

**IPIECA**



International  
Association  
of Oil & Gas  
Producers

# Mutual Aid Indemnification and Liability

including a template Emergency Personnel  
Secondment Agreement

# IPIECA

The global oil and gas industry association for environmental and social issues

14th Floor, City Tower, 40 Basinghall Street, London EC2V 5DE, United Kingdom  
Telephone: +44 (0)20 7633 2388 Facsimile: +44 (0)20 7633 2389  
E-mail: [info@ipieca.org](mailto:info@ipieca.org) Internet: [www.ipieca.org](http://www.ipieca.org)



## International Association of Oil & Gas Producers

### *London office*

14th Floor, City Tower, 40 Basinghall Street, London EC2V 5DE, United Kingdom  
Telephone: +44 (0)20 3763 9700 Facsimile: +44 (0)20 3763 9701  
E-mail: [reception@iogp.org](mailto:reception@iogp.org) Internet: [www.iogp.org](http://www.iogp.org)

### *Brussels office*

Boulevard du Souverain 165, 4th Floor, B-1160 Brussels, Belgium  
Telephone: +32 (0)2 566 9150 Facsimile: +32 (0)2 566 9159  
E-mail: [reception@iogp.org](mailto:reception@iogp.org) Internet: [www.iogp.org](http://www.iogp.org)

© IPIECA-IOGP 2014 All rights reserved.

No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior consent of IPIECA/IOGP.

# Mutual Aid Indemnification and Liability

including a template Emergency Personnel  
Secondment Agreement

## **Disclaimer**

Whilst every effort has been made to ensure the accuracy of the information contained in this publication, neither IPIECA, the IOGP, nor any of its members past, present or future warrants its accuracy or will, regardless of its or their negligence, assume liability for any foreseeable or unforeseeable use made of this publication or the template agreements to which it relates, which liability is hereby excluded. Consequently, such use is at the recipient's own risk on the basis that any use by the recipient constitutes agreement to the terms of this disclaimer. The recipient is obliged to inform any subsequent recipient of such terms. The information contained in this publication and the template agreements does not purport to constitute legal or professional advice from CMS Cameron McKenna LLP or any other law firm, and neither IPIECA, the IOGP, nor CMS Cameron McKenna LLP accepts any responsibility whatsoever for the consequences of the use or misuse of such documentation.

This document may provide guidance supplemental to the requirements of local legislation. However, nothing herein is intended to replace, amend, supersede or otherwise depart from such requirements. In the event of any conflict or contradiction between the provisions of this document and local legislation, applicable laws shall prevail.

# Contents

## Guidance notes

<b>Part A: Introduction</b>	<b>2</b>
1. Introduction	2
<b>Part B: General guidance</b>	<b>4</b>
1. Requirement for an Emergency Personnel Secondment Agreement	4
2. Scope of the EPSA Template	4
3. Local Considerations	5
4. Parties to the Agreement	5
<b>Part C: Specific guidance on template EPSA (with specific commentary on potential civil law amendments)</b>	<b>6</b>
1. Definitions and Interpretation	6
2. Commencement, Duration and Scope of Agreement	7
3. Responder Secondees	8
4. Payment	9
5. Expenses	10
6. Taxes	10
7. Indemnities	10
8. Consequential Loss	11
9. Exclusion of Liability	12
10. Insurance	13
11. Notification of Claims	13
12. Confidentiality	13
13. Termination of Engagement of Responder Secondees	13
14. Termination of Agreement	14
15. Anti-Bribery	14
16. Communications	14
17. Notices	15
18. Further Investigation of the Incident	15
19. Force Majeure	15
20. Costs	16
21. Assignment	16
22. Relationship of Parties	16
23. Third Party Rights	16
24. "Boilerplate Clauses"	16
25. Clause 30 – Governing Law	17
26. Civil law/Dutch commentary: Other Specific Guidance on Civil Law Template EPSA	17
<b>Appendix 1: Potential liability for responders to well control incidents</b>	<b>18</b>
<b>Appendix 2: Responder Immunity Survey</b>	<b>24</b>

## Template Emergency Personnel Secondment Agreement

Introduction	32
Table of contents	I
1. Definitions and Interpretation	III
2. Commencement, Duration and Scope of Agreement	VI
3. Responder Secondees	VI
4. Payment	VIII
5. Expenses	IX
6. Taxes	X
7. Indemnities	X
8. Consequential Loss	X
9. Exclusion of Liability	XI
10. Insurance	XI
11. Notification of Claims	XI
12. Confidentiality	XI
13. Termination of Secondment of Responder Secondees	XII
14. Termination of Agreement	XIII
15. Anti-Bribery	XIV
16. Communications	XIV
17. Notices	XV
18. Further Investigation of the Incident	XVI
19. Force Majeure	XVI
20. Costs	XVI
21. Assignment	XVI
22. Relationship of Parties	XVI
23. Third Party Rights	XVII
24. Counterparts	XVII
25. Waiver	XVII
26. Severability	XVII
27. Variation	XVII
28. Entire Agreement	XVII
29. Governing Law	XVII
Schedule 1: Responder Secondees, Duties, Location and Secondment Period	XIX
Schedule 2: Form of Undertaking of Confidentiality	XX

# Part A: Introduction

## 1. Introduction

### Scope of this Guidance

- 1.1 This guidance note has been prepared to provide an introduction to some of the key considerations to be taken into account in an emergency situation, such as a loss of well control incident, where one oil and gas operator (referred to in this note as an **“Incident Operator”**) is seeking aid - in the form of the provision of personnel - from another oil and gas operator (referred to in this note as a **“Responder”**).
- 1.2 This note sets out guidance on the specific provisions of the template Emergency Personnel Secondment Agreement (**“EPSA”**), appended to this Guidance Note, which may be used as a starting point for negotiation in common law and civil law jurisdictions. It summarises why each clause has been included, when it might be used and mentions some options for tailoring such template agreements to individual circumstances.
- 1.3 It should be noted at the outset that the template agreement to which this note relates does not deal with the provision of equipment between operators, as this was outside the scope of the current exercise. Rather, it deals with the situation where an Incident Operator is seeking the assistance of certain Responder personnel (referred to in this note and in the EPSA as **“Responder Secondees”**) on a secondment basis. What is envisaged is that the Responder Secondees will perform certain duties as may be required by the Incident Operator, under the Incident Operator’s absolute control, supervision and instruction. Indeed, the word **“Duties”** has been selected in place of the word **“services”** or similar, with a view to avoiding any dispute that the Responder should have any responsibility for the acts of the employee while seconded.
- 1.4 It should also be clarified that the template is not expected to be used where the Incident Operator wishes to enter into an agreement with a contractor or service company for the provision of personnel. Different considerations will be relevant where the party seconding personnel does so as part of its business – contractors are likely to have their own terms and conditions for the supply of personnel/services which they may insist on using in the event of an Incident Operator seeking assistance in an emergency situation, or the Incident Operator may have an existing master services contract with a contractor which might be used. In any event, both the risk allocation and provisions regarding remuneration are likely to be different in the context of a contractor or service company providing personnel directly.

### *Liability and Indemnity Regimes*

- 1.5 If, as is envisaged, a Responder elects to provide secondees to an Incident Operator, there is always a risk that those secondees may cause further damage or otherwise exacerbate the existing emergency situation, and as a result the Responder may incur liability either to the Incident Operator or third parties on the basis of its vicarious liability for its employees. One of the purposes of this EPSA is to allocate liabilities for such risk, on the basis that the Incident Operator, in light of the emergency situation it is facing, should – other than in exceptional circumstances – agree to assume responsibility for any further damage caused by the secondees provided by the Responder.

- 1.6 High level summary notes on the law of tort have been included in this guidance note in respect of both common law and civil law jurisdictions and these are set out at Appendix 1. These notes have been provided to set the liability regimes in context; it is important to bear in mind that in the absence of a contractually agreed liability and indemnity regime, any liability of the parties will fall to be determined ‘at law’, i.e. on the basis of the principles described in Appendix 1. In very broad terms, it is a legal principle common to most jurisdictions that in the absence of an express liability regime protecting Responders, such as that provided in the template EPSA, they may be liable if their employees are negligent. Responders faced with the risk of incurring liability to third parties may be simply unwilling to assist, particularly if assistance is to be without charge. Further commentary on the liability regime provided in the template EPSA is included at Part C (paragraph 7) below.
- 1.7 Although a suggested liability regime has been included in the template EPSA, the circumstances generating the requirement for any such agreement will also need to be considered by the parties, and to this end it will also be important to remember that even though indemnities may be granted, they will only be as good as the financial standing of the Incident Operator. If the ability of the Incident Operator to fund any liabilities is of particular concern to the Responder, further assurances may have to be sought outside the arrangements envisaged in the template EPSA.

#### *Responder Immunity*

- 1.8 The ‘at law’ situation described above and in the notes included at Appendix 2 will be familiar to many throughout the world. However, in certain countries (including the US, Australia, Norway and Canada) those responding to an emergency incident will have the benefit of limited liability under specific statutory provisions often referred to as “responder immunity”. A Responder Immunity Survey has been conducted covering a number of countries with oil and gas industries and the results of this survey have been included at Appendix 2.
- 1.9 Where responder immunity applies, nothing included in the EPSA is intended to change the application of that immunity in relation to the Responder Seconded. A provision to this effect has been included in the template EPSA. Parties should, however, duly consider approaching the relevant authorities and/or regulator to clarify that the benefit of immunity will be maintained in the case of entering into an EPSA and/or any other similar arrangement.

## Part B: General Guidance

### 1. Requirement for an Emergency Personnel Secondment Agreement

- 1.1 As noted above, an EPSA may be appropriate where a Responder is willing to provide emergency assistance to an Incident Operator (both of whom are 'operators', as opposed to one operator party and one service company party).
- 1.2 There is a distinction between the situation where a Responder has been asked to provide assistance in an emergency, and where an operator has been asked to provide secondment-type services to assist another operator with its day-to-day operations, often in the context of a joint venture in which both parties are involved. In ordinary circumstances, there is usually time for negotiation between the parties, whereas the nature of an emergency situation necessitates the efficient and expedient placing of contracts, and therefore there is little scope for negotiation. The aim is that by having a generic template to work from, this will assist Incident Operators to put any such contract into place quickly, and by providing at least a starting point, deal with the fact that there is likely to be little, if any, time for negotiation between the parties.

### 2. Scope of the EPSA Template

- 2.1 A template EPSA has been prepared that would be suitable for use in a common law jurisdiction – or a civil law jurisdiction, upon making any necessary amendments. The template EPSA (included at the end of this document) has been drafted in accordance with English law, on the basis that many international oil and gas organisations opt to use English law in their standard agreements, even where the place of work is not the UK and where the parties to the contract are not UK-registered companies. To illustrate by way of example: a Brazilian operator may wish to contract the assistance of a Norwegian company for work offshore Brazil, but here neither party is likely to be familiar with the other's legal system, and therefore English law may be selected as a more 'neutral' choice of governing law.

Accordingly, the draft agreement has, as a starting point, been drafted to be compliant with English law requirements, and subject to the inclusion of any pertinent local legal requirements, there is unlikely to be any issue in using an English law-compliant liability agreement in an international context. If, however, the parties do not wish to use English law, the draft agreement could easily be adapted to be governed by the law of another jurisdiction.

- 2.2 Civil law considerations

For civil law jurisdictions, the English law template may be amended as required to incorporate any relevant civil law provisions. Part C of this Guidance Note includes general commentary on particular clauses where it may be appropriate to make a jurisdiction-specific amendment. This commentary may be equally relevant to other common law jurisdictions. In particular parties will wish to verify any public order provisions which may prevent them from excluding their liability for wilful misconduct.



### 3. Local considerations

- 3.1 In tailoring the EPSA to take into account any local peculiarities, consideration may have to be given to matters such as employment/labour relations, visa requirements of personnel, any Local Content Requirements (although there may be exclusions or waivers available in emergency situations) and/or any Special Customs Regimes (although this would tend to be more applicable where equipment is to be provided).

### 4. Parties to the Agreement

- 4.1 As noted above, the EPSA has been drafted on the basis that it will be between an Incident Operator and a Responder. However, parties should bear in mind that a Responder may contract certain of its personnel from third parties/contractor companies. If the Responder Personnel are contracted from another employer (and the terms of the Incident Operator's contracts with such employer permit the Responder to second those personnel to the Incident Operator) or those personnel are self-employed, the EPSA may still be between the Incident Operator and Responder. Here, the EPSA can simply be amended where relevant to reflect the fact that the personnel provided are not actually employed by the Responder. (Consider references to "employer" at clauses 3.5.1 (annual leave policies), 3.6 (no transfer of employment) and 6.1 (representation regarding employment of personnel) of the EPSA).
- 4.2 If the Incident Operator is keen to obtain the secondment of personnel contracted to another operator (the "**Other Operator**") but (i) the terms of engagement of the personnel would not permit their secondment, or (ii) the Other Operator decides it does not wish to be exposed to any risks that may arise out of inconsistencies between the EPSA and its existing services contract with its contractor, it may be appropriate to place a direct contract between the Incident Operator and the employing entity – the contractor company for that contractor's personnel. However (as noted above) the EPSA would probably not be the appropriate contract for such a situation. Regardless of the contract used, it may be necessary to address the fact that the Other Operator will lose the benefit of those personnel under its own services agreement for the duration of the emergency situation. Provided such an arrangement is acceptable to all three parties, it may simply be necessary for the Other Operator to suspend the services provided to it by its contractor, invoking the suspension provisions in its existing services agreement (if any) or to execute a form of side letter permitting the contractor to suspend the services so that the contractor is able to redeploy the personnel to the Incident Operator. However, if the contract provides for the payment of standby fees on suspension, the Other Operator will wish these to be waived by the contractor if the contractor is being paid fully by the Incident Operator. The Other Operator may also wish to receive some sort of compensation from the Incident Operator for any direct impact on its operations caused by the suspension and the contractor will be concerned to have clear provisions to determine how the return of its personnel to the project of the Other Operator will be triggered. The extent to which any form of reimbursement or compensation is payable between the parties will be very much a matter for negotiation and the EPSA contains no provisions addressing this topic.

