

الحماية القانونية للمعلومات السرية في العقود

الدولية للنفط والغاز

Legal Protection for Confidential Information in International Oil and Gas Contracts

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1. Introduction:

Confidential information is a significant type of intellectual property. It plays an effective role in commercial contracts, especially in the oil and gas contracts. In resource-rich countries, governments enter into contracts with international oil companies to explore for, produce their oil and gas. Since oil and gas contracts contain exclusive technical information and business knowledge, in order to make them confidential, often international oil companies put confidentiality clauses in their contracts. There are a

number of prominent issues concerned with oil and gas contracts, for instance: which information is confidential? When is a party liable for a breach of confidence over such information? How will an owner be protected in the event of breach of confidential information? This paper aims to justify the protection of confidential information in international oil and gas contracts. In order to answer the questions above, this paper explains confidential information law and its basic requirements. It further describes the main types of oil and gas contracts, confidentiality agreements and confidentiality clauses in the oil and gas contract. Additionally, the paper discusses the defences and remedies, which are available in the event of breach of confidential information.

2. Law of Confidence:

Information is progressively becoming recognised as valuable property worldwide in many relationships and areas, especially in the media world where it is bought and sold in the oil and gas industry. In many of these areas, this information must be protected confidentiality and for this purpose, a law of confidence is essential. A useful weapon is provided by the law of confidence for fighting against the unauthorized use of confidential information and misappropriation of a person's information or/and ideas.¹ The law of confidence is particularly important and it protects a creative work or invention in the early days before there is sufficient of a tangible nature to be protected by a patent, copyright or other intellectual property rights.² For example the British Patent Act 1977 stats that 'publication made in breach of confidence will not

¹ D I Bainbridge, *Cases & Materials in Intellectual Property Law* (2nd edn Financial Times: Pitman Pub, London 1999) p. 117.

²ibid.

invalidate the patent application”.¹ Moreover, the British Copyright, Designs and Patents Act 1988 states that “nothing in this part [the part of the Act dealing with copyright law] affects... the operation of any rule of equity relating to breach of trust or confidence”.²

The information to be protected by the law of confidence must be a confidential nature and not be in the public domain unless there is the ‘springboard’ doctrine. The court will consider whether the disclosed information is in the public interest. The law of confidence has been seen essential to maintaining certain standards, both in public and private life. According to Sir John Donaldson MR in *A-G v Guardian Newspapers Ltd*³, the ‘Spycatcher’ case:

There is an inherent public interest in individual citizens and the state having an enforceable right to the maintenance of confidence. Life would be intolerable in personal and commercial terms, if information could not be given or received in confidence and the right to have that information respected and supported by the force of law.

There is no significant Act to protect confidential information but the law of confidence has developed through the common law and equity. This law should not be confused with other countries laws, which provide a right of privacy (see *Kaye v. Robertson*)⁴; although invasion of privacy can be dealt with under the Human Right Act 1988.⁵

¹The British Patent Act 1977, s.2 (4)(b)

²The British Copyright, Designs and Patents Act 1988, s. 171 (1)

³*Attorney General v Guardian Newspapers Ltd* [1988] 3 All ER 596

⁴*Kaye v. Robertson*[1991] 2 All ER 599

⁵ T Hart and L Fazzani, *Intellectual Property Law* (3rdedn Palgrave Macmillan, Basingstoke 2004)p.57.

An obligation of confidence will be forced in a large number of situations. It should be noted that sometimes it is express but often it is implied into many relationships¹ and protects secrets between many different types of parties, for instance: secrets between husband and wife (*Argyll v Argyll*)², between friends (*Stephens v Avery* [1988])³, drawings by members of the Royal family (*Prince Albert v Strange*)⁴, state secrets (*Attorney-General v The Observer Ltd*)⁵, as well as details in a journal kept by a member of the Royal family (*HRH Prince of Wales v Associated Newspapers*)⁶ and between doctor and patient or between adviser and client.

⁷ However, in fact the law of confidence has mostly been used in commercial or industrial situations to protect trade secrets, significantly in oil and gas contracts and technology, for example it protects trade secrets between insiders within various projects in oil and gas projects. In Sakhalin Island Project, the Southwark Crown Court held that corruption can occur in oil and gas contracts by supplying confidential information to bidding suppliers.⁸ Sakhalin Island Project in the Russian

¹ibid.

²*Argyll v Argyll*[1967] Ch 303

³*Stephens v Avery* [1988] 1 Ch 457

⁴*Prince Albert v Strange* [1949] 1 Mac & G 25

⁵*Attorney-General v The Observer Ltd* [1989] AC 109

⁶*HRH Prince of Wales v Associated Newspapers*[2006]EWHC 522 (Ch)

⁷Hart and Fazzani, op. cit., p. 57, 58.

⁸J Donovan, 'Prison terms for corruption in oil and gas contracts' <<http://royaldutchshellplc.com/2012/02/01/prison-terms-for-corruption-in-oil-and-gas-contracts/>> accessed 1 Jul 2015.

