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Presented by: ACC's Energy Committee, sponsored by Blake, Cassels & Graydon LLP

Faculty: Michael Laffin, Partner, Blake, Cassels & Graydon LLP; **Craig Spurn**, Partner, Blake, Cassels & Graydon LLP

Moderator: Nicole Spaur, Senior Counsel, Sprague Energy Corporation

(Nicole Spaur): Thank you. Welcome to Risk Management in International Oil and Gas. My name is (Nicole Spaur), and I am a member of the Energy Committee and will serve as the moderator of this Webcast.

I would like to thank Blakes, Cassels and Graydon for supporting the Energy Committee by sponsoring this Webcast. I also really want to thank our presenters today, Michael Laffin and Craig Spurn. Before I turn it over to them, however, I'm going to take care of a few housekeeping items.

Please note, this session is being recorded and if you need any text support during the Webcast you can E-mail accwebcast@compartners.com. At the end of the presentation, we have a question and answer period. If at any time during the presentation you have a question however, you can go ahead and type your question in the box located at the lower left corner of your screen and hit send.

The presenters will be able to review your question and they will answer it either during the presentation or more likely during the Q&A period at the end. Also there is an evaluation form for you to complete. The evaluation form is available via the link on your screen.

Now I want to introduce our presenters. Michael Laffin is a partner in the Calgary office of Blakes, Cassels and Graydon. He provides legal advice to several oil and gas companies ranging in size from Senior Integrated to Junior Exploration companies in negotiating and drafting contracts, and providing advice on issues pertaining to joint ventures, financing, purchase and sales, transportation, processing and construction, and securities issues.

Mike has supervised many large-scale projects related to oil and gas, unit consolidations, domestic and international acquisitions, take over bids, due diligence, and financings. In addition to mainstream oil and gas matters, Mike has also developed sub-specialties in the area of coal bed methane development and water rights. Mike also has a wide-ranging experience in international and offshore transactions.

Our second presenter today is Craig Spurn. Craig is also a partner with Blakes, Cassels and Graydon. His practice focuses on energy law and he is the co-chair of the firm's energy group. Craig's clients include Canadian and foreign energy companies, income funds, service and technology providers, and private capital firms.

He has extensive experience in local and international oil and gas related transactions and projects. Craig is recognized as one of Canada's leading energy lawyers by Chambers Global, and in 2004, Craig was ranked as one of the top 40 lawyers in Canada under 40 years of age by Lexpert Magazine. So with that, I'd like to go ahead and turn it over to our presenters.

Michael Laffin: Thank you very much (Nicole), this is Mike Laffin and good afternoon or morning ladies and gentlemen. It is our sincere pleasure to address certain aspects of risk management in international petroleum agreements with you.

I must say I feel somewhat like a sports announcer on a radio show, in that I should set the scene for you. Craig is sitting across the table from me in a large boardroom in our offices in Calgary, Alberta, where the weather is 21 degrees Celsius and 70 Fahrenheit.

Craig is looking pretty dapper today in an open-neck shirt and I got to think that Craig, you felt that we were going to be videoed today didn't you? Actually you know, the old saying is we do have looks that were made for radio.

During this century, petroleum has been an important commodity, often referred to as critical to national strategy and crucial to international politics. As the petroleum industry has emerged in developing countries, where ownership of petroleum almost universally belongs to the state, international oil companies or IOCs as I may refer to them, they control the petroleum exploration and exploitation.

Reality demands that IOCs and the state reach agreement regarding the developments of those resources. Exploration and exploitation of petroleum resources places an IOC in a uniquely complex business arrangement with a foreign country.

This arrangement links a government who owns the resources with the IOCs who have the technology, capital, expertise and equipment necessary for development in a sector where the stakes, risks, and possible profit margin can be very high. The question of how to contribute to this partnership and how to allocate the risks and profits are fundamental issues in any arrangement between the foreign country and the IOC.

In the next few minutes, we will briefly outline the type of host-government contracts that IOCs encounter, the potential risks faced when dealing with foreign countries, why international petroleum agreements are vulnerable to disturbance, and look specifically at certain provisions and concepts of international agreements that attempt to address risks between a foreign government and an IOC.

There are essentially three types of exploration and production agreements currently used in the international petroleum industry and they are the concession agreement, the product sharing agreement and the service agreement. Others, such as joint ventures or contracts similar to those are merely a hybrid of the foregoing.