## Part C: Specific guidance on template EPSA (with specific commentary on potential civil law amendments)

The following guidance has been prepared in conjunction with, and should be read alongside, the template EPSA. As stated previously, the template EPSA has been prepared in compliance with English law, and may be used in a number of other common law jurisdictions with any amendments made as may be necessary to reflect specific requirements of the chosen governing law. Specific commentary is also noted below in the form of Dutch law examples/considerations, where changes may be required to reflect any civil law-related considerations. The Netherlands has been chosen as one example of a civil law jurisdiction, but there may be similar provisions to those highlighted in other civil law jurisdictions.

### 1. Definitions and Interpretation

(Only those definitions which require particular comment have been noted.)

- 1.1 **“Affiliate”**. A non-jurisdictional definition has been selected, but parties may replace this with a jurisdiction-specific definition if preferred. For example, in the UK, a standard Companies Act 2006 definition may be used.
- 1.2 **“Charges”**. This definition may not be required if the Responder is to provide personnel free of charge.
- 1.3 **“Claims”**. A wide category of losses has been included in this definition. It should be noted that under English Law, it may be against public policy to indemnify a person for payment of a criminal fine (although the precise scope of this prohibition is not fully established).
- 1.4 **“Consequential Loss”**. The definition chosen for the template may be well known to upstream oil and gas operators as it is based on the Oil and Gas UK Industry Standard Joint Operating Agreement (JOA). The definition has been amended slightly to put beyond doubt that loss of production, profit etc, are intended to be excluded whether direct or indirect. For comparison purposes against the Industry Standard JOA, the revisions made to the Consequential Loss definition are (i) removal of the words ““Consequential Loss” shall be deemed to include” from the opening paragraph and replacement with the word “and”, and (ii) addition of the words “(whether direct or indirect)” after the words “...or any loss of anticipated loss of use, profit or revenue;”.

*Civil law/Dutch commentary:* On the basis of the Dutch Civil Code, reparation can be claimed for damage which is (i) related to the event giving rise to the liability of the obligor, and (ii) which, also having regard to the nature and of the liability and of the damage, can be attributed to the obligor as a result of such event. The Dutch Civil Code does not define consequential loss. If the parties do not include a definition of consequential loss a Dutch court will interpret the provision on limitation of liability taking into consideration the intent of the parties at the time they entered into the agreement (see also paragraph 27).

- 1.5 **“Co-Venturers”**. This definition may be used in the event the parties wish to extend the scope or benefit of the indemnities to the other parties to their JOAs or equivalent. The Incident Operator, in particular, is likely to wish to ensure that its Co-Venturers are protected by the indemnities given by the Responder. It is rather harder to see how the co-venturers of the Responder could incur liability to the Incident Operator but a reciprocal provision is normal in operator to operator contracts and may therefore be expected.

- 1.6 **“Duties” and “Secondment Period”**. Details of the duties to be performed, the duration of the secondment (if known) and relevant personnel are to be set out in a Schedule to be attached to the agreement – this will need to be prepared on a case-by-case basis. It is important to note that as with most agreements the effectiveness of the EPSA is highly dependent on effective drafting of the Schedule. For instance, if the personnel to be provided are listed, and one of the personnel actually provided is not included on that list, there may be arguments that the indemnities in the agreement do not apply to the activities of that person.
- 1.7 **“Force Majeure Event”**. Clause 18 has been included as an optional clause to provide relief from non-performance in the event of something outwith the control of the affected party, and certain examples are listed in the definition. With regard to (d) and the reference to “...fire, explosion and/or other natural physical disaster”, the Incident itself is expressly excluded.
- See also paragraph 20.
- 1.8 **“Incident Operator Group” and “Responder Group”**. Typical and fairly wide definitions, with optional references to Co-Venturers, have been included for the purposes of the liabilities and indemnities provisions. If the Responder is providing personnel who are normally engaged in a particular joint venture, the Incident Operator may wish to ensure that it is protected against claims from the Responder’s Co-Venturers in that joint venture. The Responder’s contractors are also included within the definition in order to benefit from the indemnities given by the Incident Operator.

## **2. Commencement, Duration and Scope of Agreement**

- 2.1 This clause covers commencement and duration of the Agreement. The proposed draft contemplates a fixed term for the Secondment Period which would be specified in Schedule 1. However, it may be difficult to predict the progress of the Incident and it would be possible to amend this clause so that the agreement is for an indefinite term which may be terminated by notice. The definition and use of the term “Secondment Period” would then need to be reviewed. The termination provisions are flexible enough to allow termination quite easily, to take account of the unpredictability of any emergency situation.
- 2.2 Clause 2.2 currently envisages that the Incident Operator will pay for the Responder Secondees. However, in the event they are to be provided free of charge this sub-clause will need to be amended. The obligations of the Responder to provide the personnel, and of the Incident Operator, as set out in the template agreement, should be sufficient consideration that there is no requirement to execute the agreement as a deed under English Law.
- 2.3 Regarding the scope of the agreement, clause 2.3 is also broad enough to allow flexibility if required, but reference is made to the Duties as defined in the Schedule, and therefore it will be worth ensuring that the content of the Schedule is sufficiently wide.

### **3. Responder Secondees**

#### 3.1 Clause 3.1 – Permits, medicals and visas

It is assumed that, for practical reasons, it will make sense for the Responder to obtain any visas and other such documentation for its personnel, on the assumption that they are most likely to hold all applicable paperwork; this tends to reflect the norm in the UK. However, the clause has been drafted to ensure that the parties work together to obtain the requisite documentation. Some wording has been added to deal with anything that only one of the parties could source (for example, a visa which requires a sponsor operating in the country of the Incident, which only the Incident Operator could source).

#### 3.2 Clause 3.2 – Work environment, facilities and equipment to be provided by the Incident Operator

This is a clause that will have to be tailored on a case-by-case basis depending on the facts and circumstances.

#### 3.3 Clause 3.3 – Exchange of information

This is a very widely-drafted clause that places an obligation on both parties to provide such information and/or assistance as may be reasonably required in relation to Responder Secondees - again this is to allow flexibility as it is difficult to predict what might be required.

#### 3.4 Clause 3.4 – Annual leave and other absences

Clause 3.4.1 is another optional clause that is more likely to be relevant in respect of a long term arrangement, with provision having been made for personnel to take annual leave during the term of the agreement.

Clause 3.4.3 is a reciprocal requirement for one party to inform the other if a person is unable to perform the Duties due to illness: in the case of the Incident Operator, it is obliged to advise the Responder if some injury or illness is affecting the Responder's secondee (this may have an impact on day rates payable), and in the case of the Responder, it should advise the Incident Operator if a person due to perform the Duties is unable to do so.

#### 3.5 Clause 3.5 – No transfer of employment

3.5.1 As with any commercial arrangement to provide services, there is always a risk of employees transferring to a new employer at the commencement and termination of the agreement. Under European legislation, this may happen by operation of law pursuant to Council Directive 2001/23/EC (known as the “Acquired Rights Directive” or “ARD”), implemented into UK legislation by the Transfer of Undertakings (Protection of Employment) Regulations 2006 (known as “TUPE”). Whether TUPE/ARD applies in any given situation, will be a matter of fact to be determined by the relevant court and will depend on a variety of different factors.

3.5.2 Clause 3.5 makes it clear that, regardless of the operation of any local laws regarding the transfer of employment, the Responder/Contractor shall remain the employer of the

Responder Secondees, and be responsible for general employee outgoings such as salary, taxes, and fringe benefits including pensions. In addition, the Responder shall also indemnify Incident Operator Group against any claims brought by Responder Secondees in relation to failure to maintain such outgoings, as well as any claim regarding employment, termination or other obligation where the Responder Secondees transfer or claim to have transferred to the Incident Operator Group. Whether a Responder will be willing to agree to this provision really depends on the likelihood of TUPE/ARD applying in the particular circumstances.

*Civil law/Dutch commentary:* There are specific TUPE/ARD regulations in the Netherlands. The ARD is implemented into Dutch legislation by articles 7:662 et seq. Dutch Civil Code.

### 3.6 Clause 3.6 – No recruitment

3.6.1 As operators can be sensitive to their valued staff being ‘poached’ when working with other operators, a ‘no solicitation’ clause has been included to restrict any such recruitment.

### 3.7 Clause 3.7 – Substitution of Responder Secondees

3.7.1 This clause gives the Responder the option to substitute Responder Secondees on the condition it can provide someone with equivalent skills/experience. The reason for this is to allow flexibility where the Responder may require such secondees for its own projects. Again, parties can choose to remove this option if substitution would not be practical or acceptable.

### 3.8 Clause 3.8 – Representations

3.8.1 The only representations made by the Responder in this clause are regarding the employment of Responder Secondees. It is made clear that it is the responsibility of the Incident Operator to satisfy itself that the secondees have whatever particular skills are required. This is to avoid any suggestion that the Responder has any responsibility for the performance of the Responder Secondees.

## 4. Payment

4.1 It is understood that in most cases a Responder would expect the Incident Operator to cover the cost of provision of its staff, and draft charging and payment wording has been included accordingly. The options are to include a negotiated rate in Schedule 1 (the “Charge-Out Rate”) or if no such rate is included the default position is that the Incident Operator will pay the built-up cost of employment of the Responder Secondee (the “Cost Rate”). Alternatively, the Responder may in exceptional cases or for short periods agree to provide personnel without cost. Please note that local VAT and other tax positions/implications should be considered on a case-by-case basis.

4.2 The standard position may be for the Responder to invoice on monthly basis with payment to be made by the Incident Operator within a specified number of days of the date of the invoice. However, if such arrangement is not suitable in the circumstances the parties should amend this provision. The

Incident Operator must have the opportunity to query invoices, and there should also be remedies for late payment including interest payments. A sensitive issue is likely to be whether the Responder should be entitled to withdraw its personnel if payment is delayed – the Responder will be conscious that such an action could have significant impact on the Incident Operator’s ability to respond to the Incident but will also be well aware that the Incident may place great strain on the Incident Operator’s finances. Provision for withdrawal of staff has been included in the template agreement. However, the parties may wish to remove this option and restrict remedies for late payment to interest only.

- 4.3 *Civil law/Dutch commentary:* Under Dutch law (and indeed the laws of other EU member states), if an obligor, in respect of a commercial agreement, fails to pay on the due date such obligor will be liable to pay statutory commercial interest from the day after the ultimate payment date until the date of payment (article 119a of book 6 of the Dutch Civil Code). Parties may agree to a different interest rate and this option has been selected in Clause 4.7.1.

## **5. Expenses**

- 5.1 Options are provided for personnel travel, accommodation and food type expenses to be either the responsibility of the Incident Operator directly, the responsibility of the Responder but reimbursed by the Incident Operator, or responsibility of the Responder without reimbursement.

## **6. Taxes**

- 6.1 This clause contains a general obligation on the Incident Operator to pay all taxes in connection with the Agreement unless the agreement provides otherwise. For example, the Responder is responsible, under Clause 3.6.1, for the payment by the Seconded Personnel’s employer of all salaries etc – including employment related taxes.
- 6.2 It is recommended that any specific tax provisions should also be reviewed by each Party’s own tax advisors.
- 6.3 *Civil law/Dutch commentary:* Under Dutch law recipient’s liability (*inlenersaansprakelijkheid*) can apply in case a supplier (i.e. the Responder) makes personnel available to a recipient (i.e. the Incident Operator) whereby the personnel’s salary is subject to Dutch wage tax (incl. social security contributions). In that case the supplier is the formal employer and is therefore subject to withhold wage tax and social security contributions on the personnel’s salary and pay these to the Dutch tax authorities. However, if the supplier refuses to make the payments, the Dutch tax authorities can hold the recipient of the personnel liable.

## **7. Indemnities**

- 7.1 In light of the Responder volunteering to assist in an emergency, the indemnity regime in the template agreement has, as a starting point, been drafted such that the Incident Operator will indemnify the Responder for loss suffered by either itself or its group or by the Responder or its group in respect of a wide range of categories of loss including injury to persons, damage to property, claims against the parties for third party people and property, reservoir or well damage, blowouts and pollution. This approach seems to be the one adopted in most emergency situations.

- 7.2 The Incident Operator will indemnify the Responder Group irrespective of the negligence or breach of duty of either the Responder Group or the Incident Operator Group. This wording is essential if the indemnities are to be fully effective under English law. The effect of this wording is that the Incident Operator will also indemnify the Responder Group irrespective of their gross negligence or wilful misconduct – these terms do not need to be mentioned expressly.
- 7.3 The principle agreed for the purposes of the template EPSA is that the Responder should bear no liability whatsoever in relation to the agreement, its Responder Secondedees or the incident, including in the case of its or their gross negligence or wilful misconduct and so no exclusion has been made from the scope of the indemnity for such cases. The terms “gross negligence” and “wilful misconduct” have no well-established meaning under English law. While a clear definition is not crucial in a case where the indemnity is intended to apply in every possible circumstance (and so has not been included), it is critical under English law if the parties agree to make an exception to the indemnity in the case of gross negligence or wilful misconduct as the definition will determine the scope of the exception.
- 7.4 Clause 7.2 of the EPSA provides clarification that Responder Secondedees will have no liability under the agreement. The Contracts (Rights of Third Parties) Act 1999 allows individual Responder Secondedees to enforce this provision even though they are not party to the agreement. However, where the governing law of the EPSA is not English Law, consideration should be given as to how Clause 7 would be enforceable by individual Responder Secondedees.
- See also paragraph 9.
- 7.5 *Civil law/Dutch commentary:* Under Dutch law it is possible to limit liability for damage on the basis of breach of contract or tort. However, in principle it will be unacceptable according to criteria of reasonableness and fairness to invoke this limitation of liability in case of damage caused by gross negligence or wilful misconduct. Here it is also relevant that on the basis of the Dutch Civil Code an employer will be strictly liable for unlawful conduct of its employees and for unlawful conduct of auxiliary persons, persons that perform work for such company in a non subordinated position. It is possible to agree to limit this liability, also in respect of damage caused by wilful misconduct or gross negligence of employees. However, if the damage is caused by a (senior) manager it may be unacceptable according to criteria of reasonableness and fairness to invoke this limitation of liability. In respect of the principle of reasonableness and fairness reference is made to paragraph 26.