Russian Federation is one of the largest integrated oil and gas projects in the world. This project involves the exploration and development of several different oil and gas fields in the Sea of Okhotsk off Sakhalin Island. Fluor Ltd, a company in Farnborough, managed the procurement process for this project. One of defendants (Saunders) engaged as contractors by the company between 2006 and 2008 and the other defendants (Rybak and Hammond) received confidential information about investigated, including: air compressors, oil pumps, generator sets, gas turbines, equipment to treat fuel gas, oily water treatment and large bore pipes worth over £17 million from insiders.¹

3. Basic Requirements for Confidential Information:

The equitable doctrine of breach of confidence is nothing new. It is quite old but its development to its modern form is only quite recent. A number of cases was available in Victorian times², for instance (*Prince Albert v Strange*)³ and (*Morison v Moat*)⁴. The doctrine of breach of confidence can be successfully invoked if a number of circumstances are satisfied which are: the information must have the requisite degree of confidence, the confidant ought to have known that there was an obligation of confidence in

¹ Barry and Richard, 'What Happens in Practice? Confidential Information Offered to Contract Bidders' <<http://thebriberyact.com/2012/01/26/what-happens-in-practice-confidential-information-offered-to-contract-bidders/>>

accessed 3 June 2015.

² Bainbridge, *Cases & Materials in Intellectual Property Law*, loc. cit.

³ *Prince Albert v Strange* [1849] 1 Mac & G 25

⁴ *Morison v Moat* [1851] 9 Hare 241

circumstances when the information was given and the disclosure of the information must have been unauthorised.¹ These circumstances have been recognised and stated as the basic requirements for confidential information by Megarry J in a very important case called *Coco v A.N. Clark (Engineers) Ltd (1969)*². Coco designed a new moped with a new design of two-stroke engine. The plaintiff (Coco) entered into negotiation with the defendant company (A.N. Clark) to discuss manufacture of the engine. During these discussions, Coco provided all the details of the moped to A.N. Clark. Then, after some time, the defendant company decided to make its own engine, not the Coco moped but one that closely resembled the Coco moped. Therefore, Coco applied for an injunction to stop A.N. Clark manufacturing its engine or sell mopeds using its confidential information but the attempt to get an injunction failed. According to the Megarry J's decision in this case, three basic requirements for confidential information were set out. He stated at page 47:

“In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information must itself ... have the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.”

¹ M Anselm, A Bleakly and K Watson, *Intellectual Property and Media Law Companion* (3rd edn Blackstone Press Limited, London 1999) p.108, 109

² *Coco v A.N. Clark (Engineers) Ltd*[1969] RPC 41

3.1 Confidential Information:

The first requirement is that for information to be confidential, it must be sufficiently important and must have the necessary quality of confidence about it (*Saltman Engineering Co Ltd v Campbell Engineering Co Ltd (1948)*) but there is no single and clear definition of confidential information in the case.¹ However, Lord Greene offered a negative definition for confidential information in a non-commercial or non-industrial context and stated that 'it must not be something which is public property and public knowledge'.² Confidential information in a commercial or industrial context is usually called a trade secret. Trade secrets cover technical information for example the mechanics of a creation that is yet to be the subject of a patent application. It also covers price lists, customers' names, addresses and delivery routes.³

To know whether the information has the necessary quality of confidence about it, it should contain four elements. According to Megarry v-c in *Thomas Marshall (Export) Ltd v Guinle*⁴, the four elements are: first, the owner must believe that the release of the information would be injurious to him or of advantage to his rivals. Second, he also must believe that the information is confidential or secret. Third, both above beliefs must be reasonable and lastly, the information must be considered taking into account trade practice.

¹ J Davis, *Intellectual Property Law* (3rd edn Oxford University Press, Oxford 2008) p. 92.

² *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* [1948]

³ All ER 414

³ Hart and Fazzani, op. cit., p. 59.

⁴ *Thomas Marshall (Export) Ltd v Guinle* [1979] 1 Ch 227

Moreover, for the necessary quality of confidence, the defendant must know that information is confidential (see *PCR Ltd v Dow Jones Telerate [1998]*). The information, which is claimed to be confidential, must be possible to isolate (see *Inline Logistics Ltd v UCI Logistics Ltd [2001]*)¹. Also the information should not be in the public domain: if it is in the public domain, the information is no longer confidential. For instance, in *Attorney General v Guardian Newspapers (No. 2) (1990)*² it was held that there was no breach of confidence and The Guardian was not liable because the book had already been widely published and commented upon in the media abroad. Therefore, a duty of confidentiality no longer existed. As mentioned before, if the information disclosed is in the public domain or published, it is not confidential anymore and the obligation of confidence is removed. However, there is an exception, which is the springboard doctrine. The springboard doctrine arises when a person will be under an obligation of confidence for a certain period of time after the general disclosure or publication of the information because this person should not have an unfair advantage as a result of having previously obtained that information.³ Roxburgh J held in *Terrapin Ltd v Builder's Supply Co. (Hayes) Ltd*⁴ that:

A person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication, & springboard it remains even when all the features have been

¹ *Inline Logistics Ltd v UCI Logistics Ltd [2001]*

² *Attorney General v. Guardian Newspapers (No 2)[1990] 1 AC 109*

³ Hart and Fazzani, op. cit., p. 60,61.