The most important distinguishing features of each of these type of agreements are as follows. In a concession agreement the state typically grants exclusive exploration and development rights to an IOC for a designated area. The IOC then provides financing, pays

taxes and royalties but receives all production. That's similar to what we would have in Canada and you would have in the States.

A service contract, in this type of contract the IOC pays all exploration and development costs and recovers these expenditures through a discounted crude purchase price or cash payments. The IOC typically does not share in production, although in limited circumstances it may be granted and negotiated a sliding share of oil produced.

Finally there is the production sharing agreement. This entails the state delegating exploration and development rights to the IOC, whereupon the IOC finances the exploration and development of the petroleum rights.

The national oil company or the host government oversees the management of the operation and if the project is successful, the IOC recovers its costs and earns a profit by receiving a share of production. There may be variations on this, for example where companies enter into a joint venture.

If one looked at where and how each of these agreements were used, in a survey conducted about 18 months ago, I looked at approximately 150 countries total concessions were used in 60 of those countries, production sharing agreements were used in 40, service contracts were used in 3, and joint venture hybrids were used in the remaining.

Now what risks does a company face when they are looking at possible involvement in a foreign country? Well there are essentially four of them, geological, fiscal, political and legal. I'd like to just touch briefly on the first three, and spend a little bit more time on the fourth.

From a geological perspective, a company must consider which nation provides the best rewards, considering geological prospectively, the amount of investment required, and the geological risks of discovering hydrocarbons in commercial quantities.

Secondly there's the fiscal regime. What are the rates of return in that present value considering the fiscal structure imposed by the host-government? And are they in keeping with the risks and reward profile assumed by the IOC?

Third there's the political regime. What are the political risks of operation in the country? Is there a history of unilateral action by expropriation, or by changes in the anticipated economic benefits of the contract?

Finally there is the legal regime. What are the terms and conditions of the petroleum legislation or model contract? Is there a right to freely export product? From an investors position there must be an acceptable and well-established legal regime in place to promote investment.

To this end, as lawyers we must look at the various constituents of the legal regime. We must examine the constitution, does it address ownership of petroleum resources, or development of petroleum resources by foreign entities? And does it allow for the integration of international law into national law?

Next there is petroleum legislation. Who owns the petroleum resources? Does the country have legislation specific to ownership and/or the development of petroleum resources? Does the legislation require local participation?

In addition to petroleum legislation, there are other legislative considerations. Such as the Exchange Control Act, Customs Act, Income Tax Act, Labor laws, laws regarding foreign workers, environmental and/or health safety laws. All of these must be considered when looking at the legal regime.

An important point to consider when looking at the legal regime, are the sovereignty issues. Early petroleum concessions granted large tracts of land for petroleum exploitation, and they normally contain a little control over the amount of activity. Also, many years ago, the applicable fiscal regimes gave limited revenues to the state.

Consequently, the term concession has had bad connotation in many areas of the world. Sovereignty in the modern petroleum regime has advanced, and some modern petroleum regimes protect sovereignty through the use of a state owned oil company. And the state owned Oil Company is given exclusive rights to petroleum exploitation or some type of special right.

There are many other ways that a country can approach exerting or influencing their sovereignty rights, and these are found through their fiscal regime, through term limits, local employment, local goods and services.

When we're discussing legal regime, just before we leave that point, a point should be made about regulations and trends in regulation. And what that host-government that we're looking at investing in has employed. The traditional form of regulation is essentially prescriptive in nature, it has little room for individual responsibility and entrepreneurship and innovation is not promoted.

There's been a movement toward a more performance-based regulation, which attempts to reach national objectives, both efficiently and effectively. They're left prescriptive and there's more reliance on individual responsibility providing latitude for innovation.

When examining the regulatory decisions of a country, one should look at have there been methods and attempts made to limit discretion? And by example, I offer the fact that has the host-government tried to eliminate certain types of approval as being unnecessary?

Have they taken a single window approach so that all approvals come through a single department? Has the host-government established and defined thresholds for specific approval criteria? Is there a record of following prior decisions, or has the host-government provided dates for approvals and when they will be given?

I want to just move on to upsetting the commercial balance in the vulnerability of international petroleum agreements. In modern day international investment practice, especially in connection with the exploitation of natural resources, contracts are particularly vulnerable to disturbances in the commercial balance as agreed to, or assumed by the parties at the conclusion of the contract.

This vulnerability has several causes. In the petroleum industry, the commitment of significant capital for exploration development and the assumption of considerable risk require contracts covering up to and over 10 years of exploration and over 20 years of an additional production phase.

