This issue is covered in detail in section 2.3.5.2, in conjunction with the issue of the potential for contractors to fall within the MER scope in certain instances. Turning to the definition of ‘relevant functions’, the MER Strategy annex defines them as: ‘the functions which relevant persons are obliged by the Petroleum Act 1998 to exercise in accordance with the Strategy, but only insofar as those functions can affect the fulfilment of the principal objective. These do not include any functions in relation to any infrastructure or activities which are downstream of an oil or gas terminal’. In the author’s opinion, the relevant functions are essentially included in the same article that defined the relevant persons, i.e. section 9C of the Petroleum Act 1998, which refers to these activities. The only further qualification it provides is the exclusion of downstream activities and the closer relevance to the objectives of the MER Strategy.

The next element of paragraph (b) involves the expectation of relevant persons if the above criteria are met. The expectation is that ‘relevant persons must give due consideration to such possibilities’. This requirement leaves room for a wide variety of interpretations. It does not seem to oblige the relevant persons to collaborate, but rather provides that they should grant ‘due consideration’ to this possibility. The obvious question that arises is what is the threshold and delimitation of the due consideration. Furthermore, it is unclear what the sanctions or consequences are for choosing to collaborate or not. These two issues should be read in light of the ‘Competition and Collaboration’ in section 2.3.3. Furthermore, paragraph (b) refers to the content of collaboration. The instances where collaboration should be taken into account are when ‘such collaboration or co-operation might’: (1) improve recovery (2) reduce costs (3) otherwise affect their compliance with obligations arising from or under this Strategy. The third requirement appears to be a generic ‘statement’ that could include various types of actions and appears more as a kind of a continuous task, with its meaning being open to interpretation.

2.3.2 Collaboration as an obligation under the 'Asset Stewardship Strategy'

The MER Strategy introduced, as mentioned above, separate sector strategies. One significant sector related to the scope of the thesis is the 'Asset Stewardship Strategy': it involves issues regarding collaboration, contracting and the supply chain.[19] The objective of this Strategy is 'to clearly define what good asset stewardship is and how the Oil and Gas Authority's enhanced asset stewardship process will work'. The Asset Stewardship Strategy is based upon four other 'complementary strategic elements'.[20] The relevant element for the thesis is the provision for a document setting out the 'Asset Stewardship Expectations', which is further analysed below.[21]

The Asset Stewardship Strategy has certain aims,[22] one of which is to 'maximise recovery' through 'optimising delivery efficiency and pace, using technology, the supply chain and collaboration'. The supply chain is again included as part of the Asset Stewardship Strategy. The Asset Stewardship Strategy revolves around ten 'Stewardship Expectations',[23] which are further elaborated in a separate document analysed below. The relevant expectations for the purposes of the thesis are the 'joint venture hub strategy', 'robust project delivery' and 'collaboration'. The Asset Stewardship Expectations are set out in a separate document that was published at the same time as the Asset Stewardship Strategy[24], and its elements are updated periodically with more specific guidance – as is the case with the elements under consideration. A first important comment is the legal nature of the Asset Stewardship Expectations. It is made clear that 'they are not intended to have binding legal effect

[19]Oil and Gas Authority, 'Asset Stewardship Strategy' (25 October 2016) <https://www.OilandGasAuthority.co.uk/media/2836/asset_stewardship_strategy_2016.pdf> [hereinafter 'Asset Stewardship Strategy'].

[20] These elements are 'Stewardship Expectations; Rationalised Industry Survey; Benchmarking; Stewardship Reviews'; see Asset Stewardship Strategy 4.

[21]Oil and Gas Authority, 'Asset Stewardship Expectations' (25 October 2016) <https://www.OilandGasAuthority.co.uk/media/2849/asset_stewardship_expectations.pdf>.

[22] The aims are to: 'Ensure asset licensees fully identify opportunities and the means to realise them; Increase the resource base; Maximise recovery; Extend infrastructure life; Identify both underperformance and best practice'; see Asset Stewardship Strategy 5.

[23] The ten 'Stewardship Expectations' are: 'Joint venture hub strategy; Exploration and appraisal subsurface work programmes; Optimum use of subsurface data; Licence activity, decision points and milestones; Robust project delivery; Production optimisation; Information management; Technology plans; Collaboration; Planning for decommissioning'; see Asset Stewardship Strategy 11.

[24] Oil and Gas Authority, 'Asset Steward Expectations' (25 October 2016) <https://www.OilandGasAuthority.co.uk/news-publications/publications/2016/asset-stewardship-expectations/> [hereinafter 'Asset Stewardship Expectations'].

but rather set out (…) expectations which, if followed, will help to facilitate delivery of the MER UK Strategy'.[25]This is an important point to be stressed as a major difference from the notion of collaboration as a 'required action and behaviour' which is legally binding as explained above. However, the document does seem to leave some room for a potentially stricter approach by the Oil and Gas Authority, if the Stewardship Expectations are not being met.[26]

The first relevant element of the Asset Stewardship Expectations is the 'Joint Venture Hub Strategy'. An implementation guide has been published recently on this element.[27] The Hub Strategy spells out the definition of a hub and several of the actions that must be taken in order to develop a comprehensive plan. Collaboration is mentioned[28], but the focus of the Hub Strategy is clearly on collaboration among operators, joint venturers, and third party operators; it does not seem to include the supply chain in its scope. Regarding the issue of risk management, the Hub Strategy envisages the use of a 'hub "risk and opportunity" register and matrix'.[29] This feature is highlighted for the purposes of the thesis as it is mentioned in the context of modern contracts and the 'tools' they use, a key tool of which is the risk register. This point can also serve as an example that the Oil and Gas Authority is supporting the use of risk registers for specific tasks.

A second interesting point is the planning for the 'Robust Project Delivery'.[30] The goals of this project delivery are vested to operators and set out the actions that are required by them.[31]The reason to cite the expectations of project delivery is to stress

[25] Asset Stewardship Expectations 4.

[26]'If, following discussions with the operator/ licensees, the Oil and Gas Authority concludes that a Stewardship Expectation has not been followed, this may lead the Oil and Gas Authority to consider whether the approach taken by the operator/licensees complies with their obligations under the MER UK Strategy.' This seems to suggest that the Oil and Gas Authority may link the non-compliance of the stewardship expectations to the obligations under the MER Strategy, which are legally binding, if 'discussions' do not rectify the omission; see Asset Stewardship Expectations 4.

[27] Oil and Gas Authority, 'Joint Venture Hub Strategy Implementation Guide' (31 March 2017) <https://www.OilandGasAuthority.co.uk/media/3538/se-01-jv-hub-strategy-implementation-guide.pdf> [hereinafter 'Hub Strategy'].

[28] See for example Hub Strategy section 2.4.

[29]The aim of the hub risk register is to: 'Identify the key risks and opportunities with their potential negative or positive impact on the hub strategy and associated activity plan; Set out an action plan for mitigating the risks and securing the opportunities identified in the register'; see Hub Strategy section 2.5.

[30] Asset Stewardship Expectations 10.

[31] These include: 'to encourage sufficient front end preparation prior to any significant project approval; to improve the predictability of project delivery – assessed against previous project

that these objectives are very similar to what the thesis will define in chapter 3 as a 'contract and commercial management' framework.

The final and most interesting part is the element of 'Collaboration'. The main expectation is that 'licensees should build effective business relationships which aim to create more value than is possible alone, by embracing a culture of collaboration and utilising collaborative tools and processes. In particular, licensees should be able to demonstrate that collaboration forms a core part of their organisational culture, and that they are making use of appropriate collaborative behaviour tools'.[32]This section seems again to refer to collaboration between operators and does not seem to include the supply chain within its scope.

The more detailed 'Collaboration Implementation Guide' on collaboration in the context of Asset Stewardship has been published recently.[33] In the introduction, the document spells out that the 'the UK oil and gas industry has been undertaking collaboration for over 40 years (for example, in the form of joint venture partnerships and areas of mutual interest)'.[34] In the context of the thesis this is a use of the word collaboration in an 'operational sense' and at a commercial level; this is pointed out in order to be juxtaposed to the legal and contractual meaning, as explained below. The 'Collaboration Implementation Guide' mentions that 'the obligations arising from the MER UK Strategy are relatively new. Collaboration by participants in the industry is required under Section 9A of the Petroleum Act 1998 (as amended)'. It continues by providing three dimensions: (a) Collaboration is a required action and behaviour in the MER UK Strategy (b) subject always to the safeguards in the Strategy (c) in particular regarding competition law ('Competition and Collaboration' publication).[35] These could be said to be in a nutshell the elements of collaboration in the eyes of the Oil and Gas Authority. The 'Collaboration Implementation Guide' refers clearly only

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performance and delivery; to drive efficiency in project delivery and reduce unit development costs in the UKCS'.

[32] Asset Stewardship Expectations 14.

[33] Oil and Gas Authority, 'SE09 – Collaboration Implementation Guide' (31 March 2017) <https://www.OilandGasAuthority.co.uk/news-publications/publications/2017/implementation-guides-for-joint-venture-hub-strategy-and-collaboration/>. [hereinafter 'Collaboration Implementation Guide']; See also Judith Aldersey Williams, Valerie Allan, Norman Wisely, 'Collaboration – how (OGA intends) to make it happen' (CMS Law-Now e-alert 16.05.2017) < http://www.cms-lawnow.com/ealerts/2017/05/collaboration--how-oga-intends-to-make-it-happen?cc_lang=en>..

[34] Collaboration Implementation Guide 2.

[35] This publication is covered in the next section.

to licensees and joint venturers.[36] It also stresses the point that there should be 'collaborative engagement beyond the immediate joint venture to recognise common interest'.

The second main objective is to promote the use of specific tools and specifically the use of the Oil and Gas Authority Collaborative Behaviour Quantification Tool [hereinafter 'CBQT'].[37] The document also promotes the aims of 'collaboration within a joint venture' and 'commercial collaboration' and suggests again the use of industry documents such as the Commercial Code of Practice [hereinafter 'CCoP'], and the Code of Practice on Access to Upstream Oil & Gas Infrastructure [hereinafter 'ICoP'], as well as the reference guides mentioned in the context of 'Project Delivery' in the Asset Stewardship Expectations.[38]Again, this reinforces the argument of the thesis about the importance of understanding the concept and utility of a contract and commercial management framework.

2.3.3 Competition and collaboration

The Oil and Gas Authority has published a document dealing specifically with the issue of competition and collaboration, as there might be some conflict between these two notions.[39] In the introduction the Oil and Gas Authority uses again a generic 'definition' of collaboration in a similar way as in the 'Collaboration Implementation Guide'. The report states that 'for the United Kingdom's oil and gas industry, collaboration (in its meaning of working together for a common purpose) is not a new

[36] The first main objective is to 'encourage licensees to develop a culture of collaboration within their organisation and to promote greater collaboration within existing joint venture partnerships'. Collaboration Implementation Guide 2.
[37] The first main objective is to 'ensure existing commercial collaboration tools and processes developed by the industry are used more positively and proactively in daily business, and to identify areas for improved collaboration through the use of a simple recognised collaborative behaviour assessment tool, such as the Oil and Gas Authority 'Collaborative Behaviour Quantification Tool'.
[38] Collaboration Implementation Guide 3,4; see also Oil and Gas Authority Press Release (20 April 2017) <https://www.OilandGasAuthority.co.uk/news-publications/news/2017/the-Oil and Gas Authority-emphasises-collaboration-as-key-to-success>.
[39] Oil and Gas Authority, 'Competition and Collaboration' (10 November 2016) 3 <https://www.OilandGasAuthority.co.uk/media/2952/OilandGas Authority_competitioncollaboration_ukcontshelf_16.pdf> [hereinafter 'Competition and Collaboration Report'].

concept (…) – it is a matter of custom and practice, bringing shared knowledge, different perspectives and experience of risk diversification'.[40]

The phrase is worthy of further analysis. It is stated that collaboration can have the meaning 'of working together for a common purpose'. Indeed, as discussed in the section below, that is close to the generic meaning of 'collaboration' that could be found in a dictionary. The report further states that collaboration 'is a matter of custom and practice' in the UKCS. These views are very helpful in order to put collaboration in context with regard to its perception by the Oil and Gas Authority. According to the thesis, the use of the term here is what is described – in the next section – as 'collaboration at the project scope/commercial level'. This means that the mere forming of a joint venture to bid for or operate an offshore oil and gas project can be seen as a form of 'collaboration'. The mere act of operators and the supply chain working on a project, can also be seen as a form of 'collaboration', if the sole criterion is the requirement of 'working together for a common purpose'.

However, the dimension that the thesis wants to distinguish and stress is the one that is termed 'collaboration at the project and contract management level'. This means the way that a project is actually carried out, from the phase of procurement until the completion of the project [hereinafter 'project lifecycle']. This includes issues such as the intended relationship between operators and the supply chain, the types and standard forms of contracts used, the negotiation process and the clauses that allocate risk, the bargaining power of the parties and the degree to which each party leveraged that to its advantage; in other words, the practical, tangible ways in which a project is executed. In that sense, collaboration is far away from 'a matter of custom and practice' in the UKCS, when it comes to the relationship between operators and the supply chain. As already discussed in the introduction, the prevailing ethos at the project and management level has been traditionally adversarial in the UKCS.

The Report provides also a further description which could be a good example of 'collaboration at the project scope/commercial level'. It mentions that the Wood Review placed emphasis 'on the need for Industry's existing collaborative approach

[40] Competition and Collaboration Report 3

to be extended right across all activities – whether in areas such as production efficiency, rig sharing, more effective deployment of new technology, improved shutdown co-ordination, sharing access to key spares or decommissioning'.[41] On another note, it is important to mention for the purposes of this Report the fact that collaboration as a required action and behaviour is a legally binding obligation – or in the phrasing of the Report 'collaboration was elevated from being a matter of general practice to a statutory obligation'.[42]

For the purposes of the thesis, we shall not go into further analysis of the Competition and Collaboration Report, as its requirements and provisions rely heavily on EU competition law, which might be a parameter that will soon be considered and is adapted to refer to UK competition law statutes.[43]

2.3.4 Collaboration in the context of the 'Enhanced Oil Recovery' Strategy

Another document where the notion of collaboration is encountered in the MER Strategy context is the 'Enhanced Oil Recovery Strategy' [hereinafter 'EOR Strategy'].[44] The EOR Strategy explains that Enhanced Oil Recovery – which is the extraction of oil and gas with advanced, non-conventional techniques- could 'extend field life by as much as 10 years', but has not been used up to date extensively due to its higher costs. [45] The EOR Strategy is another example where collaboration among operators and the supply chain is seen as a necessary step in order for the EOR Strategy to be efficient. The EOR Strategy mentions that the Oil and Gas Authority's ambition is 'working with operators and supply chain to support existing polymer EOR projects and ensuring readiness for future projects'.[46] With regard to the supply chain, it is perceived as a factor of cost reduction, whereby 'the creation of a

[41] Competition and Collaboration Report 4.
[42] Competition and Collaboration Report 4.
[43] For further information on this subject see Christopher Jones, Marc van der Woude, Nicolas Charbit and Kryiakos Fountoukakos (eds), *EU Competition Law Handbook 2017* (27th edn, Sweet & Maxwell 2016); Rosalind Kellaway, Rhodri Thompson, and Christopher Brown, *UK competition law: the new framework* (OUP 2015)
[44]Oil and Gas Authority, 'Enhanced Oil Recovery Strategy' (22 July 2016) <https://www.OilandGasAuthority.co.uk/media/1143/eor_strategy_final-2016.pdf> [hereinafter 'EOR Strategy'].
[45] The EOR strategy mentions 'polymer and low salinity water flood techniques as well as other EOR opportunities' as examples, see EOR Strategy 4.
[46] EOR Strategy 4.

competitive, robust supply chain is required to improve polymer EOR economics and reduce risk'.[47] The perspective on collaboration is that 'where possible, share learnings to build EOR knowledge and competency in the UKCS and reduce barriers to EOR development at both producing and future fields'.[48]

Regarding the operators, the Strategy promotes an agenda 'proactively (to) drive operator collaboration and partnerships via EOR workgroups' and 'actively support industry partnerships and collaboration'.[49] The latter point is quite broad and it could theoretically include the supply chain as well. The heading of the Programme does not provide much help as it titled 'Programme 3: Workgroups and industry partnerships'[50], which again could include the supply chain. This observation serves in adding up to the conclusion of this chapter, where it is argued that more precise and harmonised wording in Oil and Gas Authority documents could help in identifying exactly who is supposed to be bound by its policies.

The EOR Strategy is further explained by the 'EOR Delivery Programme'.[51] The EOR Delivery Programme further stresses the importance of cost reduction[52] and collaboration[53], which are used in a specific context for this Strategy. As we may see the supply chain is again seen as an important element in this process, in the context of cost reduction. An interesting point of the EOR Delivery Programme is the element of 'workgroups and industry partnerships'. [54] In this section, the elements of collaboration[55] and risk reduction[56] are two of the key deliverables. As these two definitions demonstrate in this context, the supply chain is again included as a factor

[47] EOR Strategy 7.
[48] EOR Strategy 7.
[49] Ibid.
[50] EOR Strategy 8.
[51] Oil and Gas Authority, 'EOR Delivery Programme' (14 December 2016) <https://www.OilandGasAuthority.co.uk/media/3171/eor_delivery_ver11.pdf>.
[52] 'Cost reduction: the creation of a competitive, robust supply chain to improve polymer EOR economics and reduce risk'; EOR Delivery Programme 4.
[53] 'Collaboration: share lessons learned to build EOR knowledge and competency in the UKCS and reduce barriers to EOR development at both producing and future fields; collective approaches will be developed to manage the risk profile of EOR developments and mitigate common risks'; EOR Delivery Programme 4.
[54] 'Element 3: Workgroups and industry partnerships'; EOR Delivery Programme 10.
[55]EOR Delivery Programme, 'Collaboration: where possible, share lessons learned to build EOR knowledge and competency in the UKCS and reduce barriers to EOR development at both producing and future fields; this will involve operators, supply chain, the Oil and Gas Authority, academia etc.'
[56]EOR Delivery Programme, 'Risk reduction: collective approaches will be developed to manage the risk profile of EOR developments and mitigate common risks'.

within the element of collaboration. Moreover, it would be interesting to have more concrete comments about what the Oil and Gas Authority perceives the 'risk profile of EOR' and 'mitigate common risks' actually entails.[57]The same comments hold true for the 'creating value – improving economics' element of the Strategy.[58]

2.3.5 Collaboration and the supply chain

The Wood Review stressed that there is a 'need for far greater constructive collaboration between operators'.[59] While the statement is abundantly clear with regard to collaboration between operators, the Review did not offer any guidance on whether collaboration should extend to the supply chain as well. The Review acknowledged the importance of the issue, but excluded it from its scope and referred to the relevant provisions of the UK Oil and Gas Industrial Strategy.[60] In turn, the Industrial Strategy did mention that it included efforts to 'sustain and promote the growth of the UK industry's supply chain, in both domestic and international markets' and 'promote purposeful collaboration across industry and between industry and Government', but despite the inclusion of supply chain matters, it did not clarify the business model and preferred relationship type between operators and contractors.[61]

2.3.5.1 The 'Supply Chain Strategy' and 'Supply Chain Delivery Programme'

At this point we shall first analyse the recent Supply Chain Strategy.[62] The Oil and Gas Authority regards the supply chain in a wider nexus and describes it as the 'Supply Chain, Exports and Skills Strategy' [hereinafter 'SCES Strategy']. One of the main goals is to promote the UK supply chain as a whole and increase its competitiveness and reach at an international level. The SCES Strategy also sets out a

[57] EOR Delivery Programme 10.
[58] Ibid.
[59] Wood Review Final Report 5.
[60] Sir Ian Wood, 'UKCS Maximising Recovery Review' (Final Report, 24 February 2014) 63.
[61] Department for Business, Innovation & Skills and Department of Energy & Climate Change, 'UK oil and gas: business and government action plan' (28 March 2013) 2 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/175480/bis-13-748-uk-oil-and-gas-industrial-strategy.pdf>..
[62] Oil and Gas Authority, 'Supply Chain Strategy' (25 October 2016) [hereinafter 'Supply Chain Strategy'] <https://www.OilandGasAuthority.co.uk/news-publications/publications/2016/supply-chain-strategy/>.

vision for the supply chain to 2035 to grow the UK service sector's share of both the domestic and global market.

Regarding the relationship between operators and contractors, the SCES Strategy indentifies as a goal that in order to achieve MER there is a need to 'create new business conditions between operators and the service sector where risk and reward are appropriately balanced'.[63] What is of particular interest is the plan of the Oil and Gas Authority to produce, as part of the Asset Stewardship process, Supply Chain Action Plans with operators. These plans 'will summarise contract strategies, key activities and accountabilities enabling consideration of the best overall value in terms of the MER UK, along with ensuring there has been a level playing field for the UK service sector'.[64] Crucially, the plans will include 'contract strategies', which hints that there might be discussion of preferences for certain contractual models. It will also show in practice the degree to which collaborative contractual models at the project level are included as part of the MER Strategy.

The 'Supply Chain Strategy Delivery Programme' further explains the deliverables of the Strategy and the time plan for their completion. [65] It includes five main elements.[66] What is of particular interest with regard to the contractual models discussed above is the element to 'encourage innovation in business models'.[67] The Delivery Programme mentions as an aim that 'operators communicat[e] demand needs and [are] open to new contracting models'. It is therefore interesting to see what these proposed 'new contracting models' will look like, and whether they will have collaborative elements. Furthermore, in the section for required 'activities', the Delivery Programme includes 'identify[ing] potential value-add contract models from other sectors including aerospace and nuclear which could be implemented in the oil and gas sector' and 'creat[ing] an environment to bring operators and contractors together to

[63] Supply Chain Strategy, 4
[64] Supply Chain Strategy, 9
[65]Oil and Gas Authority, 'Supply Chain Delivery Programme' (24 Oct 2016) [hereinafter 'Supply Chain Delivery Programme']
<https://www.ogauthority.co.uk/media/2833/supply_chain_delivery_master.pdf>
[66] Supply Chain Delivery Programme, 5: '1. Communicate supply chain capability and opportunities to a wide range of stakeholders 2. Encourage innovation in business models 3. Establish and promote mechanisms which reduce industry costs 4. Promote awareness of supply chain opportunities both internationally and domestically 5. Promote a compelling and prosperous supply chain and highlight attractive career paths'.
[67] Supply Chain Delivery Programme 7.

communicate demand opportunities, share learnings and test contract models, including decommissioning'.[68] It also remains to be seen what is meant by the aim to 'test contract models' and which types of contracts it might include.

A further sector where contracting strategies are mentioned is in the context of cost efficiency. It is mentioned that 'information on innovative cost-saving contracting models from individual companies, trade associations and government departments'.[69] This feature is stressed again in the section of the activities that must be undertaken, when it says that the Delivery Programme should 'promote the benefit of standardisation and collaboration and the benefits of adopting new contracting models across all activities'.[70] The Programme links the adoption of new contracting models as a tool to achieve cost efficiency which is an interesting link indeed. Furthermore, in the same element it is mentioned that there is a responsibility to 'revisit existing efficiency initiatives e.g. LOGIC and update as appropriate'.[71] This could mean that the terms of the LOGIC contracts might come under closer scrutiny. However, this thesis suggests that it is not the terms *per se*, but rather the whole contracting process that needs to be assessed.

2.3.5.2 Is the supply chain included indirectly within the MER Strategy scope?

This section examines whether the supply chain falls within the scope of the MER Strategy in an indirect – and probably unintended – way. The thesis only seeks to elucidate the provisions of the MER Strategy and the relevant legislation in order to determine whether the current wording leaves room for confusion. More specifically, it is submitted that there is room for an interpretation that at least some contractors in specific activities could be defined as relevant persons for the purposes of the MER Strategy. As is explained in the next section, this matter does not alter the fundamental focal point of the research, which is how to treat collaborative contractual relationships between operators and the supply chain, regardless of whether that is covered by the MER Strategy or not.

[68] Ibid. 7.
[69] Supply Chain Delivery Programme 8.
[70] Ibid.
[71] Ibid.

The starting point in this examination is evident in that the Oil and Gas Authority and the MER Strategy do not intend to include and regulate the supply chain. For example, the Supply Chain Strategy states that the 'the Oil and Gas Authority does not directly regulate the service sector'.[72] Many parts of the Supply Chain Strategy and the Delivery Programme stress that the Oil and Gas Authority sees the supply chain as a very important sector for the UK offshore sector and lends significant weight to its potential, but it does not intend to regulate the supply chain directly.

