

Parent company guarantee for NCS licensees – scope and third-party claims

Any subsidiary company holding a production licence on the Norwegian Continental Shelf (NCS) must provide to the Ministry of Petroleum and Energy a standard parent company guarantee (PCG) covering its obligations relating to the petroleum activities in which it participates.

The scope of the PCG and who is entitled to claim under it has been subject to discussion. As the PCG has never been called on and its contents have never been tried before a court, these issues remains to be finally determined. This update seeks to clarify the scope of the standard PCG and identify the third parties protected by it.

Background

The requirement to provide a PCG has its legal basis in Section 10-7 of the Petroleum Act 1996, which reads:

“upon granting a license and subsequently, the Ministry may decide that the licensee shall provide such security as approved by the Ministry for fulfilment of the obligations, which the licensee has undertaken, as well as for possible liability in connection with the petroleum activities.”

Required by the Ministry of Petroleum and Energy, the PCG is a condition for the award of a participating interest in an NCS production licence or for approval of the acquisition of such an interest. It is a non-negotiable standard document stipulated by the Ministry of Petroleum and Energy and is identical for all licensees. In regard to the term ‘parent company’, the Ministry of Petroleum and Energy has applied the general corporate law understanding, which is any company that exercises decisive influence or control (more than 50%) over another company by means of a shareholding, an agreement or otherwise. It is general practice that the PCG must be issued by the ultimate parent company of the licensee.

A Norwegian production licence is always awarded to a group of licensees which, as a condition for the award, are obliged to enter into the standard petroleum agreement, comprising a joint operating agreement and an accounting agreement forming an unincorporated joint venture, in which the licensees are jointly and severally liable for all obligations relating to the licence activity. Additionally, pursuant to Section 10-8 of the Petroleum Act, the licensees are

jointly and severally responsible to the state for financial obligations arising out of the petroleum activities under the licence.

Norwegian law generally recognises that the rights of a third party (C) may be established between A and B, and that C may invoke these rights against the obliged party.⁽¹⁾ This is also in line with Article 6:110 of the Principles of European Contract Law. Thus, there are no general legal obstacles for providing third-party rights under the PCG. Whether such rights are provided in the PCG must be assessed based on the text itself and other relevant sources of interpretation.

Interpretation of PCG

General

Only the original Norwegian language PCG is submitted to the Ministry of Petroleum and Energy and has legal effect. The English translation is used for information purposes only. In addition, only Norwegian law and legal interpretation principles and rules apply.

The PCG is kept in general terms and presupposes the use of Norwegian background law – such as contract and administrative law – for its interpretation and execution. The PCG, being signed by the parent company, is in form a contractual document. This influences its interpretation, towards a greater focus on the document’s wording. Conversely, as a condition to the award of the licence, the PCG is part of an administrative decision under administrative law, which implies that it must also be assessed in this context. As the Ministry of Petroleum and Energy

is the author of the text, the state's intentions, interests and objectives as resource owner for requiring a PCG is thus highly relevant for the interpretation guarantee.

Resource owner's objectives

The rationale behind the requirement of financial security in the Petroleum Act and the use of the PCG is that the licensee (often a smaller local subsidiary of a large international oil corporation) is the directly obligated entity engaged in an activity which involves substantial cost and risk – normally far beyond the financial capacity of the licensee itself. To ensure that the licensee fulfils its obligations (eg, mandatory work obligations and development obligations) and that the liabilities associated with the activity are secured, the Petroleum Act caters for the full utilisation of the available financial and other security that the licensee may provide. This may be bank guarantees, insurance, PCGs or other types of security. Due to the substantial size of many of the participants in the petroleum industry and the cost of financial security and insurance, a PCG is often the most attractive solution for the industry and the state as resource owner.



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In addition to the activities

and other obligations assumed by the licensee, the state has an interest in securing the risk of direct and resultant damages from and the clean-up cost of pollution and accidents brought about by the licensee's activity. This is a state issue as it is the ultimate obligated party for the damages and clean-up cost of pollution towards other nation states under public international law if the liable party cannot pay or is liquidated in the process. In addition, the size and versatility of the petroleum industry implies that there is a large group of individuals and companies that may suffer personal injury or pollution damage as a consequence of the licensee's petroleum activities. As recent events in the Gulf of Mexico have shown, the total cost of damages to physical and legal persons in the event of a major accident may exceed the financial capacity even of large international oil companies, not to mention local subsidiaries. This substantial risk to its citizens is also the state's concern – thus, the licensee's liability for such effects is also included in the Norwegian standard PCG.

Wording of the standard PCG

The material content of the standard PCG is reflected in Section 1, which reads:

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

(a) The obligations which the above-mentioned companies have assumed or may assume to the Norwegian State, a Norwegian municipality or other Norwegian public institution.

(b) Any liability, including liability for any recovery claim, which may be imposed on the abovementioned companies under Norwegian law for pollution damage and for personal injury, to the Norwegian State, a Norwegian municipality or other Norwegian public institutions, or to private persons, including companies, foundations and other associations.

The Company undertakes to pay any costs incurred by the public authorities or others in connection with the performance of work which ought to have been performed by or on behalf of the above-mentioned company, and to cover any liability incurred by the public authorities in consequence of the operations of the above-mentioned company.

This surety applies to all present and future claims whether they pertain to public or private law."