⁴ *Terrapin Ltd v Builder's Supply Co. (Hayes) Ltd[1967] RPC 375*

published or can be ascertained by actual inspection by any member of the public.

3.2 Obligation of Confidentiality:

The second requirement of a breach of confidential information is that the information must have been imparted in circumstances importing an obligation of confidence. A duty of confidence arises from a relationship between the parties. There are three relationships, contractual relationships, non- contractual relationships and the position of third parties.

3.2.1 Contractual Relationships:

Parties in a contractual relationship may have an express term in their agreement, which establishes a relationship of confidence, for instance in oil and gas contracts, the Iraqi technical service agreement (Article 33.1) starts off by stating "All information and data obtained in connection with or in relation to this Contract shall be kept confidential by the Parties and their Affiliates and shall not be disclosed or communicated to any third party without the other Party's prior written consent."¹ Even if there is no express term, the court may imply the term and an obligation of confidence may also occur in equity.² According to Megarry J in *Coco v A.N. Clark (Engineers) Ltd (1969)* 'where there is no contract, the information must have been imparted in circumstances importing an obligation of confidence'.³

¹Lawyers yammering on, 'Breach Of Contract'
<http://share.pdfonline.com/c5074b62da774a5b86a20b606083d743/oil%20contracts%20v1%20nov%203_Part20.pdf>
accessed 25Nov 2014.

²Davis, op. cit., p. 100.

³*Coco v A.N. Clark (Engineers) Ltd*[1969] RPC 41

An obligation of confidence has been imposed by the law on a variety of contractual relationships, for example: it was stated in *Tournier v National Provincial & Union Bank of England (1924)*¹ that a bank was under an obligation of confidence to its customers, except when disclosing information by law. Additionally, partnership agreements impose an obligation of confidentiality on all the partners concerned (*Morison v Moat*), also agreements between directors and the companies they represent impose duties of confidentiality (*Cranleigh v Thomas Marshall* illustrates this). The above agreements give rise to fiduciary relationships as well.²In some cases where there is a risk of breach of confidence, employees will also be under the obligation. According to the *Hivac v Park Royal Science Instruments Ltd (1946)*³, the Court of Appeal accepted that although there was no proof that confidential information had been disclosed, there was a risk that this could happen. Moreover, employees will be under the obligation of confidence even if the contract of employment has finished, as illustrated in *Faccenda Chicken Ltd v Fowler (1987)*⁴ where it was held on appeal that a restrictive covenant would not be enforced. However there were exceptions, when a trade secret reasonably needed to be protected or when preventing customers from

¹*Tournier v National Provincial & Union Bank of England* [1924] 1KB 461

²Hart and Fazzani, op. cit., p. 62,63.

³*Hivac v Park Royal Science Instruments Ltd* [1946] 1 All E. R. 350

⁴*Faccenda Chicken Ltd v Fowler* [1986] 1 Ch 117

being enticed away by abuse of personal influence was necessary. In the present case, the employee could use or disclose the sales information after the end of his employment because the information was not of such a nature that he was bound not to use or disclose it.

3.2.2 Non-Contractual Relationships:

The obligation of confidence can be implied from the relationship between the parties and is not restricted to contractual relationships. For instance, according to *W. v Edgell (1990)*¹, it applies to fiduciary relationships such as the relationship between doctor and patient that is subject to the public interest defence. It also applies to the relationship between solicitor and client. According to *Stephens v Avery*, friends are under an obligation of not disclosing secret based on a relationship of trust.²

However, in *Carflow Products (UK) Ltd v Linwood Securities (Birmingham) Ltd (1996)*³, Jacob J applied two different tests to decide whether any confidentiality obligation could be implied. Firstly, a 'subjective test' where the question was what⁴ obligation did the parties intend to impose and accept? In that case, the claimant had showed a prototype for a car steering lock to a company buyer without any express obligations of confidence. Therefore, because the parties wanted to invalidate a third party's registered design right by showing that it had previously been available in the public domain, both parties agreed that they did not intend the information to be treated as confidential. Secondly, an 'objective test' which was

¹ *W. v Edgell*[1990] 1 Ch 359

² Hart and Fazzani, op. cit., p. 64.

³ *Carflow Products (UK) Ltd v Linwood Securities (Birmingham) Ltd*[1996] FSR 424

what a reasonable person (an officious bystander) would have thought was happening. In this case the judge felt that the reasonable bystander would know that the design in question would be protected by intellectual property rights and therefore, the claim failed.

3.2.3 The Position of Third Parties:

It might be thought that a person (third party) who received the confidential information, would be free to make use of the information¹ but it should be noted that the obligation will extend to a third party if it is obvious that the nature of the information is confidential. *Stephens v Avery* stated that the media is under an obligation not to publish information received by the recipient because the information is confidential nature.²

Turner VC in *Morison v Moat* (1851)³ stated that there was an obligation of secrecy only if a third party was a purchaser for value of and paid for the secret without notice of the obligation if was not a purchaser there is no obligation of secrecy. For example in *Susan Thomas v Pearce (2000)*, the first defendant kept a list of the clients of her former employer but the second defendant used the list which was given by the first defendant. It was stated by the Court of Appeal that the correct test was whether the third party had acted honestly. The third party must have acted dishonestly, with conscious knowledge of the breach or at least purposely closed his or her mind to it: the carelessness or stupidity of the third party is not enough. Additionally, the Court of Appeal in *Francome v Mirror*

¹Bainbridge, *Cases & Materials in Intellectual Property Law*, op. cit., p. 126.