It is useful to refer back to section 2.3.1, where it was mentioned that the meaning of 'relevant persons' and 'relevant functions' would be dealt with in conjunction with the question about the supply chain. Both definitions can be found in the annex of the MER Strategy. The definition of relevant persons encompasses 'the Oil and Gas Authority and the persons listed in section 9C of the Petroleum Act 1998 at the date this Strategy is laid in Parliament'. This section was added to the Petroleum Act by virtue of section 41 of the Infrastructure Act 2015, which laid down a set of provisions entitled 'maximising economic recovery of UK petroleum'.[73]As a result, section 9C of the Petroleum Act 1998 as amended reads:

> 'Carrying out of certain petroleum industry activities
>
> (1) A person who is the holder of a petroleum licence must act in accordance with the current strategy or strategies when planning and carrying out activities as the licence holder.
>
> (2) A person who is an operator under a petroleum licence must act in accordance with the current strategy or strategies when planning and carrying out activities as the operator under the licence.
>
> (3) A person who is the owner of upstream petroleum infrastructure must act in accordance with the current strategy or strategies when planning and

[72] Oil and Gas Authority, 'Supply Chain Strategy' (25 October 2016) 3 <https://www.OilandGasAuthority.co.uk/media/2834/supply_chain_strategy_1016.pdf>.
[73] Infrastructure Act 2015 s.42 <http://www.legislation.gov.uk/ukpga/2015/7/pdfs/ukpga_20150007_en.pdf>.

carrying out the person's activities as the owner of upstream petroleum infrastructure (including the development, construction, deployment and use of the infrastructure).

(4) A person must act in accordance with the current strategy or strategies when planning and carrying out the commissioning of upstream petroleum infrastructure'.

Paragraphs (1) and (2) are transparent about their scope; they refer to the 'holder of a petroleum license' and 'operator under a petroleum license', which means that only operators and other co-licensees or co-venturers of a joint venture could fall within this provision. However, the scope of paragraphs (3) and (4) is more complex.

In paragraph (3), the 'relevant person' is 'a person who is the owner of upstream petroleum infrastructure'. *Prima facie*, one might assume that upstream petroleum infrastructure would probably include an offshore installation, such as an exploration or production platform. In that case, it is very probable that the owner of such upstream infrastructure could very well be a contractor, as operators commonly hire offshore platforms that belong to contractors. The most obvious example, due to the press it received, is the case of the Deepwater Horizon, where BP (operator) hired the offshore rig, Deepwater Horizon, from the owner of the rig Transocean (contractor). In that case, according to the definition in paragraph (3), one could assume that this contractor would fall within the scope of a 'relevant person' under the MER Strategy.

However, 'upstream petroleum infrastructure' must still be defined, and its definition is not as straightforward as it seems. In section 9H of the Petroleum Act 1998, as amended by the Infrastructure Act 2015, 'upstream petroleum infrastructure' is defined as:

'Upstream petroleum infrastructure' and its owners: (1) In this Part 'upstream petroleum infrastructure' means – (a) a gas processing facility, (b)

an oil processing facility, or (c) an upstream petroleum pipeline, if and in so far as it meets conditions A and B'.[74]

In turn, paragraph (5) of section 9H refers, for the definition of these terms, to Energy Act 2011.[75] To complete the picture, the thesis cites the definitions of 'gas processing facility'[76], 'oil processing facility'[77] and 'upstream petroleum pipeline'[78] according to section 90 of the Energy Act 2011. Furthermore, paragraph 6 of section 9H of the Petroleum Act 1998 defines what is meant by 'owners' of the above defined 'upstream petroleum infrastructure'.[79]

It is interesting to juxtapose the definition of 'upstream petroleum infrastructure' that derives from the provisions that the MER Strategy points to, with the definition of 'infrastructure' that the MER Strategy spells out. The definition of 'infrastructure' in the annex of the MER Strategy is: 'terminals and, upstream of a terminal, equipment, pipelines, platforms, production installations and subsea and subsurface facilities'.[80] In our view, this is a much more logical and natural definition in the context of the offshore oil and gas industry, as it includes all upstream infrastructure. It is also worth considering what the result would be if the MER Strategy's definition of 'infrastructure' was substituted with the term 'upstream petroleum infrastructure',

[74] Infrastructure Act 2015, 9H.; The rest of the section describes what is meant under 'pipelines' in terms of jurisdiction with regard to the UK and Norwegian pipeline systems, which is not relevant for the purposes of the argument.
[75] '(5) In this section, the following expressions have the same meanings as in Chapter 3 of Part 2 of the Energy Act 2011 (see section 90 of that Act): (a) "gas processing facility"; (b) "oil processing facility"; (c) "upstream petroleum pipeline"'.
[76]Energy Act 2011s.90: ' "gas processing facility" means any facility which – (a) carries out gas processing operations in relation to piped gas; (b) is operated otherwise than by a gas transporter; and (c) is not an LNG import or export facility (within the meaning of section 12 of the Gas Act 1995)'
[77] Energy Act 2011s.90: ' "oil processing facility" means any facility which carries out oil processing operations'.
[78]Energy Act 2011s.90: ' "upstream petroleum pipeline" means a pipeline or one of a network of pipelines – (a) which is operated or constructed as part of a petroleum production project and is not a carbon dioxide pipeline; (b) which is used to convey petroleum from the site of one or more such projects – (i) directly to premises, in order for that petroleum to be used at those premises for power generation or for an industrial process; (ii) directly to a place outside Great Britain; (iii) directly to a terminal; or (iv) indirectly to a terminal by way of one or more other terminals, whether or not such intermediate terminals are of the same kind as the final terminal; or (c) which is used to convey gas directly from a terminal to a pipeline system operated by a gas transporter or to any premises.'
[79]Infrastructure act 2015, 9H (6): 'In this Part, "owner", in relation to upstream petroleum infrastructure, means – (a) a person in whom the pipeline or facility is vested; (b) a lessee and any person occupying or controlling the pipeline or facility; and (c) a person who has the right to have things conveyed by the pipeline or processed by the facility'.
[80] MER Strategy, Annex 14.

which the MER Strategy references. It may then become apparent that a contractor who is the owner of 'infrastructure', e.g. an owner of an offshore platform that is leased to an operator, would fall within the scope of a 'relevant person'.

Returning to the original line of thought: can contractors be regarded as 'relevant persons' for the purposes of the MER Strategy, in light of section 9H para (3) of the Petroleum Act 1998, as amended? To answer this, three separate questions must be considered: whether a contractor can be the 'owner' of a 'gas processing facility'; whether a contractor can be the 'owner' of an 'upstream petroleum pipeline'; and finally, whether a contractor can be the 'owner' of an 'oil processing facility'.

In the first case, it is clear that subparagraph (c) of the Energy Act 2011 excludes LNG operations.[81] However, it could be possible for a contractor to 'carry out gas processing operations in relation to piped gas'.[82] The second possibility, i.e. whether a contractor could potentially fulfil one of the services described in the definition of an 'upstream petroleum pipeline', is dubious.[83]

However, what is of interest and not far from the reality of offshore oil and gas operations – quite the opposite – is the third possibility: a contractor being the 'owner' of an 'oil processing facility'. In this case, it is tempting to consider the outcome if an operator hired a Floating Production Storage and Offloading [hereinafter 'FPSO'] or similar unit from a contractor. As is well established, FPSO's can be highly complex and can carry out quite a diversified spectrum of services, including drilling, production, petroleum processing, loading and unloading of petroleum to oil tankers.[84] In that case, it could be argued that the potential 'oil processing services' that can be offered by an FPSO do fall within the definition of an 'oil processing facility', as the definition of the Energy Act 2011 section 90 is that 'oil processing facility means any facility which carries out oil processing operations'. [85]

[81] See supra n. 74
[82] Ibid. subparagraph (a).
[83] See supra n. 76
[84] Bluewater, 'What is an FPSO?' < http://www.bluewater.com/fleet-operations/what-is-an-fpso/>.; see also Lucia Lombardo, 'Overview of Floating Production, Storage and Offtake (FPSO) Services Agreements' (2003) 22 ARELJ.
[85] Energy Act 2011, s.90 (emphasis added).

Along the same line of thought, the same rationale could be applied in the case of Mobile Offshore Drilling Units (MODU's). [86] The oil and gas industry would not refer to an exploration 'platform'; the term platform is generally being used to refer to a permanently fixed structure.[87] In practice, it would be unusual for a contractor to lease a platform to an operator, but it is very common for contractors to lease MODU's or floating production vessels to operators. For example, in the case of Macondo, the mobile drilling rig 'Deepwater Horizon' was leased by Transocean to BP in order to conduct the activities of exploration, appraisal and drill production wells. Such a MODU could not be described as an 'oil processing facility' for the purposes of the Energy Act 2011. However, this thesis highlights the possibility of the following scenarios: first, it is common in practice that the MODU which completed the production well will produce a limited amount of oil and run a well test which usually lasts for several days (and potentially weeks) before its substitution by the production facility that will take its place. In the period of these days, it could be argued that the MODU – in the case that it is leased by a contractor – performs the activities of an 'oil processing facility'. Second, although it is not the norm, there have been cases evincing the fact that MODU's have been used for production as well.[88] In this case this could fall as well under the scope of an 'oil processing facility'.

In paragraph (4) of section 9C of the Petroleum Act 1998, a 'relevant person' 'must act in accordance with the current strategy or strategies when planning and carrying out the commissioning of upstream petroleum infrastructure'. Applying the same line of thoughts *mutatis mutandis*, it could be argued that contractors again potentially fall within this scope. This could be the case with regard to an 'oil processing facility' if, for example, a contractor was required to 'plan and carry out the commissioning' of an FPSO as a service to an operator. The same could be said for the commissioning of an 'upstream petroleum pipeline'. This argument is further enhanced by the

[86] This is the most common term used to describe this type of equipment. However, other terms are also used, such as 'mobile offshore units' or 'mobile drilling rigs' depending on the exact function of the equipment; See Petrowiki, 'MODU types' <http://petrowiki.org/MODU_types>..

[87] Hossein Esmaeili, *The Legal Regime of Offshore Oil Rigs in International Law* (Routledge 2017); Michael White QC, 'Offshore Craft and Structures: A Proposed International Convention' (1999) 18 AMPLJ.

[88] That was the case in the redevelopment of the Alma / Ardmore field in the North Sea, see <http://www.offshore-technology.com/projects/alma-ardmore-field-development/>.

Infrastructure Act's explanatory notes on this section.[89] Unfortunately, The Hansard References on the discussion of the Act do not shed more light on this particular issue.[90] Rather, the fact that the relevant clauses on the MER Strategy were not debated may be an indicator of the wide acceptance of the MER Strategy by both Houses. [91]

2.4 THE NOTION OF 'COLLABORATION' BEYOND THE MER STRATEGY CONTEXT

2.4.1 Generic use of the word 'collaboration'

The previous section thoroughly examined the various instances where the term 'collaboration' is encountered in the MER Strategy. However, the term does have a generic meaning – and potentially a technical meaning – outside the scope of the MER Strategy. Starting with the generic meaning of the word, the first reference point

[89] Infrastructure Act 2015, Explanatory notes, s.41 para [247] 'New section 9C places duties on licence holders, operators appointed under those licences and owners of upstream petroleum infrastructure to carry out certain identified activities in accordance with the strategy. Subsection (4) places a duty on a person planning and carrying out the commissioning of upstream petroleum infrastructure. This is necessary because that person may not be the owner of such infrastructure and would not fall within subsection (3).' [emphasis added]
< http://www.legislation.gov.uk/ukpga/2015/7/notes/division/4/6/3/1>.

[90] The Hansard References indicate that the relevant provisions of the MER Strategy were not debated in detail – that was the case in both Houses. The clauses were directly introduced into the Bill without further debate: 'Clauses 40 to 45 ordered to stand part of the Bill', see Committee Debate, 9th sitting, House of Commons (13 January 2015) [Column number 320]. There are two other instances where the MER Strategy is discussed: the first is in the House of Lords, see Report, 3rd sitting, House of Lords (10 November 2014) [columns 34-38]. In that instance, Baroness Verma reiterated the importance of commercial arrangements for the MER Strategy: 'Amendments 113C to 113F seek to remove from Clause 30 all references to commercial arrangements. This issue is clearly of the utmost importance, since a great deal of what industry does in its efforts to maximise the recovery of offshore oil and gas is affected through oil and gas's commercial arrangements with one another. Never in the history of the UKCS has this been more true than today. As set out in the Wood review, collaboration between licence holders, operators and infrastructure owners will be a key requirement to meet the challenge of maximising economic recovery from the UKCS. Clause 30 provides for this and makes collaboration a central part of the principle of maximising the economic recovery of UK petroleum. However, the Government recognise the legitimate concerns that industry has raised about the way in which commercial arrangements are dealt with in the clause. The industry is concerned that it may have an adverse impact on investment in the UK continental shelf, and we take those concerns seriously. It is not in anyone's interests to undermine investment in the UKCS at such an important time.' The second instance where the MER Strategy is debated is in the House of Commons, see Committee Debate, 7th sitting, House of Commons (8 January 2015) [Column number 249- 257]. In this case, an amendment was put forth to both 'extend the 'maximising economic recovery' principal objective to include co-ordination of the transport and storage of carbon dioxide' and to elect that the Oil and Gas Authority should also undertake the responsibility of 'the co-ordination of the transportation and storage of CO2'. The amendments were rejected. All aforementioned sources are available at <http://services.parliament.uk/bills/2014-15/infrastructure/stages.html>..

[91] Supra, 'Clauses 40 to 45 ordered to stand part of the Bill', see Committee Debate, 9th sitting, House of Commons (13 January 2015) [Column number 320].

would be to look up the dictionary definition of collaboration. The definition according to the Oxford dictionary is 'the action of working with someone to produce something'.[92] Indeed, 'collaboration' is used so often in everyday life with this meaning that there is no doubt that the average person would have a separate conception about the word. This dictionary definition is also not far from the phrasing by the Oil and Gas Authority when referring to the generic meaning of collaboration – 'working together for a common purpose'.[93] In an industry context, there have been other definitions, e.g. the report by Ernst and Young about the Australian oil and gas sector defined collaboration as 'the ability of the various players in the industry to design "healthy, dynamic and resilient interconnected networks", capable of mobilising the right resources, at the right time, to execute and innovate as barriers emerge'.[94] Apart from the generic meaning of the word, what is more crucial to the thesis is the analysis of collaboration's technical meaning. The thesis suggests that the technical meaning could be classified into two categories for the purposes of this research: the project scope/commercial dimension and the legal dimension.

2.4.2 Disentangling the different dimensions of the notion of collaboration

2.4.2.1 Contract 'model', 'type', 'strategy' and the relevance to the MER Strategy

An observation from reading the publications of the Oil and Gas Authority is that there is a plethora of similar terms regarding contracts and contracting, which are used interchangeably. The thesis suggests that the most common terms used are contract 'model', 'type' and strategy'. Some examples could elucidate this observation.

In the Supply Chain Delivery Programme, one of the five elements is to 'encourage innovation in business models'. This requirement includes requirements such as: 'operators communicating demand needs and being open to new contracting models'; 'identify potential value-add contract models from other sectors including aerospace

[92] Oxford dictionaries < https://en.oxforddictionaries.com/definition/collaboration>.
[93] Competition and Collaboration Report 3.
[94] EY, 'Delivering a step change in organisational productivity: Findings from the Australian Oil & Gas Productivity and Innovation Survey' (May 2013) 7 <http://www.ey.com/Publication/vwLUAssets/Delivering_a_step_change_in_organisational_productivity/$FILE/Delivering_a_step_change_in_org_prod.pdf >.

and nuclear which could be implemented in the oil and gas sector'; 'create an environment to bring operators and contractors together to communicate demand opportunities, share learnings and test contract models, including decommissioning'.[95] Furthermore, the element to 'improve cost efficiencies' spells out the following recommendations: 'information on innovative cost-saving contracting models from individual companies, trade associations and government departments'; '[p]romote the benefit of standardisation and collaboration and the benefits of adopting new contracting models across all activities'.[96] Moreover, the MER UK SCES Board and the Efficiency Task Force shall 'revisit existing efficiency initiatives e.g. LOGIC and update as appropriate' and that the ETF must 'develop good practice and standardisation models to drive new behaviours'.[97]

In sum, only in the aforementioned documents, the following terms can be found: 'tendering and contracting behaviours and the relationships between market players, in particular between operators and different tiers of the supply chain'; 'innovative business models'; 'new contracting models'; 'value-add contract models'; 'innovative cost-saving contracting models'; 'benefits of adopting new contracting models'.

The obvious question that arises is as to what the specific meaning is of all these terms. The Oil and Gas Authority does not clarify their meaning. Moreover, there is a lack of congruency in the use of these terms, which makes the ascertainment of the meaning even more difficult. The second point, which veers into the territory of speculation, is that the Oil and Gas Authority probably uses these terms in what the thesis describes in the following section as the 'project scope/commercial' meaning. Given the technical background of the majority of the Oil and Gas Authority staff, and also the relatively scarce legal comments in its publications, one may assume that this is the dimension they refer to. Perhaps in future publications – as many projects are currently in development – the features of the 'innovative business models', 'new contracting models' and 'value-add contract models' that the Oil and Gas Authority favours will be specified.

[95] Supply Chain Delivery Programme 7
[96] Supply Chain Delivery Programme 8.
[97] Supply Chain Delivery Programme 8.

2.4.2.2 The project scope/commercial dimension of collaboration

The first dimension of the technical meaning is, in the thesis' terminology, the 'project scope/commercial' dimension of collaboration. In every enterprise, decisions are made every day regarding myriad matters: strategy, planning, coping with competition and finance, to name a few. In the offshore oil and gas industry, a company and its decision makers do as well make similar decisions: going forward with a project or not, how to finance projects, investing in a new technology, the prospects of the market and competition and the company's strategy – to indicate a few. In this context, 'collaboration' could be one more of the items in the list. For example, issues such as choosing partners in order to form a joint venture, 'farming in or out' of a project, and choosing the suppliers are some examples of what might be included in the concept of 'commercial decisions'. In a similar fashion, the 'project scope' dimension signifies which route to take at the practical level; what kind of project to undertake and how to proceed from an engineering, technological and practical way of view.

It might be helpful to mention some specific examples from the UK offshore oil and gas industry and the context of the MER Strategy. The UK offshore industry has been collaborating in this generic sense for many decades. Recent examples would include the project pathfinder set up by the Oil and Gas Authority and OGUK,[98] the 'Hackathon' events where operators and contractors brainstorm to generate innovative ideas,[99] the dissemination by the Oil and Gas Authority of 'Case Studies of MER UK in action'[100] and the Oil and Gas Authority 'Open Data' platform,[101] to name a few important initiatives.

[98]Oil and Gas Authority, 'Project pathfinder' <https://www.OilandGasAuthority.co.uk/supply-chain/project-pathfinder/>.; The Project pathfinder lists the active projects in the UKCS in order to facilitate industry intelligence on the current state of the market and promote potential room for cooperation between the companies.

[99] See for example the results of recent 'Hackathons' organised by the Oil and Gas Authority; Oil and Gas Authority, 'Collective Thinking-SNS Hackathon Report' (9 January 2017) <https://www.OilandGasAuthority.co.uk/news-publications/publications/2017/collective-thinking-sns-hackathon-report/>.; Oil and Gas Authority, 'Well Construction Cost Reduction Hackathon Output Report' (31 January 2017) <https://www.OilandGasAuthority.co.uk/media/3254/tlb-workgroup-hackathon-output-report.pdf >.

[100] Oil and Gas Authority, 'Case Studies of MER UK in action' <https://www.OilandGasAuthority.co.uk/about-us/performance/case-studies-of-mer-uk-in-action/>.

[101]Oil and Gas Authority, 'Open Data' <http://data-Oil and Gas Authority.opendata.arcgis.com/>.

The common thread among these initiatives is that they are all business decisions, and in this way, collaboration is used in a generic manner. The reason for explaining this distinction is that it is necessary in order to juxtapose the generic definition with the legal dimension, which is analysed in the section below. Briefly, it is possible for an operator and contractor to 'collaborate' – in the commercial meaning of the word – in many different ways, e.g. to work together in a 'Hackathon' in order to develop an innovative technology, but at the same time have an adversarial contractual relationship in the project that they are working on together.

This point also highlights the issue of the relationship between the project scope/commercial and legal dimension of contracts and contract law, which is crucial to the research. Contracts and contracting may be studied from many perspectives and academic disciplines, e.g. project management, economic theory, organisational and enterprise management, among others. Some examples are useful to illustrate this point. Project management relates to the 'project scope' and the contract type used. In the construction (and offshore construction) industry, contract types could include 'Engineering, Procurement and Construction' [hereinafter 'EPC'], 'Engineering, Procurement and Construction with Long Lead Items [hereinafter EPC with 'LLIs']', 'Engineering, Procurement and Construction Management' [hereinafter 'EPCM'] and 'Progressive Lump Sum' [hereinafter 'PLS'].[102] In other niche activities of the offshore oil and gas industry, such as decommissioning, there may be further specialised types of contracts.[103]

Procurement systems can include, for example, separated procurement systems,[104] integrated procurement systems,[105] management-orientated procurement systems,

[102]Carolin Schramm, Alexander Meissner, Gerhard Weldinger, 'Contracting strategies in the oil and gas industry' (2010) Pipeline Technology Journal.
[103]For example, the types of 'operator led reimbursable contract' and 'lump sum Engineer, Procure, Remove, Dispose (EPRD) contract' that are often used in the decommissioning industry, see Oil and Gas UK, 'Decommissioning Contract Risk Allocation Report 2015' 5 <http://oilandgasuk.co.uk/wp-content/uploads/2015/11/Decommissioning-Contract-Risk-Allocation-2015-Secure.pdf>.
[104] D. Lowe (ed), *Commercial Management: Theory and Practice* (Wiley-Blackwell 2013) 302
[105] Ibid. 302, 'Design-build; Package deal; Turnkey; Build-Own-Operate-Transfer (BOOT) – The BOOT system can be further categorised in Build-Own-Operate (BOO) and Design-Fund-Build-Operate (DFBO); Design and Manage; Public-Private Partnerships (PPP) and Private Finance Initiative (PFI)'.

collaborative arrangements, term contracting and e-Procurement. Interface management includes the use of specific software tools that assist project management, for example PRINCE2 and PMBOK, among others.[106]

The pricing mechanisms is another way to classify, and in the offshore industry it usually takes the form of fixed-price, cost-reimbursable and unit rate/charters contracts.[107] Finally, another extensive area researched in economic theory and management is the issue of contract incentives and the optimal way that they should be structured. [108]A notion that is gaining ground here is the use of performance-based contracts.[109]

All aforementioned dimensions tend to receive rather different taxonomy and terminology influenced by the discipline and prism under which they originate. The thesis suggests that this is one of the main reasons of confusion among terms such as contract 'model', 'type' and 'strategy', which may have a function distinct from the legal dimension of contracting; these two issues are examined below.

2.4.2.3 The legal dimension of collaboration

The legal dimension of collaboration has a distinct meaning. Its main meaning is about the intended business relationship that the parties wish to develop throughout the contract lifecycle. The two extremes of the pendulum would be a completely arm's length, discrete and separate position – which tends to be termed an 'adversarial' business practice – and close co-operation that tends to be described as a

[106] Ibid.
[107] John van der Puil and Arjan van Weele, *International Contracting: Contract Management in Complex Construction Projects* (Imperial College Press 2014)
[108] Petter Osmundsen, Terje Sorenes, Anders Toft, 'Drilling contracts and incentives' (2008) 36 Energy Policy 3138; Petter Osmundsen, Anders Toft, Kjell Agnar Dragvikb, 'Design of drilling contracts – Economic incentives and safety issues' (2006) 34 Energy Policy 2324; K.S. Corts, J. Singh, 'The effect of relationships on contract choice: evidence from offshore drilling' (2003) Working Paper, Harvard University.
[109] Kostas Selviaridis Andreas Norman, 'Performance-based contracting in service supply chains: a service provider risk perspective' (2014) 19 [2] Supply Chain Management: An International Journal 153.
For more information about the management literature that focuses on the type of the selected contract, see Kostas Selviaridis, Finn Wynstra, 'Performance-based contracting: a literature review and future research directions' (2014) International Journal of Production Research.