The wording of the first paragraph of Section 1 clearly limits the obligation of the guarantor to the guarantee's obligations as licensee conducting petroleum activities as

defined and within the scope of the Petroleum Act. Subsections (a) and (b) define the two types of licensee obligation that the PCG shall cover as follows:

- Subsection (a) – directly assumed or regulated obligations as a licensee towards the state or the authorities; and
- Subsection (b) – the licensee's liability for pollution and personal injury under Norwegian law towards the state, municipalities, public institutions and private third parties.

Due to the somewhat unfortunate wording of Subsection (b), which may be interpreted as referring only to pollution damages and personal injury as an example, some have argued that all types of third-party claim may be made under the PCG (eg, payment obligations towards other licensees under the joint operating agreement).

This line of argument is partly supported by the wording of the last two paragraphs, which is also rather general with regard to who incurred the costs ("by the public authorities or others"). Arguably, however, both the wording and the rationale behind the PCG imply that the text merely



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clarifies which costs may be covered under the obligations in Subsections (a) and (b). If this section were to establish a third and separate obligation, it may be expected that this would have been included in a new Section 1(c) in the PCG. If the intention were to make the parent company liable for cash calls pertaining to the day-to-day activities of the licence, the PCG would thus arguably have been drafted differently.

Consequently, expenditures which are recoverable under the PCG under the third paragraph are arguably limited to expenditures for work performed by third parties that are entirely external to the licence group (eg, damages claims brought by third parties or the state for expenditures on clean-up efforts after oil spills). It is also clear that the state's expenditures in engaging a third party to complete the mandatory work obligation of a production licence are covered.

Finally, the wording "this surety applies to all current and future claims regardless of their public or private nature" arguably cannot be interpreted as meaning that all private claims may be brought against the parent company regardless of the obligation to which they relate. Rather, this wording appears to provide further clarification that the parent company's liability for the obligations under Sections 1(a) and (b) applies regardless of how and when the third-party claim is brought.

Preparatory works

The wording of Section 10-7 does not refer directly to PCGs and gives no guidance in this respect. However, the relevant preparatory works for Section 55 of the Petroleum Act 1985, which has the same wording as Section 10-7, (2) state that the security to be provided may include liability towards both the state and third parties. The legislature discussed whether to include wording in the law expressly stating the right for third parties to claim directly from the parent company but concluded that this was unnecessary, referring to a statement from the Norwegian Industry Association for Offshore Companies that Section 1(b) of the standard PCG already enables third parties to claim directly under it.

The preparatory works for Section 55 of the Petroleum Act 1985 include a statement that supports the interpretation that at least regular cash calls are excluded from the scope of the PCG. The statement, which relates to discussions on potential caps on the security, reads:

"the question of the limitation of the amount of security

will have to be decided in each particular case. The size should reflect the scope of the activities, other [production license] participants which are joint and severally liable [for claims], as well as the risks connected with the activities (under the production license)."(3)

As the existence of other jointly and severally liable parties under a production licence is a relevant factor when assessing the amount of security required, it is reasonable to infer that the legislature did not intend for the partners under a production licence to be entitled to claim under the security. In the end, the obligation for the guarantor under the PCG was made unlimited. Moreover, the preparatory works mention third-party claims only in respect of pollution and personal injury. If the intention had been to allow for all claims or other specific claims to be permitted under the PCG, it must be expected that this would have been discussed in the preparatory works.

Administrative law and practice

As the PCG is a condition stipulated under an administrative decision, the argument that the PCG covers third-party claims in general may also be challenged under the so-called 'doctrine of administrative abuse' developed under public administrative case law. Under this doctrine, administrative decisions that are manifestly unreasonable may be rendered invalid. The same also applies to conditions included in administrative decisions.(4)

The Ministry of Petroleum and Energy has traditionally been reluctant to express its understanding of the PCG. However, recent communications suggest that the Ministry of Petroleum and Energy does not support the understanding that the PCG allows any and all third parties to claim under it. This implies that the Ministry of Petroleum and Energy interprets the PCG as allowing third parties to claim under it, but only with respect to claims relating to pollution and personal injury.

Contractual considerations

A final argument in favour of the interpretation that only claims relating to pollution and personal injury may be brought by third parties is that the contractual payment obligations between the licensees are exhaustively regulated in the standard petroleum agreement, which includes no reference to the PCG.

Comment

Based on the PCG's wording and other relevant interpretation sources, there is arguably a solid basis to conclude that third-party claims under the PCG are limited to damages and costs relating to pollution or personal injury.

There is arguably a very limited basis for other third-party claims under the PCG – for example, claims relating to cash calls, payment for work performed for the licence group by contractual partners and other claims relating to the licensee’s activities. Such a wide application of the PCG is not supported by the PCG’s language, the preparatory works of the Petroleum Act or the resource management objectives that form the basis of the requirement for the PCG.

Endnotes

- (1) See, for example, Rt 1995 s 486, page 492.
- (2) The white paper (Ot prp 72 (1982-83)) for Section

55 of the Petroleum Act 1985 discusses the issue of Section 10-7. The later white paper of the Petroleum Act 1996 (Ot prp 43 (1995-96)) refers to the previous preparatory works.

- (3) NOU 1979:43, page 90.
- (4) See, for example, Rt 1961 s 1049.

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