## **8. Consequential Loss**

- 8.1 The template agreement provides that the Incident Operator will bear responsibility for, and indemnify the Responder against, its own Consequential Loss and that of its group arising out of the Incident or the Agreement. Even if the Responder has some connection with the Incident (other than the provision of the Responder Secondedee), it is unlikely that in any circumstances it would have any liability for the Consequential Loss of the Incident Operator and therefore this indemnity should not give rise to conflicts but any potential interaction between this Agreement and any underlying liability should be considered.

- 8.2 There is no reciprocal indemnity from the Responder, in part because it is difficult to envisage a scenario in which the provision of the Responder Seconded might cause Consequential Loss to the Responder. However, there is an express acknowledgment by the Responder that it has no claim against the Incident Operator if it suffers such loss as a result of the lack of availability of the Responder Seconded.
- 8.3 The other reason there is no reciprocal indemnity is to avoid any potential conflict between such an indemnity and any liability which the Incident Operator might have to the Responder arising out of the Incident itself (for instance because of damage to property of the Responder). For the same reason, an express statement has been included that this clause is not intended to affect any liability of the Incident Operator to the Responder arising out of the Incident.

## **9. Exclusion of Liability**

- 9.1 The indemnity clause addresses damage to persons and property but it is also necessary to consider simple contractual liability for failure to perform the obligations under the contract. It is important to note that the template is drafted such that the Responder does not assume any responsibility for the success of any recovery or emergency intervention; this responsibility rests exclusively with the Incident Operator. The only obligation of the Responder under the secondment agreement is to make one or more of his employees available to the Incident Operator. Once its staff are seconded to the Incident Operator the Responder no longer decides what his staff work on; it is the Incident Operator who determines their duties, who sets the standard for the work, and oversees the adequacy of the results achieved. Hence the only responsibility for the Responder is to make staff available who are competent for the work that the Incident Operator wants the staff to do. Even if personnel are found not to be competent, the only remedy of the Incident Operator is termination (Clause 13.2) as no warranty is given (see Clause 3.8.3). For this reason, an exclusion of liability provision has been included for the benefit of the Responder. The clause provides that the Responder – subject to any indemnities given – shall not be liable for damages incurred by the Incident Operator in connection with the duties performed by its staff. The only remedy available to the Incident Operator will be termination of the engagement of the secondee concerned.
- 9.2 Clause 9.2 has been provided so as not to have any limitation of liability conflict with any indemnities given by the Responder i.e. the indemnity given at Clause 3.5.2. If preferable to the “any” wording, which has been adopted to ensure that any indemnities take precedence over this clause, the parties may wish to expressly cross refer to those clauses under which the Responder assumes liability/gives and indemnity in favour of the Incident Operator.
- 9.3 *Civil law/Dutch commentary:* As mentioned in paragraph 7.3, on the basis of the Dutch Civil Code an employer will be strictly liable for unlawful conduct of its employees. Furthermore, a company will be strictly liable for unlawful conduct of auxiliary persons, persons that perform work for such company in a non subordinated position. It is possible to agree to limit this liability, also in respect of damage caused by wilful misconduct or gross negligence of employees. However, if the damage is caused by a (senior) manager it may be unacceptable according to criteria of reasonableness and fairness to invoke this limitation of liability. In respect of the principle of reasonableness and fairness reference is made to paragraph 26.



## **10. Insurance**

10.1 Insurance clauses in any agreement will depend on the specific requirements of the parties. This is an example clause that may be utilised by the parties if appropriate, providing simply that the Incident Operator (being the party assuming responsibility to a very large extent under the liabilities and indemnities provisions) shall have insurance in respect of its liabilities and obligations under the agreement. There is no reciprocal insurance obligation on the Responder, on the basis it is largely the indemnified party – although this position may change in the event any more extensive indemnities are to be provided by the Responder. The agreement provides for a right of termination in the event that the insurance policies are not demonstrated to be in place to the satisfaction of the Responder.

## **11. Notification of Claims**

11.1 This clause provides, as a matter of practice, that the parties should notify each other of any claims which arise in connection with the agreement, and also that, in respect of the conduct of claims, the indemnifying party should be allowed the opportunity to defend a claim on behalf of the indemnified party.

11.2 However, wording regarding the assumption of the defence of a claim has been provided in square brackets, since some indemnified operators may prefer (for reputational or other reasons), to NOT pass on the defence of any claim to the indemnifying party – or more likely that party's insurers – preferring instead to instruct their own legal counsel. Personal conduct of claims may be something that the parties are particularly sensitive to, however it may be the case that a conversation is simply had between the parties at the relevant time as to the most suitable person to conduct the defence of any claim.

## **12. Confidentiality**

12.1 The confidentiality clause provides for the protection of the Incident Operator's confidential information, given the nature of the agreement and the risk to the Incident Operator, and the fact that the Responder Seconddees are likely to have significant access to the Incident Operator's information. This provision is not reciprocal, since the Incident Operator should have no access to confidential information of the Responder.

12.2 Provision has been made for each Responder Seconddee to be required to sign a form of confidentiality undertaking, and a pro forma undertaking has been included as a Schedule 2 to the EPSA. This same form of confidentiality undertaking may be adapted in the unlikely event that the Responder needs to disclose Incident Operator Confidential Information to any of its officers, employees, contractors, agents or professional advisors.

## **13. Termination of Engagement of Responder Seconddees**

13.1 Clause 13 deals with termination of the engagement of individual Responder Seconddees while Clause 14 deals with termination of the agreement itself.

- 13.2 Fairly broad rights to terminate the engagement of individuals have been included in the template, largely to reflect the fact that if the Incident Operator is already in an emergency situation, it will be particularly sensitive to the performance of those persons helping it to deal with that situation. Especially in respect of the risk that the Incident Operator is to take on in terms of indemnities, it will desire a greater degree of control in respect of the secondees.
- 13.3 Clause 13.2 provides for two options regarding termination of secondments by the Incident Operator: Clause 13.2.2 makes provision for immediate termination in arguably more ‘serious’ breaches, whereas Clause 13.2.1 provides for a period of notice prior to termination. The period may be amended, as the length of time chosen may depend on the expected duration of the Agreement.
- 13.4 Clause 13.3 then provides for both immediate termination of a secondment by the Responder and termination with an elected period of notice.

#### **14. Termination of Agreement**

- 14.1 In the event that the situation giving rise to the agreement is resolved quite quickly or suddenly, or that the Incident Operator simply has no further requirement for the Responder Secondees, a right has been provided for the Incident Operator to terminate at any time on notice. This reflects the fact that the length of time for which personnel are needed may not be known at the stage of execution of the agreement. Other termination options include termination for material breach where such breach is not remedied within 30 days of relevant notice and where the engagement of all Responder Secondees has ended. This clause also sets out the consequences of termination: financially, in that the Responder should be entitled to payment for services rendered (unless its personnel have been provided free of charge), and practically/from a confidentially perspective, that the Responder should return all confidential documentation to the Incident Operator.

#### **15. Anti-Bribery**

- 15.1 It is becoming increasingly important in the UK as a matter of corporate governance to include anti-bribery provisions in all agreements. Accordingly, provision has been made for the Responder to comply with UK and US anti-bribery legislation. It may actually be appropriate to retain this clause even for non-English law agreements, given the wide jurisdictional scope of the FCPA and UK Bribery Act. The obligations have been drafted to address the risk that the Responder Secondees contravene anti-bribery legislation. In such a situation it may be that the Responder, the Incident Operator, or both, have some liability. It is harder to see, however, in what way the Responder could become liable for a breach of anti-bribery legislation by the Incident Operator since the Incident Operator is not providing services to or on behalf of the Responder. For this reason, it is not necessary or appropriate for this clause to be reciprocal.

#### **16. Communications**

- 16.1 As the “Incident” is likely to be an emergency situation, parties may need to act quickly, and therefore the agreement provides for communications to be principally between nominated representatives from each party, and that such representatives have authority to act on behalf of the

parties. As is standard, the powers of those representatives should not extend to amendments of the agreement; that should go through the proper corporate channels.

## **17. Notices**

- 17.1 This clause sets out appropriate means of serving formal notice under the agreement.
- 17.2 Provision has been made for fax and email notification if it is a means of communication used by the parties.

## **18. Further Investigation of the Incident**

- 18.1 In recognition of the circumstances giving rise to the agreement, the Responder may be requested to make personnel available beyond the duration of the secondment for any subsequent investigation into the incident. In a criminal situation (such as the investigation of an incident by the Health and Safety Executive, in England) such personnel would be legally compelled to co-operate in any criminal investigation, but there is no such compulsion in the UK in civil claims between private parties and not all regulatory investigations will have the power to summon witnesses. In other jurisdictions, different rules may apply. Provision of personnel for such purposes can be extremely disruptive to the Responder and so there is no obligation to do so, but the clause suggests some of the issues which would need to be addressed in such circumstances.

*Civil law/Dutch commentary:* The Dutch Code of Civil Procedure provides that any person that has been legally called as a witness is obliged to testify. If such witness does not appear the judge can order that the witness will be brought to court by the public authorities to fulfil his / her obligation. However, this clause 19 offers additional comfort in respect of the cooperation of the Responder's employees in any investigation into the incident.

## **19. Force Majeure**

- 19.1 As noted above in respect of the definition of Force Majeure, this clause has been included as an optional clause to provide relief from non-performance in the event of some event outwith the control of the affected party. Provision has not been made for any particular procedure to be followed in the event of a Force Majeure event.
- 19.2 *Civil law/Dutch commentary:* On the basis of article 75 of book 6 of the Dutch Civil Code a breach will not be attributable to a party in case of force majeure if certain criteria are met. Parties can agree contractually in which cases a party may rely on force majeure, for example in case of certain weather conditions. If the parties did not agree contractually that a certain situation constitutes force majeure, the case will be assessed according to the criteria of article 75 of book 6 of the Dutch Civil Code. In this assessment also the principle of reasonableness and fairness will play an important role (see also paragraph 27).

## **20. Costs**

- 20.1 Each party takes responsibility for costs and expenses incurred in negotiating the agreement (as opposed to charges and payments for the provision of services).

## **21. Assignment**

- 21.1 Provision has been made such that neither party may assign the agreement without the prior written consent of the other, on the basis that the parties will most likely have elected to contract with each other specifically and for a particular reason. If parties wish greater flexibility to assign without consent, perhaps to Affiliates, that is something that could be tailored by the parties.

## **22. Relationship of Parties**

- 22.1 This clause clarifies that the relationship of the Incident Operator and Responder is that of independent contractors only – this is a standard clarification in most legal agreements that the parties are not, for example, entering into a partnership agreement (as this would have certain legal (and fiscal) implications).

## **23. Third Party Rights**

- 23.1 This provision as drafted will be relevant for English law contracts only. The Contracts (Rights of Third Parties) Act 1999 provides, in essence, for third parties to have access to any benefits granted to them under an agreement. This can be unhelpful in many circumstances and therefore it is standard practice in the UK to disapply this legislation. However, where certain third parties are required to have certain rights under the agreement, this is expressly provided for. Third parties falling within the “Groups” definitions require the ability to enforce certain provisions including indemnities so this clause has been qualified to provide such rights.

- 23.2 *Civil law/Dutch commentary:* If a clause in an agreement refers to rights of a third party which is not a party to the agreement, i.e. the Responder Seconded, under Dutch law this may constitute a so-called third-party clause (*derdenbeding*), meaning that such third party may derive a right from this agreement even though it was not a party to the agreement. A third party clause should be included in the agreement to make sure the Responder Seconded does not acquire such rights except to the extent intended.

## **24. “Boilerplate Clauses”**

- 24.1 Certain standard provisions have been included: provision for execution in counterpart (permitted under English and Dutch law), waiver (to be in writing), severability (invalid provisions deemed to be deleted), variation (to be in writing) and an entire agreement clause clarifying that the EPSA constitutes the entire agreement between the parties in relation to the emergency incident. The latter may need to be amended if, for example, there are also agreements for the provision of equipment.

## 25. **Clause 30 – Governing Law**

- 25.1 As discussed in paragraph 3 above, the common law EPSA has been drafted in accordance with English law, and the Courts of England and Wales have been specified as having jurisdiction over any dispute under the agreement. The parties can specify whether jurisdiction should be exclusive or non-exclusive, which will likely depend on the nationality of the parties concerned.

## 26. **Civil law/Dutch commentary: Other Specific Guidance on Civil Law Template EPSA**

- 26.1 It is important to note that the same wording may lead to different legal effects under UK law and Dutch law. Under UK law the wording of an agreement will generally be decisive unless ambiguous. However, when interpreting a contract the Dutch courts may take into consideration the intent of the parties at the time they entered into contract. In the *Haviltex* case the Dutch Supreme Court ruled that even if the wording of a contractual clause may seem grammatically clear, the key question is what meaning the parties could have reasonably given to the clause in the specific circumstances at the time of entering into contract and what they could reasonably expect of each other in this respect<sup>1</sup>. In respect of detailed commercial agreements negotiated between professional parties usually a more objective interpretation of the mere wording prevails<sup>2</sup>, but also in respect of such commercial contracts other circumstances may be of relevance in the interpretation of the contract especially if the wording is not grammatically clear<sup>3</sup>.
- 26.2 Furthermore, traditionally Dutch contracts are substantially more concise than UK contracts, because parties may rely on the so-called corrective and supplemental function of reasonableness and fairness principle (codified in article 248 of book 6 of the Dutch Civil Code). This principle may impose additional obligations on the parties in case of issues that are not covered by an agreement (supplemental function) and this principle may also affect, inter alia, the reliance and / or enforcement of contractual provisions in case such reliance or enforcement would be unacceptable (corrective function). Hence, the reasonableness and fairness principle can be used to fill a gap, where a certain aspect has not been addressed in the agreement - the existence of such a gap should be established through interpretation of the agreement – and the corrective function of the reasonableness and fairness principle implies a change in the contractual rights and obligations of the parties. In certain situations the supplemental function and corrective function of reasonableness and fairness principle can also amalgamate.
- 26.3 The Dutch Civil Code also contains certain provisions on the basis of which an agreement may be annulled or may be void when it has been executed as a result of treat, fraud, undue influence, when it has been executed under the influence of an error regarding facts or mistake, or when it is contrary to the principles of good morals or public order.