²Hart and Fazzani, op. cit., p. 65.

³*Morison v Moat*[1851] 9 Hare 492

*Group Newspapers Ltd (1984)*¹ held that the confidentiality of the plaintiff's telephone conversation had to be protected. In this case, the plaintiff had the right to protect his confidentiality because tapping took place illegally and the information had come from an unknown source.

3.3 Unauthorised use or disclosure of information:

The final requirement for an action for breach of confidential information is unauthorised use of the information. It arises when confidential information is used without the owner's authority. There will be implied as well as express terms in an agreement relating to obligations of confidence. In *Seager v Copydex Ltd (1967)*² it was held that the confidential information that had been discussed between the defendants and the plaintiff about a design for a stair carpet grip was innocently used but were still held liable. In the case of whether a co-owner of information can prevent its use by the other co-owner, in *Drummond Murray v Yorkshire Fund Managers Ltd and Michael Hartley (1998)*³, the Court of Appeal stated that the confidential information was incidental to the relationship between the team members. When this relationship was dissolved, immediately the confidential information stopped being the plaintiff's property. Therefore, the plaintiff could not avoid the other team members from using it and also he could not prolong that relationship once he ceased to be a team member because there was not agreement about the relationship between the team members.

¹ *Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408

² *Seager v Copydex Ltd* [1967] 1 WLR 923

³ *Drummond Murray v Yorkshire Fund Managers Ltd and Michael Hartley* [1998] FSR 372

In this light, there is an important case in the oil and gas industry named Operation Navigator, which was heard at Southwark Crown Court. It was about that confidential information supplied to bidders by the defendants who were engaged as agency workers and had access to inside information. This case included different projects in Iran, Egypt, Sakhalin Island (Russia), Singapore and Abu Dhabi, over the period 2001 to 2009 but just the findings related to QASR Gas Gathering Project, Egypt will be discussed here. A company called J P Kenny based in Staines, provided procurement services for the development of the QASR gas fields in Egypt to Khalda Petroleum Company in 2004 and 2005. A generator package valued at nearly £3 million was one element of the contract. One defendant (Saunders) with another man was engaged by J P Kenny as a contractor from in 2005 to 2007. Confidential information was supplied by Saunders to the other defendant (Rybak) for the benefit of a bidding company Mantrac Egypt and its subcontractor. Rybak received over a quarter of a million US dollars, part of which was then passed onto Saunders when the contract was awarded.¹ The court held that they supplied confidential information and there was a breach of confidential information. Five years' imprisonment on each count for Andrew Rybak and three years six months for Ronald Saunders was imposed to be served concurrently.²

¹Serious Fraud Office, 'Four guilty in £70 million contracts corruptioncase' <<http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/four-guilty-in-70-million-contracts-corruption-case.aspx>> accessed 5 Jul 2015.

²Donovan, loc. cit.

4. Confidential Information in the Oil and Gas

Contracts:

Confidential information is also called trade secrets in an economic context. Trade secrets are “any formula, pattern, device or compilation of information which is used in one’s business and presents an opportunity to obtain an advantage over competitors who do not know or use it.”¹ Confidential information is considered very important and sensitive in commercial contracts, especially in the oil and gas contracts. Mostly, international oil companies put confidential clauses in their oil and gas contracts with governments, in the sake of keeping business knowledge secret.

4.1 Types of Oil and Gas Exploration and Production

Contracts:

In the oil and gas industry, there are various petroleum exploration and production contracts, however the main types are: concession contracts, service contracts and production sharing contracts.

4.1.1 Concession Contracts:

Concession contracts or licences take many different forms and are used in various sectors, in the oil and gas context. This type of contract has evolved considerably since its introduction in the early 1900s and is used in nations as

¹J P Sander and JS Sickler, ‘Protecting IP: An oil and gas perspective’ <http://www.epmag.com/EP-Magazine/archive/Protecting-IP-oil-gas-perspective_528> accessed 27 Jul 2015.

diverse as Kuwait, Sudan, Angola, and Ecuador.¹ It governs petroleum exploration, production, and marketing activities. A concession contract grants an oil company exclusive rights to explore, develop, and export petroleum in an agreed territory and for a specific period of time.²

4.1.2 Service Contracts:

The contractor company in service contracts receives a fee for extracting the oil from the ground. This type of contract does not give the international company an ownership right to oil in the ground. In other words, in this type of contract, the international company never obtains ownership or 'title' to the oil produced and the company is simply paid a fee for its services in extracting the government's oil.³

4.1.3 Production Sharing Contracts:

The most common type of oil and gas contract is the production-sharing Agreement (PSA). The PSA is

¹JRadon, 'The ABCs of Petroleum Contracts: License–Concession Agreements, Joint Ventures, and Production–sharing Agreements.' A Reporter's Guide to Energy and Development of Open Society Institute
<<http://openoil.net/wp/wp-content/uploads/2011/12/Chapter-3-reading-material1.pdf>>

accessed 24 June 2015.