The long duration of these contracts makes them particularly susceptible to political or economic influences that are unforeseeable at the time of contract conclusion. Also, the investor will incur significant costs in setting the exploration strategy in motion, i.e. sunk costs that will only be recovered over the duration of the contract.

The investor therefore depends on the contract being carried out for the length of time, and on the basis of the framework initially negotiated with the host-country. Also, many host-countries make use of the investor's investment pressing for changes to the originally negotiated equilibrium in their favor once the venture has begun and the investor has a large amount of sunk costs at stake.

Finally, there's changing expectation. Be advised that as soon as the commercially valuable mineral is developed, the psychology of the host-government is altered. The IOC may begin to enjoy a high return on its investment, the government may begin to feel that the resource is virtually being given away; the stage is set for renegotiation as the original risks are forgotten.

Usually the old terms are modified and the parties adopt new terms that are more favorable to the governments than those agreed to under conditions of relative uncertainty. In addition, changes can also result from deterioration in the general economic or political circumstances in the host-country not foreseen at the time of concluding the contract.

Now what can we do to respond to these risks? Over time companies have tried to deal with the risks either by spreading the risk, ensuring the risk, defending against the risk, structuring or managing the risk or in fact creating contractual mechanisms for risk management.

When a company tries to spread the risk, it usually tries to form joint ventures that have the two-fold effect of having others bear a share of the cost involved in the project and creating a united and stronger front against an interventionist host-government, and this is particularly helpful when you have a partner of a certain size or possibly a bank or financial institution that you partner with.

A company may also try to ensure against the risk by buying an insurance policy to protect the company from contractual changes in the agreed upon financial regime, including foreign exchange guarantees. Defending against the risk is a strategy that requires a foreign company to try to use economic, financial and political persuasion and leverage to discourage governments from aggregating from investment agreements.

Companies have also tried to structure manage the risk through actions that include association with the host-state, world visibility in the project and flexibility in the investment to be able to adapt to changing pressures and expectation.

These are some of the mechanisms that companies can use outside of the contract to help diffuse a potentially difficult situation. Before looking at some of the contractual provisions

related, that a company should be aware of as they enter into a foreign agreement, I'm going to ask Craig to look into some due diligence aspects of international transactions.

Craig Spurns: Thanks Mike, I think probably as everyone on the call would acknowledge, due diligence forms a major part of directing risk and is often the most effective way of dealing with risk management. So it's an important aspect to doing international oil and gas property transactions.

Obviously international business transactions are fundamentally the same as domestic transactions, but there are some needs and customary investigations that need to be taken into account and certain specific elements that need to be considered carefully.

Some of those specific elements include corruption, partner and country risk, the different and potentially uncertain legal system that you're dealing with, the uncertain governmental and regulatory system that you're dealing with, foreign tax structure and systems, investment and currency restrictions, financing restrictions involving securitization sourcing and structuring, domestic and international tax considerations, including rules regarding foreign affiliates, mining management rules, tax treaties, repatriation of foreign operating profits and loss utilizations, and distributing company disclosure compliance requirements, all key things to keep in mind.

In a context specifically in oil and gas transactions, as Mike has alluded to there is specific unique things that you need to consider. Production rights, ownership rights, transportation, refinery access, marketing rights, et cetera, all unique to the jurisdiction.

There is specific areas of due diligence related to an international business transaction, international oil and gas transactions that you want to carefully keep in mind. One is the foreign corrupt practices legislation and money laundering legislation applicable both domestically and internationally to your company and to the proposed transaction and the partners of the transaction.

Obviously, the United States, Canada, the OECD countries, European Union countries, all have legislation prohibiting bribe payments, money laundering, et cetera, and those requirements need to be carefully considered.

You need to know, number two, you need to know your partner and know the country. This is significant in terms of the impact on your company in terms of the compliance with corruption and money laundering concerns, and also understanding customs and risk profile of the country.

Your due diligence investigation in that respect should consider the following. Assessing the reputation of potential foreign board members, determining the source and legitimacy of investor funds, processing identity and background confirmation of key personnel, confirming performance of joint venture partners, understanding the remote country practices and local legislation that may affect the business transaction, determining the stability of the foreign government or influential neighboring countries, gaining knowledge of the foreign governments corruption level, what to expect when negotiating a transaction, verifying and confirming asset risk, establishing the stability and reputation of vendors and

consultants, and conducting detailed investigations where applicable respecting copyright trademark patent infringement law.