---

<sup>1</sup> HR 12 March 1981, NJ 1981, 635

<sup>2</sup> HR 19 januari 2007 (Meyer Europe / Pontmeyer)

<sup>3</sup> HR 19 oktober 2007 (Vodafone / ETC)

# Appendix 1: Potential liability for responders to well control incidents

## 1. Introduction

- 1.1 This appendix describes on which basis a responder – an organisation which provides assistance in emergency situations, to a well control incident – can be held liable for damages where there is no contractual relationship between the responder and the claimant. The description highlights that in the event where the responder acts without having entered into a contract with the Incident Operator, the potential liability of the responder can be significant, therefore it is not recommended to engage in responder activities without a contract in place.
- 1.2 Legal systems can be divided into two main categories – common law systems and civil law systems.
- 1.3 Common law systems (such as those in England, the United States and many Commonwealth or former Commonwealth countries) are based on a combination of statute law and common law, that is, the law which evolves through the decisions of judges which then bind other judges in lower courts through the system of binding precedent.
- 1.4 By contrast, in civil law systems (such as those in much of continental Europe and in countries which were former colonies of France and Spain) the basic principles of law are set down in a civil code – judges interpret and apply the civil code but cannot change it and therefore their decisions generally do not bind other judges and often are not widely published. The code may however be supplemented by statute law.
- 1.5 In the absence of specific laws granting immunity to responders, and of any contract between the claimant and defendant, organisations which provide assistance in emergency situations such as a loss of well control incident may be liable for their actions under the law of tort or delict. This section of the report sets out the basis on which liability might be established under both systems. International private law and treaty law are outside the scope of this note. This note is limited to a general overview of the legal framework in respect of the assessment of claims against responders under general principles of tort law.

## 2. Law of tort in common law systems – *no duty to respond but if do respond, owe a duty not to harm*

- 2.1 In common law legal systems where there is no contract between the claimant and the defendant defining contractual liability, liability for acts or omissions will be determined in accordance with the law of tort. This is part of the common law which concerns civil wrongs. There are various categories of tort, however, the most likely basis of a claim in the circumstances of an accident is the tort of negligence. This section of the appendix uses English law as an example of a common law system – other common law systems may be different and advice should be taken on the applicable law.
- 2.2 Under the tort of negligence certain elements, developed over time through case law, must be established by the claimant in order to prove the defendant's liability for its acts/omissions. A claimant must show that:

- 2.2.1 a duty of care was owed to the claimant by the defendant,
- 2.2.2 the defendant breached its duty of care, and
- 2.2.3 the claimant suffered loss as a result of the defendant's breach of its duty of care.

### 2.3 Duty of care

The test to determine whether a duty of care exists is as follows:

- 2.3.1 the damage incurred was foreseeable;
- 2.3.2 the relationship between the parties was sufficiently close; and
- 2.3.3 taking into account the circumstances, it is fair, just and reasonable to impose a duty of care.

When conducting potentially dangerous operations, it is likely that a duty of care to avoid physical harm to those in the vicinity will be found to exist.

### 2.4 Breach of duty of care

At common law, once the existence of a duty of care has been established, the defendant will be deemed to have breached such duty if they have failed to take reasonable care. The standard required is measured by reference to the hypothetical "reasonable man", i.e. what standard of care would the average "man in the street" expect? There are other elements which may be taken into consideration for example, the likelihood of harm occurring. In order to establish that the duty of care was breached the claimant only needs to prove that, on the balance of probabilities, the defendant has failed to take reasonable care.

### 2.5 Loss

Finally, a claimant must demonstrate that he or she has suffered loss which is attributable to the defendant's negligence. To do so, he or she must show both 'factual' causation and 'legal' causation.

Factual causation requires the claimant to prove that, but for the defendant's careless act or omission, the claimant would not have suffered any loss. Factual causation will not be established if the claimant would have suffered loss regardless of the defendant's negligence or if the real cause of the loss was attributable to something other than the defendant's negligence.

Identifying the cause of a claimant's loss could be complex due to the occurrence of several connected incidents, as may potentially be the case with an emergency well response incident. For example, if a party pursues the defendant for loss it incurs, the defendant may claim it only acted in response to an incident caused by another party and that such other party is in fact responsible for the true cause of the claimant's loss. In such circumstances, a court will need to determine whether the defendant's intervening act established a break in the "chain of causation" or whether no break has occurred and liability rests with the party responsible for the original incident. A break will be established if the intervening act by the defendant creates a new and separate cause of the loss incurred by the claimant. Generally, the law does not take into account the cumulative effect of

all connected events, from the perspective of each event increasing the claimant's chances of incurring loss.

Legal causation requires the claimant to prove that the defendant's negligence was legally the cause of their loss. An example used in case law is as follows – an individual seeks confirmation from a doctor that his knee is fit for a walking expedition. He only goes on the expedition as the doctor negligently misdiagnoses his knee as fit when in fact it is not. He goes on the expedition but he suffers a heart attack. Although the man only sustained his injury as a result of the negligence of the doctor (factual causation), the injury incurred was not within the scope of the doctor's duty so legal causation cannot be established.

Liability for loss under the law of negligence must be fairly placed on the defendant - this is determined in accordance with the legal principle of remoteness. The key test is that the loss must be "reasonably foreseeable" meaning that it must be closely connected to the actions of the defendant and not caused only by a remote chain of events which ultimately leads back to the defendant.

It is generally the rule, at least under English law, that a defendant will not be liable for the loss of a claimant where such loss is purely economic, such as loss of profit, and so if a party causes pollution and as a result a fisherman cannot fish, then the polluting party will not be liable in negligence (though there may be other statutory bases for recovery) but if there is a physical loss such as property damage then economic losses which flow from that (such as loss of income if a fishing vessel is damaged) are recoverable.

## 2.6 Limitation

The timeframe in which an action can be raised is ordinarily limited to a specified period. Under English law for instance, claims can usually only be brought within six years from the date the damage is incurred by the claimant. However, in certain circumstances, this time period may be extended – for instance if the claimant could not have known about the injury at the time (such as certain industrial illnesses which take years to develop after exposure to a contaminant).

## 3. **Law of tort in civil law systems – duty both to respond and not to cause harm**

3.1 This section of the appendix uses Dutch law as an example of a civil law system – other civil law systems may be different and advice should be taken on the applicable law. In particular, it should be noted that the Dutch legal system is a civil law system characterised by an emphasis on statutory law.

3.2 For a successful claim against a Responder on the basis of tort, the following four requirements have to be met pursuant to article 162, book 6 of the Dutch Civil Code ("DCC"):

3.2.1 There must be damage.

3.2.2 There must be unlawful conduct.

3.2.3 There must be a causal connection between the unlawful conduct and the damage.

3.2.4 The unlawful act can be imputed to the person, either by fault, law or prevailing opinion.



### 3.3 Damage

Damage can consist of all kinds of loss with a monetary value – economic losses, loss of income or profit, hospital costs etc. - and in certain cases also of non-material damage. Material damage must in principle be compensated fully; immaterial damage is subject to a test of fairness by the judge. Dutch courts have awarded fairly modest amounts in case of emotional damage.

### 3.4 Unlawful conduct

Conduct will be unlawful if it (i) infringes a person's right, (ii) violates a statutory duty or (iii) violates a rule of unwritten law pertaining to proper social conduct; except when there's a justification defence. Conduct can consist of action or refraining from action.

An example of infringement of a person's right is if the responder damages another person's property. In that case the responder infringes this person's right to undisturbed enjoyment of his property which follows from his ownership.

Book 8 of the DCC includes specific regulation on aid assistance to ships (see further paragraphs 3.7 – 3.9). Violation of these statutory provisions by a responder may for example constitute unlawful conduct.

The criterion 'violation of a rule of unwritten law pertaining to proper social conduct' has been used in a broad range of cases, for example cases where dangerous situations were created. Soft law – such as self-regulation – will be an indication for a judge in respect of the interpretation of the open norm of this criterion. For example, contingency plans and other guidelines on good practice in the oil and gas industry in the North Sea drawn up by the Dutch Oil and Gas Exploitation and Production Association (NOGEP) will in this respect be relevant in the assessment of the conduct of a responder to a well control incident.

Conduct that infringes a right, or violates a statutory duty or a rule of unwritten law will not be unlawful when there's a justification defence. Examples of justification defences are force majeure in an emergency situation and self-defence. In the assessment of such justification defence the professionalism of the responder will play a role. For example, in case of a responding operator a judge will consider what conduct could be reasonably be expected of a reasonable and prudent operator engaged in the same type of undertaking under the same or similar circumstances and conditions.

### 3.5 Causality

The requirement of causality will be met if there is a sine qua non connection between the conduct and the damage, but will also be met if the damage is the consequence of two or more events jointly or separately, caused by different persons.

Furthermore, the nature of the liability and the violated norm will be assessed. If the violated norm is not intended to protect against the damage suffered by the claimant there is no obligation to pay damages (so-called principle of relativity). For example, a claimant who is not an employee of a responder can in principle not claim damages on the basis of violations of any provisions of the

Labour Circumstances Act. However, in such case a judge will consider whether other norms, for example rules of unwritten law, have been breached.

3.6 Unlawful conduct can be imputed to the person

Unlawful conduct can be imputed to a person by fault, but under Dutch law unlawful conduct can – in certain cases - also be imputed to a person on the basis of strict liability. Here it is relevant that on the basis of the DCC an employer will be strictly liable for unlawful conduct of its employees. Furthermore, a company will be strictly liable for unlawful conduct of auxiliary persons, persons that perform work for such company in a non subordinated position.

If a full payment of damages under the given circumstances, including the nature of the liability, the relation between the parties and the financial capacity of the parties would lead to unacceptable outcomes, a judge can mitigate a legal obligation to pay damages.

3.7 Specific regulations on responder liability and aid assistance to ships

Book 8 of the DCC includes inter alia rules with respect to the providing of aid to ships in emergency situations and the possibility for responder to limit liability with respect to certain claims by constituting one or more funds. The aforementioned statutory provisions may in certain situations apply to platforms as described in paragraph 3.8 and 3.9. The first mentioned rules implement provisions of the International Convention on Salvage and the last mentioned rules implement provisions of the Convention on Limitation of Liability for Maritime Claims. If any of the aforementioned conventions is applicable in a certain case, it prevails over the provisions as included in book 8 of the DCC.

3.8 Statutory provisions on aid assistance

In respect of the providing of aid to ships in emergency situations the DCC provides that the responder is obliged (i) to provide the aid with due care and (ii) to exercise due care to prevent or limit environmental damage, (iii) to call other aid providers for assistance if this is necessary under the circumstances; and (iv) to accept the intervention of other aid providers if the captain of the ship, the ship owner or the owner of the goods on the ship reasonably requests for such intervention. Whether the aid provider exercised due care will be assessed on the basis of the care that could be reasonably expected from the responder under the given circumstances. Furthermore, this article provides that the captain of the ship, the owner of the ship or the owner of the goods on the ship is obliged to fully cooperate with the responder during the aid assistance and to exercise due care to prevent or limit environmental damage in such cooperation.

The aforementioned statutory provisions are not applicable in case of aid to fixed or floating platforms or movable drilling installations if these are in operation to explore or extract minerals of the sea-bed or the subsoil thereof at a certain location, unless such installations are being transported to such location. The Parliamentary Explanatory Note in respect of the aforementioned regulation states that these rules are not applicable in such cases because the operators of such installations have drawn up their own contingency plans.

A violation of the provisions as mentioned above by the aid provider may lead to liability to third parties in tort (see paragraph 3.2 to 3.6).

### 3.9 Statutory provisions on limitation of liability

The DCC stipulates that liability can be limited with respect to certain claims provided that the aid provider has constituted one or more funds. This title also sets out the amount to which a certain claim against a responder can be limited. If such claims are made against a person for whose acts, neglect or default a responder is responsible; such person shall also be entitled to avail himself of the limitation of liability.

In respect of these statutory provisions on the limitation of liability the DCC provides that this possibility does not apply to a platform that is built for the exploration or extraction of minerals of the bottom of the sea and that is able to float, if such platform is fixed to the bottom of the sea. Hence, it does apply to floating platforms not fixed to the bottom of the sea. (This is a derogation in respect of the Convention on Limitation of Liability for Maritime Claims which provides in article 15 subsection 5 (b) that the convention is not applicable to floating platforms constructed for the purpose of exploring or exploiting the natural resources of the sea-bed or the subsoil thereof.)

## Appendix 2 – Responder Immunity Survey

### Survey of Responder Immunity Laws

#### 1. Introduction

1.1 This survey has been carried out in order to assess whether specific statutory provisions, which have the effect of protecting from liability those individuals or corporations who provide support, assistance, or advice in mitigating the effects of oil spill incidents (“responders”), are in place in different jurisdictions around the world.

1.2 The legislation of 22 different territories has been reviewed and the results show that most of the countries have no specific laws providing responders with protection against liability in such situations. Specific rules were observed only in the US, Canada, Norway and Australia.

1.3 The liability of responders could be also limited in accordance with international conventions, namely the 1992 Civil Liability Convention and 1992 Fund Convention. Most of the countries reviewed are signatories to these international conventions. However; the scope of the conventions is restricted to loss or damage caused by contamination resulting from the escape or discharge of oil from the ship. These conventions are discussed further at section 2.1.

1.4 The countries reviewed were among the top 20 countries for offshore oil production, together with Australia (as it was understood to have responder immunity laws) and Indonesia (21st in at least one league table). The reason for the selection of countries was that they should give a good overall representation of the laws likely to come into play in the event of a requirement to rely of such applicable responder immunity laws.

1.5 Countries surveyed were:

Saudi Arabia	Qatar
Russia	United Kingdom
United States	Azerbaijan
Iran	Indonesia
China	Australia
Canada	
Iraq	
UAE	
Mexico	
Kuwait	
Brazil	
Nigeria	
Venezuela	
Norway	
Algeria	
Angola	
Kazakhstan	

- 1.6 In the absence of specific laws granting immunity to responders, organisations which provide assistance in emergency situations such as a loss of well control incident may be liable for their actions. It should be clarified, however, that a survey of the tort laws of each country or other relevant laws as may be applicable to responders is outwith the scope of this note.
- 1.7 This Report presents (i) specific exceptions to responders' liability arising out of international conventions, noting the countries, from those reviewed, that are signatories to those conventions, and (ii) the provisions present in the domestic legislation of the countries reviewed which effectively grant immunity to responders.