²PAghion and L Quesada, 'Petroleum Contracts: What Does Contracts Theory Tell Us?' in *The Natural Resources TRAP*, W Hogan and F Sturzenegger (eds)(MIT Press, Cambridge, Mass 2010) p. 48.

³Openoil, 'Iraq Oil Almanac:AnOpenOil Reference Guide'
<<http://openoil.net/wp/wp-content/uploads/2012/08/Iraq-Oil-Almanac-English-PDF.pdf>> accessed 21 June 2015.

sometimes called the production-sharing contract (PSC). The PSA was first used in 1966 in Indonesia. It recognizes that the ownership of the natural resources rests with the host government but it permits a contractor to manage and operate the development of the oil field at the same time.¹ Sidney Moran states that ‘the contractor explores for, develops, and produces hydrocarbons. An agreed upon share of gross hydrocarbons revenues, often referred to as cost oil, is made available to the contractor for recovery of exploration, development, and operating cost.’² In almost all countries, all of these types of contracts contain confidentiality clauses to protect confidential information. Additionally, if a company does not take appropriate measures to protect its trade secrets, it will face misappropriation by another company. Consequently, they need confidentiality agreements.

4.2 Confidentiality Agreements:

Confidentiality agreements are sometimes called non-disclosure agreements. These agreements can be used to protect valuable information or data. They are usually used in circumstances where one party is requested to disclose information to another party but at the same time, hopes to protect that information from unauthorised use by or disclosure to third parties.³ This obligation of non-

¹Radon,loc. cit.

²S Moran, ‘Analysis of International Oil and Gas Contracts’ in *The Business of Petroleum Exploration*, R Steinmetz (eds), (The American Association of Petroleum Geologists, Tulsa, Oklahoma 1992) p. 308.

³BD&P, ‘Confidential Information and Nondisclosure Agreements’
<<http://www.bdplaw.com/content/uploads/2013/01/BDP-IP-Technology-Confidential-Information-Booklet-June-2009.pdf>>

disclosure of information sometimes remains binding years after the life of the agreement. The confidential information or trade secrets in the oil and gas industry may include: future product plans, patentable inventions, product designs, business opportunities, customer information, pricing information, manufacturing techniques, marketing plans, various types of raw data and source codes.¹

The confidentiality agreement is one of the most common business tools in the oil and gas industry in helping to provide safeguards when the valuable information is requested. In terms of dealing with confidentiality agreements, several things should be kept in mind. For instance, the party receiving the information and the party providing it have very different agendas. The provider will want specific safeguards to protect the shared information. In contrast, the receiver needs a very specific definition of what information is given in confidence. A confidentiality agreement usually states that everything being shared by the provider is confidential, except for what is already in the public domain.²

In a confidentiality agreement, the provider can acquire the right to become a party to any action involving disclosure and can defend the action. The provider should also avoid providing any representation or warranty about the

accessed 29 June 2015.

¹O Dike, 'Do Area of Mutual Interest Agreement Breach the Doctrine of Freedom of Trade?'

<<http://www.eisourcebook.org/cms/Mutual%20Interest%20Agreements.pdf>> accessed 1 Jul 2015.

²T Stock, 'Confidentiality Agreements and areas of Exclusion'

<<http://www.tdstock.com/confidentiality-agreements-and-areas-of-exclusion/>>accessed 5 Jul 2015.

accuracy or completeness of the information. The agreement should state that if the deal, the receiver will return all information provided. Moreover, it should include a specified date or occurring certain kind of even to expire the information when the information no longer needs to be kept confidential. It is good if a confidentiality agreement includes a provision that if the confidential information is disclosed in breach of the agreement, the provider has the right to get an injunction.¹

In oil and gas confidentiality agreements, the obligations of the receiver and the provider should be mentioned. For example, Brazil's Modern Concession Agreement (2001 Article 33.1) places the following obligation on the Concessionaire 'All and any data and information produced... shall be confidential and therefore, shall never be disclosed by the Concessionaire without the prior written consent of ANP...' and The obligation on the Brazilian government, as represented by the ANP, is that 'The ANP undertakes not to disclose any data and information obtained as a result of the Operations and which regards the part(s) of the Concession Area retained by the Concessionaire...'²

The contractual parties may want to limit the dissemination of the information by including confidentiality clauses. Confidentiality clauses should be enforceable if damages

¹ibid.

²J West, 'Confidentiality' <<http://www.booki.cc/how-to-read-and-understand-petroleum-contracts-7/confidentiality/>> accessed 27 Nov 2015.

are proved.¹

4.3 Confidentiality Clauses:

Many countries have made confidential agreements in the oil and gas industry and contracts will be kept secret by a confidentiality clause. A confidentiality clause will usually be near the end of the contract. It is used to avoid information from coming into the hands of other parties. Also, it explains which information is confidential, for how long and mentions various exceptions to the confidentiality obligation that allow the disclosure of information in certain situations.

