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Funmi Roberts & Co. Legal & ADR Practitioners

Dispute Management in Africa Infrastructure Projects

Oil & Gas Week

DAY 1 – Hot Topics

19 October 2020

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Oil & Gas Week

DAY 1 – Hot Topics

19 October 2020

1

Welcome Address and Introductions

Speaker

Mrs. Funmi Roberts
Partner, Funmi Roberts & Co.

Agenda Day 1

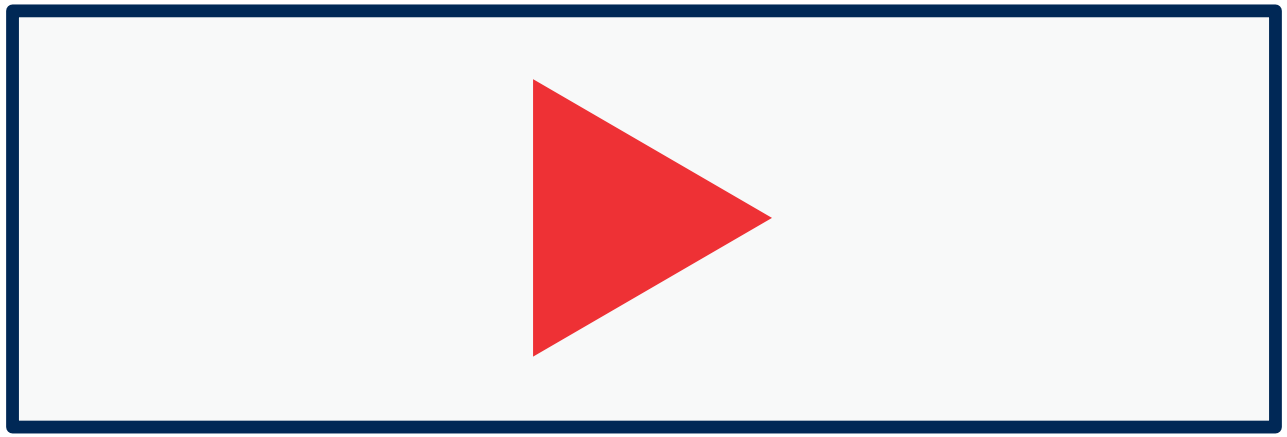
Welcome Address and Introductions	**1:00 pm – 1:10 pm**
Keynote Address	**1:10 pm – 1:20 pm**
Regulatory and compliance issues in the Nigerian Oil & Gas Industry	**1:20 pm – 1:40 pm**
Managing risk in Oil & Gas Construction Projects in the wake of COVID-19 and the Nigerian oil market's decline	**1:40 pm – 2:00 pm**
Coffee break	**2:00 pm – 2:10 pm**
Balancing political and contractual risk in Africa	**2:10 pm – 2:30 pm**
Liquidated Damages Explained in Oil & Gas Construction Projects	**2:30 pm – 2:50 pm**
Fast Track Arbitrations in Oil & Gas Construction Projects	**2:50 pm – 3:10 pm**
Video tour	**3:10 pm – 3:20 pm**
Panel Session/Q&A	**3:20 pm – 3:50 pm**
Closing remarks	**3:50 pm – 4:00 pm**

2

Keynote Address

Speaker

H.E. The Honorable
Mr. John Munyes EGH
Kenyan Cabinet
Secretary of Petroleum &
Mining



3

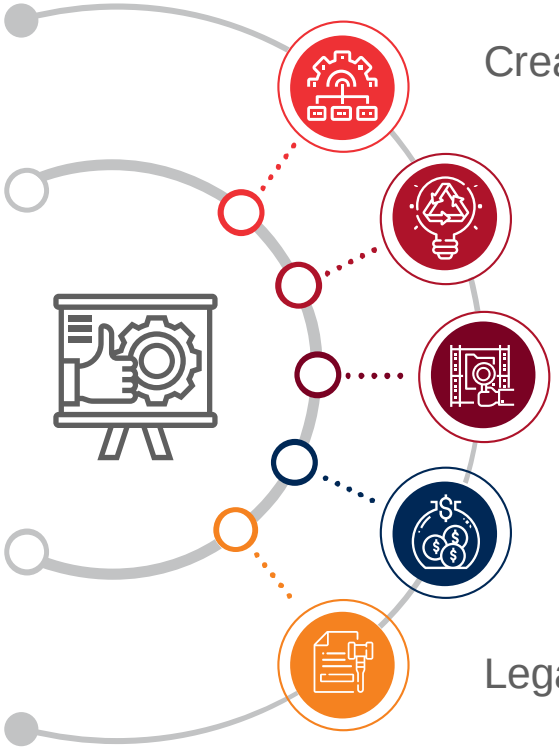
Regulatory and compliance issues in the Nigerian Oil & Gas Industry