## **2. International Legal Framework**

- 2.1 1992 Civil Liability Convention and 1992 Fund Convention
- 2.1.1 The 1992 Civil Liability Convention ("1992 CLC") and the 1992 Fund Convention define the international legal framework for the liability of ship-owners for oil pollution damage (originally the 1969 International Convention on Civil Liability for Oil Pollution Damage and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, however, this regime was amended in 1992). Together, these conventions form a two-tier system for compensation to governments or other authorities in case of an oil pollution incident.
- 2.1.2 The 1992 CLC establishes a regime where ship-owners are strictly liable for oil pollution damage but claims are limited to a certain amount related to the size of the ship. The 1992 Fund Convention governs liability when compensation under the CLC is considered inadequate to compensate victims.
- 2.1.3 Both conventions are applicable to oil pollution damage caused in the territory (including territorial sea) or in the Exclusive Economic Zone (EEZ) of a Contracting State. However, they apply only to the loss or damage caused outside a ship by contamination resulting from the escape or discharge of oil from the ship and do not apply to loss or damage caused by supply of personnel or other equipment.
- 2.1.4 For the purpose of this report, an important provision is article III of the 1992 CLC which prohibits claims against any person taking preventive measures or performing salvage operations with the consent of the owner or on the instructions of a competent public authority. It may therefore be relevant if the support rendered in the event of an offshore incident takes the form of supply of a vessel owned by the responder.
- 2.1.5 The following table summarises which of the countries surveyed are covered by the conventions:

<b>State</b>	<b>1992 CLC</b>	<b>1992 Fund Convention</b>
Saudi Arabia	X	
Russia	X	X
United States		
Iran	X	
China	X	X
Canada	X	X
Iraq		
United Arab Emirates	X	X
Mexico	X	X
Kuwait	X	
Brazil		
Nigeria	X	X
Venezuela	X	X
Norway	X	X
Algeria	X	X
Angola	X	X
Kazakhstan		
Qatar		X
United Kingdom	X	X
Azerbaijan	X	
Indonesia	X	
Australia	X	X

### 3. Survey of Responder Immunity Laws

This section details the responder immunity laws for the countries where such limitations might be available in relation to parties providing emergency aid, as far as we have been informed.

#### 3.1 United States

##### 3.1.1 Oil Pollution Act 1990

The Oil Pollution Act 1990 (the “OPA 90”) was introduced following the oil spill incident which occurred in Alaska in 1989 when the Exxon Valdez oil tanker ran aground. The OPA 90 concerns the liability of those involved in oil spill incidents (spills may be from vessels, offshore and onshore facilities) and sets down the principle that the party who is responsible for the pollution (ordinarily the owner of the relevant facility or the licence holder) is responsible for the damage caused.

In respect of the liability of parties who provide assistance in responding to emergency oil spill incidents, the OPA 90 contains a provision which protects such parties from liability (except in the case of personal injury or wrongful death and provided that the actions of the responder do not constitute gross negligence or wilful misconduct). The responder immunity provision was expressed to have the purpose of ensuring that “responses to oil spills be immediate and effective. Without such a provision the substantial financial risks and liability exposures associated with spill response could deter vessel operators, cleanup contractors, and cleanup cooperatives from prompt, aggressive response”<sup>4</sup>.

##### 3.1.2 Problems with OPA 90

Notwithstanding the provisions in the OPA 90, in the aftermath of the Deepwater Horizon incident – a rig explosion which resulted in approximately 4 million barrels of oil being spilled into the Gulf of Mexico – a large number of claims were raised against responders, many of which were complex multidistrict litigations<sup>5</sup>. The claims were on the basis of alleged gross negligence (even though there may not necessarily have been evidence supporting such allegations) or personal injury<sup>6</sup>, both of which are expressly excluded from the scope of the OPA 90.

Such actions have caused a great deal of concern among the responder community as the provisions of the OPA 90 have not prevented responders from becoming involved in legal actions. Regardless of the outcome of an action, it is clear that responders are still at risk of having to defend claims, potentially spending large amounts of money on legal fees in the process.

<sup>4</sup> H.R. Conf. Rep. 101-653 (August 1, 1990)

<sup>5</sup> American Salvage Association – Soundings, volume 10, No.3, Fall 2011

<sup>6</sup> American Salvage Association – Soundings, volume 10, No.3, Fall 2011

The result of such legal actions could be that responders are reluctant to provide prompt assistance in relation to future emergency incidents and delays could occur if responders are concerned about obtaining contractual protection in respect of exposure to liability. This situation would be at odds with the intention of the responder immunity provision in the OPA 90.

### 3.1.3 Proposed amendments to responder immunity law

The Deepwater Horizon incident caused members of the responder industry to review the applicable law and to take action to increase the level of protection available to responders. A coalition, incorporating a range of bodies from across the industry including the American Salvage Association and the Spill Control Association of America among others, was formed to address the matter<sup>7</sup>.

The proposed legislation, which arose as a result of the coalition, is intended, amongst other things, to provide (1) a clear definition of the term “responder”, (2) that court costs and legal fees will be paid by the claimant, (3) that the responder will be protected with the same immunity as the government in respect of an emergency response incident, (4) that the scope of immunity will be extended to include personal injury, and (5) that the responder will be protected from civil and criminal penalties<sup>8</sup>.

It was hoped that the new responder immunity provisions would be passed in 2012, however, this did not occur and further development is yet to be reported. Despite the slow progress, the matter is still considered to be a key issue for the response industry in order to ensure that, if another major spill occurs in the future, responders will not hesitate in providing their services<sup>9</sup>.

## 3.2 Canada

3.2.1 Under s. 201(7) of the Canadian Environmental Protection Act, 1999 (SC 1999, c. 33), anyone who provides assistance or advice in taking measures to respond to an environmental emergency (including when directed to do so by an enforcement officer) is not personally liable, either civilly or criminally, for any act or omission by them unless it is established that they acted in bad faith. However, this exemption does not extend to anyone who is an owner, or who has charge, management or control of the affected substance before the emergency, or who has caused or contributed to the emergency. An environmental emergency is defined in that Act to include “an uncontrolled, unplanned or accidental release” of a listed substance (s. 193). The substances affected are set out in the Environmental Emergency Regulations (SOR/2003-307), which lists dozens of toxic substances including benzene, ethylene, propane, butane, toluene, liquefied natural gas, gasoline and naphtha.

---

<sup>7</sup> American Salvage Association – Soundings, volume 10, No.3, Fall 2011

<sup>8</sup> Marine Salvage, January 2013, Vol 118, No.1

<sup>9</sup> Marine Salvage, January 2013, Vol 118, No.1



3.2.2 In respect of discharges of pollution from a vessel in Canada, response organisations and persons designated by the federal Minister of Fisheries and Oceans as approved responders are not personally liable, civilly or criminally, for any act or omission arising during the course of a response operation unless it is shown that they acted with intent to cause loss or damage, or acted recklessly with knowledge that loss or damage would occur (Canada Shipping Act, 2001 (SC 2001, c. 26), s. 181(2)). A “response operation” is broadly defined to include virtually any operation or activity that would be undertaken in response to the discharge of pollution from a vessel (s. 181(4)). There are four designated oil spill response organisations in Canada, each with a defined geographic region for which they have responsibility.

(See: [www.tc.gc.ca/eng/marinesafety/oep-ers-regime-ros-771.htm](http://www.tc.gc.ca/eng/marinesafety/oep-ers-regime-ros-771.htm))

3.2.3 As an example, under the Ontario Environmental Protection Act (RSO 1990, c. E.19), Ontario government employees are protected from having any action or other proceeding instituted against them for any act done in good faith in the execution or intended execution of their duties and authority under the Act, or for any alleged neglect or default in the execution in good faith of their duties and authority (s. 180). Those duties could include responding to spills.

### 3.3 Norway

3.3.1 The Norwegian Petroleum Act 1966 (the “1966 Act”) establishes that licensees are strictly liable for damages legally defined as pollution damage. It also sets out, under section 7-4 (c) of the 1966 Act, a protection for individuals and companies involved in work related to mitigating the effects of oil pollution. However, this provision only provides immunity in relation to liability for pollution damage therefore it is not directly applicable if a person injures persons or damages property while acting to mitigate the effects of an oil spill. This provision, which has remained unchanged for 28 years, reads as follows:

“Section 7-4 Channelling of liability

The liability of a licensee for pollution damage may only be claimed pursuant to the rules of this Act. Liability for pollution damage cannot be claimed against:

a) anyone who by agreement with a licensee or his contractors has performed tasks or work in connection with the petroleum activities.

b) anyone who has manufactured or delivered equipment to be used in the petroleum activities.

c) anyone who undertakes measures to avert or limit pollution damage, or to save life or rescue values which have been endangered in connection with the petroleum activities, unless the measures are performed in conflict with prohibitions imposed by public authorities or are performed by someone other than public authorities in spite of express prohibition by the operator or the owner of the values threatened.

d) anyone employed by a licensee or by someone mentioned under literas a, b or c.

If the licensee has been ordered to pay compensation for pollution damage, but fails to pay within the time limit stipulated by the judgement, the party that has sustained damage may bring action against the party that has caused the damage to the same extent as the licensee may bring action for recourse against the party causing the damage, cf. Section 7-5.

The licensee may claim compensation from the party causing pollution damage to him to the same extent as the licensee may bring action for recourse against the party causing the damage, cf. Section 7-5."

- 3.3.2 If the responder has acted with wilful misconduct or gross negligence, immunity may not be available as per Section 7-5 of the 1966 Act which is noted below.

"Section 7-5 Recourse

The licensee cannot claim recourse for pollution damage against someone exempted from liability pursuant to the rules of Section 7-4, unless the person in question or someone in his service has acted wilfully or by gross negligence.

Recourse liability may be mitigated to the extent that this is considered reasonable in view of manifested conduct, economic ability and the circumstances in general.

The provisions contained in the Maritime Act of 24 June 1994 No. 39 relating to limitation of liability shall be applicable to the extent recourse is claimed against someone entitled to limitation of liability pursuant to the rules of the Maritime Act.

Any agreement on further recourse in respect of those against whom liability cannot be claimed pursuant to Section 7-4, second paragraph, shall be invalid."

### **3.4 Australia**

- 3.4.1 The Protection of the Sea Legislation Amendment Act 2010 (the "2010 Act"), came into effect on 9th November 2010 and amends both the Protection of Sea (Prevention of Pollution from Ships) Act 1983 (PPS Act) and the Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008 (Bunkers Act). The key amendment in respect of responder immunity is the addition of a new section 24A to the Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008 (the "2008 Act").
- 3.4.2 Prior to the introduction of the 2010 Act, there was no specific legal protection in domestic law for responders and if their actions in relation to an oil spill incident caused further pollution damage, they could be held responsible.
- 3.4.3 Under the new section 24A "no civil action, suit or proceeding lies against a person in relation to anything done, or omitted to be done, reasonably and in good faith by the person in relation to preventing or minimising pollution damage" meaning that, subject to

certain exceptions, no civil legal action should be raised against a person who has provided assistance in responding to an oil spill incident. Responder immunity shall not be applicable: (1) to the ship-owner concerned, or (2) where the party seeking to rely on the exemption has acted (or omitted to act) with intent to cause damage or recklessly with the knowledge that damage would be likely to occur.

- 3.4.4 The scope of responder immunity appears to be limited to spills in connection with ships – ‘Pollution damage’ is defined by the 2008 Act as “loss or damage caused outside the ship by contamination resulting from the escape or discharge of bunker oil from the ship” and ‘ship’ is defined as “any seagoing vessel and seaborne craft, of any type whatsoever”.
- 3.4.5 The rationale behind the introduction of statutory immunity was to provide responders with a greater degree of certainty that they would not be the subject of future legal claims in respect of their actions. It was considered “essential that persons or organisations not be deterred from providing assistance following an oil spill because they think they may become liable if their actions inadvertently lead to increased pollution”<sup>10</sup>.

#### **4. Conclusion**

- 4.1 This report presented the results of a survey on the domestic legislation of different jurisdiction to assess whether there are specific provisions granting immunity to protect from liability those individuals or corporations who provide care, assistance, or advice in mitigating the effects of oil spill.
- 4.2 The appraisal of the legislation of 22 different countries revealed that the majority have no specific provisions limiting the liability of responders. In addition to the US, where the OPA 90 provisions have become a benchmark, only Canada, Norway and Australia have similar terms in place.
- 4.3 Most of the countries researched are signatories for the 1992 Civil Liability Convention which limit liability as noted in section 2.1 of this report. However, the conventions have limited effect for responders, being applicable only to pollution caused by vessels.
- 4.4 Finally, it should be clear that in the absence of specific responder immunity provisions, a responder’s liability for acts and omissions conducted during response will be determined under the civil (and potentially criminal) law of the country concerned but also by contractual indemnities available to the responder.

---

<sup>10</sup> Second reading speech for the Protection of the Sea Legislation Amendment Act 2010. Taken from ‘Oil Pollution Responder Immunity now part of Australian Law’, Norton White, December 2010.

# Template Emergency Personnel Secondment Agreement

## **Introduction**

The template Emergency Personnel Secondment Agreement (EPSA) provided on the following pages would be suitable for use in a common law jurisdiction – or a civil law jurisdiction, upon making any necessary amendments. It has been drafted in accordance with English law, on the basis that many international oil and gas organizations opt to use English law in their standard agreements, even where the place of work is not the UK and where the parties to the contract are not UK-registered companies.

Subject to the inclusion of any pertinent local legal requirements, there is unlikely to be any issue in using an English law-compliant liability agreement in an international context. If, however, the parties do not wish to use English law, the draft agreement could easily be adapted to be governed by the law of another jurisdiction.

Specific guidance on the use of the template can be found in Part C of the Guidance Notes on pages 6–17 of this document, and should be read alongside the template EPSA.

Dated

201[●]

---

[ Party 1 ]

- and -

[ Party 2 ]

---

**Emergency Personnel Secondment Agreement**

---

Note: this document should be used in conjunction with the accompanying Guidance Notes [which are available from the [●] website].