In connection with these types of investigations you also want to consider whether there are any bilateral or multilateral investment treaties governing the relevant countries. These can be great sources of additional security and a ((inaudible)) universe management, and you want to carefully consider what, if any, bilateral treaties exist and what they do for you.

An additional area of concern regarding due diligence is knowing the foreign legislation or regulatory system that you'll be dealing with. Obviously North American legal systems are fairly sophisticated and advanced, the country that you're dealing with may not be nearly advanced, and it certainly may enforce its laws differently.

Accordingly you need to be very knowledgeable in this area and understanding the system of law, whether it's a common law system versus a civil law system is incredibly important to whether or not you're going to successfully negotiate an agreement and achieve the results and goals that you're expected to achieve as part of your project. We'll discuss that a little bit more later on in the conference.

You will conduct typical oil and gas property in production due diligence, very similar to what you would do in North America. And part of that will be addressing whether or not you're dealing with a production sharing contract, concession, et cetera, and the various petroleum agreements that Mike has already discussed.

You will also be conducting general due diligence and you'll be addressing many of the typical general due diligence issues that you would look at in the North American context, such as corporate investigations, shareholder matters, material contract review, et cetera, all of the typical things.

You also want to examine things from a public company disclosure due diligence perspective, both in terms of local laws of the jurisdiction in which the project exists but also the impact of your own securities legislation and disclosure requirements.

And finally and certainly not by no means least important, the tax structure of the investment in the cross border implications related to that. That will require careful due diligence consideration.

I think that's all I probably I need to speak to you on ((inaudible)). Mike?

Michael Laffin: OK, thanks Craig. Let's get into some of the certain contractual provisions that may help us address risk management.

First are applicable laws, whose laws will govern the contract? It seems obvious that most agreements would choose the local laws as applicable for the petroleum agreement. In a review of several agreements, many jurisdictions proved this presumption as virtually all of the agreements adopt local law.

However, in many situations the agreements are applicable to jurisdictions where some of the principles of commerce are not addressed by local law. This is especially true as it relates to common principles of oil and gas law.

For these reasons, it is not uncommon to see that international oil and gas agreements also state the principles of international law shall apply to the contract. Occasionally there are references of the application of principles of law from jurisdiction where the exploitation of resources is common.

For example, Alberta law and Texas law is often used in international joint venture because there is certain body of knowledge available in each of those jurisdictions. And I don't know if it's in your slide, but for example in China, recently negotiated China agreement, it adopts a local law, but where it says that for the interpretation or implementation of the contract the principles of the applicable laws widely used in coal-bed methane resources countries acceptable to the parties shall be applicable. So the choice of law is crucial in these situations.

Arbitration …

Craig Spurns: Maybe I could just speak to applicable law a little ...

Michael Laffin: Sure.

Craig Spurns: ... Mike, I would add as well you want to I think consider carefully the jurisdictions of the parties involved and the host-country. Getting back to my allusion to differences between common law jurisdictions and civil law jurisdictions I think is very important here.

You may not have a lot of choice in your choice of laws if you have a state entity involved in your joint venturing, and therefore you may be required to choose the laws of the host-country. But I do think that you need to understand if you are choosing between civil law jurisdictions versus common law jurisdiction, most of the lawyers on this call, including the presenters, are familiar with common law jurisdiction and our practice in common law jurisdiction and our preference would be to choose laws from a common law jurisdiction.

In a circumstance where that is not an option and we're stuck with a civil law jurisdiction, it's important to appreciate that there are important differences between the two and that this needs to be reflected in your negotiations and your drafting, and ultimately what you agree to in your joint venturing.

Some of those key differences could include the enforceability of provisions regarding agency relationships, whether or not non-operators will be bound to honor the commitments made by the operator on behalf of the project. For example, will a non-operator be required under civil law to make good trade payables?

The effectiveness of release and limitation of liability provisions respecting the operator’s liability and conduct, those may not be enforceable in civil law jurisdictions, in certain civil law jurisdictions, something to consider carefully.

The impact of the absence of recognition civil law jurisdictions of legal interest versus beneficial interest, very important, and this can impact on how you deal with sole risk operations and you'll need to again carefully consider whether or not you need to find a different way of achieving the same economic result.

Another example of a key difference is the applicability at common law concepts of economic interest and fiduciary duties, which just simply won't apply in certain civil law jurisdictions. So there are important differences between civil law jurisdictions and common law jurisdictions, and those need to be appreciated in terms of your drafting and choice of laws provisions.

