OIL AND GAS LEASE BLOCK CROSSINGS – A WIDER ROLE FOR CONTRACTS

Joel Saltsman (Independent Consultant), Takalani Tshivhase (MTN Group – Dubai)
Email: joel.saltsman@gmail.com
tshivhase@mtn.com

Abstract: The paper examines the need to broaden the use of formal cooperation agreements when new submarine cables are laid through offshore oil and gas exploration blocks.

Traditionally, most lease block crossing agreements between cable owners and energy companies have been informal, based on correspondence alone. Cable owners may even be obliged at times to proceed with the marine operation in the absence of response to a notification, considering the non-response as a non-objection.

This is understandable, given the large number of concessions crossed by some cables and the difficulty of tracking down anyone responsible for certain inactive blocks. Moreover, these informal arrangements have usually sufficed to avoid problems arising from this familiar shared use of the seabed. However, when an entity fails to respect recognized international norms of co-operation and information exchange, lack of a formal contract between cable owner and exploration firm can generate disputes and prevent the aggrieved party from proving its case in court.

While the situation of lease block crossing is very different from that of cable/pipeline crossing (where detailed agreements are standard practice), it seems timely to consider more frequent recourse to co-operation agreements setting out each party's rights and obligations in case of future exploration and extraction activity near the cable.

1. INTRODUCTION

Submarine cable owners have long entered into crossing agreements with pipeline and power transmission cable operators to define the locations of the respective infrastructures, agreed crossing notification procedures, and methods for performing the activity. With offshore petroleum lease blocks, however, there seem to have been few such agreements with cable operators. This article will explore some of the reasons why and propose a wider role for co-operation agreements in response to the evolving needs of both sectors.

2. CURRENT PRACTICE

"The self-help mechanisms traditionally used by submarine cable operators to coordinate with offshore oil and gas and commercial fishing activities have thus far proven wholly inadequate for addressing emerging issues with offshore renewable energy development and increasingly fail to address continuing issues with oil and gas development, dredging, and beach replenishment."[1]

Before examining the benefit of using co-operation agreements, a brief look at existing practices shows why there is a growing need for more thorough coordination with planned oil and gas (O&G) activities.

Both industries have long recognized that "uncoordinated offshore O&G exploration, exploitation, and transport activities pose significant risks to submarine cables." These may include "direct physical disturbance through the use of anchors for production platforms and related exploration and production equipment; pipeline proximity to and crossings with cables, … and impaired access to submarine cables both at the surface (for cable ships) and on the sea floor (for cables) during installation and maintenance." All these risks add to the complexity, costs, and time required to complete installations and repairs, which in turn can increase the costs to customers of network outages.[2]

The desktop study and marine survey for a new submarine cable are the main instruments for identifying the risks and defining the safest cable route. To effectively uncover future as well as existing hazards, cable operators consult with the various public and private stakeholders including O&G operators, using the results of the route survey to modify the initial route identified in the desktop study.[3]

During both preliminary route planning and desktop study, hydrocarbon exploration and production is just one of many competing uses of the oceans where constraints and risk factors must be identified and addressed. Consultation with rights holders of O&G lease blocks along and close to the selected cable route enables the cable owners to:

- notify all parties who may potentially have a conflicting interest in the area of the cable owner's intention to install a cable[4]
- Where necessary, negotiate a mutually acceptable route through or around the lease blocks, including future cable and pipeline crossing arrangements.

3. THE LEGAL FRAMEWORK

There is no obligation either in law[5] or in industry practice to sign co-operation agreements where a cable owner plans to install a submarine system that crosses offshore lease blocks in which a company has been granted exploration or production rights under the laws of the country having jurisdiction over the EEZ where the lease blocks are situated.

Indeed, cable owners may need to remind public officials and private stakeholders that "all States enjoy the freedom to lay cables, subject only to the requirement that if the first laid cable or pipeline is injured in the crossing, the crossing party must indemnify the first laid cable or pipeline for the cost of repairs." [6]

This principle is equally true where the cable would merely cross hydrocarbon lease blocks especially where, as often in developing regions, exploration and production activities may be absent and not yet even planned. Consequently, cable owners usually approach lease block crossings in a pragmatic and informal way, identifying and contacting rights holders with a view to obtaining confirmation from them that they have no objection to the cable's planned route through the relevant area.