'collaborative' business practice. Furthermore, the intended business relationship in turn influences the contract form and content. In terms of the contract form, it could mean insisting on using the company's in-house drafted standard agreement, which is a common practice used by the oil majors, or agreeing on another standard form agreement perceived to be in favour of the operator or the contractor (which usually depends on the body that has published the form). On the other hand, in a collaborative relationship, the contract form could mean choosing a standard model that is designed to be collaborative (these contracts are analysed in chapter 3). In regard to the contract terms, the differences are reflected in the drafting and the clauses that are used, which are completely different in the case of an adversarial and a collaborative business model. In turn, the drafting, language and terms that are used ultimately raise legal questions in litigation – with different challenges in each case.

For example, the challenging legal questions in the adversarial archetype were, as explained in chapter 1, questions about the exclusion of liability, limitation of liability, consequential loss, force majeure, and other 'risk allocation' clauses. In a collaborative archetype, the legal questions that emerge regard the extent and meaning of collaboration, the rights and responsibilities of the parties and the limits of the self-interest of each party, among others. In terms of contract doctrine, this could mean issues of the meaning of good faith, 'quasi good faith' clauses, and relational contracts. A series of these cases have arisen in recent years, and this topic is addressed in chapter 4.

2.5 CHAPTER CONCLUSION

This chapter provided an overview of the MER Strategy and the Oil and Gas Authority and their general aims and scope. The main aim of the chapter was to ascertain the meaning of collaboration both within and beyond the MER Strategy.

The first conclusion regards the meaning of collaboration within the MER Strategy context, as well as the Oil and Gas Authority's perception of this term. The chapter demonstrates that the term has two main meanings within the MER Strategy framework: (a) 'required action and behaviour' under the MER Strategy, and (b) a separate obligation under the Asset Stewardship Strategy and the Asset Stewardship

Expectations.[110] It should be stressed that the 'required action and behaviour' is a legally binding obligation. The Collaboration and Competition Report is a necessary accompanying document that helps delimit the boundaries of this legally binding obligation. As regards the second main aspect, collaboration is one of the ten Asset Stewardship Expectations. It does not have a legally binding effect in the context of the Asset Stewardship Strategy. Apart from these two main meanings, however, the word 'collaboration' is encountered in miscellaneous uses – sometimes in an inconsistent manner – in various other Oil and Gas Authority publications. As demonstrated, one example is its use for the purposes of the Enhanced Oil Recovery Strategy. A second example is the generic definition expressed in the Competition and Collaboration Report, where the word has the means 'working together for a common purpose'. Similarly, there seems to be a plethora of synonyms used by the Oil and Gas Authority regarding the terms 'contract type', 'contract model' and 'contract strategy', without a clear explanation of the meaning of these terms.

The second conclusion is about the relevance of the MER Strategy to the supply chain. As mentioned in the introduction of the chapter, the MER Strategy is clearly intended to be applicable to one side of the offshore oil and gas industry – the operators' side[111]. However, the chapter argues that the current wording used could leave room for interpretation that certain contractors undertaking certain projects (i.e. leasing of and providing services on FPSO's and MODU's) could fall within the scope of the MER Strategy. The thesis' argument is that current wording leaves room for confusion and this could be remedied by the Oil and Gas Authority in the future. In any case, the chapter stressed that the intention of the Oil and Gas Authority is not to include the supply chain within the MER Strategy. The core question however remains: what is the preferred method of contracting between operators and contractors in the offshore oil and gas industry? If a collaborative contracting model is seen as a preferred solution, then the question of the meaning of collaboration in English contract law remains relevant and unanswered; the only part of the question that is answered is that the MER Strategy, its concepts and its definitions, are not

[110] The conclusion refers to the main aspects of collaboration. Other dimensions include the use in the context of the 'Enhanced Oil Recovery' Strategy, as discussed in section 2.3.4

[111] In the interest of preciseness, 'the operators' may include many different legal entities and does not refer only to the actual operator, but also to the co-licensees and potential joint venturers under the license.

relevant and should not be taken into account. Therefore, the answer to this question is addressed in chapter 4.

The third conclusion argues that the term collaboration has two discrete dimensions, a project scope/commercial and a legal. The thesis does not suggest that there is a strong polarisation between these elements – there are certainly commercial elements in the legal dimension and vice-versa. The thesis argues rather that failing to understand the characteristics and differences between these two dimensions is the main cause for the inconsistency in the use of terms such as contract 'model', 'type' and 'strategy', which have been used interchangeably, but with no specified meaning, in various Oil and Gas Authority publications. It is submitted that it is also important for the Oil and Gas Authority to express its position on the legal dimension of contracting. In this matter, the stance of the Oil and Gas Authority is open to speculation. Given the fact that the Oil and Gas Authority views itself as a 'light touch' regulator, it would most probably leave it up to the industry to choose the type of contracting and relationship they see fit. The Oil and Gas Authority would probably not introduce an 'obligation' for collaborative contracting between operators and contractors. Yet, the Oil and Gas Authority taking a bolder stance and endorsing collaborative contracting is an idea worth considering, in the author's opinion. The rationale in this case is that the Oil and Gas Authority acknowledges in many instances that collaboration is a key element for the effectiveness of the MER Strategy. Also, the Supply Chain Strategy makes abundantly clear in many instances the need for operator-contractor collaboration. Therefore, the next logical step in this direction would be for the Oil and Gas Authority to 'influence' the use of this type of contracting. After all, one of the three main roles of the Oil and Gas Authority, set out in its initial strategy, is to 'influence'[112] '(…) the UK oil and gas industry to achieve its statutory principal objective of maximising the economic recovery of UK offshore oil and gas resources'.[113]

[112] The exact description of the role of 'influence' is even more indicative of this argument: 'the Oil and Gas Authority has a critical role to influence and encourage a culture of greater cooperation and collaboration on the UKCS, improved commercial behaviours, and the creation of a lower cost, more efficient industry'; see note infra

[113] Oil and Gas Authority, 'Oil and Gas Authority Corporate Plan 2016 – 2021' (4 March 2016) 1 <https://www.OilandGasAuthority.co.uk/news-publications/publications/2016/oil-and-gas-authority-corporate-plan-2016-2021/>.

CHAPTER 3

‘MODERN CONTRACTING’ AND ‘CONTRACT AND COMMERCIAL MANAGEMENT’ IN THE CONTEXT OF OFFSHORE OIL AND GAS CONTRACTING

3.1 CHAPTER INTRODUCTION

This chapter focuses first on the difference between ‘traditional’ and ‘modern’ contracting. These terms are not legal terms of art and require an explanation about their legal context. Even at this introductory stage, it should be stressed that these terms do not imply a simplistic ‘traditional is bad’ and ‘modern is good’ approach. Rather, they signify a difference in school of thought, whereby the ‘traditional’ approach adopts a ‘static’ role for a contract, and the ‘modern’ approach advocates a more ‘dynamic’ role and provides tools expected to be used throughout the contract lifecycle. The chapter explains the development of modern contracts by examining their evolution in the context of the construction industry, as this is the industry within which these concepts were first conceived and later evolved; furthermore, the chapter provides examples of ‘modern contracts’ and explains their characteristics. This discussion is necessary to reach the ultimate aim of evaluating the relevance of traditional and modern contracts to offshore oil and gas contracting in the UK and if, or the extent to which, they should be adopted in light of the MER Strategy.

The second section, which is closely connected to the notion of modern contracting, explains the potential and importance of ‘contract and commercial management’ [hereinafter ‘CCM’]. The academic taxonomy of CCM is explained in this section; the chapter also considers that CCM is closer, from an academic taxonomy perspective, to the discipline of management (or project management) rather than law. However, the thesis argues that the legal discipline should also give due account to its potential to lead to sustainable and successful contracts, and hence, successful projects.

Finally, the chapter applies conclusions about CCM to the specific context of offshore oil and gas contracting and the MER Strategy. The thesis argues that the instruments that have already been developed and published by the Oil and Gas Authority and other industry bodies, can be said to have created – or taken concrete steps towards creating – a sector-specific body of norms tailored for the offshore oil and gas industry. The thesis stresses the importance of this realisation, and analyses the most influential documents that form the skeleton of this sector-specific body of documents.

3.2 THE NOTIONS OF 'TRADITIONAL' AND 'MODERN' CONTRACTING

As already mentioned, the terms 'contract' and 'contracting' have separate meanings for the purposes of the thesis.[1] A contract is 'an agreement giving rise to obligations which are enforced or recognised by law', whereas 'contracting' is used to signify the process of negotiating, signing and administering a contract from the beginning to the end of its lifecycle ('contract lifecycle').[2] The offshore industry may be characterised as a 'project-based industry', including the construction, manufacturing, IT and pharmaceutical industries among others. From an academic viewpoint, these industries are frequently examined together, as they share common characteristics, such as complex supply chains and interdependence between the stakeholders of a project. In the following sections the thesis draws examples and insight from the contracting practice of the UK construction industry, to cross-fertilise the contracting paradigm in the offshore oil and gas industry.

3.2.1 The evolution of the 'modern contract' in the UK construction industry

The classic definition of a contract as 'an agreement giving rise to obligations which are enforced or recognised by law' summarises succinctly what is perceived to be the 'traditional' role of a contract. Within this definition, the contract has a more 'static' role, i.e. it works mainly as a documentation of the rights and responsibilities of the parties. In traditional contracting the phases of the contract lifecycle, the negotiations

[1] See supra section 1.2.4

[2] For a detailed explanation of the notion of 'contract lifecycle' see John van der Puil, Arjan van Weele, *International Contracting: Contract Management in Complex Construction Projects* (Imperial College Press 2014) 65.

to reach an agreement and the execution of the project/contract are non-standardised; this means that they follow no particular best practice guide or method. The factors prevalent in a traditional contracting environment are the risk appetite of each party, its overall business strategy, the company culture and the bargaining power. Traditional contracts are drafted 'defensively' to maximise the benefits and avoidance of liability of each party.[3] The result of traditional contracting is that contract clauses prove advantageous if litigation occurs, rather than focusing on the optimal execution of the contract – and the project.

The weaknesses and limitations of traditional contracting became apparent and the first attempt to be tackled took place in the UK was in the construction industry. The notion of 'modern' contracts is not as recent as one might presume, since it is was introduced in UK literature and practice after the influential construction reports in the nineties: the Latham Report in 1994[4] and Egan Report in 1998.[5] The Latham Report aimed to address the concern of the UK construction industry that procurement methods were outdated and that post completion claims were lengthy and expensive. One of the key recommendations of the Latham Report was that 'endlessly refining existing conditions of contract will not solve adversarial problems. A set of basic principles is required on which modern contracts can be based. A complete family of interlocking documents is also required'.[6] In this way, the concept of a 'modern' contract, which departed from the 'traditional' function of a contract as a set of general terms and conditions, was introduced. The Latham Report also drew attention to the importance of the underlying business relationship, and suggested that adversarial business relationships would inescapably engender tension between the

[3] See the thesis introduction for the description of the general contracting practice in the UK offshore oil and gas industry.

[4] Michael Latham, 'Constructing the Team: Joint Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry' (Final Report July 1994). [hereinafter 'Latham Report']

[5] John Egan, 'Rethinking Construction' (Department of Trade and Industry 1998) <http://constructingexcellence.org.uk/wp-content/uploads/2014/10/rethinking_construction_report.pdf>. [hereinafter 'Egan Report']

[6] Michael Latham, 'Constructing the Team: Joint Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry' (Final Report July 1994) vii <http://constructingexcellence.org.uk/wp-content/uploads/2014/10/Constructing-the-team-The-Latham-Report.pdf>.

parties. The Latham Report spells out what it considers to be the main characteristics of a modern contract[7], which will be further analysed below.

3.2.2 Characteristics and examples of 'modern' contracts

Having explained the evolution and the influence of the Latham Report, it is necessary to draw conclusions about the most important characteristics of modern contracts. First, the role of a modern contract is to function as a 'roadmap' for the execution of the project. It also emphasises embedded project management tools, such as risk register, early warning system, joint teams and regular communication among the parties and others. The risk register is an example of a contractual management tool perceived to assist in the 'joint risk management' of the project, and to address the problems associated with the 'risk transfer culture' described in the introductory chapter. The use of risk registers was also recommended in a specialised report on the management of the Government's services contracts published by the National Audit Office [hereinafter 'NAO'],[8] and is also proposed as best practice by the BSI Standard BS 11000-1:2010'.[9]

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[7] Latham Report 37, para 5.18 'A modern contract: the most effective form of contract in modern conditions should include: 1. A specific duty for all parties to deal fairly with each other, and with their subcontractors, specialists and suppliers, in an atmosphere of mutual cooperation. 2. Firm duties of teamwork, with shared financial motivation to pursue those objectives. These should involve a general presumption to achieve 'win-win' solutions to problems which may arise during the course of the project. 3. A wholly interrelated package of documents which clearly defines the roles and duties of all involved, and which is suitable for all types of project and for any procurement route. 4. Easily comprehensible language and with Guidance Notes attached. 5. Separation of the roles of contract administrator, project or lead manager and adjudicator. The Project or lead Manager should be clearly defined as client's representative. 6. A choice of allocation of risks, to be decided as appropriate to each project but then allocated to the party best able to manage, estimate and carry the risk. 7. Taking all reasonable steps to avoid changes to pre-planned works information. But, where variations do occur, they should be priced in advance, with provision for independent adjudication if agreement cannot be reached. 8. Express provision for assessing interim payments by methods other than monthly valuation i.e. mile stones, activity schedules or payment schedules. Such arrangements must also be reflected in the related subcontract documentation. The eventual aim should be to phase out the traditional system of monthly measurement or remeasurement but meanwhile provision should still be made for it. 9. Clearly setting out the period within which interim payments must be made to all participants in the process, failing which they will have an automatic right to compensation, involving payment of interest at a sufficiently heavy rate to deter slow payment. 10. Providing for secure trust fund routes of payment. 11. While taking all possible steps to avoid conflict on site, providing for speedy dispute resolution if any conflict arises, by a pre-determined impartial adjudicator/referee/expert. 12. Providing for incentives for exceptional performance. 13. Making provision where appropriate for advance mobilisation payments (if necessary, bonded) to contractors and subcontractors, including in respect of offsite prefabricated materials provided by part of the construction team.'

[8] National Audit Office, 'Central government's management of service contracts' (19 December 2008) 24 <https://www.nao.org.uk/wp-content/uploads/2008/12/080965.pdf>.; the section on risk management reads: 'Area 7: Risk (…) There was a variety of risk management arrangements on the

Second, modern contracts stress the importance of the underlying business relationship and suggest that a non-adversarial, 'good working relationship' is the key to avoiding disputes that could eventually lead to litigation. The modern contracting paradigm can be said to be a hybrid of commercial management on the one side, and the legal element as manifested in the contractual documents that underpin the agreement, on the other. An important element is that the commercial process of contract negotiation and administration is not performed randomly, but there is an effort to standardise and streamline this process. This process, however, can take many different forms, from looser to more concrete, step-by-step flowchart approaches. Examples of these include best practice guides such as the PRINCE2[10] or PMBOK[11].

Having summarised the main characteristics, the thesis now provides examples of modern contracts. The UK government has launched the 'Government Construction Strategy' in 2011. The final Report[12] introduced three main methods for testing: the 'Two Stage Open Book', 'Cost Led Procurement' and 'Integrated Project Insurance'.[13] The Government Construction Strategy chose three models of collaborative contracts, which would test each parameter accordingly.[14]

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contracts we assessed, including examples of excellent processes. The Department for Work and Pensions, for example, has a network of risk registers for its contract with BT, with registers at the operational level feeding up to an IT strategic risk register for the Department as a whole. (.) Each risk has a clearly defined owner and the risk registers also include planned mitigation and a summary of the actions taken. Risks are also regularly discussed with BT.'

[9]BSI, 'Collaborative business relationships – Part 1: A framework specification' (October 2010) 17 <http://shop.bsigroup.com/en/ProductDetail/?pid=000000000030212011>. 'Risk mitigation shall include identification of risks that need to be raised with collaborative partners to ensure the most effective mitigation approach is adopted. A risk register should be established, documented and available to every member of the programme team. This can be carried forward to become part of the joint risk management programme with the collaborative partner'.

[10] PRINCE2, 'Projects in Controlled Environments' <https://www.prince2.com/eur/what-is-prince2>.

[11] Project Management Institute <https://www.pmi.org/pmbok-guide-standards>.

[12] Cabinet Office and Efficiency and Reform Group,' Government Construction Strategy: Final Report to Government by the Procurement/Lean Client Task Group' (July 2012) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61157/Procurement-and-Lean-Client-Group-Final-Report-v2.pdf>. [hereinafter 'Government Construction Strategy'].

[13] Cabinet Office, 'New models of construction procurement' (2 July 2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/325011/New_Models_of_Construction_Procurement_-_Introduction_to_the_Guidance_-_2_July_2014.pdf>.

[14] Government Construction Strategy 5; 'Trials should apply collaborative forms of contract. Cost-led procurement trials should use NEC 3 option C, Integrated Project Insurance should use PPC 2000, and Two Stage Open Book should use JCT Constructing Excellence'.

Another Report commissioned for the government compared modern contracts for the purposes of the construction industry. The report was commissioned by the Office of Government Commerce and compared the following types of 'partnering contracts': NEC3 Engineering and Construction Contract, ACA Project Partnering Contract (2000, amended 2003) (with the associated Specialist Contract for Project Partnering) and JCT Constructing Excellence Contract (2006).[15]The thesis summarises these selected contracts and stresses their core characteristics and their main differences to traditional contracts. The point is not to go into detail for each type, nor to argue which is 'better', but rather to assess whether and to what extent they can or should be used in offshore contracting – if at all.

The first contract endorsed and chosen to be trialled by the 'Government Construction Strategy' is the New Engineering Contract [hereinafter 'NEC']. NEC was the contract endorsed by the Latham Report.[16] Its developers contend that its unique characteristics are flexibility, clarity, simplicity and stimulus to good management. In terms of use, NEC proponents stress its use in complex projects such as the BAA Heathrow Terminal, the Olympic Delivery and the construction of Crossrail. As mentioned above, the first element is the emphasis on the project management dimension in contrast with the more static approach of traditional contracts, which has been criticised as the 'putting the contract in a drawer' approach.[17] Second, there is a preference for a collaborative business relationship as a driving force behind the contract clauses, which has been described as a 'cultural transition' from an adversarial to a collaborative paradigm.[18]

[15] Arup Project Management and OGC, 'Partnering Contract Review: Report of 25 September 2008' <http://www.ppc2000.co.uk/pdfs/arup_partnering_contract_review.pdf>.; Lowe provides an analytical table with a comparison of the perceived advantages and disadvantages of these three types of contracts, see D. Lowe, *Commercial Management: Theory and Practice* (Wiley-Blackwell 2013) 204-215.

[16]History of NEC3 <https://www.neccontract.com/About-NEC/History>.

[17] Brian Eggleston, *The NEC 3 Engineering and Construction Contract: A Commentary* (2nd edn, Blackwell Science 2006) 2 'For users of the contract the difference is of very significant practical effect. It used to be said that a good contract was never taken out of the drawer until it was needed. For the New Engineering Contract that rule does not apply. It is as much a manual of project management as a set of contractual conditions – and it should never be taken off the desk and put in the drawer.'

[18] Procurement and Strategies Guide (NEC Panel, 2005b); 'NEC is a modern-day family of contracts that facilitates the implementation of sound project-management principles and practices as well as defining legal relationships. Key to the successful use of NEC is users adopting the desired cultural transition. The main aspect of this transition is moving away from a reactive and hindsight-based decision-making and management approach to one that is foresight based, encouraging a creative environment with pro-active and collaborative relationships'.

A second widely-used modern contract is the standard form of a Project Partnering Contract, PPC2000. It has been developed by the Association of Consultants Architects [hereinafter 'ACA'] and consists of a suite of partnering contracts under the name of 'PPC Suite'. Sir Michael Latham reviewed PPC2000 at the time of its original publication, and confirmed that it embodies all his recommended principles for a modern construction contract. He described PPC2000 as 'the full monty of partnering and modern best practice'. It is a direct response to the recommendations of the Construction Task Force's 1998 report 'Rethinking Construction' (often called 'the Egan report'), and incorporates ideas set out in the Construction Industry Council's Guide to Project Team Partnering. PPC2000 was developed through prototypes tested on many pilot projects.

Finally, the Joint Contract Tribunal [hereinafter 'JCT'] contracts is another suite that contains collaborative contracts among others. The Joint Contract Tribunal has produced standard forms of construction contracts, guidance notes and other standard forms of documentation for use by the construction industry. JCT contracts include both traditional as well as partnering contracts and are most frequently used in the construction/building sector.[19]

3.2.3 Should the UK offshore oil and gas industry use 'modern' contracts?

As already explained in the introductory chapter, contracting in the UKCS has historically had an adversarial ethos. It is not an easy task to explain why this might have happened. An indicative – and largely speculative – list of the factors that played a role in this could include: the fact that the risks of offshore working are such that the parties are always eager to have these allocated clearly; the particular features of the oil industry, such as the fact that many contractors may be engaged by an operator for a single project rather than having a prime contractor as with civil engineering projects; a certain industry 'arrogance' and leverage of bargaining power over the contractors; the boom/bust cycle and a lack of investment in contract managers who could operate more sophisticated contract management systems.

[19] Joint Contract Tribunal <http://www.jctltd.co.uk/>.

Whatever the case might be, it is necessary to examine the practicalities of offshore contracting. The prevalent standard forms are the LOGIC contracts, which evolved from the 'CRINE' initiative in the nineties.[20] The LOGIC forms are close to the notion of 'traditional' contracts; for example, the contents of the latest edition of the standard form for offshore services contains in its first part the 'General Conditions of Contract' which are close to the format and contents of a 'traditional' contract. [21]

Does this mean that 'traditional' contracts are outdated and that the industry should move to using 'modern' contracts, such as e.g. the NEC? The answer is not straightforward; the thesis does not suggest that a 'traditional' contract is axiomatically outdated and that a 'modern' contract is fitter for purpose. The terms are only intended to signify the traditional function of a contract as a static documentation of the parties' rights and responsibilities, in contrast with the more proactive and collaborative philosophy of modern contracts. It is not 'labels' that make a type of contract fit for purpose, but rather the results and how it addresses the needs of the particular industry that it is designed to serve.

For example, it has been suggested that the NEC contract might not be well suited to the offshore oil and gas industry. Although the developers of the NEC contract assert that it could be used in a wide range of industries, among them the oil and gas industry,[22] some have suggested that its structure and 'plain English' writing style might create more problems than it solves.[23] Proponents of the contract acknowledge

[20] Oil and Gas UK, 'LOGIC Contracts' <http://www.logic-oil.com/standard-contracts>.
[21] 'Services (On- and Offshore) Edition 3 March 2014' <https://www.logic-oil.com/content/standard-contracts-0>. The General Part consists of 33 clauses, with many referring to the 'risk allocation' clauses, such as: '11. Variations 12. Force Majeure 19. Indemnities 20. Insurance by Contractor 21. Consequential loss 24. Termination'; this list is indicative and the contract will be included in the appendix of the thesis.
[22]'Works encompasses purchases such as the construction, refurbishment and decommissioning of buildings, structures, process plants and infrastructure – including everything from houses, schools, hospitals and leisure facilities to infrastructure for water, energy, transport, industry and waste.' <https://www.neccontract.com/About-NEC/How-NEC3-Works>.
[23] A more detailed example of the wording and structure of NEC contracts: '(they) are written in a plain English style, avoiding jargon; Are written in the present tense; Are designed to be used to manage a project, rather than rule who is at fault only when a dispute arises; Do not cross-reference between clauses: each clause stands alone; Seek to use consistent numbering and language throughout, for example each main option under the Engineering and Construction Contract (ECC) uses different numbering, so that each clause number is only used once. A user does not have to remember which version of a particular clause to use for each main option: each clause is uniquely identified; the different forms in the suite use similar numbering and operative terms, wherever possible; The suite shares a common overall layout and design; and the suite aims to use the same defined terms

that the danger of novel wording, which has not been the subject of litigation, can hamper legal certainty about the meaning of certain terms and bears the risk of 'throwing the baby out with the bath water'.[24] This fear is exacerbated by the scarcity of case law on NEC contracts; however, contract proponents view this lack of litigation as proof of success of the NEC non-adversarial and non-litigious philosophy.