Ultimately if you're coming from a common law jurisdiction, I think you should probably not be too hung up on your choice of laws provided that you ultimately end up in a choice of law jurisdiction where it's got a common law background and there's a strong energy law juris-prudence behind it. So supporting a choice of law other than your home jurisdiction is sometimes a prudent course of action.

Michael Laffin: Thanks Craig. Let's move on to arbitration. Nearly all-international contracts contain an arbitration clause, and while there are many nuances to be considered in such a clause an interesting consideration is the scope of the jurisdiction of the arbitral tribunal; and the question is how narrowly are the terms of reference defined for the arbitral tribunal.

In the more narrow jurisdiction where a dispute exists between parties, such as an interpretation of a clause, a tribunal is not called upon to make a creative legal decision but to decide the rights and obligations of the parties.

There are however, situation where the parties to a contract do not want a decision from the tribunal on the interpretation of a clause, rather they want the tribunal to undertake the adjustment of the contract for the parties.

Consequently, arbitrators are no longer being called upon to make a legal decision, but rather to shape the contractual relationship between those parties. The question remains whether such tribunals are authorized to do so. It has been generally recognized that a mere conflict or difference of opinion between the parties is not sufficient for an arbitration.

However, modern developments provide support for the assumption of a more extensive jurisdiction for arbitral tribunal including the authorization to adjust and adapt contracts. Factors in support of this proposition are the significantly greater arbitration friendliness of National Arbitration Acts, increasingly equal treatment of the judication by tribunals and by national courts.

For many years, international contract doctrine has been concerned with balancing the formal rule of sanctity of contracts with the goal of insuring fairness. Today, one can observe a trend to move away from a contractual model that is static and complete at the time of conclusion, towards the contractual understanding, which is dynamic, and therefore except interference by parties or by third parties that they have authorized.

As a result, the formal all or nothing rule of the principle of sanctity of contract is often replaced with a more flexible and pragmatic approach that attempts to guarantee that the

rights and obligations set out in the contract with regard to the economic background remain fair, appropriate and consistent with the economic interests of the parties. Not just at the time of concluding the contract, but throughout its duration.

Force majeure clauses ...

Craig Spurns: Mike, maybe I just ...

Michael Laffin: Sure.

Craig Spurns: A few comments on arbitration, I would like to add. The more nuts and bolts provisions, but in my experience I think there's some key things that you want to focus on in your arbitration clause that I think are important, particularly in the international contracts.

There are a few obvious ones that apply across the board and domestic transactions as well. But number one you want to select you're number of arbitrators, you need a mechanism to appoint arbitrators in the event the parties are unable or unwilling to do so, that's obvious.

Place of arbitration, very important, particularly in international arbitration matters. The language of arbitration, obviously that's not a given so you really need to address that and then what specific rules will govern those proceedings. Those rules might be part of recognizing the institution such as the International Chamber of Commerce, the Aligned Court of International Arbitration, or you may choose our ad hoc arbitration rules and simply adopt arbitration rules of, for example, the United Nations Commission on International Trade Law.

Part of the reason of why a place for arbitration is important is to the extent that you don't have rules covering any particular aspects in your arbitration, the rules of the place of the arbitration will likely apply and therefore you want to carefully consider that.

Another important aspect in the place of arbitration is whether or not that jurisdiction is party to or recognizing international treaties that will cause the enforcement of arbitral award. And we recommend insuring that the jurisdiction be party to the United Nations Convention and Recognition Enforcement of Foreign Arbitration Awards of 1958.

So that was just what I wanted to add, Mike, thanks.

Michael Laffin: OK thanks, Craig. Force majeure clauses, and we're not going to get into a technical discussion on force majeure clauses, however there are two points that I'd like to point out, namely unforeseeably in force majeure and economic force majeure.

Unforseeability is occasionally a requirement for reliance upon force majeure clauses. It may be argued that the non-performing party should not be entitled to rely on the force majeure clause where at the time of making the contracts he or she could reasonably foresee events inevitably leading to its operation and could make provisions to facilitate the completion of the contract.

However, it has, it's been suggested that force majeure clauses should not be limited to events not in existence at the date of the contract, or for those which are unpredictable at the

time it was made. Requiring unforseeability would unreasonably restrict the operation of force majeure clause.

There's a party seeking performance could almost always argue that an event was foreseeable. As a result the other party to the contract would be required to perform when it is practically impossible to do so. Such a requirement could adversely affect war torn or economically unstable countries where many, if not most force majeure events would be foreseeable.