4. PRACTICAL CONSTRAINTS

Indeed, to do more in many cases would be either impractical or unjustified. To give just some examples:

a) Unlike subsea cables, the energy industry has no centralized database where all leases, boundaries and staff contacts are recorded. Consequently, it is sometimes not possible to identify lease block boundaries or to find a local energy company contact despite reasonable efforts such as record searches and knocking on doors.
b) Blocks may be leased with the intention to hold them in reserve for several years while seeking financing or for other reasons.

c) Exploration may never take place or may not turn up deposits worth extracting. Extraction may prove short-lived and wells decommissioned.
d) Drilling may ultimately be done directionally from on-shore.
e) Lease block holders may be unwilling to reveal the presence of infrastructure or their plans to install it.
f) Lease blocks or energy development areas may be unassigned and only designated by public authorities "at a programmatic level to support lease auctions and conceptual development". Such activity can inform subsea network design without requiring any stakeholder consents.
g) Time pressure: "There are demands on providers to reduce project schedules during the construction phases with related demands being imposed on system planners…to expedite various planning and installation processes." Because permitting and routing negotiations with other seabed users are among the schedule constraints outside the control of system planners, they tend to be the activity of service providers that are in turn most severely targeted for a reduction in schedule.[7]

Weighing the time and effort to negotiate a contract against the low risk and rarity of problems [8], the informal alternative of notification or consent by exchange of correspondence will continue to be the most common method adopted in cable projects.
Knowing this, specialists from both industries agree that since identifying all required permissions may not be an easy task, it is indispensable to "consider the potential impact of route selection at the beginning to avoid large variations from original planned cable routes."[9] Lim points out that in the absence of full and timely consultation with all relevant public authorities and private stakeholders, route changes can become necessary even after the marine survey is complete, resulting in cost variances and possible delays.
Lim urges consultations with pipeline owners and O&G lease block holders at a particularly early stage of any project (p. 4), since they "are constantly planning new exploration or pipeline installation works within their concession block." Early consultation also facilitates choice of less costly crossing methods and reduces the risk of schedule changes conflicting with installation timetables.[10] Implementing clear lines of responsibility between cable owner and contractor for notification, consultation and clearance is another indispensable step to avoid this task falling through the cracks of project work.

5. FROM SHARED SEABED USERS TO INDUSTRIAL PARTNERS

Increasingly there are other, more strategic reasons for cable owners to seek out O&G lease holders in earliest stages, and indeed for O&G operators to initiate or respond to contacts from cable owners. Beyond the question of risk management, offshore energy operators could have future needs for connectivity on the cable, either from a landing station or via a BU reserved for their future use.
"Coupled with an ever-increasing demand for bandwidth and soaring satellite communications costs, O&G operators are increasingly turning to submarine fiber optic cables for robust and reliable communications solutions between offshore installations and onshore control centers. …Fiber optic cable systems…improve not only operational safety and efficiency of an offshore installation, but also the welfare and morale of her crew." [11]
In short, energy sector markets "are transitioning from fellow seabed users to partners in offshore operations". As such, they share common issues, challenges and solutions with submarine communications.[12] Early contact enables the parties to integrate

needs for subsea cable connectivity in both the platform design and the cable design, rather than addressing them after the infrastructures are built.

6. RATIONALE FOR CONTRACTS

Though not required by law, the use of crossing and proximity agreements is standard industry practice, codified in International Cable Protection Committee (ICPC) Recommendation 3. [13] In recent years, cable crossing agreements have supplanted "agreements via email exchanges between owners"[14]

The applicable UNCLOS provisions are well known[15]. To summarize, among its many provisions, UNCLOS provides that coastal States have sovereign rights in a 200-nautical mile exclusive economic zone (EEZ) with respect to natural resources and certain other economic activities, as well as over the continental shelf for exploring and exploiting it, and exercise jurisdiction in the EEZ over marine science research and environmental protection. All other States (and their nationals, given that cables are often private ventures) have freedom of navigation in the EEZ, as well as freedom to lay submarine cables and pipelines. [16]

Cable owners thus are well advised to notify and consult with coastal States when laying their cables through these zones. Any resource-related measures by coastal states on such operations must be "reasonable" and must show "due regard" for the rights and duties of other States.[17]

Despite enjoying this freedom, and in addition to consultation, a co-operation agreement could usefully come into play in many cases.

To paraphrase the ICPC[18], ultimately the objective is to allow the cable to share the seabed with any future O&G activities and infrastructure without significant impact to future maintenance of the cable or to development of such future offshore activities.