Contractual parties can make almost anything confidential because of contract freedom that allows them to keep even mundane information secret. Confidentiality clauses are largely generic and they look very similar across a variety of countries' oil and gas contracts. Usually, they are more carefully crafted than other clauses of the contract.² A typical example of a clause in an oil and gas contract is the clause in China's contract 2002 (see Appendix for more such clauses):

Geological and other technical information and figures and operational and production information is confidential and can only be used for related projects. If a Party wants to release detailed information to the public, it needs prior consent from the other Party, unless the information is already

¹J S Lowe, 'Analyzing Oil and Gas Farmout Agreements' (1987)41SW LJ 759-867

²P Rosenblum and S Maples, *Contracts Confidential: Ending Secret Deals in the Extractive Industries*(the Revenue Watch Institute, New York 2009) p. 23.

*published.*¹

There are a number of typical features of confidential clause and the clauses cover a broad range of information. For instance, some clauses state specific examples of confidential information in addition to declaring that all information is confidential.² The Iran Petroleum Model Contract 2003 states that:

*All plans, maps, sections, reports, records, scientific and technical data, and other similar information relating to the operation shall be treated by the contractor as confidential even after the termination of the Contract and shall not be disclosed by the contractor or its affiliates without prior written consent of NIOC...*³

Another feature of confidential clauses is that there is no standard time when confidentiality ends. In these clauses in oil and gas contracts, there is a wide variation as to when the confidentiality obligation ends and they are different from one contract to others.⁴

Oil and gas contracts have been kept confidential by most developing countries. However, more recent practice demonstrates that even in developing countries steps are being taken toward the transparency in their oil contracts. For example, the Sao Tomean Oil Revenue Management Law requires disclosure and public access to oil resources or oil revenues activities and contracts in Sao Tome and

¹ibid. , p. 71.

²ibid. , p. 24.

³ibid. , p. 78.

⁴ibid. , p. 25.

Principe.¹ Sometimes companies rely on confidentiality clauses in order not to make contracts public and contend that the government prevents them from disclosing such information. However, the government can determine that such information shall be disclosed to the public.²

Despite all the advantages of transparency, people can differ over what forms transparency. Full disclosure of an agreement, including all of its parts is a delusion, because exclusive technical data and business experience in a contract must remain secret. Although, the argument for contract transparency is convincing, it is not a popular practice yet. Thus, transparency is the key to achieve the public acceptance of oil and gas contracts. However, the complete disclosure of an oil and gas contract, including all of its exhibits may not be reasonable, because of the contract's technical data and business knowledge.

5. Defences in Oil and Gas Contracts :

In general, the real defence to disclosing information is that it is in the public interest and also, in a number of circumstances, confidentiality may be breached to prevent crime (see *Lion Laboratories Ltd v. Evans & Others (1984)*³ and *Hellewell v Chief Constable of Derbyshire (1995)*)⁴. However, Colston and Middleton state that “There are a number of defences to allegations of breach of confidence: the confider may have expressly consented to

¹ J C. Bell & T M. Faria, ‘ Critical Issues for a Revenue Management Law ’ in M Humphreys, J D. Sachs & J E. Stiglitz (eds), *Escaping the Resource Curse*, Columbia University Press, New York, 2007, p. 305

² Ibid,p. 306

³ *Lion Laboratories Ltd v. Evans & Others* [1984]

⁴ *Hellewell v Chief Constable of Derbyshire* [1995]

the use of the information; a licence to use it may be implied; or the confidant may establish that the information was already known to him or in the public domain.”¹ Finally, it can be noted that in the oil and gas contract, there are more defences for disclosing of confidential information as follow:

There are a number of exceptions in confidentiality clause and, many of these are explicit (see Appendix). Exceptions usually include: information in the public domain, information that must be disclosed by law. Other exceptions include: providing confidential information as required by stock exchanges, banks, insurers or other funders or government authorities; providing information to arbitrators or other experts in connection with the agreement, also to bona fide prospective transferees of financial interests such as in mergers, consolidation or sale of the majority of shares.²

6. Remedies in Oil and Gas contracts :

Generally, there are a number of remedies that apply to breach of confidence. The most usual remedy is an injunction prohibiting use of the information however the law of confidence has been reinforced to some extent by the Human Rights Act 1998. The claimant has had to satisfy a particularly high threshold test to restrain publication by means of an interlocutory injunction since the enactment of the Human Rights Act 1998 (see *Cream Holdings Ltd v Bannerjee (2005)*).³ An injunction can be obtained if damage has yet to be suffered.⁴ On the other

¹C Colston and K Middleton, *Modern Intellectual Property Law* (2nd edn Cavendish Publishing, London 2005) p. 239

²Rosenblum and Maples, op. cit., p. 26–28.