For example, suppose rebels are active in a host-country when the agreement is signed, and later disrupts the project, delay work and kidnap employees. This could have been foreseeable, but from the IOCs point-of-view it should clearly be an event of force majeure, unless perhaps the IOC was expressly required to provide military security against rebel activity.

However, one of the political analysts for the IOC produced a letter wherein the analyst produced data that was dated six months prior to signing the agreement predicting this would happen. What would occur if the analyst made the prediction six months after the agreement was executed?

Since force majeure clauses are by their very nature designed to protect against an unanticipated contingency, they cannot be limited to a precise definition or a finite list of examples.

Economic force majeure, is there such a thing? Often events of a purely economic nature such as decreases in oil prices are characterized as non-force majeure events. The fluctuation of economic conditions is a recognized unpredictability against which IOCs can protect themselves by signing risk through the provisions of the relevant agreement.

Therefore, even major changes in the economic climate should not justify judicial intervention as they could have been accounted for in the agreement. In determining whether a party may rely on economic reasons for enforcing a force majeure clause, the courts or arbitral tribunals will look at the construction of the clause.

Contracting parties should specifically agree to include economic force majeure clause if they wish the court to excuse non-performance resulting from economic conditions or constraints. If a contract force majeure clause did not include a provision regarding economic fluctuation, it will be presumed that the parties intended to assign risk to the pricing mechanism contained in the agreement.

Craig?

Craig Spurns: Sure, I would like to add just a couple comments on force majeure, and again, this goes back to which type of jurisdiction you're dealing with in terms of interpreting the force majeure provisions. It is often the practice in North America to include in your list of force majeure items, items that are reasonably beyond the control of the parties.

That may or may not be an enforceable concept in certain jurisdictions and so I would caution lawyers working in other jurisdictions that what the typical practice here is, may not in fact work, may not be acceptable, may not be enforceable in other jurisdictions.

And accordingly I think that in some cases you'll need to unfortunately go into the exercise of sending out exhaustive lists of force majeure events, and I think in that respect I'd think you'd want to be very careful about what might be left to grey areas. For example, what's included in war? What's a war? Was the military intervention in Iraq a war, or is that an invasion, or is it something else?

What's an epidemic? Is SARS or the bird flu an epidemic, or is it something else? What really goes into those types of concepts? I think that in North America we take it for granted given the courts having interpreted the general wording of reasonably beyond the control of the parties is be inclusive of many other things.

In jurisdictions where that may not work, you probably need to put your mind very carefully to what exactly is intended to be a force majeure event and what is not, and you need to be very careful about in certain jurisdictions, so, just a practice note for the listeners. Thanks Mike.

Michael Laffin: OK, thank you Craig. Hardship concepts, what is it? The unidroit principles of international commercial contracts, they're neither model clauses nor are they contract forms. What they are intended to cover is the area of contract law without being conceived in terms of specific types of transactions.

And while they do not have any binding force and will be implied in practice by reason of their persuasive value only, certain concepts may be incorporated into international agreements. Having said that, the unidroit principles go to some length to define hardship and it's legal consequences.

And I'm not going to go through the full definition of it, but suffice to say that the hardship concept aims directly at maintaining the commercial equilibrium of a contract in that it is triggered when the burden posed on one party has reached the limit of sacrifice. As a legal consequence of hardship, the parties are obliged to renegotiate their contractual relationship if the hardship concept is incorporative into the agreement.

But the hardship concept proves to be a special form of the same idea as incorporated in renegotiation clauses that is making contractual obligations more flexible in-line with alterations for the commercial equilibrium.

Is there an inherent duty to renegotiate a hardship situation? It is often argued that even without a specific contractual clause, international investments contracts include such a duty to renegotiate in light of changed circumstances.

In the absence of such clauses providing for review, IOCs should respond positively to requests for review or renegotiations concluded with government, in circumstances marked by duress, or clear inequality between the parties are where the conditions upon which such a contract was based have fundamentally changed causing unforeseen distortions in the relationships between the parties.

Now is there a duty to renegotiate? Notwithstanding that there may be a moral one, a duty to renegotiate can be taken into consideration only if the law applicable to the contract provides for it. And at the international level there is by no means agreement on the existence of such a duty to renegotiate, even in light of the changing understanding of a contract as a flexible framework for the fair and reasonable distribution of contractual right.