The thesis does not seek to conclude whether the NEC, or any other specific contract, is the preferred solution for the industry. The important element is drawing attention to the fact that the industry should give due consideration to the philosophy of modern contracts in general, as they are better aligned with the principles of the MER Strategy. The two main characteristics of modern contracts, i.e. their project management orientation and preference for collaborative relationships, fit well within the wider MER Strategy philosophy. This is because the Strategy requires closer co-ordination between the industry players at the operational level, and therefore project management is even more important to how industry players coordinate their actions. Also, the 'required action and behaviour' of collaboration of the Strategy can be better implemented through contracts which have been designed with this very philosophy as their cornerstone.

3.3 THE POTENTIAL OF CONTRACT AND COMMERCIAL MANAGEMENT (CCM)

The thesis submits that CCM is a discipline that can significantly improve offshore contracting. From an academic point of view, CCM is defined as 'the management of contractual and commercial issues relating to projects, from project inception to

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throughout.' See Andrew James and Martin Collingwood, 'NEC contracts' (Westlaw Update, 14 March 2016) para 40.

[24] Brian Eggleston, *The NEC 3 Engineering and Construction Contract: A Commentary* (2nd edn, Blackwell Science 2006) 4; 'Legal interpretation of the contracts is not so easily solved. Neither the guidance notes nor the flow charts are intended to be used for legal interpretation and the application of legal precedents from traditional forms of contract written in conventional drafting style can only be surmised. Which raises the question, have NEC contracts sacrificed legal certainty in pursuit of a new order? There are certainly some who feel that discarding conventional drafting amounts to discarding the accumulated contractual wisdom of generations. Throwing the baby out with the bath water is how one eminent construction lawyer put it. But others are far more optimistic and they suggest that to focus on the words of NEC contracts is to miss the point of the message; and that the courts, if called upon to do so, will have no difficulty in discovering the true intentions of the parties.'

completion'.[25] Contract management and commercial management are often used interchangeably. For the purposes of the research, however, commercial management is perceived as broader in meaning, as it can encompass many commercial functions of a company (e.g. business strategy, pricing policy, sales targets etc). Contract management has a narrower scope and focuses on the contractual procedures from the beginning to the end of a contract lifecycle, and can thus be regarded as a subcategory of commercial management. The thesis therefore refers mostly to contract management, but its close relationship to commercial management should be considered.

From an academic taxonomy viewpoint, contract management is closer to the discipline of management rather than law, but it can drastically influence the outcome of a contract and the potential legal ramifications. In business practice, contract management plays an important role in modern companies and a dedicated role for contract managers is very common in corporate organisational structures. Lowe points out that '(…) commercial managers can now be found across a spectrum of industries, especially those that are predominantly project-based'.[26] This is the case in the offshore oil and gas industry as well. The job description of a contract manager for an oil and gas company clearly demonstrates the pivotal tasks that are expected of this role.[27] It is not an exaggeration to say that contract managers, who often have a non-legal background, are more actively involved in the procurement and contract administration than the legal experts of the company. It is a common phenomenon that contract managers – usually from an in-house company department or external contractors – negotiate and draft the contracts, with advice sought from the company's legal department or external consultants only for the more complex issues.

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[25] David Lowe and Roine Leiringer (eds), *Commercial Management of Projects: Defining the Discipline* (Blackwell Publishing 2006) vii.

[26] David Lowe and Roine Leiringer (eds), *Commercial Management of Projects: Defining the Discipline* (Blackwell Publishing 2006) vii; As an example of project-based industries Lowe mentions 'Aerospace, Construction, IT, Pharmaceutical and Telecommunications'.

[27] 'Contract Manager' job description advertised in Oilandgaspeople.com, <http://www.oilandgaspeople.com/jobs/446923925/contract-manager-facilities-operations-and-mainten/>.; The job description includes tasks such as to 'manage and coordinate all activities involved in the administration of the contract, subcontracts, and purchase orders'; 'manage and assist in the administration of the contract'; 'meeting the KPI`s according to the contract agreed targets'; 'meeting with clients, stakeholders and the public, represent in order to enhance reputation and foster a partnership approach to the relationships'; 'perform contract/subcontract review, negotiations and interface with customer/vendor contracting personnel'.

A further issue with regard to CCM is to dispel the confusion that exists about the term as it may refer to different concepts. As already explained, the first dimension of the word is its reference to the academic and practical discipline, with features of management, project management and organisational (enterprise) theory. The second dimension is the process of CCM at a project level: the process(es) that take place in the lifecycle of a project, from the beginning till the end of its lifecycle. Those two meanings are the ones that the thesis refers to. A third dimension that often leads to confusion is referring to the term as an IT, electronic software tool used in order to, literally, 'manage contracts' of companies or other organisations. 'Contract management' systems may include: online repositories of documents; central archive of the contracts that the company has signed with its supply chain; model contracts used for the companies' contracting activities; remote access to documents or sharing of documents between employees, outsourced personnel hired by the company so that managers or staff can remotely access these archives and monitor the status of a contract. In the offshore oil and gas sector, it is common for operators and contractors to run 'contract management' systems within their organisation, which is an internal, inter-organisational tool for better monitoring and planning of an organisation's activities.

3.3.1. Academic definitions of CCM

The first attempt to academically define contract management was carried out by Lowe and other authors in the first book in the field.[28] Commercial management is defined as: 'The management of contractual and commercial issues relating to projects, from project inception to completion'. Lowe points out that 'the term commercial management has been used for some time, not least in construction, while the job title commercial manager can be found across a spectrum of industries, especially those that are predominantly project-based, for example, Aerospace,

[28] David Lowe and Roine Leiringer (eds), *Commercial Management of Projects: Defining the Discipline* (Blackwell Publishing 2006); For more recent work see D. Lowe (ed), *Commercial Management: Theory and Practice* (Wiley-Blackwell 2013); For other influential academic sources on contract and commercial management see Gregory A. Garrett, *World Class Contracting* (6th edn, Wolters Kluwer 2015); Anuj Saxena, *Enterprise Contract Management* (J Ross Publishing 2008); Georg Berkel, 'Contract Management' in Michael Kleinaltenkamp, Wulff Plinke and Ingmar Geiger (eds), *Business Project Management and Marketing* (Springer 2016); Stewart R Clegg, Martin Kornberger and Tyrone S. Pitsis, *Managing and Organizations: An Introduction to Theory and Practice* (4th edn, SAGE Publications 2015).

Construction, IT, Pharmaceutical and Telecommunications'.[29] One point that should be stressed here is the term 'project-based industry'. Project-based industries, such as the ones mentioned above, share many common characteristics regarding the relationship between the client and the contractors and potentially sub-contractors.[30] The offshore oil and gas industry, whether with construction, drilling or offshore services, belongs in the spectrum of 'project-based industries'.

Another influential definition on the subject is provided by the academics John van der Puil and Arjan van Weele. They define contract management as 'the process that ensures that all parties to a contract fully meet their obligations, in order to satisfy the operational objectives of the contract and the strategic business goals of the customer'.[31] The authors identify three elements in this definition: (a) contract management as a process, 'which is aimed at successful and profitable project delivery'; (b) the obligations from both parties, which should be fully met; and (c) the strategic business goals of the final customer.[32] The authors suggest that the process described in point (a) may include different stages, such as the pre-contractual stage, contract-negotiation stage and the post-contractual stage. These stages together can be said to form the 'contracting cycle' or 'contract lifecycle'.

The authors provide an example to illustrate point (c) of their definition. If a dredging project occurs for a port, the 'final customer' might not be the contractor's employer, but the Port Authority. Therefore, they argue, 'the employer and the contractor may have one common interest: to jointly serve the interests of the city's council'.[33] Although the authors' example could be common in practice, the thesis argues that the third element of their definition might significantly expand the scope of contract management. It is difficult to ascertain which criteria should be followed in order not to include every entity that could benefit from completing a project in the potential list of the 'final customer'. The thesis argues that this final element is not a core element

[29] David Lowe and Roine Leiringer (eds), *Commercial Management of Projects: Defining the Discipline* (Blackwell Publishing 2006) 8-9.
[30] For example, the International Association for Contract and Commercial Management (IACCM) has also dedicated groups on Aerospace and Defence, Construction & Engineering, Pharmaceutical, Oil & Gas, Telecommunications and Technology, see <www.iaccm.com>.
[31] John van der Puil, Arjan van Weele, *International Contracting: Contract Management in Complex Construction Projects* (Imperial College Press 2014) 35.
[32] Ibid.
[33] Ibid. 36.

of CCM and the discipline should focus on parties with contractual relationships with each other and not extend to any parties beyond that.

3.3.2. Industry and knowledge bodies definitions of CCM

The International Association for Contract and Commercial Management [hereinafter 'IACCM'] is an active institution in the field with a global reach. IAACM published the 'IACCM Operational Guide' with the aspiration of providing a holistic overview to the discipline of CCM.[34] According to this book, the definition of commercial management is 'broader than the role or activities implied by the term 'contract management'. However, we find that gap is narrowing'.[35] The IAACCM Guide argues that 'contract management has historically been viewed as a more administrative – and therefore much narrower and more reactive – activity than commercial management. It has often been a role that safeguards the rules or practices of others, rather than changing or questioning those rules. However, this book challenges that narrow definition and positions contract management as an activity equivalent to commercial management'.[36] The IACCM Operational Guide features five stages: Initiation, Bid, Development, Negotiation, Management. Despite its title, this book does not actually offer a coherent guide with specific steps and procedures that can be followed. The second influential definition is that of the UK-based 'Chartered Institute of Purchasing and Supply' [hereinafter 'CIPS'].[37] CIPS has produced several guides on contract management. The definition of CIPS is: 'the process of systematically and efficiently managing contract creation, execution and analysis for maximising operational and financial performance and minimizing risk'.[38] The guide clarifies that its scope is generic and its principles are intended to be applicable to all contracts from a simple order through framework contracts, to complex construction or service contracts. It is equally applicable to contracts in the private and the public sector. The guide points out that there are several other

[34] Tim Cummins, Mark David and Katherine Kawamoto, *Contract and Commercial Management: The Operational Guide* (Van Haren Publishing 2011) 6-7.
[35] Ibid.
[36] Ibid.
[37] CIPS is originally based in the UK, but has recently expanded its reach to a more global audience <https://www.cips.org/>. The equivalent US-based institution is the 'National Contract Management Association' (NCMA) <http://www.ncmahq.org/>.
[38] R. D. Elsey, 'The Chartered Institute of Purchasing and Supply: Contract Management Guide' (October 2007) 3 [hereinafter 'CIPS Guide'].

definitions of contract management, the majority of which refer to post-award activities. Successful contract management, however, is most effective if upstream or pre-award activities are properly carried out. This remark stresses that there are several stages in the contractual process, known as the pre-contractual stage, the contract-negotiation stage and the post-contractual stage, which can better illustrate the different stages of a contract life cycle. The guide sets out certain criteria to measure success,[39] and many criteria benefit both parties. The guide further suggests that a contract strategy should be further developed, to consider matters such as the style and type of management to be adopted for the subsequent service delivery, relationship management and contract administration. Possible supplier relationship types range from spot buy through call-off contracts, fixed contracts and strategic alliances, to long-term partnerships. Issues of relationship style such as adversarial, partnership, hands-on or proactive should also be considered. A further consideration is risk management. Having assessed the risks and identified those requiring action, responsibility for managing and mitigating them should be allocated. This allocation should depend on the assessment of the likelihood and consequence of the risk.

3.3.3 UK Government contracting definitions of CCM

One might presume that the industry would have developed contract management guides to facilitate the contracting procedure. However, although best practice guides exist for many sectors, contract management is a notable exception.[40] In the UK, it is actually the public and not the private sector that has produced noteworthy documents in the field of contract management. Various governmental bodies have published several interesting frameworks and guides.[41] Although the guides refer to a government-to-business context and are written to help public officials improve the effectiveness of contracting with private companies, they relate to a business-to-

[39] CIPS Guide, 3 'It is worthwhile noting that contract management is successful if:
the arrangements for service delivery continue to be satisfactory to both parties, and the expected business benefits and value for money are being realised; the expected business benefits and value for money are being achieved; the supplier is co-operative and responsive; the organisation understands its obligations under the contract; there are no disputes; there are no surprises; a professional and objective debate over changes and issues arising can be had; efficiencies are being realised.'

[40] The International Best Practice Institute (IBPI) has a wide collection of all the main non-proprietary frameworks and standards with associated templates and white papers, see <http://ibpi.org/>.

[41] The Office of Government Commerce (OGC) was substituted by the National Audit Office (NAO), which is now incorporated under the new umbrella organisation Crown Commercial Service (CCS), see <https://www.gov.uk/government/organisations/crown-commercial-service>.

business context as well. The clearest definition of contract management comes from a report published by the Office of Government Commerce in 2002 [hereinafter 'OGC'].[42] The successor of OGC, the Crown Commercial Service [hereinafter 'CCS'], seems to have now crystallised the concepts of commercial and contract management for the purposes of government contracting. In 2014, CCS published a suite of documents on contract management consisting of: (a) contract management principles (b) contract management framework summary (c) contract management operating model overview. [43] The CCS contract management standards are partly based on the framework published by the National Audit Office [hereinafter 'NAO'] in 2008. [44] All of the above frameworks share the view that collaborative relationships are preferable and can produce better outcomes. There is no need to reinvent the wheel, and these authoritative frameworks that have evolved through time from well-appointed government bodies, could offer valuable assistance in understanding and developing a CCM framework for offshore oil and gas contracting.

3.4 CONTRACT AND COMMERCIAL MANAGEMENT IN THE OFFSHORE OIL AND GAS CONTRACTING CONTEXT

This part of the thesis provides a connection between the academic discipline of CCM and its application in the context of offshore oil and gas contracting. It is submitted that this is an original approach that does not exist in the current literature. The first step in this process is the actual realisation that CCM principles may be applied in many different business contexts and can help develop sophisticated and sector-specific industry norms. This statement holds true for the offshore oil and gas

[42] Office of Government Commerce (OGC), 'Contract Management Guidelines - Principles for service contracts' (2002): 'Contract management is the process that enables both parties to a contract to meet their obligations in order to deliver the objectives required from the contract. It also involves building a good working relationship between customer and provider. It continues throughout the life of a contract and involves managing proactively to anticipate future needs as well as reacting to situations that arise. The central aim of contract management is to obtain the services as agreed in the contract and achieve value for money. This means optimising the efficiency, effectiveness and economy of the service or relationship described by the contract, balancing costs against risks and actively managing the customer–provider relationship. Contract management may also involve aiming for continuous improvement in performance over the life of the contract'.
<https://www.ifad.org/documents/10180/f8d49768-e1e0-4dba-aac9-9a2b3c407d2b>.

[43] Crown Commercial Service, 'Commercial capability: Contract Management Standards'
<https://www.gov.uk/government/publications/commercial-capability-contract-management-standards>.

[44] This framework summary is based on NAO, 'Good practice contract management framework' (2008), <https://www.nao.org.uk/report/good-practice-contract-management-framework-2-2/>.

industry. The thesis stresses that the recent publications of the Oil and Gas Authority, and certain older documents which are now under the process of reconsideration,[45] shape what could be described as a sector-specific contract and commercial framework for the offshore oil and gas industry. Although the documents exist, what is missing is the mere realisation of their interconnection to the wider academic discipline of CCM. The thesis highlights the fact that it is important for the Oil and Gas Authority and the industry to recognise that these documents are not standalone or unique, but rather that the existing academic framework of CCM can provide assistance and insight for a better understanding, application and further development of these principles in the context of offshore oil and gas contracting.

3.4.1 British Standards Institute: 'BS 11000-1' and 'BS 11000-2:2011'

The Oil and Gas Authority has mentioned in several of its publications that it considers the British Standard 11000-1 'Collaborative business relationships – Part 1: A framework specification' [hereinafter the 'Standard'] [46] to be one of the cornerstone documents of the guides that are used as reference.[47] The Standard has been developed in co-operation between the British Standard Institute [hereinafter 'BSI'][48] and the Institute for Collaborative Working [hereinafter 'ICW'].[49] The Standard is accompanied by the Guide for its implementation, 'BS 11000-2:2011 Collaborative business relationships: Guide to implementing BS 11000-1' [hereinafter 'Standard

[45] For example, new versions of the Commercial Code of Practice (CCoP) and the Infrastructure Code of Practice (ICoP) have been – or are in the process of bring – drafted in order to incorporate the provisions of the MER Strategy.

[46] BSI, 'Collaborative business relationships – Part 1: A framework specification' (October 2010) <http://shop.bsigroup.com/en/ProductDetail/?pid=000000000030212011>. In the interest of preciseness, it should be mentioned that this Standard has been recently been replaced by 'BS ISO 44001; see BSI, 'BS ISO 44001 Collaborative business relationship management systems: Requirements and framework' (March 2017). However, it is submitted that the withdrawal and substitution of the Standard does not change the analysis for the purpose of the thesis. The reason is that the Oil and Gas Authority has already announced the former version of the Standard as their reference point. This means that switching to the new standard will take time, as it was introduced recently. Further, the new Standard mentions that it contains certain improvements, but maintains its core characteristics: 'although the structure has changed, the founding principles and key requirements have been retained'.

[47] See for example the 'References' which are mentioned in the Asset Stewardship Strategy Expectations where the BS Standard is mentioned, Asset Stewardship Strategy Expectations 14.

[48] BSI is the UK's National Standards Body and represents UK economic and social interests across all European and international standards organizations and in the development of business information solutions for British organizations of all sizes and sectors, see BSI, 'About Us' <http://www.bsigroup.com/en-GB/about-bsi/ >.

[49] The Institute for Collaborative Working has also been the driving force behind the new BS 44001, see ICW, 'Insight to ISO 44001' <http://www.instituteforcollaborativeworking.com/Resources/Documents/insight_into_iso44001.pdf>.

Guide'].[50] The thesis submits that the Standard and the Standard Guide have the potential to become reference points for offshore oil and gas contracting and the MER Strategy.[51] It is beyond the scope of the research to analyse the Standard in all of its dimensions, so the thesis shall focus on the aspects that relate to contracting. As a second focus, it shall refer to the provisions about joint risk management, and the idea of a risk register, that is proposed in the Standard and is common characteristic of most 'modern contracts'. As a general outline, the BS standard follows a three-phase approach: strategic, engagement and management. These phases are then divided into stages, and each of the stages has its own processes and steps. The stages also correspond to the clauses of the standard. All stages are underpinned by a 'Relationship Management Plan' [hereinafter 'RMP'], with the dual goal to function internally as a 'corporate model', and also externally as a 'working platform for relationship management through the life of the collaboration, ensuring that relationship management is effectively communicated at all levels and integrated into execution and delivery for all stakeholders'.[52] The definition that the standard gives to the term 'collaborative business relationships' defines it as 'formal and/or informal business arrangements where two or more discrete organizations collaborate to create mutual value'.[53] The following page provides the Chart Flow of BS 11000-1 as reproduced from BSI.[54]

[50] BSI, 'Collaborative business relationships – Part 2: Guide to implementing BS 11000-1' (December 2011) <http://shop.bsigroup.com/ProductDetail/?pid=000000000030235626>.
[51] See also io, 'Continuing the collaborative conversation' (io oil & gas consulting, 20 August 2015), 'A British Standards Institution (BSI) report from 2010 entitled 'Collaborative business relationships' was the catalyst for current conversations. It addressed the requirements for collaborative relationships to ensure they are effective, optimised and deliver enhanced benefits to stakeholders. Though it was written five years ago, long before the oil price crash and without any specific industry in mind, the report's insights hold true today and should be applied to the oil and gas sector and beyond.'
[52] Ibid. 5.
[53] Standard 8
[54] Standard 7

Figure 2 **Overview of the principal components of successful collaborative business relationships**

Strategic	**Awareness (Clause 3)**	Establish executive responsible and organizational policy	Identify business objectives and value proposition	Identify and prioritize relationships	Establish resources, competencies and behaviours	Undertake initial risk assessment	Relationship Management Plan
	Knowledge (Clause 4)	Develop specific business strategy	Establish knowledge management process	Establish objectives, strategy, business case and identify potential collaborative organizations	Establish initial exit strategy	Incorporate relationship management with risk management processes	
	Internal assessment (Clause 5)	Undertake self assessment	Establish collaborative profile	Establish collaborative leadership	Establish partner selection criteria	Establish and implement action plan	
Engagement	**Partner selection (Clause 6)**	Nominate potential partners	Evaluate potential partners	Establish partner selection plans	Create joint objectives and negotiation strategy	Select partner	
	Working together (Clause 7)	Establish governance, joint objectives and leadership	Establish organizational structure, roles, responsibilities and processes	Establish performance measurement	Establish joint risk management and exit strategy	Establish contract arrangements	
	Value creation (Clause 8)	Establish value creation programme	Define value drivers	Establish improvement team	Establish learning from experience	Implement innovation process	
Management	**Staying together (Clause 9)**	Ongoing management, monitor and measure the relationship	Continual innovation	Maintain behaviours and trust	Manage delivery and performance	Manage issue resolution and monitor joint exit strategy	
	Exit strategy (Clause 10)	Develop and maintain joint exit strategy	Establish boundaries for the relationship	Monitor and evaluate changes	Manage business continuity and transition	Evaluate future opportunities	

The stages that are most relevant for the research are stage 7 'Working together' and stage 9 'Staying together'. Clause (stage) 7 explains in its introductory note that 'each organization accepts the collective responsibility for managing an integrated process, with mutually agreed objectives'.[55] It mentions the contractual steps to be taken, saying that 'the organizations establish and agree a formal foundation for working together, including contractual frameworks or agreements, roles and responsibilities'.[56]

The first important element is the work of the 'joint management committee', which shall be established from the 'initiating organisation' and its 'collaborative partner'.[57] In the offshore context, this means that in a case of the operator-contractor relationship, they should set up a joint management committee. To equip this structure with adequate power, the clause provides that this responsibility should be incorporated in the contract: 'this shall be consistent with the contractual responsibilities and incorporated into contractual agreements under which the collaborative relationship is to be formally recognized'.[58] This joint management committee is vested with important duties, such as joint knowledge management,[59] communications management[60] and joint risk management[61]. The 'joint risk management' process includes important aspects, one of which is the inclusion of a risk register.

The clause that deals primarily with the contracting features is clause 7.7, entitled 'Contracting Arrangements'. The first point is whether 'the collaborative relationship is to be covered by a formal or informal agreement'. This was an issue first raised by the Latham Report, i.e. that formal agreements might hinder the relationship and could be eliminated over time. But this suggestion never materialised, as practitioners proved sceptical and preferred formal written agreements. The joint management team also has an important role to play at the contracting procedure, as it is provided

[55] Standard, 21
[56] Ibid.
[57] Ibid. clause 7.2.1
[58] Ibid.
[59] Ibid. clause 7.3
[60] Ibid. clause 7.4
[61] Ibid. clause 7.5

that ‘when developing a contractual agreement, the joint management team shall consider and mutually agree the most appropriate approach’.[62]

‘Contract terms’, which are also linked to the terms of LOGIC contracts, are to be reviewed as well. The standard provides that ‘contract terms shall be reviewed to determine clarity of purpose, encourage appropriate behaviours and identify the potential impacts on or conflict with the aims of collaborative working’.[63] This returns to the question whether the widely-used contracts, such as LOGIC, should change their wording in order to take into account ‘the aims of collaborative working’, as suggested by the Standard. This is unnecessary. By inserting specific clauses, and using documents such as the Standard, a more collaborative process could be applied in practice. The Standard also notes that ‘risk and reward models, issue management, exit strategy, knowledge transfer and sustainability should be considered when developing a contractual agreement’.[64] Risk and reward models can also be linked to ‘contract models’ and its meaning, as discussed above. The Oil and Gas Authority has announced that it wants to review ‘contract models’ that ‘add value’, where the risk and reward fits in the same scope.