Provision of personnel by a Responder and use of the template is voluntary. IPIECA / IOGP acknowledge that often there may be facts and circumstances that exist at the time aid is requested that may cause a Responder to decline aid, to decline to use the template agreement or to alter the terms and conditions of this template agreement, and the Responder need not disclose the reasons or rationalize any such decision which may be based on any factor that, in the sole discretion of the Responder, is relevant to the safe or commercial operation of its business or asset.

The template is not intended by the IPIECA / IOGP members to be, nor is it binding on such members. It is intended only as a starting point for any party involved in an offshore emergency incident when requesting assistance from third parties, with a view to promoting the efficient provision of personnel during such emergency.

## Table of Contents

1. Definitions and Interpretation	II
2. Commencement, Duration and Scope of Agreement	VI
3. Responder Secondees	VI
4. Payment	VIII
5. Expenses	IX
6. Taxes	X
7. Indemnities	X
8. Consequential Loss	X
9. Exclusion of Liability	XI
10. Insurance	XI
11. Notification of Claims	XI
12. Confidentiality	XI
13. Termination of Secondment of Responder Secondees	XII
14. Termination of Agreement	XIII
15. Anti-Bribery	XIV
16. Communications	XIV
17. Notices	XV
18. Further Investigation of the Incident	XVI
19. Force Majeure	XVI
20. Costs	XVI
21. Assignment	XVI
22. Relationship of Parties	XVI
23. Third Party Rights	XVII
24. Counterparts	XVII
25. Waiver	XVII
26. Severability	XVII
27. Variation	XVII
28. Entire Agreement	XVII
29. Governing Law	XVII
Schedule 1: Responder Secondees, Duties, Location and Secondment Period	XIX
Schedule 2: Form of Undertaking of Confidentiality	XX

This **EMERGENCY PERSONNEL SECONDMENT AGREEMENT** is made and entered into on \_\_\_\_\_ 20[●]

**BETWEEN**

- (1) [NAME], a company having an office at [address] (hereinafter referred to as the “**Incident Operator**”);  
and
- (2) [NAME], a company having an office at [address] (hereinafter referred to as the “**Responder**”).

The Incident Operator and the Responder may be referred to individually as a “**Party**” or together as the “**Parties**”.

**RECITALS**

**WHEREAS**

- (A) The Incident Operator now requires the assistance of the Responder in the form of the secondment of personnel, in connection with an offshore emergency incident (the “**Incident**”).
- (B) The Responder has agreed to make certain of its personnel available to the Incident Operator to perform duties in response to the Incident, and the Responder and the Incident Operator desire to set out the terms of such secondment of personnel on the terms set out herein.
- (C) This Agreement is based on the standard Emergency Personnel Secondment Agreement provided by IPIECA dated [●] / version [●].

The Parties hereby agree as follows:

**1. Definitions and Interpretation**

1.1 In this Agreement, unless the context otherwise requires, the following definitions apply:

“**Affiliate**” means, in respect of a Party, any company or other entity that controls, is controlled by, or is under common control with, such Party. For the purposes of this definition, control shall mean the ownership, directly or indirectly, of more than fifty percent (50%) of the voting rights in the appointment or removal of the directors or similar representatives of such company or entity, either through ownership of shares or shareholders’ agreement. “**Affiliates**” shall be construed accordingly.

“**Agreement**” means this emergency personnel secondment agreement.

“**Claims**” means any and all claims, losses, damages, costs (including legal costs), expenses, liabilities, fines, penalties or causes of action or other imposition of whatever nature.

“**Consequential Loss**” means any indirect or consequential loss howsoever caused or arising whether under contract, by virtue of any fiduciary duty, in tort or delict (including negligence), as a consequence of breach of any duty (statutory or otherwise) or under any other legal doctrine or principle whatsoever whether or not recoverable at common law or in equity, and without prejudice to the foregoing generality, the following to the extent to which they might not otherwise constitute indirect or consequential loss

- (a) loss or damage arising out of any delay, postponement, interruption or loss of production, any inability to produce, deliver or process hydrocarbons or any loss of or anticipated loss of use, profit or revenue (whether direct or indirect);
- (b) loss or damage incurred or liquidated or pre-estimated damages of any kind whatsoever borne or payable, under any contract for the sale, exchange, transportation, processing, storage or other disposal of hydrocarbons;

- (c) losses associated with business interruption including the cost of overheads incurred during business interruption;
- (d) loss of bargain, contract, expectation or opportunity;
- (e) damage to any reservoir, geological formation or underground strata or the loss of hydrocarbons from any of them; and
- (f) any other loss or anticipated loss or damage whatsoever in the nature of or consequential upon the foregoing.

“**Cost Rate**” means a sum equivalent to the aggregate of:

- (i) the actual costs incurred by the Responder in relation to the employment of each relevant Responder Seconded during any calendar year, including (to the extent relevant) the costs to the Responder of:
  - (a) the Responder Seconded's annual salary or wages;
  - (b) the cost of holiday, sickness, and disability benefits, and other customary allowances paid to such Responder Seconded excluding severance payments or other termination allowances; ***[details of any other payments or allowances paid to the seconded under that person's contract of employment]***;
  - (c) [National Insurance contributions] ***[OR non-UK insert other legally required contributions]*** or other expenditures or contributions made pursuant to assessments imposed by governmental authority that are applicable to the salaries and wages referred to in (a) made by the Responder in relation to the Responder Seconded;
  - (d) the current cost of established plans for employee benefits, including group life insurance, medical and dental insurance, pension, stock purchase, thrift, bonus, and gross-up for income or withholding tax, applicable to the salaries and wages referred to in (a), based on the Responder's (or its Affiliates) actual cost;

the aggregate of all such payments being averaged across the number of days for which the Responder Seconded is contracted to work during the year to produce a daily rate and such rate being applied to the number of working days during the relevant invoice period during which Duties were performed;

- (ii) actual costs incurred by the Responder for training pursuant to its training policy or in relation to the Duties of Responder Secondeds;
- (iii) costs of performance awards to Responder Secondeds, to the extent such awards pertain to the Duties;
- (iv) any overtime payments made to the Responder Seconded during the performance of the Duties and approved in advance by the Incident Operator; and
- (v) relocation costs, consistent with the Responder's (or its Affiliates') normal allocation procedures, incurred in transferring Responder Secondeds in connection with the performance of the Duties, to the extent not recovered under Clause 5;

“**Co-Venturer(s)**” means any other entity with whom the Incident Operator or Responder (as the case may be) is, or may be from time to time, party to a joint operating agreement or unitisation agreement or similar agreement relating to the operations for which the Duties are being performed or in which the Responder Secondeds are usually engaged, as applicable, and the successors in interest of such Co-Venturer or the assignees of any interest of such Co-Venturer.



**“Duties”** means the duties to be performed by the relevant Responder Seconddees as specified in Schedule 1.

**“Effective Date”** means the date of execution of this Agreement.

**“Force Majeure Event”** means an event which is outside of the control of the Party affected including:

- (a) riot, war, invasion, act of foreign enemies, hostilities (whether war be declared or not), acts of terrorism, civil war, rebellion, revolution, insurrection of military or usurped power;
- (b) Ionising radiations or contamination by radio-activity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel or radio-active, toxic, explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof;
- (c) Pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds;
- (d) Earthquake, flood, fire, explosion and/or other natural physical disaster, but excluding the Incident and weather conditions as such, regardless of severity;
- (e) Strikes at a national or regional level or industrial disputes at a national or regional level, or strikes or industrial disputes by labour not employed by the affected Party its subcontractors or its suppliers and which affect a substantial or essential portion of the Duties;
- (f) Maritime or aviation disasters;
- (g) Changes to any legislation or the introduction of new legislation (such legislation being applicable to the Agreement), excluding any changes or new legislation which could reasonably have been foreseen at the Effective Date.

**“Incident”** means the incident as defined in recital (A).

**“Incident Operator Confidential Information”** means any information which is provided by or on behalf of the Incident Operator Group to the Responder in connection with the performance of the Duties of a Responder Seconddee under the Agreement;

**“Incident Operator Group”** means the Incident Operator, its Co-Venturer(s), its Affiliates, its and their other contractors (of any tier), its and their respective directors, officers, agents, employees and other personnel (including agency personnel), but shall not include any member of the Responder Group.

**“Location”** means any location at which Responder Seconddees are required to perform the Duties as specified in Schedule 1 , or as otherwise agreed between the Parties in writing from time to time (acting reasonably), which may be on land, waters or other places including offshore installations, floating construction equipment and vessels.

**“Payments”** means the payments, charges and/or costs payable by the Incident Operator to the Responder in accordance with Clause 4.

**“Responder Group”** means the Responder, its Affiliates, its Co-Venturer(s), its and their other contractors (of any tier), its and their respective directors, officers, agents, employees and other personnel (including agency personnel) and any Responder Seconddees, but shall not include any member of the Incident Operator Group.

**“Responder Secondees”** means the persons provided by the Responder to the Incident Operator under the conditions set out in this Agreement and as specified in Schedule 1 or as otherwise agreed between the Parties in writing from time to time.

**“Secondment Period”** means the period during which each Responder Secondee is to perform the Duties, as specified in Schedule 1.

- 1.2 In this Agreement, unless the context otherwise requires, the following rules shall apply:
- 1.2.1 A person includes a natural person, corporate or unincorporated body (whether or not having separate legal personality).
  - 1.2.2 A reference to a Party includes its successors or permitted assigns.
  - 1.2.3 A reference to a statute or statutory provision is a reference to such statute or statutory provision as amended or re-enacted and includes any subordinate legislation made under that statute or statutory provision, as amended or re-enacted.
  - 1.2.4 Any phrase introduced by the terms “including”, “include”, “in particular” or any similar expression, shall be construed as illustrative and shall not limit the sense of the words preceding those terms.
  - 1.2.5 Unless the context otherwise requires in this Agreement the singular shall include the plural and vice versa.
  - 1.2.6 A reference to a ‘Clause’ or a ‘Schedule’ shall be to a clause or schedule of the Agreement.
  - 1.2.7 To the extent that any applicable law or regulation offers any member of the Responder Group additional and/or more beneficial protections beyond those envisaged in this Agreement, such applicable law or regulation shall take precedence over the provisions of this Agreement.

## **2. Commencement, Duration and Scope of Agreement**

- 2.1 The Agreement shall commence on the Effective Date and shall continue for the duration of the Secondment Period or if earlier, until terminated by either Party in accordance with Clause 13 (Termination).
- 2.2 The Responder shall make available the Responder Secondees to perform the Duties at the Location for the Secondment Period unless the secondment of any Responder Secondee is terminated earlier in accordance with Clause 13.
- 2.3 The Incident Operator shall have the right to specify the scope and nature of the duties to be performed by each Responder Secondee, and the Responder authorises the Incident Operator to instruct, supervise and direct each Responder Secondee in the performance of such duties, provided always that such specifications and directions generally fall within the description of the Duties relating to such Responder Secondee as specified in Schedule 1.

## **3. Responder Secondees**

- 3.1 Permits, visas and medicals

The Parties shall co-operate and provide each other with any assistance reasonably requested by the other Party in connection with obtaining any documentation and/or authorisations relating to work permits, visas, medical certification and any other administrative authorisations as may be required to allow each Responder Secondee to perform the Duties at the Location, save that the Incident Operator or the Responder (as the case may be) shall be solely responsible for obtaining

any such permits, visas, medical authorisations or other administrative authorisations which only the Incident Operator or the Responder (as the case may be) is authorised to apply for and obtain.

### 3.2 Work environment, facilities and equipment to be provided by the Incident Operator

The Incident Operator shall provide the following items and services to Responder Secondees as reasonably required in order to perform the Duties at the Location and shall do so to the same extent that the Incident Operator provides such items and services to its own equivalent personnel:

- (a) accommodation and transportation;
- (b) facilities and equipment with which to perform the Duties including any personal protective equipment;
- (c) a safe working environment in accordance with applicable regulations and the HSSE Policy of the Incident Operator;
- (d) security, safety, crisis-management and first aid services and facilities; and
- (e) on-the-job training or programs needed to enable Responder Secondees to competently and effectively use the items and services referred to in this Clause 3.2.

### 3.3 Exchange of information

Each Party shall endeavour to provide such other information or assistance to the other Party as is reasonably required regarding Responder Secondees.

### 3.4 [ Annual leave and other absences

3.4.1 Subject to the Incident Operator's reasonable requirements, Responder Secondees shall be permitted to take annual leave according to the normal and relevant policies and practices of the Responder. The Responder shall notify and consult the Incident Operator in advance of any annual leave that will be taken by Responder Secondees.

3.4.2 Any annual leave planned and agreed between Responder Secondees and the Responder may, provided that the Incident Operator has been informed of the duration and timing of such annual leave prior to the Incident Operator accepting the relevant Responder Secondee, be taken by the Responder Secondee without further consultation with the Incident Operator.

3.4.3 Each Party shall inform the other Party of any accident or illness of a Responder Secondee which occurs at the Location or otherwise (as the case may be) and which prevents such Responder Secondee from performing the Duties in accordance with the Agreement during the applicable Secondment Period. If the Responder Secondee is prevented from performing the Duties, the Responder shall endeavour to provide a substitute individual with equivalent skills and experience to perform the Duties. ]

### 3.5 No transfer of employment

3.5.1 The Parties agree that it is not their intention that the commencement, termination, or expiry of this Agreement or all or any part of the Duties to be performed will constitute a relevant transfer for the purposes of [the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE")] [Insert relevant employment law if applicable]. The Responder agrees that it shall remain the employer of all Responder Secondees at all stages during, on and after the expiry or termination of this Agreement or all or any part of performance of the Duties.

- 3.5.2 The Responder shall be responsible for all employer obligations to Responder Secondees, including remuneration, employee benefits, payment of all taxes and national insurance contributions, pension payments, insurances, promotion and career planning. The Responder shall defend, indemnify and hold harmless the Incident Operator Group from and against any and all Claims arising from, out of or in connection with the failure of the Responder to make such payments.
- 3.5.3 The Responder shall defend, indemnify and hold harmless the Incident Operator Group from and against any and all Claims which may be suffered or incurred by the Incident Operator Group arising from, or in connection with, the employment and/or dismissal of (or other obligation relating to) any Responder Secondee who is or has been seconded to the Incident Operator Group at any stage whatsoever and howsoever, whether during, on or after the expiry or termination of this Agreement or all or any part of the Duties, pursuant to TUPE or otherwise.
- 3.5.4 Only the Responder shall have the authority to terminate the employment or change the terms of employment of any Responder Secondee or to administer disciplinary action. The Incident Operator shall have no such authority and shall only have the rights to terminate the secondment of Responder Secondees under this Agreement pursuant to Clause 13.