Craig, anything on hardship? If not, we'll just move to renegotiation clauses. A renegotiation clause is essentially a clause that provides a mechanism and allows the parties to address an unfavorable situation in the economic balance between the parties at the time the contract was entered into.

A major source of conflict between host-governments of developing countries and IOCs derives from the preoccupation of IOCs with stability and predictability in contractual relations on the one hand, and the persistent demands of host-governments for a more flexible contract regime on the other.

The more flexible contract regime gained through the renegotiation clause leaves the host-country's sovereignty intact, because it is a private law agreement on the renegotiation of the contract. To guarantee this flexibility, the contractual provision must unavoidably be open in style, therefore they tend to exhibit significant uncertainty.

One of the key components of a renegotiation clause is what will trigger the renegotiation? As indicated earlier, an IOC will want changes in tax laws, changes in the economic ring, changes in the fiscal regime, however countries are loath to do that in order to protect their sovereignty and what they will insist on in many cases is that wording such to the effect that if there's a material change in the economic benefits accruing to each party.

Renegotiation clauses should not result in a commercial advantage to one of the parties, but instead function either to maintain or to restore the commercial balance of a contract to adjust to changed circumstances.

Now is there duty to agree even in light, if in fact if there is a renegotiation clause included. According to preponderance of international opinion, renegotiation clauses can only contain an obligation on the parties to make the best possible effort to reach an agreement. They do not however, require the parties to actually reach such an agreement.

Stabilization clauses and we'll talk a little about after we talk about stabilization clauses about the comparison with renegotiation clauses, but stabilization clauses are essentially a specific commitment by a foreign country not to alter the terms of the agreement by legislation or other means without the consent of the other contracting party.

And there are many risks associated or addressed in these stabilization clauses, such as expropriation, labor laws, changes to accounting rules, et cetera. There are essentially three types of stabilization clause, one is an intangibility clause, which essentially provides that a government could not unilaterally modify or terminate the contract.

Secondly, there's a strict adherence clause, now which it says a governing law of the contract shall be that of the contracting state at the time the contract was executed. Finally, there's a

goodwill clause, which indicates that a contract shall be formed consistently with goodwill or in good faith.

Now the special characteristic of renegotiation clause become clear when compared with the classic stabilization clauses. Stabilization clauses are designed to protect the investor by freezing the legal situation in the host-country at the time of concluding the contract. Unavoidably this comes in to contact with the sovereignty of the host-country.

To avoid this, and because of the potential legal validity of these clauses, the renegotiation clauses aim to protect the investor, not by establishing a fixed legal situation in advance, but by making the contractual framework flexible and dynamic throughout the duration of the contract, in case the host-country changes the economic circumstances by a sovereign act.

Comparing both approaches, freezing here allowing for flexibility there, reveals a classic conflict of interest between host-country and investor, which has always characterized the law of international investment contracts.

The final clause that, you know, it's imperative that you have or at least seek to have in these agreements is a Waiver of Sovereignty Immunity Clause. This will enable an IOC to seek judgments against host-governments in foreign jurisdictions more easily.

Now in terms of some of the concluding points on the PowerPoint, there are a few points that must be made. And one is that an IOC must make every effort to understand the foreign country's legal regime for petroleum exploration and development, and they have to appreciate the importance of sovereignty to that host-government. They must assess trends and regulations. Are they prescriptive in nature, or are they more innovative?

Do not underestimate the importance of the relationship between a host-government and the investor. And ensure that the contract includes an arbitration clause that empowers arbitrators to carry what you envision, whether it's the narrow jurisdiction or a more fully and broader right to alter and interpret the contract.

Major uncertainties prevailing at the time an international contract is negotiated generally make it easier to reexamine the terms at a later date. In addition, the bargaining powers of the parties to the agreement are likely to change over time, creating tensions that generally lead to revisions.

To meet this challenge it is important for IOCs and host-countries to understand how, when and why clauses and concepts such as stabilization, renegotiation, hardship and force majeure have been used in the past and how courts and arbitral awards that treated such clauses.

There are many decisions that show such clauses are taken seriously by arbitrators, what is telling is that the precise language used in these clauses has not been particularly significant, rather they are generally analyzed from a policy perspective that considers the limitation on sovereignty expressed by such a clause in light of all of the circumstances surrounding the transaction.

And that wraps up my portion of the presentation. Craig, do you have anything that you would like to add at this point?