Notably, the provision includes an RMP as a guide in the contract. The Standard provides that ‘a joint RMP may be established and annexed to formal contracts to formalize the overall management of the collaborative relationship and encompass the principles of collaborative behaviours’.[65] The suggestion is that the RMP will be annexed, and in that way incorporated into the contract. This suggestion is also similar to the proposal of including a ‘partnering charter’ – the wording may vary, but the essence remains the same, which is to include a ‘relationship guide’ that will be used to as aid for the relationship of the parties. This was also a proposal in several NAO reports. For example, in a major review of the performance of the governments contractors, it was found as best practice to: ‘outlining explicitly in a document the expected behaviours of both customer and supplier throughout the duration of the contract’ and also that ‘each party was clear about the roles and responsibilities of the

[62] Ibid.
[63] Ibid. clause 7.7
[64] Ibid.
[65] Ibid. clause 7.10

other, and there was a "Partnership Charter" outlining the behaviour expected of each party for the duration of the contract'.[66]

The other clause that is more relevant in the Standard is clause 9 'Staying together'. The main purpose of the clause is to 'ensure that the relationship is maintained at its most effective level. Mutually agreed measures to monitor the relationship are put in place so that appropriate action is taken to maximize effectiveness. Continual improvement is addressed as well as the development of a dispute resolution process'.[67]The joint management team is again vested with critical tasks for this purpose: monitoring and measuring the relationship, ongoing management, continual innovation, maintaining behaviours and trust and delivering performance.[68] In the offshore context, this would require a leap towards the relationship between operators and contractors and the current prevalent contracting paradigm. However, it is clear that collaborative working requires the integration of the teams of stakeholders, as it becomes evident from the tasks of the joint management team. If the Standard is applied, then the creation and function of the joint management team in practice would be a substantial challenge for the industry. However, the thesis submits that, both the current Standard – as well as its updated version, and all versions of modern contracts – include the feature of a joint management team. That the Oil and Gas Authority has endorsed the Standard means that operators and contractors should work towards a closer integration of their teams and activities, as the Standard suggests.

Moving on to the Standard Guide, it has the same structure as the Standard and elaborates on its clauses following the same structure. Clause 7.5 provides a useful explanation on joint risk register and what it should include.[69] In addition, the elaboration on the Guide on Contracting in clause 7.7 is of particular interest. The first suggestion is that 'the appropriate contracting arrangements which should support the

[66] NAO, 'Central government's management of service contracts' (19 December 2008).
[67] Ibid. clause 9.
[68] Ibid.
[69] Standard Guide, clause 7.5.4 'The joint team should identify the profile of potential risks and create a joint risk register that enables all participants to ensure risk concerns have been recognized and, where possible, addressed. The joint risk register should be readily accessible to all team members and reflect the risk issues of the joint approach, in addition to those of the partners individually. The risk register should clearly define ownership for managing each identified risk and, where possible, the potential impact and mitigation approach to be taken'.

collaboration' should be established and that 'all elements of the contract are written with collaborative approaches in mind and support the appropriate collaborative behaviours'.[70] Again, this raises questions about the extent to which the wording of existing contracts, such as LOGIC, might have to change. The thesis argues that 'appropriate collaborative behaviours' can be introduced in practice and by virtue of closely following the steps of the Standard. A bolder step in this direction would be to formally incorporate the Standard into the contract between the parties.

The Standard Guide again raises some issues of scepticism about the adequacy of formal contracts to ensure the execution of the project. The Standard Guide mentions that 'formal contracts operated under a collaborative relationship can become areas of conflict, particularly if expectations are not realized. Few contracts provide a complete solution and the value of a robust collaborative relationship is the ability of the parties to address issues without resorting to contractual interpretation'.[71] It is mentioned that 'in principle, a collaborative relationship might require less formal contractual governance than one that is transactional because of the higher levels of trust'.[72] These points echo the scepticisms of the Latham Report on formal contracts, as explained in the previous section. However, as explained, this is not an idea endorsed by the thesis and, contrary to the position expressed in the Standard Guide, it is impossible not to 'resort to contractual interpretation' if litigation occurs.

3.4.2 Oil and Gas Authority

Most publications of the Oil and Gas Authority are naturally important for the new landscape in the offshore oil and gas sector. This section focuses on the Oil and Gas Authority publications that could be said to contribute to the establishment of a sector-specific CCM framework.

The first publication of the OGA relevant in this context is the 'Collaboration Implementation Guide' for the Asset Stewardship Strategy.[73] The Collaboration

[70] Standard Guide, 44
[71] Ibid.
[72] Ibid. 45
[73] See supra section 2.3.2.

Implementation Guide[74] is based on two main aims: to 'build a culture of collaboration'[75] and 'utilising collaborative processes'.[76] To meet the criteria of the first aim, the OGA expects that the operators demonstrate the culture of collaboration within their companies, and the joint ventures they participate in. The expectations require the involvement of senior management in this process and lay down a set of criteria.[77] The second branch is more prescriptive, in that the OGA expects that at least every two years, operators and their joint venturers conduct and document an assessment of collaborative behaviour using a recognised 'collaborative behaviour assessment tool'.[78] This tool, which was developed by the Oil and Gas Authority, is examined in the next paragraph. Notably, this requirement is extended not only to the operators but their joint venturers. Again, as the thesis is focused on the relationship with the supply chain, one wonders whether such a tool could be developed – or in fact the same tool could be used – to measure the collaboration performance among operators, joint venturers and their supply chain.

The second tool of importance is the development of CBQT, which was developed in collaboration with the industry[79] and its aim is to 'introduce a number of methods to assess and improve collaboration'.[80] The rationale of CBQT is that both the operator and the OGA set up a team of experts who assess the performance of the operator on the issue if collaboration. The criteria that demonstrate collaborative behaviour are set out by CBQT as: reasonableness; alignment; learning behaviours; strategic

[74] Oil and Gas Authority, 'SE09 - Collaboration Implementation Guide' (31 March 2017) <https://www.Oil and Gas Authorityuthority.co.uk/news-publications/publications/2017/implementation-guides-for-joint-venture-hub-strategy-and-collaboration/>.
[75] Ibid. para 3.1.
[76] Ibid. para 3.2.
[77] Ibid, para 3.1 '(a) Evidence of senior leadership commitment to a culture of collaboration (b) Evidence of organisational engagement on the added value of collaboration (c) Recognition of importance of technical alignment as the basis for subsequent collaboration (d) Evidence of collaborative engagement beyond the immediate joint venture to recognise common interest (e) A regular assessment of opportunities to learn from and share with others, and a willingness to communicate these learnings f. A review and improve process to assess the impact of collaboration'.
[78] See also Judith Aldersey Williams, Valerie Allan, Norman Wisely, 'Collaboration – how (OGA intends) to make it happen' (CMS Law-Now e-alert 16.05.2017) <http://www.cms-lawnow.com/ealerts/2017/05/collaboration--how-oga-intends-to-make-it-happen?cc_lang=en>.
[79] CBQT was developed in collaboration with Chevron in 2016.
[80] Oil and Gas Authority, 'Collaborative Behaviour Quantification Tool: Assessment Guidance Note' (April 2017) <https://www.Oil and Gas Authorityuthority.co.uk/media/3596/420432-Oil and Gas Authority-cbqt-assessment-guidance-note_17.pdf>.

behaviours; appropriate attitude to change; demonstrating respect; being accommodating and being open.[81]

Regarding operators and the supply chain, most of the tools refer to inter-operator collaboration. However, since the Oil and Gas Authority has stressed the importance of the supply chain, as spelled out in the Supply Chain Strategy and Supply Chain Strategy Expectations, the thesis suggests that it would be interesting to entertain the idea of expanding the scope of the CBQT to include the supply chain. A further suggestion of the thesis is that there could be an initiative to align the criteria and processes laid down by the CBQT with the steps and processes of the BS 11000-1. In that way, similar criteria and a similar flowchart of steps and processes could facilitate the harmonisation of performance measurement (in this case collaborative performance) across the industry.

A third interesting publication is a recent assessment published by the OGA entitled 'Lessons Learned from UKCS oil and gas projects 2011-2016'.[82] The report tracks specific projects of different types over the last few years; the exact methodology and rationale of the projects chosen can be found in the report. The report identifies as a generic comment, before explaining the specific sectors of the lessons, that some general conclusions are that: '[o]ver and above these specific lessons, it was also clear that there is a common necessity for: More clearly defining the project scope prior to project sanction; Keeping the project as simple as possible; increasing the accountability of project delivery; Improving the co-operation between companies/stakeholders'. The most interesting of this point is the last one, i.e. 'improving the co-operation between companies/stakeholders', which echoes the question already discussed in chapter 2 – whether and to what extent is the supply chain involved in this process. Again, as a matter of critique, perhaps terms such as 'stakeholders' do not help in this case to identify the exact entities to which it refers. The report concludes with the 'lessons learned', which cover five areas:

[81]Oil and Gas Authority, 'CBQT Appendix A: Scoring collaborative behaviours' (20 April 2017) <https://www.ogauthority.co.uk/media/3594/420432-oga-cbqt-appendix-a-c-example-behaviours_15.pdf>.
[82]Oil and Gas Authority, 'Lessons Learned from UKCS oil and gas projects 2011-2016' (3 March 2017) <https://www.Oil and Gas Authorityuthority.co.uk/media/3380/Oil and Gas Authority-lessons-learned-from-ukcs-oil-and-gas-projects-2011-2016.pdf>.

'Organisational', 'Project Management', 'Front-end Loading (FEL)', 'Execution' and 'Behaviours'. [83]

3.4.3 Oil and Gas UK

The trade association of the UK offshore oil and gas industry has also published several guides that could be used to form a CCM framework. Several publications are now under reconsideration to reflect the changes from the MER Strategy. The thesis summarises the most important documents that could form a sector-specific CCM framework for the offshore oil and gas industry.

3.4.3.1 Commercial Code of Practice (CCoP)

The Commercial Code of Practice [hereinafter 'CCoP'] was first published in 2002 by Oil and Gas UK. Its initial goal was to 'produce a voluntary Commercial Code of Practice to aid negotiations such as asset transfers (…) and establish an agreed framework that would minimise (the often very considerable) resources spent on such negotiations and promote positive and co-operative commercial behaviour'.[84] The CCoP of 2002 was withdrawn on October 2016 to be revised in light of the MER Strategy.[85]

The 2016 version of CCoP[86] [hereinafter 'CCoP 2016'] has been perceived as following in the tracks of the previous version, with wording changes shifting closer to the MER Strategy, but essentially maintaining the same meaning.[87] However, the more important ramifications of the new version is that it embeds the principles and – potential consequences – of the MER Strategy. Comments suggest that it 'includes

[83] Ibid. at 11-15.
[84] Oil and Gas UK, 'Commercial Code of Practice' (2002) <http://oilandgasuk.co.uk/commercialcodeofpractice.cfm>.
[85] For the text of the CCoP 2002 see <https://www.gov.uk/guidance/oil-and-gas-codes-of-practice>; the link includes also other relevant oil and gas guides that were withdrawn.
[86] For the text of CCoP 2016 see <https://www.ogauthority.co.uk/media/3088/commercial-code-of-practice-2016.pdf>.
[87] 'For instance, 'co-operative' and 'non-blocking approaches' have been repackaged as 'collaboration'; see Judith Aldersey Williams, Valerie Allan, Norman Wisely, 'CCoP revised in light of MER UK' (04.01.2017) <http://www.cms-lawnow.com/ealerts/2017/01/ccop-revised-in-light-of-mer-uk>.

'teeth' perhaps lacking in its earlier counterpart, as it carries the prospect of sanctions'.[88]

The position of CCoP 2016 regarding the supply chain is also notable, yet addressed by neither academics nor practitioners. Although the text of the CCoP 2016 itself covers one page, the three pages of 'supporting notes' deserve closer scrutiny. The scope of the CCoP 2016 is defined in the supporting notes as 'appl[ying] to licensees; infrastructure owners; potential licensees; potential infrastructure owners and advisors to these parties'.[89] The issues that arise here are similar to the issues in the analysis of whether the supply chain can be said to fall within the scope of the MER Strategy in certain instances.[90] The scope includes 'infrastructure owners' and 'potential infrastructure owners'. The question that arises here is as to which definition 'infrastructure' takes in this case: the definition provided by the MER Strategy in its annex,[91] or the 'ping-pong' of referrals of definitions explained in chapter two.[92] The answer is not straightforward, because with 'relevant persons' for the purposes of the MER Strategy, the Strategy itself made an express reference to the persons listed in Petroleum Act 1998 as amended,[93] which in turn was the genesis of the 'ping-pong' mentioned above. With CCoP 2016 there is no such explicit reference. Either definition of 'infrastructure' could be argued, but what it is more important is that the outcome of the question would be applied in both contexts to at least ensure harmonisation and clear scope for both the MER Strategy and CCoP 2016.

Another noteworthy aspect in the comments section is the repetition of other relevant stakeholders. These are referred to on multiple occasions as 'JV partners, external advisors, current and potential counterparties'.[94] The suggestion to discuss the course of action with the joint venturers and external advisors cannot come as a surprise; on the contrary, it is self-evident. However, one might indicate a 'wide' inclusion of stakeholders. Therefore, the reference to 'current and potential counterparties' would logically include the supply chain of the operators and their joint venturers. One might

[88] Ibid.
[89] CCoP 2016, 2.
[90] See supra section 2.3.5.2.
[91] MER Strategy, 14 'Infrastructure means terminals and, upstream of a terminal, equipment, pipelines, platforms, production installations and subsea and subsurface facilities'.
[92] See supra section 2.3.5.2.
[93] MER Strategy, 14 'Relevant persons means the OGA and the persons listed in section 9C of the Petroleum Act 1998 at the date this Strategy is laid in Parliament'.
[94] CCoP 2016, 2-4.

wonder who could be a closer 'counterparty' than the contractors working on the very same project. Again, it should be clarified that the arguments brought up in the thesis as to the supply chain do not intend to prove that it should be included within the scope of the Strategy and/or the SCCoP, but rather intend to raise awareness of the potential inconsistencies in the current wording of the existing framework.

3.4.3.2 Infrastructure Code of Practice (ICoP)

The Infrastructure Code of Practice [hereinafter 'ICoP'] was initially published in 1996 as the 'Offshore Infrastructure Code of Practice'. It was reviewed in 2012 to reflect new legislation in the Energy Act 2011. The official name of the Code is the 'Code of Practice on Access to Upstream Oil and Gas Infrastructure on the UK Continental Shelf',[95] which reflects its purpose and is accompanied by Guidance Notes.[96] The purpose of the Code is to 'facilitate the utilisation of infrastructure for the development of remaining UKCS reserves through timely agreements for access on fair and reasonable terms, where risks taken are reflected by rewards'.[97] The rationale behind the Code was to allow smaller players to operate in the UKCS by having access to third party infrastructure, such as pipelines and other equipment.[98] By agreeing to ICoP, the parties must agree to other relevant guidelines, or 'principles', of the industry.[99] ICoP is another piece of the puzzle with which CCoP influences industry players to commit to collaborative processes.

[95] DECC and OGUK, 'Code of Practice on Access to Upstream Oil and Gas Infrastructure on the UK Continental Shelf' (November 2012) <http://oilandgasuk.co.uk/wp-content/uploads/2015/05/ICoP-revised-2013.pdf>.
[96] DECC and OGUK, 'Code of Practice on Access to Upstream Oil and Gas Infrastructure on the UK Continental Shelf: Guidance Notes' (November 2012) <http://oilandgasuk.co.uk/wp-content/uploads/2015/05/OP080.pdf>.
[97] ICoP, para 1(2).
[98] Oil and Gas UK <http://oilandgasuk.co.uk/infrastructurecodeofpractice.cfm>.
[99] Oil and Gas UK <http://oilandgasuk.co.uk/infrastructurecodeofpractice.cfm>. 'Parties uphold infrastructure safety and integrity and protect the environment; Parties follow the Commercial Code of Practice (CCoP); Parties provide meaningful information to each other prior to and during commercial negotiations; Parties support negotiated access in a timely manner; Parties undertake to ultimately settle disputes through the Automatic Referral Notice (ARN) process which involved the Secretary of State; Parties resolve conflicts of interest; Infrastructure owners provide transparent and non-discriminatory access; Infrastructure owners provide tariffs and terms for unbundled services, where requested and practicable; Parties seek to agree fair and reasonable tariffs and terms, where risks taken are reflected by rewards; Parties publish key, agreed commercial provisions'.

3.4.3.3 Supply Chain Code of Practice (SCCoP)

The Supply Chain Code of Practice [hereinafter 'SCCoP' or 'Code'] was published by OGUK and PILOT in 2012.[100] In a recent Compliance Report[101] – analysed below – it was announced that 'there will be a full refresh of the SCCoP in 2017 to ensure that it remains fit for purpose and is aligned with the Industry Behaviours Charter'. An accompanying document was published, which recaps the goals and aspirations of the new SCCoP.[102]

Since the new publication is still pending at the time of this thesis' completion, the thesis shall analyse the 2012 publication. SCCoP mentions three main tasks as its goals: to improve performance, eliminate unnecessary costs, and add value and boost competitiveness. The mission statement states that 'the code is designed to help its signatories achieve the highest attainable standards of business ethics, health, safety and environmental operations in accordance with all relevant statutory, local and national legislative requirements'.

The Code provides for three stages: 'Plan', meaning 'transparent planning of contracting activity by major purchasers to improve supply chain capability'; 'Contract', meaning 'streamline pre-qualification, tendering and negotiation processes to reduce bidding costs, eliminate waste, add value and increase competitiveness'; and finally, 'Perform and Pay', meaning '[i]ncrease feedback dialogue and shorten payment cycles to improve performance'. The most relevant phase – which is examined under the Compliance Report below – is 'Contract'. The last parameter to 'perform and pay' might be important from a practical and commercial point of view for the contractors, as it obliges the 'purchasers' to 'pay all valid invoices (or the undisputed portion of a disputed invoice) within 30 days'.[103] However, this commercial matter is beyond the focus of the thesis.

[100] OGUK and PILOT, 'Supply Chain Code of Practice' <http://oilandgasuk.co.uk/wp-content/uploads/2015/05/SC021.pdf >.
[101] Oil and Gas UK, 'SCCoP Compliance Report' <http://oilandgasuk.co.uk/wp-content/uploads/2016/11/Supply-Chain-Code-of-Practice-2016.pdf >.
[102] Oil and Gas UK, <http://oilandgasuk.co.uk/wp-content/uploads/2015/05/SCCoP-Booklet-March-2017.pdf >.
[103] SCCoP 7.

The relationship among operators and contractors in the scope of SCCoP is pertinent in that the Code makes a peculiar distinction between the stakeholders and the signatories that it intends to attract. On the one hand are 'purchasers', which includes 'operators and major contractors'[104] and on the other 'suppliers', which includes 'companies providing goods or services'.[105] One might wonder what the rationale behind this division is; it might be a purposeful inclusion of operators and major contractors only on the one side, which implies that smaller contractors – who in many cases are hired as sub-contractors – are on the supply side. This does seem odd, as the reference to 'companies providing goods or services' could very well refer to major contractors as well.

As to the benefits and advantages for the purchasers, SCCoP puts forward various elements.[106] However what is the most noteworthy is the emphatic way in which the SCCoP declares that these elements 'all combin[e] to make the UKCS a global leader in collaborative, efficient supply chain'.[107] The thesis submits that SCCoP clearly states its preference for collaboration among operators and the supply chain.

3.4.3.4 Industry Behaviours Charter

Oil and Gas UK developed an 'Industry Behaviours Charter' that aims to become an industry norm. The vision of the Charter is to 'promote the behaviours that will deliver a safe, competitive and sustainable industry capable of maximising economic recovery in the UK Continental Shelf and therefore best serving its stakeholders'.[108] Within OGUK, the Charter was developed to assist the ETF,[109] and is also supported

[104] Ibid.
[105] Ibid.
[106] SCCoP 5, 'Signing the oil and gas industry's SCCoP demonstrates your commitment to work towards: Applying industry best practice; Aligning with corporate responsibility and good business principles and ethics; Improving performance, eliminating unnecessary costs and adding value across the UKCS oil and gas industry; Giving forward visibility to project work plans of contracting activity (e.g. 'PILOT Share Fair' business opportunity events and PILOT Forward Workplans); Helping standardisation by use of industry standard LOGIC ITTs and contract forms; Paying all valid invoices within 30 days; Increasing dialogue and two-way feedback on performance; Eliminating repetitive pre-qualification; Driving performance improvement against your peers'.
[107] Ibid.
[108] OGUK, 'Industry Behaviours Charter' (2016) <http://oilandgasuk.co.uk/wp-content/uploads/2016/05/Industry-Behaviours-Charter.pdf>.
[109] The Oil & Gas UK executive formally launched the Efficiency Task Force (ETF) in September 2015 to drive a pan-industry improvement in efficiency; see <http://oilandgasuk.co.uk/efficiency-task-force.cfm> and <http://oilandgasuk.co.uk/etf-toolkit.cfm>.

by the Oil and Gas Authority. The Charter has already attracted important players as signatories, and both important operators and contractors active in the North Sea are included in the list so far.[110] The Charter consists of five 'commitments' that the signatories undertake to uphold. However, this is not a legally binding document. Moreover, it seems that the expressions are phrased in a generic manner and there are no more specific details provided on how these commitments should operate in practice. Therefore, there is room for improvement from the implementation perspective. The most noteworthy provisions are those that require the signatories to commit to 'strengthen industry co-operation through continual improvement in and support for, industry codes of practice, forums and standards' and 'contribute to performance improvement by ensuring transparent and time-bound legal, commercial and contractual engagements'.[111] The former commitment demonstrates the importance of industry codes and standards, which is what the thesis also highlights. The latter commitment emphasises the importance of the 'legal, commercial and contractual' dimension of offshore contracting as a parameter that can contribute to the main goal of the MER Strategy. As already mentioned, the Charter could benefit from more precise guidance about how these general principles can be applied and monitored in practice.

3.4.3.5 Deloitte Collaboration Report

The Deloitte Collaboration Report [hereinafter 'Deloitte Report'], undertaken in co-operation with Oil and Gas UK, is also on this list of potential CCM tools, as it appears to be an important tool for the Oil and Gas Authority. [112] In a recent event organised by the Oil and Gas Authority, it was mentioned that the Deloitte Report would become annual, and that it might 'potentially extend the Deloitte supply chain study of leading indicators' to other areas as well. [113] The Deloitte Report indicates

[110] For example, the list includes most oil majors on the operators' side (Chevron, Total, ConocoPhillips, BP, Shell, ExxonMobil) and many major contractors (e.g. Transocean, Halliburton, Amec, Technip among others) <http://oilandgasuk.co.uk/industry-behaviours-signatories.cfm>.
[111] Industry Behaviours Charter, see ibid.
[112] Deloitte, 'Making the most of the UKCS: Collaborating for success' (February 2016) 6 <https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/energy-resources/deloitte-uk-making-the-most-of-ukcs-2016.pdf>.
[113] Gunther Newcombe, Neil McCulloch, Russell Richardson, 'MER UK in Practice, Collaboration, Competition Law & Area Plans' <https://www.Oil and Gas Authorityuthority.co.uk/media/2867/mer-

that almost all participants (98 percent) see collaboration as 'crucial' to their future success.[114] Furthermore, one of the final recommendations of the Report is 'integration of the supply chain'. The Report suggests that 'integrating supply chain…processes end-to-end and sharing the benefits realised with the supply chain has helped improve response times, lower the costs, reduce and optimise inventory, as well as reduce the number of unplanned shutdowns. (…) Supply chain integration can lead to cost savings in the region of 20-40 per cent improving wrench time'.[115]

3.5 CHAPTER CONCLUSION

The first conclusion of this chapter regards the notion of 'traditional' and 'modern' contracting. As stated in the introduction, these notions do not suggest a simplistic division between 'good or bad' and 'efficient or non-efficient' approaches, respectively. The notion of modern contract was developed within the construction industry over the last few decades in the UK, and its main characteristics are the tools it uses at the project management and contract management level with the aim of a successful project outcome. This goal, i.e. the successful project outcome, is an issue that can also be said to have a certain importance from a legal perspective. As already mentioned, the traditional contract approach adopts 'success criteria' viewed solely from a narrow, legal standpoint. For this contracting philosophy, the aims of 'protecting one's interests' through 'good drafting' and favourable risk allocation are the end goals themselves. In case a project failure occurs – whatever the reason might be – the wording of a contract that mitigates the loss of the client, or entitles the client to compensation, is perceived as a 'successful' contract. A modern contract – which arguably evidences its engineering background – focuses on the success of the project. In this school of thought, the previous example would be an 'unsuccessful' contract, as ultimately it failed to maintain the relationship of the parties and lead to a successful project execution.

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uk-in-practice-collaboration-competition-law-and-area-plans.pdf>. (slide presentation in Oil and Gas Authority Aberdeen conference October 2016).

[114] Deloitte Collaboration Report 5

[115] Deloitte Collaboration Report 22.