³ *Cream Holdings Ltd v Bannerjee* [2005]

⁴M Anselm, A Bleakly and K Watson, op. cit., p. 109.

hand, there are other remedies if it is too late for an injunction to be effective: Firstly, an account of profits which is where a sum similar to the profit that is obtained by the defendant's misuse of information is awarded to the claimant. Secondly, damages can be awarded to return the claimant to a position similar to that which he would have been in had there not been misuse of information. Damages are awarded after assessment of the type of information. Finally, delivery up and destruction of property containing the confidential information.¹

However in the oil and gas industry, it should be said that it is quite difficult to determine the consequences of any breach of confidentiality. A few contracts include penalties for breach of confidentiality.

Most contracts require expensive arbitration; however the damage caused by the breach is not easy to measure. Another possibility for remedy in a number of contracts is court orders. Another remedy is to terminate a contract altogether or receive some other compensation.² An example of termination in case of a breach of confidentiality is the Angolan PSA: **(Article 39)** "Termination of the Agreement (1) Sonangol may terminate this Agreement if Contractor Group: (d) discloses confidential information related to the Petroleum Operations without having previously obtained the necessary authorization thereto if such disclosure causes prejudice to Sonangol or the State."³

¹ibid.

²Rosenblum and Maples,op. cit., p. 29.

³ibid. , p. 30.

7. Conclusion:

In conclusion, confidential information is considered as an important and sensitive subject in oil and gas contracts. In order to protect this information, a large number of oil and gas contracts are confidential. The paper has found that confidential information is valuable property in many relationships and areas. The confidentiality of this information must be protected and for this purpose recourse to law is essential in order to fight against the unauthorized use of confidential information and misappropriation of a person's information or/and ideas.

The basic requirements for confidential information are: the information must have the requisite degree of confidence, the confidant ought to have known that there was an obligation of confidence when the information was given and the disclosure of the information must have been unauthorized. In addition, the paper has clarified various types of oil and gas contracts, concession contracts, service contracts and production sharing contracts, which mostly contain confidentiality agreements in many countries. As in some of these contracts information is vital to the parties and to their businesses, it is imperative that they seek adequate protection over its disclosure. These protections come in the form of confidentiality clauses that are enforceable between the affected parties. Finally, it is explored that in the case of breach of the confidential information, a number of defences and remedies are available generally, and also more specifically in the oil and gas industry. The remedies include injunctions prohibiting the use of the information; an account of profits, damages, delivery up and destruction of property and, very occasionally, termination of the contract.

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Appendices

A Number of Confidentiality Clauses in Oil and Gas Contracts

Country	Date	Contract Type	Confidentiality Clause or Clause Summary
Abu Dhabi	1980	Petroleum	The Government must treat all information, maps, records, and reports provided by the Company under this Section as confidential, except as required for settlement by arbitration of a dispute between the parties.
Argentina	2006	Petroleum – Model	During the term of the Contract and for two years after termination of the contract, any data or information related to development shall be treated by Contractor as strictly confidential and shall not be disclosed to third parties without prior written consent of the Applicable Authority. Employees, agents, representatives, attorneys-in-fact and subcontractors must also be subject to the same confidentiality conditions. Any information related to the Contract area shall become the exclusive property of the Province, which may freely dispose of it under the same conditions as the relinquishments in Art. 3.2.
Australia	2006	Minerals	Unless otherwise agreed by the Participants or required by law or the Listing Rules of ASX, all information obtained in relation to the Joint Venture and which is not in the public domain shall be kept confidential and shall not be disclosed by the Participants. If the release of any information is required in order to comply with the Listing Rules of the ASX, and the Participants agree that such information may be given to the ASX for release to the market, such release is

			permitted; provided that all Participants have been given a reasonable period of time, bearing in mind the circumstances, to comment on the draft announcement to ASX.
Iran	2003	Petroleum – Model	All plans, maps, sections, reports, records, scientific and technical data, and other similar information relating to the operation shall be treated by the contractor as confidential even after the termination of the Contract and shall not be disclosed by the contractor or its affiliates without prior written consent of NIOC except if required by law to prepare or publish a report. Both parties will fully comply with any license restrictions relating to proprietary technology contained in the license until the license restrictions terminate.
Iraq	1972	Petroleum	All plans, maps, sections, reports, records, scientific, technical and economic data, and other similar information relating to the operations under this Contract shall be treated by Contractor as confidential and may not be disclosed without the written consent of INOC.
Iraq (Kurdistan Region)	2007	Petroleum – Model	All data and information relating to the Contract and Operations shall be kept confidential during the entire term of the Contract and shall not be disclosed to third parties without the consent of other Parties, except if the information or data becomes part of the public domain, is already known to the recipient before disclosure, or is required to be furnished in compliance with applicable law or rules/regulations of a government or recognized stock exchange. Contractor may also disclose data and information to affiliates, employees, officers, directors, consultants or agents for analyzing or evaluating data or information; and to banks or financial

			institutions, bona fide prospective assignees, or prospective or actual Subcontractors and suppliers of the Contractor; provided that those parties first enter into a confidentiality undertaking. Both the Government and Contractor may use data and information relating to relinquished areas for any purpose.
Norway	2003	Petroleum	Plans, programs, maps, records, technical and scientific data or other information relating to technical, financial, or commercial activities under the agreement may not be disclosed by parties without consent of other parties, except: to affiliated parties; to financial institutions in connection with financing of party's share of the joint activities (must give prior notice to other party); to potential assignees of a Party's participating interest (with advance notice to other Parties); from the operator to consultants and contractors directly engaged in the activities necessary for performing the work; and to professional consultants carrying out work for the Party. Parties must ensure information is kept confidential. Confidentiality obligation binds parties ceasing to be parties to the agreement
Venezuela	2006	Petroleum – Draft Model	All geological, geophysical and any other information of a technical character relating to the primary activities carried out in the Designated Area shall be the property of the State, and the Joint Venture Company shall be entitled to use such information only in connection with the execution of the transferred activities. If the right to engage in primary activities is terminated for any reason, the Joint Venture Company shall deliver the original materials containing such information to the Ministry of Energy and Petroleum.