### 3.6 No recruitment

The Incident Operator may not, without obtaining the prior written consent of Responder, solicit any Responder Secondee with a view to employment during the term of the Responder Secondee's Secondment Period or for a period of **[twenty-four (24) months]** following the end of such Secondment Period.

### 3.7 Substitution of Responder Secondees

The Responder shall be entitled to request a substitution of a Responder Secondee at any time during the Agreement by providing a written notice of such request, provided that the Responder agrees to provide a substitute individual with equivalent skills and experience.

### 3.8 Representations

3.8.1 The Responder represents that each Responder Secondee is an employee of the Responder [or one of Responder's Affiliates].

3.8.2 The Incident Operator represents that:

- (a) it has received sufficient evidence of each Responder Secondee's qualifications and suitability to perform the Duties; and
- (b) it has verified the qualifications of each Responder Secondee and found those qualifications suitable and sufficient for the performance of the Duties.

3.8.3 The Responder does not give any representations or warranties, implied or express, other than those set forth in Clause 3.8.1.

## 4. Payment

4.1 The Incident Operator shall pay the Responder for the performance of the Duties provided by Responder Secondees at the day rates for such Responder Secondee as set out in Schedule 1, or if no such rates are provided, at the Cost Rate, in each case exclusive of VAT (and/or any other tax or duty); and (the "**Payments**").

- 4.2 At the end of each month during the term of the Agreement the Responder shall submit to the Incident Operator an invoice which gives details of the days which each Responder Seconded has worked that month (based on the timesheets signed off under Clause 4.3, if any) and the amount payable [(plus VAT, if applicable)] [together with details of any expenses payable pursuant to Clause 5].
- 4.3 The Responder shall use its reasonable endeavours to ensure that the Responder Secondeds keep accurate records of the hours they have spent on the performance of their Duties and shall submit such timesheets electronically on a weekly basis, or such other basis as may be agreed, to the Incident Operator for approval.
- 4.4 If any Responder Seconded is performing Duties on a part-time basis, the charge for such Responder Seconded shall be a percentage of the charge that would have been paid for such Responder Seconded on a full-time basis determined by the proportion that the number of hours recorded by such Responder Seconded on the timesheets signed off by the Incident Operator under Clause 4.3 bears to the total number of hours worked inclusive of vacation and holidays by such Responder Seconded in a certain month.
- 4.5 The Incident Operator shall pay each invoice submitted by the Responder in accordance with Clause 4.2, within 60 days of receipt.
- 4.6 If the Incident Operator disputes any invoice, in whole or in part, then the Incident Operator shall be liable under Clause 4.5 to pay only the undisputed portion of such invoice until such time as the Incident Operator and the Responder have reached agreement as to what payment, if any, is due. The Incident Operator shall promptly notify the Responder of any disputed amount and the Parties shall endeavour to settle expeditiously and in good faith any dispute. Any agreed adjustment or subsequent payment shall be made within 30 days following the date of settlement.
- 4.7 If the Incident Operator fails to pay the Responder on the due date (excluding sums reasonably in dispute) then, without prejudice to any other right or remedy that it may have, the Responder may:
- 4.7.1 charge interest on such sum from the due date for payment at the annual rate of two percent (2%) above the base rate from time to time of [full name of bank], accruing on a daily basis and being compounded quarterly until payment is made, whether before or after any judgment] and the Incident Operator shall pay the interest immediately on demand; and
- 4.7.2 suspend the provision of Responder Secondeds and the performance of the Duties until payment has been made in full.

**[OR (in place of 4.1 – 4.7)]**

- 4.1 [The Responder Secondeds shall be provided by the Responder to the Incident Operator free of charge, [except as set out in Clause 5]].

## **5. Expenses**

- 5.1 [The Incident Operator shall reimburse the Responder for all reasonable expenses properly and necessarily incurred by it or by the Responder Secondeds in connection with the performance of the Duties subject to production of receipts or other appropriate evidence of payment]

**OR**

[The Incident Operator shall be directly responsible for all expenses incurred in connection with the performance of the Duties and Responder Secondeds under the Agreement and shall reimburse the Responder Secondeds for all reasonable expenses properly and necessarily incurred subject to production of receipts or other appropriate evidence of payment]

**OR**

[The Responder shall bear its own expenses incurred in connection with the Agreement and shall not be entitled to reimbursement from the Incident Operator].

## **6. Taxes**

- 6.1 The Incident Operator shall, unless otherwise provided for in the Agreement, be responsible for the payment of all taxes, duties, levies, charges and contributions (any interest or penalties thereon) for which the Incident Operator is liable as imposed by any appropriate government authority arising from this Agreement.

## **7. Indemnities**

- 7.1 The Incident Operator shall defend, indemnify and hold harmless the Responder Group from and against all Claims arising from, out of or in connection with this Agreement in respect of:

- 7.1.1 loss or recovery of or damage to property of the Incident Operator Group or Responder Group whether owned, hired, leased or otherwise;
- 7.1.2 personal injury including death or disease to any person employed by the Incident Operator Group or Responder Group,
- 7.1.3 personal injury including death or disease or loss of or damage to the property of any third party, and for the purposes of this Clause "third party" shall mean any party which is not a member of the Responder Group or Incident Operator Group;
- 7.1.4 loss of or damage to any well or hole (including, without limitation, the cost of re-drill);
- 7.1.5 blowout, fire, explosion, cratering or any uncontrolled well condition (including, without limitation, the costs to control a wild well and the removal of debris);
- 7.1.6 damage to any reservoir, geological formation or underground strata or the loss of oil or gas therefrom;
- 7.1.7 pollution or contamination of any kind including, without limitation, the cost of control, removal and clean-up; or
- 7.1.8 damage to, or escape of any substance from, any pipeline, vessel, or storage or production facility,

in each case regardless of cause and irrespective of negligence and/or breach of duty (statutory or otherwise) of any member of the Incident Operator Group or the Responder Group including where such Claim has arisen as a result of the gross negligence or wilful misconduct of any member of the Responder Group.

- 7.2 For the avoidance of doubt, Responder Seconddees shall have no responsibility whatsoever for any Claims regardless of cause and irrespective of negligence and/or breach of duty (statutory or otherwise) including where such Claim has arisen as a result of the gross negligence or wilful misconduct of any such Responder Seconddee.

## **8. Consequential Loss**

- 8.1 Notwithstanding any provision to the contrary elsewhere in the Agreement, the Incident Operator shall be liable for, and shall defend, indemnify and hold the Responder Group harmless from and against the Incident Operator Group's own Consequential Loss, arising out of or in connection with [the Incident and/or] this Agreement.

8.2 The Incident Operator shall have no liability to the Responder for any Consequential Loss suffered by the Responder arising out of the fact that the Responder Seconded is not available to perform work for the Responder due to the secondment of any Responder Seconded under this Agreement.

8.3 Nothing in this Clause 8 is intended to affect any liability of the Incident Operator to the Responder Group arising out of or in connection with the Incident.

## **9. Exclusion of Liability**

9.1 Subject to Clause 9.2, the Responder shall have no liability to the Incident Operator for the performance, mis-performance, poor performance or non-performance of the Duties provided by Responder Secondeds. The only remedy available to the Incident Operator for any performance, mis-performance, poor performance or non-performance shall be termination of the secondment of the individual Responder Seconded concerned in accordance with Clause 14.

9.2 The exclusion described at Clause 9.1 shall be without prejudice to any indemnity given by the Responder pursuant to this Agreement.

## **10. Insurance**

10.1 The Incident Operator shall effect and maintain, for the duration of the Agreement, appropriate insurance policies in respect of its liabilities and obligations arising under the Agreement. All insurance shall be placed with reputable and substantial insurers and the Incident Operator shall bear all excesses and deductibles incorporated therein. [The Responder shall be entitled to request copies of such insurance policies and may, always acting reasonably, terminate this Agreement in the event that the Incident Operator does not provide evidence of adequate insurance to its reasonable satisfaction.]

10.2 The policy limits of insurance obtained by the Incident Operator in accordance with clause 10.1, or any failure of the Incident Operator to comply with such requirement, shall not relieve the Incident Operator from any of its obligations, nor limit its liability under the Agreement.

## **11. Notification of Claims**

11.1 Each Party shall give the other prompt notice of any Claim with respect to the indemnities under the Agreement, accompanied by full details of the circumstances of any incident giving rise to such Claim. [The indemnified Party shall fully co-operate with the indemnifying Party in the defence of any such Claims, including negotiations, appeals or any settlement or compromise.]

## **12. Confidentiality**

12.1 The Responder shall at no time during the term of the Agreement, [or for a period of [five (5)] years thereafter,] without the prior written consent of the Incident Operator make any publicity releases or announcements concerning [the Incident or] the subject matter of the Agreement.

12.2 The Responder shall at no time during the term of the Agreement, [or for a period of [five (5)] years thereafter,] without the prior written consent of the Incident Operator;

12.2.1 use, reproduce, copy, or disclose to its officers, employees, contractors, agents or professional advisors any Incident Operator Confidential Information, except as may be strictly necessary to enable the Responder to perform its obligations under the Agreement, and where any such disclosure to any person is required pursuant to this clause 12.2.1, the Responder shall ensure such persons have signed a confidentiality undertaking substantially in the form set out at Schedule 2;

- 12.2.2 disclose to or place at the disposal of any other person, or enable any other person to use, peruse or copy any Incident Operator Confidential Information.
- 12.3 The provisions of Clause 12.1 shall not apply to information which the Responder can prove:
  - 12.3.1 is part of the public domain; or
  - 12.3.2 was in the possession of the Responder prior to execution of the Agreement and which was not subject to any obligation of confidentiality owed to the Incident Operator; or
  - 12.3.3 was received from a third party whose possession is lawful and who is under no obligation not to disclose; or
  - 12.3.4 is required to be disclosed in order to comply with the requirements of any law, rule or regulation of any governmental or regulatory body having jurisdiction over the Agreement, the Responder or the Responder Seconded.
- 12.4 The Incident Operator may require each Responder Seconded to sign a confidentiality undertaking substantially in the form set out at Schedule 2.

### **13. Termination of Secondment of Responder Secondeds**

- 13.1 Right of either Party to terminate the secondment of Responder Secondeds
  - 13.1.1 Either Party may terminate the secondment of an individual Responder Seconded under the Agreement immediately by notice to the other Party, if:
    - (a) the Responder Seconded concerned ceases to be an employee of the Responder; or
    - (b) necessary work permits, visas and any other administrative authorisations required to allow the Responder Seconded to perform the Duties are not obtained within a reasonable period of time, or are cancelled or withdrawn.
- 13.2 Right of Incident Operator to terminate the secondment of Responder Secondeds
  - 13.2.1 The Incident Operator may terminate the secondment of an individual Responder Seconded under the Agreement upon [five (5)] days prior written notice to Responder if:
    - (a) the Responder Seconded in question fails to act consistently with the Incident Operator's workplace rules, or to comply with the regulations and policies (including the Incident Operator's HSSE Policy), or the directions given by the Incident Operator; or
    - (b) the Responder Seconded (following issue of notice on the Responder of unsatisfactory performance), continues to perform his or her Duties in a manner that is unsatisfactory to the Incident Operator; or
    - (c) in the Incident Operator's reasonable opinion, the Responder Seconded's Duties are no longer required; or
    - (d) the Responder has not timeously provided a substitute individual to perform the Duties, acceptable to the Incident Operator as set out in Clause 3.4.3 or 3.7.
  - 13.2.2 The Incident Operator may terminate the secondment of an individual Responder Seconded under the Agreement immediately without prior written notice to Responder:



- (a) if the Responder Seconded engages in serious misconduct or violates any substantive or material laws, which in the Incident Operator's reasonable opinion significantly impairs the Responder Seconded's ability to perform his or her Duties; or
- (b) if the Responder Seconded materially breaches the confidentiality obligations agreed under the confidentiality undertaking executed in accordance with this Agreement.

Immediately after any termination without notice, the Incident Operator shall notify Responder setting out the reasons for such termination.

### 13.3 Right of Responder to terminate the secondment of Responder Secondeds

13.3.1 The Responder shall have the right to immediately terminate the secondment of an individual Responder Seconded under this Agreement:

- (a) in case of a personal emergency concerning the relevant Responder Seconded. The Responder shall promptly give notice setting out the general circumstances of such personal emergency; or
- (b) if, whilst the Responder Seconded in question is at the Location, the Incident Operator fails to comply with the any applicable health and safety laws and/or the HSSE Policy of the Incident Operator in respect of such Responder Seconded; or
- (c) the Responder requires the individual Responder Seconded in connection with an emergency incident affecting its own operations or those of its Affiliates.

13.3.2 The Responder may terminate the secondment of an individual Responder Seconded under the Agreement on [five (5)] days prior written notice:

- (a) If the Responder requires the Responder Seconded itself in connection with another project and, due to extraordinary circumstances, has no other reasonably feasible alternative; or
- (b) for any reason by providing the Incident Operator [[●] days] prior written notice or such shorter period agreed by the Incident Operator.

13.4 The secondment of all Responder Secondeds will automatically terminate upon reaching the end of the Secondment Period and/or upon the termination of the Agreement.

## 14. Termination of Agreement

14.1 The Incident Operator may terminate the Agreement by providing prior written notice to the Responder if the Responder Seconded' Duties are no longer required by the Incident Operator in connection with the Incident.

14.2 Either Party may terminate the Agreement by providing prior written notice to the other Party, if:

- 14.2.1 there has been a material breach by any Party of its respective obligations under the Agreement which is not capable of being fully remedied;
- 14.2.2 there has been a material breach by any Party of its respective obligations under the Agreement which has not been fully remedied within a period of 30 days from the affected Party's notice of such breach; or
- 14.2.3 the performance of Duties by all Responder Secondeds under the Agreement has ended or the secondment of all Responder Secondeds has, pursuant to Clause 13 been terminated.