The second conclusion regards the definition of the discipline of CCM. The thesis explains its relevance to the legal discipline, which is not immediately clear from an academic standpoint. CCM is essentially an academic sub-discipline of management in the broader sense and project management in a narrower sense. CCM is an alien concept to the traditional legal standpoint on contract law and contracting, whereas the areas of interest have been 'certainty and predictability', 'clear drafting', the peculiarities of the 'wording' and its potential interpretation. However, the evolution of the 'modern' contract in the UK construction industry described in this chapter demonstrates that a paradigm shift took place over time, and the role of the contract was enhanced by management elements aimed at the successful execution of the contract, and ultimately, of the project itself.

The third conclusion is about the potential of CCM for offshore oil and gas contracting, specifically in light of the MER Strategy. The chapter argues that there is 'an elephant in the room' in the sense that despite the existence of an adequate body of documents published by the Oil and Gas Authority which effectively form a tailor-made, sector-specific body of CCM for the offshore oil and gas industry, this realisation seems to elude the Oil and Gas Authority and the industry. The thesis argues that the realisation of the value of CCM is critical, because CCM in the context of the offshore oil and gas industry can benefit from the more coherent and sophisticated theoretical background of CCM already developed in other industries, and even in government contracting. In this way, it becomes evident that project-based industries can cross-fertilise each other, as the challenges are often essentially the same. The chapter stresses that the new MER Strategy should be built around BS Standard 11000-1.[116] If the Standard is followed, it would drastically change the contracting paradigm between operators and contractors. As explained in the chapter, new mechanisms such as joint management teams would have to work jointly and develop joint risk registers and relationship management plans (among many other tools) to ensure the successful execution of a project.

[116] As noted in section 3.4.1 the BS Standard 11000-1 has now been withdrawn and has been replaced by BS 44001. However, until is the Accompanying Guide is published and the new Standard finds its way in practice, the previous BS Standard 11000-1 remains relevant, especially since the Oil and Gas Authority explicitly endorses it.

CHAPTER 4

THE NOTION OF 'COLLABORATION' IN THE ENGLISH LAW OF CONTRACT

4.1 CHAPTER INTRODUCTION

Chapter 2 analysed the notion of collaboration within and beyond the MER Strategy. In Chapter 3, the notion of modern contracting and the potential of contract and commercial management for offshore oil and gas contracting was explained. Chapter 4 places the final piece of the puzzle, which is examining the notion of collaboration and its practical consequences from a legal standpoint. An important aim of the chapter is to explain that collaboration is not a legal term of art, and thus it is 'reflected' in other legal notions and must be examined in conjunction with them. The first section of the chapter provides an overview of the 'ethos' and 'ideology' of the English law of contract. This section does not intend to be an in-depth analysis of contract theory, which is a distinct branch of the legal discipline with unresolved questions that have been debated for a long time. The aim is rather to set the stage and introduce certain long-standing debates about contract law, e.g. the formalism/contextualism debate. Next, the relationship of 'collaboration' with contract law notions is examined in order to see how it can fit in this wider context. The methodological rationale for choosing and analysing specific cases and notions is explained in detail. As a final remark, it should be noted that the question posed in this chapter has a broad scope and may be applicable in many areas of contract law, especially in the context of project-based industries. However, the focus of the chapter is to link, where possible, the analysis on this doctrinal question with the MER Strategy and the potential ramifications for offshore oil and gas contracting.

4.2. THE 'ETHOS' AND 'IDEOLOGIES' OF THE ENGLISH LAW OF CONTRACT

Commenting on the ethos and ideologies of the English law of contract is so theoretical that it seems irrelevant to a question which arises out of practical scenarios. The reason for the theoretical inquiry is that in order to ascertain the meaning of 'collaboration' in the English law of contract, one must at least understand the fundamental presumptions on which English law evolved. Scrutinising the substance of, and taking sides on, this theoretical debate lies outside of the research scope. However, without an understanding of the foundations and the different views, such as the fundamental difference in the school of thought of contract law formalism and contextualism, it is impossible to put in context the notion of collaboration.

Before the main analysis begins, it is helpful to also provide historical context about the approach of the research. The thesis takes into account the context of the 'modern contract law' era; this term is juxtaposed with 'classical contract law' period, which is thought to have been developed and predominant during the nineteenth and the first part of the twentieth century. [1]

The main characteristics of classical contract law were perceived to be the effort to 'develop a general body of contract law applicable to all types of contracts' and 'in the endeavour to attain the highest degree of stability and predictability so as to ensure the parties' ability to rely upon the binding effect of the contract'.[2] The 'modern law' era of English law is calculated from the 1940s onwards.[3] The characteristics of modern contract law are perceived to be 'an increased control over the contractual regime (…) reflected both by general supervision over the process of contract formation and by intervention in the very contents of the contract' and a 'tendency of modern contract law is to dilute formal requirements and to attach greater weight to substantive fairness'.[4]

[1] Jack Beatson and Daniel Friedmann, 'From 'Classical' to Modern Contract Law' 7 in Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (OUP 1995).
[2] Ibid. 10.
[3] Ibid. 12.
[4] Ibid. 15.

The next point of consideration is the underlying 'ethos' and 'ideologies' of the English law of contract.[5] This inquiry may offer further insight into the underlying assumptions that exist in the dominant contract law doctrine.

Brownsword recognises three main potential 'underlying ethics' in the English law of contract: the ethic of individualism[6], the ethic of cooperativism[7] and the ethic of altruism[8]. Leaving altruism aside,[9] the question remains whether individualism or cooperativism is the main ethos of the English law of contract. This question has been a long-standing one, and the pendulum has swung many times, shifting according to case law. Nevertheless, the starting point of English contract law doctrine has been certainly closer to the 'classical' model of contract, with the main characteristics being an adversarial ethic, the primacy of the contractors' intentions, the centrality of exchange and the protection of the expectation interest.[10]

A closely related issue to that is the so-called 'ideologies' of contract law. In understanding commercial contracts, Brownsword suggests that the prevailing ideology is 'market-individualism'. This notion can be further divided into the ideas of 'static' and 'dynamic' market-individualism. Static market-individualism sees the principal function of contract law as being to 'establish a clear set of ground rules within which a market can operate' and dynamic market-individualism 'favour(s) a

[5] For a theoretical discussion on contract theory see Stephen A. Smith, *Contract Theory* (1st edn, OUP 2004); Hanoch Dagan and Michael Heller, *The Choice Theory of Contracts* (Cambridge University Press 2017); Gregory Klass, George Letsas and Prince Saprai (eds), *Philosophical Foundations of Contract Law* (OUP 2014); Hugh Collins, *Regulating Contracts* (OUP 2014); Peter Benson (ed), The *Theory of Contract Law: New Essays* (1st edn, Cambridge University Press 2008); Jean Braucher (ed), *Revisiting the Contracts Scholarship of Stewart Macaulay* (Hart Publishing 2013); For a theoretical law and economics analysis see Eric Brousseau (ed), *The Economics of Contracts: Theories and Applications* (Cambridge University Press 2002).

[6] 'The prioritization of self-interest - in which a contractor puts its own interests above the interests of a fellow contractor', see Roger Brownsword, *Contract Law: Themes for the twenty-first Century* (2nd edn, OUP 2006) 28.

[7] Ibid., 'The equality of interest - in which a contractor treats its own interests and the interests of a fellow contractor as of equal weight'.

[8] Ibid., 'The prioritization of the interests of others- in which a contractor puts the interests of a fellow contractor above its own interests'.

[9] Ibid., Altruism is described as a 'characteristic of fiduciary rather than contractual relationships'.

[10] Roger Brownsword, *Contract Law: Themes for the twenty-first Century* (2nd edn, OUP 2006) 47 'Spelling this out rather more fully,we can say that the doctrinal landmarks of the classical law are founded upon a handful of key ideas: in particular, an adversarial ethic (this being presupposed by 'the economic model of the free market transaction'); the primacy of the contractors' intentions; the centrality of exchange; and the protection of the expectation interest (the executory promise of future performance being treated, so to speak, as a matter of present entitlement).'

more flexible approach, guided by the practices and expectations of the contracting community (particularly the commercial community)'.[11]

The classical model and ethos of the English law have been challenged in the past few decades by the evolution of the 'regulatory and relational contract law theory'. Morgan provides a succinct and elucidating description of the 'modern' contract law theory school of thought. The leading studies that laid the foundations in in this field are widely accepted to be the empirical work of Macaulay and other socio-legal scholars and economists.[12] The original empirical study might have taken place as long as five decades ago, but the conclusions remain relevant today. The work of McNeil has also been highly influential in this field.[13]

The essence of the 'relational contract theory' school of thought is that there is a stark difference between transactions as reflected in a contract and what actually happens between the businessmen who negotiate and draft the contracts. Macaulay referred to this difference agreements on paper and agreements in the real world, or in other words, the 'real' and the 'paper' deal.[14] This argument is advocating a 'contextualist' approach, in which the text of a contract is not 'sacred', but what matters more is to ascertain and enforce the real intention of the parties, broadly defined.

The initial breakthrough of the relational/contextualist school of thought did not go unanswered by the scholars and practitioners advocating that modern contract law should not depart too far from its classical roots. This school of thought termed as the 'formalist' (also known as 'neoformalist') approach has conducted empirical studies that yielded contradictory conclusions, i.e. that businessmen in many instances – as in

[11] Roger Brownsword, Contract Law: *Themes for the twenty-first Century* (2nd edn, OUP 2006) 139-141; See also Roger Brownsword, 'Contract Law, Co-operation, and Good Faith: The Movement from Static to Dynamic Market-Individualism' in Simon Deakin and Jonathan Michie (eds), *Contracts, Co-operation, and Competition: Studies in economics, management and law* (OUP 1997).

[12] For the leading studies on this field see, S. Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28American Sociological Rev l; H. Beale and T. Dugdale, 'Contracts between Businessmen: Planning and the Use of Contractual Remedies' (I975) 2 BJL&S 45; R. Gordon, 'Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law' [1985] Wisconsin LR 565; H. Collins, *Regulating Contracts* (Oxford University Press, 1999); S. Macaulay, 'The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules' (2003) 66 MLR 44; O.E. Williamson, *The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting* (Free Press 1985).

[13] The work of Mcneil will be examined in more detail in section 4.3.3.

[14] For an elaboration of this notion see Catherine Mitchell, *Contract Law and Contract Practice: Bridging the Gap between Legal Reasoning and Commercial Expectation* (Hart Publishing 2013).

the case study of the US cotton industry – preferred strict rules that were perceived as providing a more predictable trading framework.[15]

At this point, the thesis intends to propose an original angle; that is, where 'collaboration' sits on the spectrum of the contextualist and the formalist approach and how does recent UK case law approach these matters. The thesis submits that a perception has been created – partly due to misunderstandings stemming from recent case law due to reasoning in *Yam Seng Pte Ltd v International Trade Corp Ltd* – that collaboration can only take effect in a contextualist, 'relational' contracting framework. The thesis submits that this is an incorrect perception, and that a collaborative relationship can operate both within a contextualist and formalist contracting environment. The difference is not the contracting theory, but rather the intention of the parties and the wording they choose in order to apply their intention in a collaborative business relationship.

4.3 'COLLABORATION' AND ITS RELATIONSHIP WITH ENGLISH CONTRACT LAW NOTIONS

4.3.1. Case law on client-contractor 'collaborative' contracts

In this section, it is necessary to first explain the methodology that is used in order to select the appropriate cases that can help build a theoretical framework with which to ascertain the meaning of collaboration in the English law of contract. The first step is to provide a general chronological context for this methodology. The thesis includes in its analysis the 'modern' contract law era, the characteristics of which were explained in the previous section.[16] Furthermore, the research includes cases brought before the English courts and does not examine arbitration cases. The reason for the exclusion of arbitrated cases is that the focus of the analysis is to ascertain the current

[15] J. Gava and J. Greene, 'Do We Need a Hybrid Law of Contract? Why Hugh Collins Is Wrong and Why It Matters' [2OO4] CLJ 605; J. Morgan, *Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law* (Cambridge University Press 2013); L. Bernstein 'Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions' (2001) 99 Michigan LR 1724; A. Schwartz and R.E. Scott, 'Contract Theory and the Limits of Contract Law' (2003) 113 YaIe LJ 541.
[16] See supra section 4.2.

doctrine of English law on collaboration. Case law can offer a more authoritative picture of the current state of affairs than arbitral cases.

The specific criteria used for case law selection is:

> (a) cases involving a client-contractor relationship. This is necessary as it reflects the nature of project-based industries in general and the offshore oil and gas industry in particular;
>
> (b) cases where the parties have chosen to have a 'collaborative relationship' and have used terms that are perceived to reflect a collaborative relationship;
>
> (c) cases where contracts that are self-defined as 'collaborative' (e.g. NEC, PPC2000) were brought before the courts.

These cases are examined in chronological order in order to follow the evolution of the law. Before continuing to the main analysis, it is necessary to resolve a 'chicken and egg' situation in this methodology selection. One the one hand, the aim of this section is to define collaboration; on the other, it is already 'assumed' that collaboration has a relevance to certain notions, such as good faith, 'quasi-good faith' clauses ('mutual trust and co-operation' clauses), relational contracts and partnering and alliancing contracts. However, there must be a starting point, after which the research may then 'reverse-engineer' its findings to ascertain whether the original assumptions were correct. Finally, after the analysis of the selected case law, the research considers each of the notions separately, including in its analysis aspects of offshore oil and gas contracting where relevant.

4.3.1.1 Compass Group UK and Ireland Ltd (t/a Medirest) v Mid Essex Hospital Services NHS Trust

In the case of *Medirest v Mid Essex Hospital Services*[17] the contract between the Mid Essex Hospital NHS Trust [hereinafter 'Trust'] Trust and the contractor (Medirest)

[17] *Compass Group UK and Ireland Ltd (t/a Medirest) v Mid Essex Hospital Services NHS Trust* [2012] EWHC 781 (QB); [2012] 2 All E.R. (Comm) 300 [hereinafter '*Medirest v Mid Essex Hospital Services*'].

was the offering of catering and cleaning services to the hospital. At first instance, Mr Justice Cranston stated that 'at the heart of this claim is a clause in a long-term facilities contract which obliged the parties, *inter alia*, to cooperate in good faith'.[18] The contract imposed a duty to cooperate in good faith which read:

> '3.5 The Trust and the Contractor will co-operate with each other in good faith and will take all reasonable action as is necessary for the efficient transmission of information and instructions and to enable the Trust or, as the case may be, any Beneficiary to derive the full benefit of the Contract'.[19]

Mr Justice Cranston held that this clause imposed a 'duty to co-operate in good faith' which was breached by the Trust. Furthermore, the contract was utilising a so-called 'Service Failure Points' [hereinafter 'SFP'] system, whereby the Trust could impose payment deductions to the contractor in case of poor performance. [20] With regard to SFP's, Mr Justice Cranston found that the Trust exercised this contractual provision in an 'arbitrary, irrational or capricious manner'[21] by appointing disproportional numbers of failure points to the contractor.

The case was appealed and overturned in *Medirest v Mid Essex Hospital Services* (Court of Appeal) [22]. The Court of Appeal overturned both elements of the decision. With regard to the clause 3.5, which provided for the 'duty to co-operate in good faith', the Court of Appeal took a rather literal interpretation of this duty and linked it with the rest of the provision, i.e. 'the efficient transmission of information and instructions and to enable the Trust or, as the case may be, any Beneficiary to derive the full benefit of the Contract'.[23] By narrowing the scope of the duty to co-operate only within the specific action of 'efficient transmission of information and

[18] Ibid. para [1].
[19] Ibid. para [11].
[20] Ibid. para [12], contract clause 5.8.
[21] *Paragon Finance Plc (formerly National Home Loans Corp) v Nash Paragon Finance Plc v Staunton* [2001] EWCA Civ 1466; [2002] 1 W.L.R. 685; [2002] 2 All E.R. 248; [2001] 2 All E.R. (Comm) 1025; [2002] 2 P. & C.R. 20; (2001) 98(44) L.S.G. 36; (2001) 145 S.J.L.B. 244; [2002] 1 P. & C.R. DG13; Times, October 25, 2001.
[22] *Compass Group UK and Ireland Ltd (t/a Medirest) v Mid Essex Hospital Services NHS Trust* [2013] EWCA Civ 200; [2013] B.L.R. 265; [2013] C.I.L.L. 3342 [hereinafter '*Medirest v Mid Essex Hospital Services* (Court of Appeal)'.
[23] *Medirest v Mid Essex Hospital Services*, para [11].

instructions to derive the full benefit of the contract', the Court of Appeal held that the Trust did not fall short of this obligation.

With regard to the duty to not act in an 'arbitrary, irrational or capricious manner' Lord Justice Jackson held that 'there is no justification for implying into clause 5.8 a term that the Trust will not act in an arbitrary, irrational or capricious manner'.[24] The rationale was that, in this case, the contract gave to the Trust the discretionary power of 'whether or not to exercise a contractual right'.[25] This right was further amplified by the characterisation of the Trust as a 'public authority delivering a vital service', which granted the Trust an even greater power of discretion as a matter of public policy.[26]

A further issue deriving from this case is an insight about the content of the 'duty to co-operate in good faith'. Lord Justice Jackson put forth two possible interpretations: first, a narrow interpretation where the duty was only confined to acting honestly;[27] and second, a broader and 'stronger' interpretation, whereby the duty should be construed as 'to observe reasonable commercial standards of fair dealing, and to be faithful to the agreed common purpose, and to act consistently with the justified expectations of the parties'.[28] The Court of Appeal chose the narrow approach, choosing to attribute a literal meaning to the duty of co-operation only to what was expressly mentioned in clause 3.5 of the contract.

The first relevant point for the purposes of the research is the narrow meaning that was attributed to the good faith clause. Another relevant observation is the utter ineffectiveness of the 'Service Failure System' or similar 'carrot and stick' performance measurement systems. A similar system was applied in the recent *Portsmouth City Council v Ensign Highways Ltd*, with equally poor results for the success of the project.[29] It is not common to see such a system in offshore oil and gas

[24] *Medirest v Mid Essex Hospital Services* (Court of Appeal), para [92].
[25] Ibid, para [83].
[26] Ibid, para [91].
[27] Ibid, para [109]; The paragraph references *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd* [2001] UKHL 1, [2003] 1 AC 469, where Scott LJ held that 'the duty of utmost good faith required no more than that the insured should act honestly and not in bad faith'.
[28] Ibid, para [111]; See reference to *CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535 (Ch); [2010] C.I.L.L. 2908; [2010] N.P.C. 74, para [246].
[29] See for example *Portsmouth City Council v Ensign Highways Ltd* [2015] EWHC 1969 (TCC); [2015] B.L.R. 675; 161 Con. L.R. 71; [2015] B.L.G.R. 791; [2015] C.I.L.L. 3717 [hereinafter '*Portsmouth City Council v Ensign Highways Ltd'*].

contracts *per se*, but the traditional adversarial contracting ethos did create similar problems, as already explained.[30]

4.3.1.2 TSG Building Services Plc v South Anglia Housing Ltd

The case of *TSG Building Services Plc v South Anglia Housing Ltd*[31] is a case of particular interest. The reason is that it is based on a contract which has been designed specifically as a 'partnering contract', TPC 2005,[32] which belongs to the 'PPC suite' of contracts.[33] The reason that this case is important is that, as it has been described, 'it goes to what many believe is the heart of partnering contracts, namely the spirit of trust, fairness and mutual co-operation'.[34] Leaving aside the adjudication issues which arose in this case, the thesis shall focus directly on the issue of the 'partnering' or 'quasi good faith' clause.

> '[1] The Partnering Team members shall work together and individually in the spirit of trust, fairness and mutual co-operation for the benefit of the Term Programme, within the scope of their agreed roles, expertise and responsibilities as stated in the Partnering Documents, and [2] all their respective obligations under the Partnering Contract shall be construed within the scope of such roles, expertise and responsibilities, and [3] in all matters governed by the Partnering Contract they shall act reasonably and without delay.'[35]

The scope of the contract was the offering by TSG of gas services and associated works programme to houses owned by South Anglia. One year after the contract signature, South Anglia sought to terminate the contract. The issue that arose was

[30] See supra 1.2.4.
[31] *TSG Building Services Plc v South Anglia Housing Ltd* [2013] EWHC 1151 (TCC); [2013] B.L.R. 484; 148 Con. L.R. 228 [hereinafter '*TSG Building Services Plc v South Anglia Housing Ltd'*]
[32] TPC2005, 'The ACA Standard Form of contract for term partnering: Introduction and explanatory notes' < http://ppc2000.wiserhosting.com/wp-content/uploads/2017/01/IntroductiontoTPC2005.pdf>.
[33] See supra 3.2.2.
[34] David Mosey, 'Partnering's tough side, Building Magazine' (25 June 2013) available at < http://www.building.co.uk/partnerings-tough-side/5056796.article>.
[35] *TSG Building Services Plc v South Anglia Housing Ltd* [para 33]; It should be noted that the numbering in the paragraph is added by Mr Justice Akenhead himself, noting that 'it is probably helpful if one breaks Clause 1.1 down into its arguably different parts (withparagraph numbers added)'

whether South Anglia had the right to terminate the contract at convenience, since it had entered into a partnering agreement and had agreed to the aforementioned clause including the duty to 'work together and individually in the spirit of trust, fairness and mutual co-operation'. Clause 13.3 of the contract provided for termination at convenience.[36] TSG attacked the termination on two grounds, first on content of the partnering clause, and second on the grounds of an implied term of good faith.

Mr Justice Akenhead rejected both arguments. With regard to the partnering clause, it was held that the duty to 'work together and individually in the spirit of trust, fairness and mutual co-operation' related only to the 'Term Programme', which in turn had only 'as its object the efficient and good quality performance of the gas related works in some 5500 dwellings'.[37] In other words, the Court again adopted an extremely narrow interpretation of this 'quasi good faith' clause and attached its meaning only to the specific tasks under the Term Programme. With regard to the argument of the implied term of good faith, Mr Justice Akenhead held that there was no such duty and even if there were, it could not override the express clause of termination at convenience.[38]

This case serves to reiterate that the scope of 'partnering' or 'quasi good faith' clauses may be narrowed down significantly by a very literal interpretation of the content of the clause. It is clear that the Court did not intend to expand the scope of the partnering clause and limited the interpretation only to the scope of the 'Term Programme', following the rationale of *Medirest v Mid Essex Hospital Services* (Court of Appeal) which restricted the scope only to the issue of 'efficient transmission of information and instructions'. The *TSG Building* decision was met with satisfaction from practitioners in the construction sector, as it was perceived as a

[36] Ibid [para 42], 'Clause 13.3 entitles either party to terminate for any or even no reason. Clause 13.1 makes it clear that the four year term is subject to Clause 13. Clause 13 provides for automatic termination for bankruptcy, insolvency or the like (Clause 13.5), termination for breach (Clause 13.6) and an unqualified and unconditional right to terminate (Clause 13.3).'
[37] Ibid para [33 (1)].
[38] Ibid para [31], 'I do not consider that there was as such an implied term of good faith in the Contract. The parties had gone as far as they wanted in expressing terms in Clause 1.1 about how they were to work together in a spirit of 'trust fairness and mutual cooperation' and to act reasonably. Even if there was some implied term of good faith, it would not and could not circumscribe or restrict what the parties had expressly agreed in Clause 13.3, which was in effect that either of them for no, good or bad reason could terminate at any time before the term of four years was completed. That is the risk that each voluntarily undertook when it entered into the Contract, even though, doubtless, initially each may have thought, hoped and assumed that the Contract would run its full term.'

sign that entering into partnering contracts and using 'quasi good faith' clauses was not something to be dreaded. Mosey expressed this relief in saying that '*TPC* has retained its hard commercial edge without giving up its collaborative processes'.[39]

Aside from these two main issues raised by this case, it is noteworthy to comment on what the Court understood 'working together' to mean. The following paragraph provides an elucidating example:

> 'One can see that there has to be substantial co-operation between the parties to arrange for this work. South Anglia might, in acting reasonably, have to seek to facilitate as many of these operations in a specific area or street at about the same time; it would be reasonable, arguably, and fair to seek to do this not only on the grounds of efficiency but because it might well be cheaper for TSG, compared with 5,526 separately arranged visits at different times. Similarly, TSG could be expected, in acting reasonably, when doing annual services to put right defects which it actually noticed did not need putting right exactly at that time but which foreseeably would go wrong or fail before the next annual service'.