Two Best Practice (Confidentiality Clauses):

Example One

This Agreement will be published in [government gazette/federal register] or publicly available at [ministry website/ ministry library/ parliamentary records]. Information in relation to activities under these agreements shall be kept confidential if requested by a Party, to the extent that such Party establishes that confidentiality is necessary to protect business secrets or proprietary information. Such confidentiality is subject to [relevant disclosure laws], as well as to applicable laws and regulations, including stock exchange and securities rules, and requirements for the implementation of the Extractive Industries Transparency Initiative.

Example Two

a) Subject to the limitations below and subject to applicable Law, for a period of [three] years from disclosure, each party agrees not to divulge information designated in writing at the time of delivery as confidential information (“Confidential Information”) by the other party to any other Person without the prior written consent of the designating party. By designation of information as Confidential Information a party will be deemed to have represented that after review of such information it has reasonably determined that the release of such information to third parties would materially adversely affect the party or its economic well-being. In any event Confidential Information does not include information that was publicly available or otherwise known to a party prior to the time of disclosure to it and not subject to a confidentiality obligation, subsequently becomes publicly known through no act or omission by a party, otherwise becomes known to a party other than through disclosure to such party by the other party, constitutes financial statements delivered to the

Government that are otherwise publicly available, is mainly of scientific rather than commercial value such as geological or geophysical data relating to areas in which the Company no longer holds a valid exploration license and has not designated as a Proposed Production Area, or has been disclosed pursuant to generally applicable Law or a final order or any court having jurisdiction that is not subject to appeal.

b) Each party will maintain the confidentiality of Confidential Information disclosed to it in a manner consistent with procedures adopted by such party to protect its own confidential information, provided that such party may deliver or disclose Confidential Information to its financial, legal and other professional advisors (to the extent such disclosure reasonably relates to the administration of this Agreement) or any other Person to which such delivery or disclosure may be necessary or appropriate to effect compliance with any law, rule, regulation or order applicable to such party, in response to any subpoena or other legal process, in connection with any litigation to which such party is a party if reasonably delivered necessary to protect such party's position in such litigation or if an Event of Default has occurred and is continuing but only to the extent such party reasonably determines such delivery and disclosure to be necessary or appropriate in the enforcement or for the protection of the rights and remedies under this Agreement. c) This Agreement and any annexes or amendments are not confidential, and the Company is not entitled to confidential treatment of information relating to the timing and amount of royalties and other payments specifically due under the terms of this Agreement or of Taxes and Duties payable by the Company or the rates at which such royalties, other payments or Taxes and Duties become due or are assessed, or information that is necessary to compute

the amount of such royalties or other payments becoming due.

Source: Extract from:P Rosenblum and S Maples, *Contracts Confidential: Ending Secret Deals in the Extractive Industries* (the Revenue Watch Institute, New York 2009)

الملخص

عقود النفط والغاز غالباً ما تكون المعلومات الفنية الحصرية والمعرفة التجارية ؛ لذلك تضع الحكومات وشركات النفط العالمية في كثير من الأحيان بنوداً سرية في عقودهم التي تمنع افشائها. فهذا البحث يقوم بدراسة المعلومات السرية والمتطلبات الأساسية لهذه المعلومات حتى تجعلها محل ثقة ، وهذه تتم عن طريق الإجابة عن مجموعة من الأسئلة أهمها: ما هي البنود السرية؟ وما مسؤولية الطرف الذي كشف عن سرية المعلومات؟ توصل البحث إلى أنه في حالة افشاء المعلومات السرية إمكانية الدفاع بعدة طرق والحلول المتوفرة في عقود النفط والغاز، اعتمد البحث على المنهج التحليلي والمنهج القانوني وأجاب على أسئلة البحث عن طريق دراسة مستفيضة من الأدبيات ذات الصلة وعلى أساس القوانين والاحكام القضائية.

Abstract

Oil and gas contracts often hold exclusive technical information and business knowledge. Therefore, governments and International oil companies put confidentiality clauses in their contracts which forbid the disclosure of the contracts. This paper explains confidential information and the basic requirements for this information in order to make it confidence. It attempts to answer the questions: What are confidential clauses? How is a party liable for a breach of confidence over the information? The paper shows that in the event of breach of the confidential information, a number of defences and remedies are available in the oil and gas contracts. The research methods are adopted in this study include the analysis method and the legal method. The research questions are answered through extensive study of the relevant literature and based on statutes and case law.