Through 2017 and, looking ahead to 2018, we have seen a number of trends arising in oil and gas disputes. As infrastructure ages in mature basins such as the North Sea, disputes have arisen in relation to force majeure provisions, maintenance and third party access, and disputes relating to decommissioning are likely to increase. New challenges for energy majors are emerging in the form of class actions, including in relation to climate change in the US courts. An increasing number of group actions are also being brought in the English courts for environmental damage abroad. Meanwhile, the recent trends of LNG and natural gas price review disputes and disputes relating to the low oil price continue but the incidence of drilling rig disputes, particularly post-Transocean Drilling UK Ltd v Providence Resources Plc [2016] EWCA Civ 372, appears to be subsiding.

**Force majeure, maintenance and third party access**

A major source of disruption in late 2017, in the North Sea, was the closure of the Forties pipeline in December due to a leak. The operator, Ineos, invoked force majeure (FM) provisions and shippers of crude oil from more than 80 fields were affected. The incident caused substantial disruption and contributed to Brent crude prices rising to nearly USD 66 bbl. As infrastructure ages, the service of FM notices can only be expected to increase and this will inevitably lead to disputes.

We have already seen disputes arise in the context of FM claims following the shutdown of production facilities as a result of the need to carry out repairs or provide access to third party fields. In Scottish Power UK PLC v BP Exploration Operating Company Ltd and Others [2016] EWCA Civ 1043, under-deliveries of gas occurred whilst an oil platform was repaired and third-party access infrastructure constructed. We expect disputes attributable to the operation and maintenance of facilities to increase, particularly in mature production areas such as the North Sea. We also expect to see a trend of similar disputes arising as operators seek to maximise recoveries from
marginal fields, in line with the 2016 MER UK Strategy, focussed on extending field life and maximising UK petroleum recoveries.

**Decommissioning**
Where repair of older plant or continued production is considered uneconomical, we are beginning to see disputes in relation to decommissioning. For example, we have seen disputes arise where platforms are to be decommissioned which contain infrastructure that is still required by surrounding fields. In common with others in the industry, we expect to see the incidence of decommissioning disputes gather pace. Between 2017 and 2025, almost 2,500 wells are expected to be plugged and abandoned, over 200 platforms retired and nearly 8,000km of pipeline will be removed.¹ This raises questions about how this process can be done efficiently and without disrupting production from neighbouring fields, in an industry where infrastructure does not operate in isolation.

**US climate change class actions**
In the US, new challenges for the larger oil and gas companies are arising in the form of class actions in relation to climate change. In 2017 and early 2018 we saw nuisance claims filed by Californian communities and the City of New York against five major energy companies (Chevron, ConocoPhillips, ExxonMobil, BP and Royal Dutch Shell), alleging that they funded scientific studies and PR campaigns to create uncertainty about the existence, causes and risks of climate change, despite their internal understanding and acknowledgement of its effects. The claimants are seeking to hold the energy companies liable for billions of dollars’ worth of historical and prospective property damage caused by the effects of climate change. (See, for example, *City of New York v. BP plc*, et al., No. 18-cv-182 (S.D.N.Y. Jan. 9, 2018); *People of the State of California v. BP plc*, et al., No. CGC-17-561370, 2017 WL 4161895 (Cal. Super. Ct. filed Sept. 19, 2017); *People of the State of California v. BP plc*, et al., No. RG17875889, 2017 WL 4168934 (Cal. Super. Ct. filed Sept. 19, 2017)).

In common with similar previous claims, the latest actions are likely to face significant causation problems. However, any partial success or progress even only at an early stage in proceedings could encourage many more similar claims. Irrespective of their legal merit, we would expect to see more such claims being brought as political tools, to maintain awareness of and boost support for action against climate change,² in the US and elsewhere. In Australia, for example, which also has a very active class action market, we expect to see climate change class actions commenced soon.

**Environmental claims in the English courts**
We have also seen activity in the English courts in relation to environmental issues. In *INEOS Upstream Ltd & Ors v Persons Unknown* (2017) EWHC 2945 (Ch), the English High Court ordered the continuation of injunctions restraining unlawful activities including trespass, private nuisance, interference with access rights and unlawful means conspiracy by anti-fracking protestors. As fracking in the UK increases, we expect to see more disputes arise.