This is an interesting point because the definition could also be used in the context of the offshore oil and gas industry, and generally in a client-contractor environment. Mr Justice Akenhead holds that 'in acting reasonably', both the client and contractor should be expected to assess the overall state of the project and facilitate the probable and reasonable needs of their counterparty, as the above paragraph describes. This is a point that could be considered in the context of offshore oil and gas contracting, and in the same line of thought, operators and contractors should facilitate one another's work if they work in an environment of collaboration, as in this case.

4.3.1.3 Fujitsu Services Ltd v IBM United Kingdom Ltd

The case of *Fujitsu Services Ltd v IBM United Kingdom Ltd* [40] provides insight into several issues: partnering contracts, the relationship of the contractor and

[39] David Mosey, 'Partnering's tough side, Building Magazine' (25 June 2013) available at <http://www.building.co.uk/partnerings-tough-side/5056796.article>.

subcontractor – which is a common phenomenon in the offshore oil and gas industry – and the issue of good faith and fiduciary duty.

IBM United Kingdom Ltd [hereinafter 'IBM'] agreed to provide IT services for a period of ten years to the company DVLA under a 'Partners Achieving Change Together Partnering Agreement' [hereinafter 'PACT']. At the same time, IBM entered into a contract with Fujitsu Services Ltd [hereinafter 'Fujitsu'] and sub-contracted certain services such as day-to-day management and support and maintenance.

During the contract execution, Fujitsu claimed that IBM was not sub-contracting enough services according to their contract, and that this caused a loss of revenue of £36 million. The first issue that arose was whether this amount could be claimed in light of an exclusion and limitation of liability clause. This matter frequently appears in the context of adversarial offshore oil and gas contracts,[41] however it is not the focus of this thesis' analysis.

The relevant issues were, first, whether IBM owed a fiduciary duty to Fujitsu and, second, whether there was an express duty of good faith that entitled Fujitsu to compensation.

With regard to the issue of the fiduciary duty, Fujitsu claimed that under the PACT agreement, IBM 'had a duty to act in good faith for the benefit of both parties' in its relationship with the client (DVLA).[42] Mrs Justice Carr held that the relationship was not within one of the settled categories of principal and fiduciary, and that the sub-contract did not make any mention of partnering, but rather kept the relationship at arm's length, stating that 'to import fiduciary obligations would be to distort the true

[40] *Fujitsu Services Ltd v IBM United Kingdom Ltd* [2014] EWHC 752 (TCC); [2014] 1 C.L.C. 353; 153 Con. L.R. 203.

[41] Chris Kidd, 'Consequential Loss Exclusion Clauses in Offshore Contracts: The Need for Greater Clarity' in Baris Soyer and Andrew Tettenborn (eds), *Offshore Contracts and Liabilities* (1st edn, Informa Law 2015); See also section 1.2.4.

[42] *Fujitsu Services Ltd v IBM United Kingdom Ltd* [para 121], 'FSL contended that the cardinal issue was that IBM was not entitled 'when dealing with arrangements which affect[ed] the Sub-Contract or under it … to put [its] interests ahead of [FSL's] or to act in such a manner as to disadvantage [FSL] at [FSL's] expense.' IBM had 'a duty to act in good faith for the benefit of both parties in dealings which relate[d] to under the [PACT Agreement] which can affect or do affect [the] Sub-Contract or are capable of affecting the Sub-Contract or capable of affecting [FSL's] expectations under the Sub-Contract'.; note that the Court referred to Fujitsu as 'FSL'.

bargain between the parties'.[43] Commentators on this issue have argued that future partnering contracts will slowly move in the direction of the introduction of a fiduciary duty,[44] while others disagree fiercely with this notion.[45] The thesis submits that this is a welcome statement as the introduction of fiduciary duties would be definitely problematic in the context of an operator-contractor offshore oil and gas contract. This argument has been put forward in the offshore contracting context, but only in the relationship between the operator and the joint venturers, and the existence of a fiduciary duty is doubtful even in this case.[46]

The second issue under consideration was whether there was an express duty of good faith in the sub-contract between IBM and Fujitsu. Fujitsu claimed that the contract referred to 'good industry practice' and should be read in the partnering spirit of the PACT agreement. Mrs Justice Carr held that 'in a detailed contract like the Sub-Contract, one would expect clear words if there was to be an express duty of good faith; (t)here are no such clear words'.[47]The absence of clear words pointing to an express duty of good faith made also the reference to 'good industry practice' not strong enough of an argument.[48]

4.3.2. Good faith and collaboration

Good faith is a vast subject that has been debated and analysed for many years. It has undergone many different 'phases', from complete hostility in the 'classical' contract

[43] Ibid [para 144] 'Put simply, to import fiduciary obligations would be to distort the true bargain between the parties. It cannot be said that obligations of a fiduciary nature could reasonably be expected to apply to the Sub-Contract which was a contract between main contractor and sub-contractor for the supply of services.'

[44] Jim Mason, 'Collaborative working: Age of the team players' (Building.co.uk, 25 September 2014) <http://www.building.co.uk/collaborative-working-age-of-the-team-players/5070865.article>.

[45] Begg, P.D., 'Fiduciary content in joint ventures and partnering contracts in the construction industry' (2003) Scottish Law & Practice Quarterly 272-288 <https://openair.rgu.ac.uk/bitstream/handle/10059/180/fiduciaryobligations%20paper-%203-10-03.pdf?sequence=1>.

[46] Peter Roberts, *Joint Operating Agreements: A Practical Guide* (3rd edn, Globe Law and Business 2015).

[47] *Fujitsu Services Ltd v IBM United Kingdom Ltd* [para 152]; See also [para 153] 'Secondly, it is difficult to see why in the context of the warranty in clause 19.4(f) an obligation of good faith on the part of IBM would arise. The warranty to perform makes such an obligation otiose.'

[48]*Fujitsu Services Ltd v IBM United Kingdom Ltd* [para 160] 'Thus the warranty in clause 19.4(f)(c) does not give rise to an express obligation of good faith on the part of IBM in the performance of its duties under the Sub-Contract. Again, there is no claim for breach of IBM's warranty that the personnel supplied by IBM would discharge IBM's obligations with all due skill, care and diligence in accordance with "Good Industry Practice" '.

law era, to recent cases that favoured the introduction of good faith, in a direct or indirect way, in the English law of contract.

4.3.2.1 Express term of good faith

The starting point and the most important distinction when it comes to the issue of good faith is the distinction between an express and implied duty of good faith. The rule is that an express duty of good faith should be included in the contract in order for it to be taken into account in its construction. As the cases demonstrated above, express terms of good faith can often take the form of 'quasi good faith clauses', i.e. using wording similar to that of a good faith clause but avoiding to mention the words expressly. Examples of these 'quasi-good faith' clauses are the clauses of 'the spirit of trust, fairness and mutual co-operation' found in the long-term version of PPC2000 (TPC2005) and the clause of 'spirit of mutual trust and co-operation' found in NEC, as explained in the above sections.

The question that arises in this situation is whether an express duty of good faith has an overriding effect on other clauses of the contract. As explained in the case of *TSG Building Services plc v South Anglia Housing Ltd* analysed above, it was held that such good faith and 'quasi good faith' clauses do not have an overriding effect on other, more specific, and express contract clauses – such as the clause for termination at convenience in this instance.

4.3.2.2 Implied term of good faith

A more complicated issue is the effect of an implied duty of good faith. The traditional approach of the English courts was that an implied duty of good faith may not be recognised. However, Y*am Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB) [hereinafter *Yam Seng*] sparked a wave of doubt on this matter. This case is also an example of the point made in the introduction that certain contract law doctrine notions do not have a clear and set meaning. In *Yam Seng Pte Ltd v International Trade Corporation Ltd,* the issue of the implied duty of good faith turned on the characterisation of the contract as 'relational'.

In *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Trading Ltd* (Court of Appeal), the Court of Appeal held that there must be an express contractual reference for a duty of good faith to be invoked; an implied duty of good faith does not suffice.

A further consideration about the nature of good faith is its potential link to the idea of a 'joint maximisation' principle.[49] The joint maximisation principle could be a helpful guide in constructing collaborative contracts. It should be noted that idea of the joint maximisation principle is spelled out by the authors in the context of hardship of commercial contracts to the extent that contractual devices may offer practical and effective solutions. The thesis however suggests that the principle can provide structural guidance in the case of collaborative contracts.

The authors explain that US case law[50] has linked the notions of good faith and joint maximisation. In the context of English law however, caution may be due in the transposition of the US line of thought, as 'it might thus be said that the traditional English law canons of construction are tacitly hostile to the joint maximisation approach'.[51] This is because the rationale of English law requires that 'for joint maximisation to work, it needs to be demonstrated that the object of joint maximisation is a bilateral matter (namely a matter of presumed intention) between the parties (as against some sort of public or greater economic good)'.[52] Notably, this means that a joint maximisation principle could be accepted in the context of English

[49] Catherine Pédamon and Jason Chuah, *Hardship in Transnational Commercial Contracts* (Paris Legal Publishers 2013) 82

[50] *Empire Gas Corp v American Bakeries Co.* 840 F.2d 1333 (7th Cir. 1988) 'It is a nice question how exigent the buyer's change of circunstances must be to allow him to scale clown his requirernents from either the estimated level or, in the absence of estimate, the "normal" level. Obviously it need not be so great as to give hirn a defense under the doctrines of impossibility, impracticability, or frustration, or under a force rnajeure clause. (…) The reason may be that parties linked in an ongoing relationship - the usual situation under a requirerments contract - have a strong incentive to work out disagreements amicably rather than see the relationship destroyed by litigation'.[emphasis added]

[51] Catherine Pédamon and Jason Chuah, *Hardship in Transnational Commercial Contracts* (Paris Legal Publishers 2013) 84; See also Jason Chuah, 'The Factual Matrix in the Construction of Commercial Contracts' (2001) 294 I.C.C.L.R 12

[52] For a better analysis on this matter see Ibid. 84 'The idea of using joint maximisation as a factor to guide the interpretation of the hardship clause is subject to these prevailing notions of what the interpretation process should set out to achieve. In the case of English law, for joint maximisation to work, it needs to be demonstrated that the object of joint naxirnisation is a bilateral matter (namely a matter of presumed intention) between the parties (as against some sort of public or greater economic good). The four corners rule thus makes it diffcult for an English court to admit joint maximisation if joint maximisation is characterised as an extrinsic good. However it is not at all natulal to presune joint maximisation as an intencled objective of both parties. It might thus be said that the traditional English law canons ofconstruction are tacitly hostile to the joint maximisation approach.'

law, if it can be demonstrated that it is a bilateral matter and reflects the presumed intention of the parties. As the thesis suggests, in a collaborative contracting environment, the parties do express their intention for close collaboration, regardless of the wording that will be used, i.e. good faith, mutual trust and co-operation type of clauses.

4.3.3. 'Relational contracts' and collaboration

4.3.3.1 Overview of the relational contract theory

The issue of relational contracts has long been debated in academic literature, and it is once again in the spotlight after recent judicial awards. Before explaining its relevance to offshore contracting, a brief introduction is in order. The theory of relational contracts was developed by Ian Mcneil in the US in the late 1960's.[53] The theory developed in various disciplines; however, it is outside the scope of the research to examine the theory's more socio-legal dimensions.[54] The theory sparked a debate as it was at odds with the dominant classical and neo-classical contract theory of the time, and its influence also made its way from the US into academic discussion in the UK.[55]

[53]For the most important pieces of work by Mcneil, see Macneil, 'Whither Contracts?' (1969) 21 Journal of Legal Education, 403; Macneil, 'Restatement (Second) of Contracts and Presentiation', (1974) 60 Virginia Law Review, 589; Macneil, 'The Many Futures of Contracts', (1974) 47 Southern California Law Review, 691; Macneil, 'Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical and Relational Contract Law', (1978) 72 Northwestern University Law Review, 854; Macneil, 'Values in Contract: internal and external', (1983) 78 Northwestern University Law Review, 340; Macneil, 'Relational Contract Theory: Challenges and Queries', (2000) 94 Northwestern University Law Review, 877

[54] See for example Macneil, *Contracts, instruments for social cooperation, East Africa: text, cases, materials* (Rothman 1968); R. Macneil, *The New Social Contract* (Yale University Press 1980); Macneil, 'Relational Contract Theory as Sociology: A Reply to Professors Limberg & de Vos.', (1987) 143 Journal of Institutional and Theoretical Economics, 272; Also the critique in Carl J Circo, 'The Evolving Role of Relational Contract in Construction Law', 32 Constr. Law. 16 (2012).

[55] For the most eminent work on the subject in UK literature see David Campbell, Linda Mulcahy and Sally Wheeler, *Changing Concepts of Contract: Essays in Honour of Ian Macneil* (1st edn, Palgrave Macmillan 2013); D. Campbell, D. Harris, 'Flexibility in Long-term Contractual Relationships: The Role of Co-operation', (1993) 20 Journal of Law and Society, 166; D. Campbell (ed), *The Relational Theory of Contract: Selected Works of Ian Macneil* (Sweet & Maxwell, 2001); D. Campbell, 'The Relational Constitution of Remedy: Co-operation as the Implicit Second Principle of Remedies for Breach of Contract', (2005) 11 Texas Wesleyan Law Review, 455; Penny-Anne Cullen, Richard Hickman, 'Conflicts between Contract Law and Relational Contracting, Lean Construction Journal' (2012) 44-60.

In UK literature, 'relational' contracts were often synonymous with the idea of long-term contracts.[56] They were frequently used in case law in the context of employment contracts, which have frequently been characterised as relational.[57]

For the thesis' view, the most succinct and 'accurate' meaning that the term 'relational contract' should have is Eisenberg's, which arose over 25 years ago. Despite the subsequent literature on the subject, the thesis submits that this explanation remains the most robust, congruent and timely as per the time it was written. Unfortunately, the 'transposition' of the term 'relational contract' has not been particularly successful in English case law in the thesis' view, and this has been the root of the many misconceptions discussed in the following sections.

The first elucidating realisation that Eisenberg points to is that classical law was developed on the premise that all transactions are 'discrete', which means that there is no relationship involved between the parties and that each party should strive for its self-interest, which was by default at odds with the interests of the counterparty. The relational contract theory did rightly highlight that this was a wrong application of classical contract law, and in this way the relational contract theory was a 'reaction' to this rigidity of the classical contract law. In the author's opinion, Eisenberg provides a very insightful and convincing explanation of the misconception around relational contracts, which if taken seriously into account, could help in clarifying the concept in current English law doctrine. Briefly, classical contract law was missing the true point that most transactions are not discrete and should not be treated always in an arm's length, adversarial way. Relational contract theory was right in identifying this mistake, but made the same mistake on the other side of the spectrum, by wanting to introduce a separate category of 'relational contracts' within the same framework of classical contract law that it criticised.[58]

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[56] For example, McKendrick refers to relational contracts as 'long term' contracts, see subsequent analysis; Ewan McKendrick, 'The Regulation of Long-Term Contract in English Law' in Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (OUP 1995).

[57] See for example, TSG Building Services Plc v South Anglia Housing Ltd [2013] EWHC 1151 (TCC); [2013] B.L.R. 484; 148 Con. L.R. 228 para 51 following 'It can of course be said that employment contracts, given the nature of the relationship between employer and employee, fall into a somewhat different category to commercial contracts but these dicta at least provide a pointer which is germane.'

[58] The explanation of Eisenberg on this point is elucidating, see Melvin A Eisenberg, 'Relational Contracts' in Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (OUP 1995) 298 'Once it is understood that most contract are relational, it is easy to see why modern contract

Eisenberg continues by laying out what is his perception of the true nature and correct definition of a relational contract. The thesis adopts this definition and explains how it could be utilised to shed light to recent English cases. According to Eisenberg's definition, 'the obvious and straightforward definition of a relational contract is a contract that involves not merely an exchange, but also a relationship, between the contracting parties'.[59]

4.3.3.2 Relational contracts in English case law and their relevance to offshore contracting

The issue of relational contracts in English case law came under the spotlight recently after the decision in *Yam Seng Pte Ltd v International Trade Corp Ltd*, where a normal commercial distribution contract was regarded to be relational.[60] Mr Justice Leggatt did not elaborate on the nature and characteristics of what constitutes a relational contract in English law and confined his examples to some 'some joint venture agreements'.[61] A similar view was expressed in *Bristol Groundschool Ltd v Intelligent Data Capture Ltd* where relational contracts were described as being 'akin

law has overthrown classical contract law, based, as the latter body of law was, on the mistaken premise that most contract were discrete. The irony, however, is that relational contract theory has made the same empirical mistake as classical contract law. Classical contrat law took the discrete contract as the paradigmatic case, and then made rules that failed to fit most contracts. Relational contract theory properly stresses that not all contracts fit the discrete-contract paradigm, but does not really reject the empirical premise of classical contract law, that relational contract are unusual. Instead, relational contract theory tacitly accepts that premise, and then argues that these unusual contracts should be governed by special rules, rather than by the general rules of a properly formulated body of contract law.'

[59] For a more elaborate explanation see Melvin A Eisenberg, 'Relational Contracts' in Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (OUP 1995) 296 'Once we identify bargain as the core of the contract for this purpose, the meaning of the adjective relational is easy. A bargain is an exchange in which each party views his performance as the price of the other party's performance. Accordingly, every bargain contract necessarily involves an exchange. However, not every bargain contract necessarily involes a relationship between the contracting parties. Therefore, the obvious and straightforward definition of a relational contract is a contract that involves not merely an exchange, but also a relationship, between the contracting parties. (Correspondingly, the obvious and straightforward definition of a discrete contract is a contract that involves only an exchange and not a relationship). This definition can not only be operationalised, but reflects the everyday, common sense meaning of the term "relational". This definition also highlights a major shortcoming of competing definitions: any definition of a relational contract that fails to make critical whether the contract involves a relationship is bound to be incongruent with the ordinary meaning of the term it purports to define.'

[60] *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB); [2013] 1 All E.R. (Comm) 1321; [2013] 1 Lloyd's Rep. 526; [2013] 1 C.L.C. 662; [2013] B.L.R. 147; 146 Con. L.R. 39; [2013] Bus. L.R. D53

[61] Ibid.

to a joint venture'.[62] It seems that the characterisation of the distribution agreement as relational is done almost 'automatically' – there is no justification or elaboration about the characteristics that makes any particular distribution contract 'relational'. The same is the case in *Bristol Groundschool Ltd v Intelligent Data Capture Ltd*, where there is no further explanation of the relationship of relational contracts and its relevance to a 'joint venture'. Furthermore, as the previous section explained, in the theoretical background of relational contract scholars, it would hardly be impossible to find support for the assertion that the gist of relational contracts is something 'akin to a joint venture'. Furthermore, recent case law has used relational contracts in the context of employment contracts, which is again irrelevant to commercial contracts. However, joint ventures are only one example, and they do not go the core of what is relational.

In respect of the relevance of the relational contracts to the context of offshore contracts, one may speculate as to whether the characterisation of offshore contracts as 'relational' is – first of all – possible, and if it would be beneficial. As demonstrated from the analysis so far, the introduction of relational contracts in the English case law has been problematic. In this regard, the thesis submits that it is a redundant notion overall, which adds to confusion rather than facilitating collaborative relationships. Therefore, it is submitted that this is not a concept that would benefit offshore oil and gas contracting in any way.

However, the real value of the relational contract debate may be that it draws attention to a key question: that is, how a contract should be construed *when the intention of the parties themselves is to have a close, collaborative working relationship*, regardless of the terminology that is used to express this intention. McKendrick provides interesting insight into the issue of co-operation and relational contracts. McKendrick's view is generally sceptical about the idea of relational contracts; his final conclusion is that they are redundant as a notion and distinct category for English contract law – which would apply in the case of offshore contracts as well, as explained.[63] However, the very hostility of McKendrick's view on relational contracts

[62] *Bristol Groundschool Ltd v Intelligent Data Capture Ltd* [2014] EWHC 2145 (Ch).
[63] Ewan McKendrick, 'The Regulation of Long-Term Contract in English Law' in

renders his view on the intentional use of 'co-operative' language, as he refers to it,[64] yet more convincing. On that matter, he notes that 'where the parties choose to express themselves in co-operative language, as where they accept a duty to re-negotiate the contract in good faith on the occurrence of an event which causes exceptional hardship to one of the contracting parties, then it suggests that such a clause serves a useful purpose from the perspective of the parties which should, if possible, be enforced by the courts'.[65] In that particular quote, McKendrick mentions examples of 'a duty to re-negotiate the contract in good faith' in the event of a 'hardship'; however this is just one of the many examples that one could mention.

What matters is the thought process, and this is what the argument of the thesis aims to support: that there is a major difference between collaboration and its consequences, whether this is expressed by the parties as their own intention or not. If the parties themselves opt for collaborative wording, then this is something that should be taken into account by the courts, as McKendrick argues.

4.3.4. 'Partnering' and 'alliancing' contracts and collaboration

This part examines the notions of partnering and alliancing and their relevance to collaboration and the oil and gas industry. These terms are frequently used

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Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (OUP 1995) 332 'English law would not be justified in taking the step of recognizing the existence of a formal category of relational contracts. In the vast majority of cases parties can insert into their contracts provisions which will provide the flexibility necessary to enable them to adapt their contract to changing circumstances.'

[64] The term co-operative can be easily replaced by 'collaborative' and the way they are used is indentical.

[65] For the quotation in its full context see Ewan McKendrick, 'The Regulation of Long-Term Contract in English Law' in Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (OUP 1995) 315; 'The final point of distinction, relating to the co-operative relationship engendered by a relational contract, can be pushed too far. Co-operation in the face of change should not be considered in isolation from the need to ensure a degree of stability and control at the moment of formation of the contract; risks must be allocated between the parties and the ability to shift that risk must be limited, if not eliminated. While a contracting party may choose, for extra-legal reasons, to co-operate with the other contracting party and to adjust the bargain on the occurrence of some unexpected event, this is not the same thing as saying that the party should be compelled to forego her legal rights in the interest of "co-operation" and the preservation of a harmonious relationship. But, where the parties choose to express themselves in co-operative language, as where they accept a duty to re-negotiate the contract in good faith on the occurrence of an event which causes exceptional hardship to one of the contracting parties, then it suggests that such a clause serves a useful purpose from the perspective of the parties which should, if possible, be enforced by the courts'.

interchangeably and their exact legal meaning is uncertain. The thesis examines their similarities and differences in light of the MER Strategy.

More than a decade after the first specialised book on partnering was written, the comment that 'it is widely accepted that partnering means different things to different people and that the term is far from being a term of art' still holds true. [66] The authors provided the two more generally accepted definitions of partnering in the construction sector, written by the National Economic Development Council in 1991[67] and the Reading Construction Forum in 1995[68]. What becomes apparent from these definitions is that the term 'partnering' is essentially a management approach. Therefore, it should not be confused with the strict legal sense of 'partnership'.[69] However, the legal nature of partnering and partnering agreements often creates confusion.

In fact, partnering can take two forms, non-contractual and contractual.[70] In non-contractual partnering, the parties agree to adopt the processes laid down in a non-contractually binding partnering charter. As Ashworth puts it, '(…) the result is that the partnering agreement rather than the contract documentation drives the relationship between the parties'. [71] On this matter, Chitty takes the view that

[66] D. Jones, D. Savage, R. Westgate (eds), *Partnering and Collaborative Working: Law and Industry Practice* (Informa Professional 2003)

[67] National Economic Development Council, 'Partnering: Contracting Without Conflict' (National Economic Development Office 1991); Partnering is '(…) a long term commitment between two or more organisations for the purpose of achieving specific business objectives by maximising the effectiveness of each participant's resources. The relationship is based on trust, dedication to common goals and an understanding of each other's individual expectations and values. Expected benefits include improved efficiency and cost-effectiveness, increased opportunity for innovation, and the continuous improvement of quality products and services'.

[68] Reading Construction Forum (1995), 'A management approach used by two or more organisations to achieve specific business objectives by maximising the effectiveness of each participant's resources. The approach is based on mutual objectives, an agreed method of decision making and an active search for continuous measurable improvements.'

[69] Partnership Act 1890 s 1(1); 'Partnership is the relation which subsists between persons carrying on a business in common with a view of profit.'

[70] For an elaboration on this see Christina D. Tvarnø, 'To bind or not to bind: Formalizing collaboration through partnering contracts in the US, British and Danish construction industries' (2016) Journal of Strategic Contracting and Negotiation 288-314; 'The article compares the different types of collaborative partnering contracts in the three countries, and provides a conclusion on whether the collaborative partnering contract should be binding or non-binding, based on the three empirical contracts analyzed in this article.'