Craig Spurns: I think we have a few minutes here before we finish up, so maybe I could expand on something that I spoke to earlier and didn't spend a lot of time on, but it was the bilateral investment treaties and what you might be looking for in those treaties, what you want to consider.

Because although you don't necessarily think of these things in that context, they do form a very important part of the matrix of the legal regime that you're dealing with and it's not necessarily just host-country or just the country that your home base is in, it's sort of in-between the two in a hybrid and something that sometimes gets overlooked.

But I think in terms of bilateral investment treaties or multilateral investment treaties; you want to look for three key investor rights within those documents. The first is the non-discrimination national treatment type of provision, which is basically that simply because you are not a resident entity in the host-country, that you will protected from any discriminatory business practices.

Two, related to that that you are going to be treated fairly and equitably by the government in terms of your investment on the same basis as anyone engaged in business in the jurisdiction. And that three, there's no expropriation without compensation. And this additional risk management in terms of change of laws and is a compliment to the stabilization and other types of provisions that you might be looking for.

Other investor rights that you would be looking at in bilateral treaties would include a most favorite nation's treatment, that there are no restrictions on transfer of funds. That's going to be an important part of it. The right to choose management, key personnel; what types of rights there are or obligations there may be in terms of employment obligations and things of that nature.

And what limits exist on performance requirements, things like that. Most of the newer treaties that you're looking at will provide for direct investor remedies, some of the older treaties will require a state-to-state remedy, which is obviously not as effective from your perspective. So you want to consider that.

You want to consider the mechanisms or means by which you can pursue remedies under that treaty. You will also want to consider what is covered, what is the scope of the treaty very carefully. What's the definition of investment and does it include your project and your asset and whether or not there's any precedence set in terms of the interpretation of that; similarly whether or not you're covered as a defined investor under the treaty as well.

So those treaties are very important, those are just a few comments on the treaties, but their something that should not be overlooked. So we can turn it over to questions now if there's time. And I'm just going to flip through here and see if there are any questions.

(Nicole Spaur): I just want to remind all the attendees if you do have questions you can submit those in the, I believe it's the lower left-hand corner. There's a box and if you just hit send,

you can submit them and anything not answered today we'll follow up with answers to your questions in the near future.

Craig Spurns: There was one question (Nicole) that was asked that was do you have any sample contract clauses covering a representation of compliance FCPA that is the Foreign Corrupt Practices Act in the U.S., we have similar legislation here.

We do have those, there are sample contract clauses and we're happy to provide something after the conference is over. Unfortunately I don't have anything with me that I could read to you over the phone, but we do have those.

They're typically handled as representations and warranties with an indemnity for any breach of representation or any untrue representation of warranty. That's typically how it's handled, it's pragmatically, probably the only way you can handle it and it's not necessarily a guarantee that there is compliance with FCPA obligations but hopefully it gets you some comfort that there is compliance.

Mike Laffin: And just following up on that question, the FCPA and similar legislation in Canada has become an important part of due diligence as Craig has alluded to, you know, I've been involved where companies from the U.S. have come into Canada looking to negotiate a deal and lo and behold, the FCPA or our Act of Corruption of Foreign Public Officials Act comes into play and may in fact scuttle the deal.

Craig Spurns: Yes, there are a number of pieces of legislation that you need to keep in mind in terms of sanctions against specific countries that may benefit from transactions indirectly that you're involved in, the scope of those pieces of legislation are incredibly broad and far reaching and you need to consider very carefully whether or not you're doing something that might potentially put you offside of a piece of legislation that you're subject to because you have a branch office or your head office is in a certain jurisdiction that prohibits you from dealing with certain countries. So you want to consider that very carefully.

(Nicole Spaur): Excellent, very good information. Well if we have no other questions, we can probably go ahead and wrap up unless Craig or Mike, do you have any final comments you'd like to make?

Craig Spurns: No.

Mike Laffin: No thank you.

Craig Spurns: Thank you, thanks for everyone listening in, we appreciate it.

(Nicole Spaur): Excellent. Well then, on behalf of the Energy Committee I want to thank both of you for presenting today on such an interesting and useful topic. I think the practice pointers you provided, the attendees will find very helpful. I also want to thank your law firm, Blake, Cassels and Graydon for sponsoring this Webcast and also a special thanks to all of the attendees for participating in today's Webcast.

If you would please take a few moments just to complete the evaluation form it would be very much appreciated. The Energy Committee finds the information useful as we go ahead and plans for future Webcasts.

So again, I think with that we'll conclude today's Webcast and everyone may now disconnect.

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