The trend of environmental group actions in the English courts is also continuing, with claims being brought by foreign claimants against UK-domiciled energy companies in relation to the actions of their subsidiaries abroad (for example, *Okpabi and others v Royal Dutch Shell* (2017) EWHC 89 (TCC); *AA & Ors v Unilever Plc & Anor* (2017) EWHC 371 (QB).³ These cases have involved English class action lawyers signing up claimants in less developed jurisdictions to actions commenced in the English courts, despite the fact that the claimants are domiciled abroad and the disputes are subject to foreign environmental law. This is sought to be achieved by identifying a local subsidiary of an English holding company and using the holding company’s English domicile to obtain jurisdiction in England, claiming that it owes a duty of care to the local claimants for the acts of its local subsidiary. The local subsidiary is also sued in England as a necessary and proper party to the dispute.

This is a developing area of law and the most recent cases referred to above have not yet gone beyond the jurisdiction stage. It remains to be seen whether any of the claims will ultimately be successful. Other “class action tourism” claims, which have gone beyond the jurisdiction stage have faced significant challenges (see, for example, the unsuccessful High Court claim by a group of Columbian farmers in relation to the construction of the Oceansa pipeline in Columbia during the mid-1990s: *Ipedro Emiro Florez Arroyo and others v Equion Energia Limited* (formerly known as BP Exploration Company (Columbia) Limited) [2016] EWHC 1699 (TCC)).

**Natural gas and LNG price reviews**
Meanwhile, we have continued to see natural gas and LNG price review disputes in the European market and in Asia. Whilst wholesale gas prices in Europe are increasingly linked to Hub indexation, the majority of LNG contracts remain indexed to oil.⁴ Consequently, we would expect LNG price review disputes to continue in relation to long-term contracts, as buyers and sellers alike seek to benefit and minimise losses from price differentials. Recently, European prices have been relatively low, as diversions and re-exports of excess supply to Asia have reduced following new projects coming on stream in Australia to supply the Asia-Pacific region.

Price review clauses are commonly enforced by arbitral tribunals and a recent decision of the English courts confirmed that, as a matter of English law, a clause requiring the parties to

---

1. *2017 Decommissioning Insight, Oil and Gas UK.*
2. See our article, “California dreamin’: Suits by California municipalities over climate change likely to fail”, for a more detailed look at this trend.
4. *Associated British Ports v Tata Steel UK Ltd* [2017] EWHC 694 (Ch).
renegotiate the terms of their contract was enforceable, not being a mere “agreement to agree”,4 providing assurance to parties to long-term supply contracts subject to English law that they may continue to rely on price review clauses (which provide a process for the parties to renegotiate the contract price following certain trigger events).

**The price of oil**

Unsurprisingly, we have also continued to see disputes in jurisdictions world-wide related to the low oil price; for example, involving the termination and renegotiation of contracts, restructurings and corporate administrations, as well as regulatory shake-downs, permitting issues, audit and cost recovery disputes arising under PSAs in the CIS and the settlement of long-running tax disputes in Africa. However, the recent stabilisation of the oil price will perhaps ease the pressure on oil and gas companies, making them less predisposed to pursue claims. In this context, collaboration and investment should also increase and, going forward, we would expect to see more disputes in relation to issues arising from M&As or JVs, as well as a diet of the “usual” JOA disputes involving issues such as the exercise of pre-emption rights and funding disagreements.

**Drilling rigs**

The initial spate of drilling rig disputes that we saw following the Court of Appeal decision in *Transocean Drilling UK Ltd v Providence Resources Plc*, however, now appears to be subsiding. That case considered the interpretation of an exclusion clause for consequential loss, loss of use and other losses. The reduction in the number of disputes might be explained by an increase in the commercial alignment between parties and amendments to standard form consequential loss provisions in rig providers' contracts.

**Challenges continue**

In summary, despite increasing oil price stability and some industry alignment on the need for up-stream participants to reduce the volume of oil and gas disputes, the sector continues to face challenges and the continuing potential for disputes as its business changes.

"new challenges for the larger oil and gas companies are arising in the form of class actions in relation to climate change"

---

**Key contacts**

- **Gregg Rowan**
  - Partner
  - +44 20 7466 2498
  - gregg.rowan@hsf.com

- **Sophie Jones**
  - Senior associate
  - +44 20 7466 7572
  - sophie.jones@hsf.com

- **James Baily**
  - Partner
  - +44 20 7466 2122
  - james.baily@hsf.com

- **Rachel Lidgate**
  - Partner
  - +44 20 7466 2418
  - rachel.lidgate@hsf.com