In that regard, this comment in ICPC Recommendation 3 could equally be taken to heart in the context of O&G lease block crossings:

> "International Law is inadequate to protect the interests of the parties involved in pipeline and cable crossings and, where a crossing occurs within the legal jurisdiction of a State, the relevant legislation is also rarely sufficient. In addition, the recourse to any court following a conflict of interest is a lengthy and expensive matter. It is therefore very much in the interests of both parties to negotiate an Agreement to cover any pipeline/cable crossing."

7. BENEFITS OF USING A CO-OPERATION AGREEMENT

a) A contract would only supplement and not replace the need to obtain all necessary permits from national authorities. Indeed, the permit in principle could include a requirement to obtain express agreement from the lease holders. Still, formalizing their agreement is one way the parties can demonstrate to authorities that they have gone beyond mere passive acquiescence to informed consent by proactively defining rules to settle future issues.

b) Limiting exposure to liability. A classic reason for entering any business agreement, this consideration is clearly more relevant for cable crossings than for lease block crossings, where the risk of property damage is limited.
However, the subject of liability may be foremost in the minds of energy operators and lead them to propose draconian indemnity clauses that place cable owners at a disadvantage (see below).

c) Clear purpose and definitions. Even if the agreement reached does not result in a signed contract and remains informal, the document will still have served as a checklist ensuring that the parties have covered all important matters on which consultation is required. To outline the main topics to cover:

- The preamble would note that the route to be followed by the cable system crosses the area which is subject to the O&G company's exploration right. It would refer to an annex with **accurate coordinates of the exploration area and the planned cable route**.
- A **statement of purpose** would follow, indicating that in a spirit of mutual co-operation, the parties were forming a binding agreement to govern their future interactions in the leased area, aimed at limiting the disruption of either party's industrial activities.
- The parties would **commit to engaging with each other** over time openly and in good faith, to accommodate each other's reasonable requests, and to aim to resolve any disputes amicably and without delay. This commitment would continue for the **Agreement Term**, which would normally extend for as long as the parties (or their assigns) hold their respective rights and the cable crosses the exploration area.
- Within a defined notice period, each party will provide the other with co-ordinates of **future installations** and of any movement of existing infrastructure they become aware of.
- **Future activity would be defined** to mean installing subsea exploration or production infrastructure either crossing or in proximity to the cable, as well as a cable repair operation within the lease area. This could be called "Additional Work", as opposed to the "Initial Work" of surveying and system installation.
- A **confidentiality** clause provides both parties protection to exchange sensitive information such as RPL's for cable owners, and the presence of oil deposits for lease block holders.
- Selecting a **dispute settlement** mechanism in advance – whether by mediation as in crossing agreements, arbitration, or commercial courts – is another mutual benefit of using a contract.

8. POTENTIAL DRAWBACKS OF A CONTRACT

While UNCLOS liability rules for cable crossings have been universally adopted (despite occasional exceptions, specifically in the Arabian Gulf where energy companies "sometimes demand one-sided and onerous crossing agreements for pipeline crossings that violate UNCLOS" [19]), co-operation agreements for lease block crossings are far from being standardized yet. As a result, cable owners may need to scrutinize models put forward by O&G companies, to avoid "one sided and onerous" conditions particularly on two points: approvals for additional work and liability limitations.

a) Additional Work

In models proposed by energy operators, although both parties commit to using suitably qualified contractors for Additional Work (see definition above), and to ensuring they take precautions to avoid risks of injury and damage, other obligations may not be reciprocal. Rules for written notice [20],

information and approval may apply before the cable owner can perform Additional Work, including repair vessel movements.
Prior O&G company approval will naturally be required before the cable installation can cross any pipeline, or for subsequent cable repair operations within 500 meters of oil platforms. However, cable owners could have difficulty including in the co-operation agreement a corresponding obligation from the O&G company to obtain their approval before installing rigs within a minimum distance from the cable.

b) Liability and Indemnity

The approach to liability in co-operation agreements put forward by O&G companies may differ from that now enshrined in crossing agreements. While cable operators will, as we have seen, primarily be seeking consultation and consent to minimize operational problems, the subject foremost in the minds of O&G companies may well be to limit their exposure to legal claims for damages.
Standard form oil field service contracts between oil platform operators and their contractors provide for mutual indemnities regardless of fault for loss or damage to their own property, and for death or injury claims.[21] O&G lease block holders may automatically insert this form of 'knock-for-knock' liability and indemnity clause into the co-operation agreements they propose to cable owners.
The clause provides that each party assumes liability not only for third party claims, but for all costs associated with damage to its own infrastructure, whatever the cause and regardless of the other party's fault. In other words, each party surrenders its rights to claim compensation from the other for damage to its respective infrastructure. Under standard cable crossing agreements, on the contrary and in line with UNCLOS principles, each cable owner assumes liability for direct damage it causes to the other's cable, subject to an agreed cap.