- 14.3 In the event of termination of the Agreement:
- 14.3.1 The Responder Seconddees shall cease performance of the Duties as soon as practicable;
  - 14.3.2 The Responder shall be entitled to payment for the Duties performed up until the date of termination but not thereafter; and
  - 14.3.3 The Responder shall, and shall procure that Responder Seconddees shall, promptly return to the Incident Operator, or if requested by the Incident Operator destroy, all copies, extracts, drawings and other materials or records that contain or reflect, in whole or part, any Incident Operator Confidential Information.

**15. Anti-Bribery**

- 15.1 The Parties shall:
- 15.1.1 comply with all applicable laws, statutes, regulations, and codes relating to anti-bribery and anti-corruption including the UK Bribery Act 2010, the US Foreign Corrupt Practices Act 1977 or any similar anti-bribery legislation in effect in the jurisdiction where the incident has occurred (the "Anti-Bribery Legislation");
  - 15.1.2 have and maintain in place throughout the term of the Agreement its own policies and procedures to ensure compliance with the Anti-Bribery Legislation and enforce them where appropriate, including but not limited to adequate procedures under the Bribery Act 2010;
  - 15.1.3 promptly report to the Incident Operator any request or demand for any undue financial or other advantage of any kind received in connection with the performance of the Agreement;
- 15.2 In the event that the Incident Operator has any basis for good faith belief that the Responder is not acting in compliance with this Clause 15, the Incident Operator shall be entitled to terminate the Agreement on the provision of written notice pursuant to Clause 13 on the basis that failure to comply with this clause constitutes a material breach of the Agreement.

**16. Communications**

- 16.1 Party Representatives
- 16.1.1 The Incident Operator Representative and the Responder Representative shall be as follows:  
  
Incident Operator Representative:  
  
[Insert details]  
  
Responder Representative:  
  
[Insert details]
  - 16.1.2 The Incident Operator Representative
    - (a) The Incident Operator Representative shall have the authority to commit the Incident Operator in all matters under the Agreement and, subject to any delegation of such authority which shall be notified to the Responder in writing, shall be responsible for issuing to and receiving from the Responder all notices, information, instructions and decisions.

- (b) By notice to the Responder, the Incident Operator Representative may at any time delegate any of his authority to any nominated deputy. Such notice shall specify the precise authority of any such deputy and shall be sent to the Responder Representative.
- (c) The Incident Operator may change the Incident Operator Representative at any time and shall notify the Responder of any change.
- (d) Except as expressly stated in the Agreement, the Incident Operator Representative has no powers to amend the Agreement or to relieve the Responder from any of its obligations under the Agreement.

16.1.3 The Responder Representative

- (a) The Responder Representative shall have the authority to commit the Responder to any course of action within the rights and obligations of the Responder under the Agreement and, subject to any delegation of such authority, shall be responsible for issuing to and receiving from the Incident Operator all notices, information, instructions and decisions.
- (b) The Responder Representative may delegate any of his authority to any nominated deputy, the terms of such delegation being subject to the prior approval of the Incident Operator which shall not be unreasonably withheld or delayed.
- (c) The Responder shall not change the Responder Representative or any nominated deputy without cause without the prior approval of the Incident Operator which shall not be unreasonably be withheld or delayed.
- (d) The Responder Representative has no powers to amend the Agreement.

**17. Notices**

17.1 All notices given in respect of the Agreement shall be in writing and delivered by hand, by fax, by email, by first class post or by courier to the addresses set out in this Clause or such other address as either Party may notify to the other in writing from time to time.

Incident Operator

Contact Name: [ ]

Address: [ ]

Copied to: [ ]

Responder

Contact Name: [ ]

Address: [ ]

Copied to: [ ]

17.2 Notices shall be effective:

- (a) if delivered by hand or email, at the time of delivery; or
- (b) if sent by fax, at the time of completion of transmission by the sender, provided confirmation of delivery report is received;

- (c) if sent by first class post, forty eight (48) hours after the time of posting,
- (d) if sent by courier, at the time of delivery; or
- (e) if the time of such deemed receipt is not during normal business hours in the time zone of the territory of the recipient, notice shall be deemed to have been received at 10:00am on the next working day in the territory of the recipient.

**18. Further Investigation of the Incident**

- 18.1 Except as may be required by law, the Responder is under no obligation to make the Responder Personnel available to the Incident Owner or any relevant authorities, as witness, expert or otherwise, for any investigation into the Incident, any dispute resolution proceedings, court hearing or otherwise after the termination of any Secondment Period. If nevertheless the Responder agrees to make the Responder Personnel available to the Incident Operator or any relevant authorities, the Parties will agree the need for the Responder Personnel to be assisted by external counsel, the need for access to all relevant information, the need for adequate preparation time, compensation to the Responder for the costs of the foregoing and any other matter that enables the Responder Personnel to support the investigation and protects the Responder against the impact of the unavailability of the Responder Personnel on the Responder's own operations.

**19. Force Majeure**

- 19.1 Neither Party shall be responsible for any failure to fulfil any term or condition of the Agreement (other than any obligation to make payment when due for Duties already performed) if and to the extent that fulfillment has been delayed or prevented by a Force Majeure Event. The affected Party shall use all reasonable endeavours to limit the effect of that delay or prevention on the other Party.
- 19.2 If a Force Majeure Event occurrence continues to prevail, either Party shall have a right by giving notice to terminate the Agreement with immediate effect.

**20. Costs**

- 20.1 Each Party shall be solely responsible for its own costs and expenses incurred in connection with the preparation, negotiation and execution of the Agreement

**21. Assignment**

- 21.1 Neither Party shall, without the prior written consent of the other, assign, transfer, charge, subcontract or deal in any other manner with all or any of its rights or obligations under the Agreement.

**22. Relationship of Parties**

- 22.1 The Responder shall be an independent contractor engaged by the Incident Operator to make Responder Seconddees available for the purposes of the performance of Duties in accordance with the Agreement.
- 22.2 Nothing in the Agreement is intended to or shall operate to create a mining or other partnership, joint venture, association or trust between the Parties, or to authorise either Party to act as agent or representative for the other.

**23. [Third Party Rights**

- 23.1 Subject to Clause 24.2, the Parties intend that no provision of the Agreement shall, by virtue of the Contracts (Rights of Third Parties) Act 1999 (the “**Act**”), confer any benefit on, or be enforceable by any person who is not a Party to the Agreement.
- 23.2 Subject to the remaining provisions of this Agreement, Clauses, 3.5.2, 7 and 8 are intended to be enforceable by any Third Party by virtue of the Act. For the purposes of this Clause 24, “Third Party” shall mean any member of the Incident Operator Group (other than the Incident Operator) or the Responder Group (other than the Responder).]

**24. Counterparts**

- 24.1 This Agreement may be executed in counterpart and by each Party in separate counterparts, each of which shall be deemed an original instrument but both such counterparts together shall constitute one agreement.

**25. Waiver**

- 25.1 No failure or delay on the part of either Party at any time to enforce any of the terms and conditions of the Agreement shall constitute a waiver of such terms and conditions.
- 25.2 No terms or conditions of the Agreement shall be considered to be waived by either the Party unless a waiver is given in writing by one Party to the other.

**26. Severability**

- 26.1 If any provision or part-provision of the Agreement is found by any court or administrative body of competent jurisdiction to be invalid or unenforceable, the Parties hereby agree to attempt to substitute such provision for a valid or enforceable provision which achieves to the greatest possible extent, the economic, legal and commercial objectives of the invalid or unenforceable provision. If such modification cannot be agreed within a reasonable timeframe, the provision or part-provision concerned shall be deemed deleted. Any modification or deletion under this Clause shall not affect the validity or enforceability of the rest of the Agreement.

**27. Variation**

- 27.1 No variation to the Agreement shall be effective unless evidenced in writing and signed by both Parties to the Agreement.

**28. Entire Agreement**

- 28.1 The Agreement constitutes the entire agreement between the Parties with respect to its subject matter and supersedes all prior negotiations, representations or agreements related to the Agreement, either written or oral.

**29. Governing Law**

- 29.1 The Agreement and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with [English law] and the Parties irrevocably agree that the courts of [England and Wales] shall have [exclusive / non-exclusive] jurisdiction to hear and determine or otherwise settle any and all disputes which may arise.

**IN WITNESS WHEREOF** this Agreement has been duly executed by the Parties on the date first above written in accordance with their respective laws

Signed by ..... )  
for and on behalf of )  
**[Incident Operator]** ) .....

Signed by ..... )  
for and on behalf of )  
**[Responder]** ) .....

## Schedule 1

### Responder Secondees, Duties, Location and Secondment Period

1. Include specification for each Responder Secondee. Details to be provided include:
  - 1.1 Name of Responder Secondee
  - 1.2 Position
  - 1.3 Location
  - 1.4 Scope of Secondment (the "Duties")
  - 1.5 Charge out rate
  - 1.6 Rotation details
  - 1.7 Secondment Period
  - 1.8 Other additional information

## Schedule 2

### Form of Undertaking of Confidentiality

UNDERTAKING OF CONFIDENTIALITY DATED \_\_\_\_\_

BETWEEN

(3) [NAME], a company having an office at [address] (hereinafter referred to as the “**Incident Operator**”); and

AND

(4) [NAME], who resides at [address]  
(hereinafter referred to as the “**Responder Secondee**”).

WHEREAS

- (A) The Incident Operator and the Responder Secondee’s employer, [insert Responder name] (the “**Responder**”), have entered into the Emergency Personnel Secondment Agreement dated [insert date of agreement] (the “**EPSA**”).
- (B) Pursuant to Clause 12.1.3 of the EPSA, the Responder is required to ensure that its Responder Secondees (as defined in the EPSA) are aware of, and comply with, the obligations set out in Clause 12 of the EPSA.
- (C) Accordingly, the Responder Secondee has agreed to enter into this Undertaking of Confidentiality in favour of the Incident Operator.

THE PARTIES NOW HEREBY AGREE AS FOLLOWS:

1. Words and expressions defined in the EPSA shall, unless otherwise defined below, or the context otherwise requires, have the same meanings in this Undertaking of Confidentiality as if they were set out herein.
2. The following definitions shall apply in this Undertaking of Confidentiality:

“**Confidential Information**”: means (i) any Incident Operator Confidential Information; and (ii) any information which the Responder Secondee prepares in connection with the performance of his Duties in accordance with the Agreement, and shall include (without prejudice to the foregoing) all information in whatever form (including written, oral, visual or electronic form or on any magnetic or optical disk or memory and wherever located) relating to the business, customers, products, affairs and finances of the Incident Operator for the time being confidential to the Incident Operator and trade secrets including technical data and know-how relating to the business of the Incident Operator, whether or not such information (if in anything other than oral form) is marked confidential.

“**Incident Operator Property**”: all documents, books, manuals, materials, records, correspondence, papers and information (on whatever media and wherever located) relating to the business or affairs of the Incident Operator or its or their clients and business contacts, and any equipment, keys, hardware or software provided for the Responder Secondee’s use by the Incident Operator during the Secondment Period, and any data or documents (including copies) produced,



maintained or stored by the Responder Seconded on the Incident Operator or the Responder Seconded's computer systems or other electronic equipment during the Secondment Period.

3. The Responder Seconded acknowledges that in the course of the Secondment Period he/she has had and will continue to have access to Confidential Information, and accordingly the Responder Seconded hereby agrees to accept the restrictions in this Undertaking.
4. The Responder Seconded shall (save in the proper course of the Responder Seconded's Duties), either during the Secondment Period or at any time afterwards:
  - (a) not use or disclose to any third party (and shall use the Responder Seconded's best endeavours to prevent the publication or disclosure of) any Confidential Information. This restriction does not apply to any use or disclosure authorised by the Incident Operator or required by law; or any information which is already in, or comes into, the public domain otherwise than through the Responder Seconded's unauthorised disclosure; and
  - (b) not use, reproduce, transform, or store the Confidential Information in an externally accessible computer or electronic information retrieval system or transmit it in any form or by any means whatsoever outside of the Incident Operator's usual place of business; and
  - (c) ensure that any document or other records containing Confidential Information shall be kept at the premises of the Incident Operator as appropriate and the Responder Seconded shall not remove or allow to be removed such document or records from such premises.
5. On the date that the Secondment Period terminates (or upon request at any time during the Secondment Period) the Responder Seconded shall:
  - (d) immediately deliver to the Incident Operator all Incident Operator Property in the Responder Seconded's possession or under the Responder Seconded's control; and
  - (e) irretrievably delete any Confidential Information stored on any magnetic or optical disk or memory and all matter derived from such sources which may be in the Responder Seconded's possession or under the Responder Seconded's control outside the premises of the Incident Operator.
6. For the avoidance of doubt all Incident Operator Property shall remain at all times the property of the Incident Operator.
7. This Undertaking shall terminate only on the written request of the Incident Operator.
8. This agreement shall be governed by and construed in accordance with *[insert relevant governing law]*

We, the undersigned, each a Party and together the Parties, each acknowledge and irrevocably agree to the terms of this Undertaking of Confidentiality set out above.

Signed by ..... )

for and on behalf of )

**[Incident Operator Name]** ) .....

.....

**[Responder Seconded Name]**

This page is intentionally blank

This page is intentionally blank

# IPIECA

IPIECA is the global oil and gas industry association for environmental and social issues. It develops, shares and promotes good practices and knowledge to help the industry improve its environmental and social performance; and is the industry's principal channel of communication with the United Nations. Through its member led working groups and executive leadership, IPIECA brings together the collective expertise of oil and gas companies and associations. Its unique position within the industry enables its members to respond effectively to key environmental and social issues.

[www.ipieca.org](http://www.ipieca.org)



IOGP represents the upstream oil and gas industry before international organizations including the International Maritime Organization, the United Nations Environment Programme (UNEP) Regional Seas Conventions and other groups under the UN umbrella. At the regional level, IOGP is the industry representative to the European Commission and Parliament and the OSPAR Commission for the North East Atlantic. Equally important is IOGP's role in promulgating best practices, particularly in the areas of health, safety, the environment and social responsibility.

[www.iogp.org.uk](http://www.iogp.org.uk)