[71] Ibid. 221 'There is some doubt as to the legal status of the partnering charter. There is concern that making explicit statements that a partnering charter does not create a legally binding relationship between partners does not necessarily mean that none exists. Although the construction contract provides a framework of rights and obligations, partnering has the potential to impact upon the allocation of risk established by the contract and subsidiary contracts. If the partnering arrangement breaks down, a party may find itself in a position where it is necessary, or at least attractive, to assert

partnering is always intended not non-contractual and chooses not to include it in the scope of construction contracts at all: 'the essence of partnering is that it is intended not to create enforceable contractual rights, and is therefore beyond the scope of this chapter'.[72]

In contractual partnering, the standard forms that are used take a more contractual route and seek to achieve partnering in a way intended to be legally enforceable. An example of this form is the PPC 2000 which has been recently the subject of judicial interpretation. [73] The National Audit Office seems to have embraced the practice of contractual partnering in at least one major report. In an accompanying report to the 'Good practice contract management framework',[74] which aimed at assessing the efficiency of government's contractors,[75] it was suggested that the existence of a 'partnership charter outlining the behaviour expected of each party for the duration of the contract' [76] was an example of good practice.

Partnering is not an unknown practice in the offshore oil and gas industry. An older study had attempted to identify which are the perceived 'success factors' for partnering in the UK upstream industry.[77]The fact that it is a notion close to

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that the contractual risk allocation has been altered, either by the provisions of the partnering charter or by subsequent conduct or representations in the course of the partnering process.'

[72] *Chitty on Contracts, Vol. II Specific Contracts* (32nd edn, Sweet & Maxwell 2015) 37-058; 'English law does not recognise a more general duty of good faith which might prevent the employer rejecting tender offers at any stage, or ending negotiations at any time. Given the general antipathy of English law towards a broader understanding of pre-contractual duties and obligations of good faith, professionals in the construction industry have-sought to develop new approaches to the problems of financial risk experienced by tenderers, as well as the risk, cost and uncertainty to which the employer is exposed. The phenomenon of 'partnering' in the construction industry (an expression covering a loose amalgam of different strategies for cooperation and collaboration between contracting parties) can be considered in this light. Partnering arrangements may be based on the long-term relationship between contractor and employer or may be project-specific. Partnering charters set out the broad aims of the parties, such as cooperation in a spirit of openness and team work. Partnering agreements may provide for more concrete collaboration between the parties, such as shared use of information and resources. The essence of partnering is that it is intended not to create enforceable contractual rights, and is therefore beyond the scope of this chapter.'

[73] David Mosey, 'Partnering's tough side' (25 June 2013) available at <http://www.building.co.uk/partnerings-tough-side/5056796.article>.

[74] NAO, 'Good practice contract management framework' (December 2008) <https://www.nao.org.uk/wp-content/uploads/2013/03/Good_practice_contract_management_framework.pdf>.

[75] NAO, 'Central government's management of service contracts' (19 December 2008) <https://www.nao.org.uk/wp-content/uploads/2008/12/080965.pdf>.

[76] Ibid., at 20

[77] SM Mamotazul Haque, Richard Green, William Keogh, 'Collaborative Relationships in the UK Upstream Oil and Gas Industry' Problems and Perspectives of Management (1/2004) <http://businessperspectives.org/journals_free/ppm/2004/PPM_EN_2004_01_Haque.pdf>.; The study

collaboration could resurface the question whether it is a suitable method the requirements under the MER Strategy.

Recent case law provides further insight into the current understanding of partnering in English courts. In *TSG Building Services Plc v South Anglia Housing Ltd*, the High Court made clear that partnering should be not be confused with the legal notion of partnership: 'the standard terms used by the parties, albeit somewhat specifically adapted, in addition to Clause 1.1, provide for what might loosely be called 'partnering', which is to be distinguished from legal partnership. It would be wrong to say that the partnering envisaged an equal sharing of the profits or losses suffered by the parties'.[78]Furthermore, in the same case, the clause in the contract that was drafted by the two parties provides a rather elucidating insight of what they expected their partnering agreement to include.[79]

Portsmouth City Council v Ensign Highway Ltd[80] provides another recent example where a partnering agreement was used. This case also involved a system of failure points, and featured also a term of good faith and a potential implied term of good faith. The Court based its core thinking on the case of *Medirest v Mid Essex Hospital Services* (Court of Appeal). The relevant good faith clause in this case was under a heading of 'Liaison and Partnering' and read as follows:[81]

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had concluded that factors such as the 'absence of shared aligned goals', 'absence of clear targets', 'absence of trusting attitudes', 'absence of fair allocation of risk and reward', 'absence of commitment' and 'presence of adversarial behaviour' are viewed as the main factors which often cause failure of partnering

[78] *TSG Building Services Plc v South Anglia Housing Ltd* para [25].

[79] Ibid. 'The Partnering Team members shall establish, develop and implement their partnering relationships, within their agreed roles, expertise and responsibilities and in accordance with the Partnering Documents, with the objectives of achieving for the benefit of the Term Programme and for the mutual benefit of Partnering Team members: – (i) trust, fairness, mutual cooperation, dedication to agreed common goals and an understanding of each other's expectations and values; (ii) satisfaction of the agreed pre-conditions to implementation of the Term Programme referred to in clause 6.1; (iii) implementation of Tasks within the agreed time and price and to the agreed quality pursuant to Orders issued in accordance with clause 6; (iv) innovation, improved efficiency, cost-effectiveness, lean production, improved Sustainability and other measurable continuous improvements by means of the Processes referred to in clause 2.2 and by reference to the agreed KPIs and Targets referred to in clause 2.5; (v) commitments to people including staff and Users; (vi) any additional objectives stated in the Term Partnering Agreement'.

[80] *Portsmouth City Council v Ensign Highways Ltd* [2015] EWHC 1969 (TCC); [2015] B.L.R. 675; 161 Con. L.R. 71; [2015] B.L.G.R. 791; [2015] C.I.L.L. 3717 [hereinafter '*Portsmouth City Council v Ensign Highways Ltd*'].

[81] *Portsmouth City Council v Ensign Highways Ltd* para [27].

> Clause 44.3 provides for Best Value Reviews. These are to be held once every five years. Under the heading 'Liaison and Partnering', clause 44.4 provides as follows:
>
> 44.4.1 PCC and [Ensign] shall deal fairly, in good faith and in mutual co-operation with one another and with Interested Parties.

The Court in this case also favoured a narrow understanding and textual understanding of the 'duty to co-operate'.

Alliancing is another method tested in various industries and contexts, including the offshore oil and gas industry. In an alliancing arrangement, the owner and service providers work as a single integrated team to deliver a specific project under a contractual framework where their commercial interests are aligned with actual project objectives. Alliancing involves a formal contract in which the parties undertake to act in the best interests of the project. This is a key difference from partnering, where the undertaking to act in such a manner is purely voluntary.[82] An even bolder approach is the idea of strategic alliancing, which has also been proposed as an alternative solution by certain consultancies.[83] Project alliancing has been used in the UKCS in the past. The most notable example is the BP Andrew field, which is often mentioned as the most successful alliancing project in the offshore oil and gas sector.[84] For this project, BP developed a new 'painshare-gainshare' compensation program. This contracting methodology involved complete open-book accounting, sharing all 'uninsurable' risk between all project members, and setting an initial target cost generated by the whole project team. This target cost would then be compared to the final cost and the under or overruns would be shared by all project participants.

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[82] Charles MacDonald, 'What are the important differences betweenn partnering and alliance procurement models and why are the terms so seldom confused?' <http://cms.3rdgen.info/3rdgen_sites/107/resource/MacDonald-AIPMOct05.pdf>.

[83] 'Project-by-project contracts and frame agreements have many advantages, but they can be adversarial in nature and limited to meeting the contractual terms for a specific project. The more collaborative approach of strategic alliances, which some operators and contractors are now considering, could drive greater value in project delivery. These alliances may be particularly helpful in today's upstream environment, where operators and contractors are facing major financial and competitive challenges.'; Boston Consulting Group, 'Strategic Alliances in Upstream Oil and Gas: Getting Serious About Collaboration' (27 April 2015) 1-2 <https://www.bcgperspectives.com/Images/BCG-Strategic-Alliances-in-Upstream-Oil-and-Gas-Apr-2015_tcm80-186438.pdf >.

[84] NAO has used this case study in a report for the Ministry of Defence, see <https://www.nao.org.uk/defencevfm/collaborative-relationships/case-studies/>.

Another critical aspect of BP's new contracting strategy involved team member selection. The main contractors that formed the alliance with BP were not selected competitively based on cost, but instead on their ability to contribute to the project performance.[85]

Although alliancing first appeared in the UK, it was further developed and systematically used in Australia.[86] In the Australian offshore oil and gas sector, the East Spar development and the Wandoo B oil platform are often mentioned as case studies.[87] In Australia, an even further step has been suggested to standardise project alliance agreements.[88] Therefore a currently relevant question is whether alliancing could be a potential alternative for realising the new collaborative culture that is required in the UKCS. Notably, after the recession, there was a rise in alliancing in the UK construction sector.[89] However, alliancing does not come without legal challenges, which revolve mainly around the legal nature of the relationship of the parties, e.g. the existence of a fiduciary duty. In the context of Australian law, good faith was another matter that became the subject of judicial examination.[90]

[85] Matthew W. Sakal, 'Project Alliancing: A Relational Contracting Mechanism for Dynamic Projects' Lean Construction Journal Vol 2 (1 April 2005) <http://www.leanconstruction.org/media/docs/lcj/LCJ_05_005.pdf>.

[86] Victorian Department of Treasury and Finance, 'In Pursuit of Additional Value: A benchmarking study into alliancing in the Australian Public Sector' (2009) <http://www.dtf.vic.gov.au/Publications/Infrastructure-Delivery-publications/In-pursuit-of-additional-value>.;'Between 2004 and 2009, the total value of alliance projects in the road, rail and water sectors in New South Wales, Victoria, Queensland and Western Australia was $32 billion, which represented 29% of the total infrastructure spend of $110 billion in the same sectors across the whole of Australia'

[87] Australian Constructors Association, 'Relationship Contracting: Optimising Project Outcomes' (1999) <http://www.constructors.com.au/wp-content/uploads/1999/02/Relationship-Contracting-Optimising-Project-Outcomes-1999.pdf >. p. 28-32;

[88] Sergio Capelli and Chris Slocombe, 'The standardisation of project alliance agreements: alliancing contracts, past and present' (1 May 2013) <http://www.claytonutz.com/publications/news/201305/01/the_standardisation_of_project_alliance_agreements_alliancing_contracts_past_and_present.page>.

[89] Cecily Davis, 'Alliancing thriving post recession' (14 Jul 2015) <http://www.fieldfisher.com/publications/2015/07/alliancing-thriving-post-recession#sthash.OVLJBAOY.BY5ExEoY.dpbs>.

[90] James Lacey, 'Partnering and Alliancing: Back to the Future?', Australian Resources and Energy Law Journal (2007) 26 < http://www.austlii.edu.au/au/journals/AURELawJl/2007/24.pdf>.

4.4 CHAPTER CONCLUSION

The first conclusion of this chapter answers the following question: is the idea of 'collaboration' in the English law of contract similar to the MER notion of collaboration? As explained in chapter 2, collaboration has its own characteristic meaning within the MER. To sum up its most prominent features, various meanings could include collaboration between operators – 'the required action and behaviour', different methods of collaboration under different sector strategies, or the generic meaning of 'working together for a common purpose'. As is evident, none of these definitions is relevant to the legal meaning explained in chapter 4. Therefore, the answer to the question is that the notion of collaboration in the context of the MER Strategy, and its interpretation in the English law of contract are completely distinct. However, this is not contradictory to the argument of the thesis. The thesis seeks to shed light to what collaborative contracting means when it takes place between a client and a contractor - and in the case of the offshore industry, operators and contractors. This question is a separate question, regardless of its relevance to the meaning of collaboration in the MER Strategy context.

The second conclusion is about the relationship between collaboration and the 'ethos' and 'ideologies' of English contract law. The thesis argues that the dominant, formalist approach – as set out and explained in section 4.2 – is the preferred platform on which to found a collaborative relationship. It is important to explain and stress that a collaborative contractual relationship can take place both in the context of a formalist and a contextualist contractual framework. It is misconception that collaborative contractual relationships can only take place in a contextualist framework. The difference between the two would be that in the case of a formalist framework, the dominant general contract theory would be applied. A practical example of the aforementioned discussion is the rationale of *TSG Building Services Plc v South Anglia Housing Ltd*. Although the contract under consideration was a 'collaborative' contract specifically designed for this purpose, the Court ruled that the 'trust, fairness and mutual co-operation' clause would not have an overriding effect.

The third conclusion regards the relationship with collaboration and good faith. The thesis drew attention to the two possibilities when discussing good faith: where it is expressed as an express term and an implied term. In the case of express terms, the conclusion is that the wording and the intention of the parties must be very clear. The 'mutual trust and co-operation' or 'quasi good faith; clauses do not reach that threshold of express terms, as case law has shown. In the context of offshore contracting, that is arguably a positive development. Offshore contracting has traditionally been very close to the adversarial end of the spectrum, and the fear of overriding principles of good faith only made collaborative contracts more unpredictable in the mind of the practitioners. The strict, formalist interpretation that the courts seem to follow in the latest cases is a development that can paradoxically promote the use of collaborative contracts. Since the fear of overriding clauses has been dispelled, the industry may now focus on what collaborative contracts offer: the collaborative processes and contract and commercial management principles that aim at project success. For implied terms of good faith, the thesis explained the rationale that was followed after the decision in *Yam Seng*. It seems that this trend has changed and that subsequent cases were very conservative in finding implied terms of good faith in contracts.

The fourth conclusion is about collaboration and relational contracts in general, as well as the case of offshore oil and gas contracting in particular. The chapter demonstrates that relational contract theory has deep theoretical roots and can take different academic pathways. From a contract law point of view, it can be said that relational contract theory was developed as a 'reaction' to the rigid and narrow view of the dominant 'classical' or 'formalist' model of contract law. The chapter explains that although the relational contract theory as a legal branch is not to be dismissed and has certainly fertilised the academic debate, it must be approached with caution when it comes to its practical consequences. A specific example that explains this statement is the arguably problematic fashion in which relational contract theory has been applied in recent English cases. Through the cases analysed in this chapter, it is evident that the transposition of the term lost any of its intended theoretical meaning and became an unpredictably applied *sui generis* term. Specifically, in the context of offshore contracting, the introduction of relational contracts would not be a step in the right direction. The gist of relational contracts, the ethos and philosophy of

collaboration, can be introduced through mutual trust and co-operation. The additional layer of characterising a contract as relational would not add anything, but would rather obscure the aim of the collaborative contractual relationship. The chapter also demonstrates that collaboration can work in a formalist context and that the relational/contextualist context is not necessary.

The final part of the chapter delivers a conclusion about partnering and alliancing contracts. The conclusion on partnering is that it is still not a legal notion. The chapter explains how partnering is seen mainly as a management process rather than a legal notion. However, partnering contracts do exist, and their use is gaining ground in the construction sector in particular. There are suites of contacts, such as the PPC 2000 family of contracts, for which there has been specific case law in the recent years. Alliancing contracts also have certain peculiarities about their legal nature. They have been used in the offshore sector in the past and can offer an alternative solution in order to promote collaborative relationships.

CHAPTER 5

RESEARCH CONCLUSIONS

5.1 CONCLUDING REMARKS ON THE RESEARCH QUESTIONS

This chapter describes the conclusions reached on the research questions, and what the thesis proved or disproved. It also identifies certain limitations beyond the scope of the research or the capacity of the writer and suggests topics for future research. The research questions introduced in the introductory chapter are: (1) to explain the meaning of 'collaboration' within and beyond the context of the MER Strategy; (2) to explain the notion of 'modern contracting' and 'contract and commercial management' and argue that offshore oil and gas contracting in the UK should follow this contracting paradigm, which is also aligned with the MER Strategy; and (3) to ascertain the meaning of 'collaboration' in the English law of contract and explain its relevance to UK offshore oil and gas contracting.

Regarding the first question, chapter 2 comprehensively examines the various meanings of the term 'collaboration', both within and beyond the MER Strategy context. In the MER context, the term has two main meanings: first, that of a 'required action and behaviour' under the MER Strategy and second, a separate obligation under the Asset Stewardship Strategy and the Asset Stewardship Expectations. Furthermore, the word 'collaboration' has miscellaneous uses such as 'working together for a common purpose'. Another conclusion from chapter 2 is that collaboration is a notion that is designed to be applied between operators under the MER Strategy. However, it is argued that the question about the exact relationship between operators and contractors remained unanswered. As is explained in chapter 3, and the section below, the thesis argues that the best contracting model for the offshore oil and gas industry is a collaborative one between operators and contractors. This is also evident from the SSCoP, which already points out the fact that operators should collaborate with the supply chain. The future direction of the Oil and Gas Authority is worth considering in this respect. The thesis speculates that the Oil and Gas Authority will not take a hard line in order to force a collaborative contracting model among the supply chain. However, it is again important to stress the thesis'

argument that since one of the major roles of the Oil and Gas Authority is to 'influence', it could provide clearer support to collaborative contracting operator-contractor models in the future.

Regarding the second question on modern contracting, CCM and contracting in the UK offshore oil and gas sector, the following question was raised: what is the preferred method of contracting between operators and contractors in the offshore oil and gas industry? The thesis' answer is that collaborative contracting models are the optimal model for the offshore oil and gas industry. The thesis stresses the importance of modern contracting and contract and commercial management and argues that the offshore contracting paradigm should be built around BS Standard 11000-1.

With regard to the third question about the meaning of collaboration in the English law of contract and its impact to the MER Strategy, as explained also above, is not a question that is relevant only in the context of offshore oil and gas contracting. In fact, it is a much wider question, applicable across contract law doctrine. It is submitted that in order to answer this question, one parameter would certainly be to examine the meaning of collaboration within a business context. Therefore, it is argued that the thesis makes a contribution to this answer by examining the question in the context of first, offshore oil and gas contracting, and second, to wider cases which refer to a client-contractor relationship.

In answer, the first point is that 'collaboration' is not a legal term of art, and none of the case law examined in the thesis ever addressed it as such.. Its relationship to legal doctrine is its interaction with established doctrinal terms, as demonstrated in chapter 4: good faith, relational contracts, partnering and alliancing.

The examination of the case law in chapter 4 reveals that recent cases seem to prefer the formalist, traditional approach to English contract law. The debate on an alternative framework for English contract law has long been debated, as set out in section 4.2. The most recent resurfacing of the debate took place after the rationale in *Yam Seng Pte Ltd v International Trade Corporation Ltd*, which could be read as an attempt to transform the fundamental formalist approach into a more contextualist approach. However, the series of cases examined in chapter 4 have demonstrated the trend to persist with a formalist approach.

The question that arises hence is, what does collaboration mean in practice? Can it still work within the traditional and formalist framework of English contract law? The answer is yes. What differentiates collaborative working is its interdisciplinary nature and the inclusion of management – project and contract management – characteristics. The thesis agrees with Mosey's comment that it is 'the contractual processes of collaboration that are of critical importance rather than the mutual declarations'.[1] It is the contractual tools explained in chapter 3 that differentiate collaborative working, and not merely the risk allocation wording of the contract.

5.2 RESEARCH LIMITATIONS

Having concluded with the comprehensive outline of the research conclusions, it is necessary to acknowledge certain limitations of the research. The first limitation, as the very title of the thesis suggests, is the focus solely on English law. This is largely unavoidable since the MER Strategy and its implications on offshore oil and gas contracting is an instrument founded on statute governed by English law. For this reason, adopting a more regional or international approach is beyond the scope of the thesis; however, an analysis with elements from other common law jurisdictions with significant offshore oil and gas production, such as the United States of America, Canada or Australia, could offer valuable insight into the matter of offshore oil and gas contracting. Another main theme of the research is the notion of collaboration. Although this notion is analysed thoroughly at many levels, both within and beyond the MER context and from an English law standpoint, the thesis could not analyse the relationship between collaboration and other notions with the same level of detail. One example of such an extension is the conflict between competition law and collaboration as envisaged in the MER Strategy.

Another limitation is that the thesis did not 'dig' deeper in the theoretical backgrounds of contract law and where the notion of collaboration fits in the context of contract law theory. [2] In the author's opinion, the theoretical background and assumptions of contract law have a direct influence on the evolution and interpretation of contract law

[1] David Mosey, 'Partnering's tough side' (Building.co.uk, 25 June 2013) <http://www.building.co.uk/partnerings-tough-side/5056796.article> [emphasis added].
[2] See the analysis in section 4.2.

doctrine by the courts; this perception is at odds with the prevalent viewpoint that contract theory is an area for academic scholars and is irrelevant for practitioners. Although it might be true that practitioners focus on the hectic task of following new case law developments and view contract theory to be redundant, the thesis argues that the answer to many 'practical' questions can only come through a better understanding of the theoretical foundations of contract law. An elucidating example is the problematic 'transposition' of the relational contract law theory in English law, which requires a deeper understanding of contract theory. The thesis highlighted this point[3], however it did not seek to provide an answer about the 'correct' implementation of the relational contract law theory in the English law of contract.

These observations serve only to highlight the rule that no research can be perfect, and the present thesis is not an exception. Nevertheless, the final section of the thesis suggests areas for further research and provides concrete research directions that could build on the work of the present thesis.

5.3 AREAS FOR FURTHER RESEARCH

This section elaborates on certain areas for further research that could utilise this thesis as a theoretical platform. In the introduction, it was explained that the thesis is library-based and uses mainly qualitative criteria, as it is beyond the capacity of the author to conduct quantitative analysis. One direction for further research would be interdisciplinary research. The field of contracting should be seen as a holistic, interdisciplinary field. The areas of management, economics, law, organisational theory, each describe part of the contractual phenomenon, but no single discipline can approach the whole 'truth'.

From a legal standpoint, there are several interesting issues that deserve closer scrutiny. In the specific context of offshore oil and gas contracts, it is submitted that the issue of implied duties is important in a way similar to industries such as the shipping industry. For example, in the leading book for 'tug and tow' contracts, Rainey mentions specific implied duties that derive from long-established commercial

[3] See supra section 4.3.3.2

practice. [4] The same is the case in the US oil and gas industry, where there has been interesting literature on the implied duties in the sector.[5] Another noteworthy aspect from a legal standpoint is a more thorough theoretical analysis of the relationship between collaboration and its meaning within the English law of contract. This theme, which essentially constitutes chapter 4 in the thesis, is composed of many more theoretical threads that can be explored. The thesis, as explained in the chapter introduction, intentionally confines the subject to the client-contractor relationship and included only specific parameters in order to define the meaning of collaboration in the offshore contracting context. However, the theoretical debate mentioned in section 4.2 could be explored in further depth.

Beyond the academic points made above, there are other directions for further research. For example, one interesting and current issue is 'decommissioning', which is the last phase of the upstream cycle of offshore oil and gas operations. The 'hot potato' is certainly the allocation of the costs for an activity which is essentially a financial liability for oil and gas companies, with no potential financial upside. On the other hand, this activity is a lucrative opportunity on the side of the contractors, as the costs are often substantial. In this context, collaboration could also be the centre of the debate to allocate the costs among the industry players.

Additionally, the thesis suggests that the MER Strategy could be turned into an example for the exploitation of 'mature' oil and gas fields. This is an expressed intention of the OGA, which aspires to make the MER Strategy a 'success story' that can be replicated in other 'mature' oil provinces around the world. The Oil & Gas Technology Centre established in Aberdeen could be seen as an example towards this direction.[6] The potential of 'exporting' the know-how of mature field exploitation could also provide a more international approach to the current thesis. As mentioned above, one of the thesis limitations is its sole focus on the UKCS and English law. However, as other oil provinces will inescapably reach a similar level of 'maturity', applying the experience and the lessons learned in the UK legal jurisdiction to other jurisdictions could be a useful expansion of this thesis.

[4] Simon Rainey, *The Law of Tug and Tow and Offshore Contracts* (3rd edn, Informa Law 2011).
[5] John Burritt McArthur, *Oil and Gas Implied Covenants for the Twenty-First Century* (Juris Publishing 2014).
[6] The Oil & Gas Technology Centre, 'About Us' < https://theogtc.com/about-us/at-a-glance/>

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