9. CONCLUSION

"As the demand for energy increases and as technology evolves, oil and gas infrastructure will likely move offshore into deeper waters and potentially to new areas along the Atlantic and Pacific coasts", and no doubt in new areas in other waters as well. This prospect "requires significant and improved coordination with submarine cable operators. There is a need to promote development and implementation of multiple measures—some existing, some yet to be developed—by government agencies and industry.[22] Submarine cable protection is a complex undertaking that requires more than just a default separation distance from other marine activities, helpful though such a default separation distance can be.[23]

Both sectors should also be motivated to improve coordination by growing opportunities for synergies in the rollout of subsea communications systems in areas of active petroleum exploration and development.

More frequent recourse to cooperation agreements is one such measure to be considered even if, given the pros and cons, cable owners will often continue to take their chances with less formal written consents and even with non-objection, if the alternative is giving up their rights to future claims for property damage or their legal freedoms to install and maintain submarine systems.

10. REFERENCES

[1] Working Group 8, Communications Security, Reliability and Interoperability Council IV (CSRIC IV WG 8) Final Report 1, Protection of Submarine Cables Through Spatial Separation (Dec. 2014), pp. 11-12, https://transition.fcc.gov/pshs/advisory/csric4/CSRIC_IV_WG8_Report1_3Dec2014.pdf

[2] CSRIC IV WG 8 Report 1, p. 6.

[3] CSRIC IV WG 8 Report 1, p. 3.

[4] G Evans and M Page, "The Planning and Surveying of Submarine Cable Routes", in D. Burnett et al, Submarine Cables: The Handbook of Law and Policy (Martinus Nijhoff, 2014), Ch. 4, p. 97

[5] "Under UNCLOS there are no requirements for crossing agreements and there is no basis under international law to compel a party to agree to an unreasonable crossing agreement". Evans & Page, p. 97.

[6] Idem

[7] Evans and Page, p. 117.

[8] Such as project delays, re-routing, or inability of one or other infrastructure owner to subsequently perform repair or maintenance.

[9] R Lim, "Importance of Permit Acquisition for Building Submarine Cables", published sSubOptic 2013, pp. 3-4. See also ICPC Recommendation 3, note 13 below.

[10] Lim, p. 4. See also Evans and Page: "This negotiation should ideally be concluded prior to the commencement of survey operations." (p. 97).

[11] G Stoner, S Arsenault, P Kravis, "Crossing the Cultural Divide to the Offshore Oil and Gas Sector", in Submarine Telecoms Magazine Issue 96, p. 38.

[12] D Toombs, "Oil & Gas and Special Market Topics at SubOptic", Submarine Telecoms Magazine Issue 102, p. 58.

[13] International Cable Protection Committee, ICPC Recommendation #3, Criteria to be Applied to Proposed Crossings of Submarine Cables and/or Pipelines, Issue 10A, 12 February 2014. Available by request at www.iscpc.org or secretariat@iscpc.org.

[14] Lim, Ronnie, "Importance of Permit Acquisition for Building Submarine Cables", SubOptic 2013, p. 6.

[15] For a full account see D. Burnett et al, "Overview of the International Legal Regime Governing Submarine Cables", in Submarine Cables: The Handbook of Law and Policy (Martinus Nijhoff, 2014) Ch. 3.

[16] For UNCLOS overview and full text see http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm

[17] Burnett et al, Ch. 3, pp. 78-82.

[18] ICPC Recommendation #2, Recommended Routing and Reporting Criteria for Cables in Proximity to Others, Issue 10B, 12 November 2012.

[19] Burnett et al, Ch. 3, p. 86. See also W Nielsen and T Davenport, "Submarine Cables and Offshore Energy", in Burnett et al, Ch. 16, p. 362, on energy industry "overreach" in the EEZ.

[20] With oral notice being allowed for urgent maintenance.

[21] Discussed in House of Lords judgement in the "Piper Alpha" case, *Caledonia North Sea Limited v. British Telecommunications Plc* (2002, UKHL 4).

[22] CSRIC IV WG 8 Report 1, pp 33-36.

[23] CSRIC IV WG 8 Report 1, p. 12.