Speakers

Yindi Gesinde
Partner, Baker McKenzie London

Feyisara Obayemi
Company Secretary and Head, Legal Services of Midwestern Oil & Gas Company Limited

Why do we have a compliance program?



Creates a process for early detection

Raises awareness

Provides a safe mechanism for reporting wrongdoing

Can save unplanned cost

Legal requirement/expectation

Benefits of an effective compliance program

Communicates the organization's ethics, values and rules

Provides a centralized source of information on industry regulations

Develops procedures that allow investigation of alleged misconduct and immediate and appropriate corrective action

Reduces an organization's risk of exposure

Can lead to identification of internal vulnerabilities

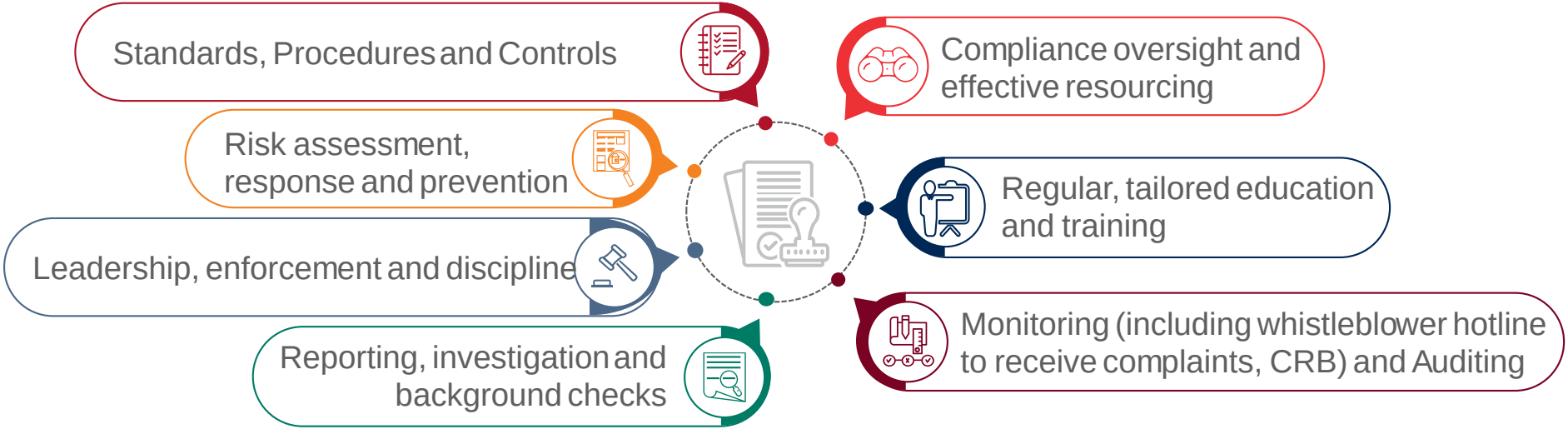
Prevents breaches, criminal and unethical conduct

What is the best compliance program?

- There is no single "best" compliance program or tool
- It varies according to the complexities within each industry, size and structure of an organization and guidance from regulators is also available
- Most effective when proactive rather than reactive
- However all compliance programs have some elements in common:

Essential elements of a compliance program

Organizations more than ever have to be deliberate about compliance. An 'off the cuff' approach will no longer cut it.



Regulatory bodies interface matrix

Challenges & Mitigation

Challenges
Increasing regulatory burden/changes (constantly shifting expectation of regulatory bodies)
Volume and pace of regulatory change
Unhealthy/unbalanced focus on numbers, particularly during challenging economic periods
Incompatible corporate culture/tone from the top/echo from the bottom
Improper training of personnel on compliance matters
Inadequate manning levels and other resources in regulatory agencies

Compliance mechanism

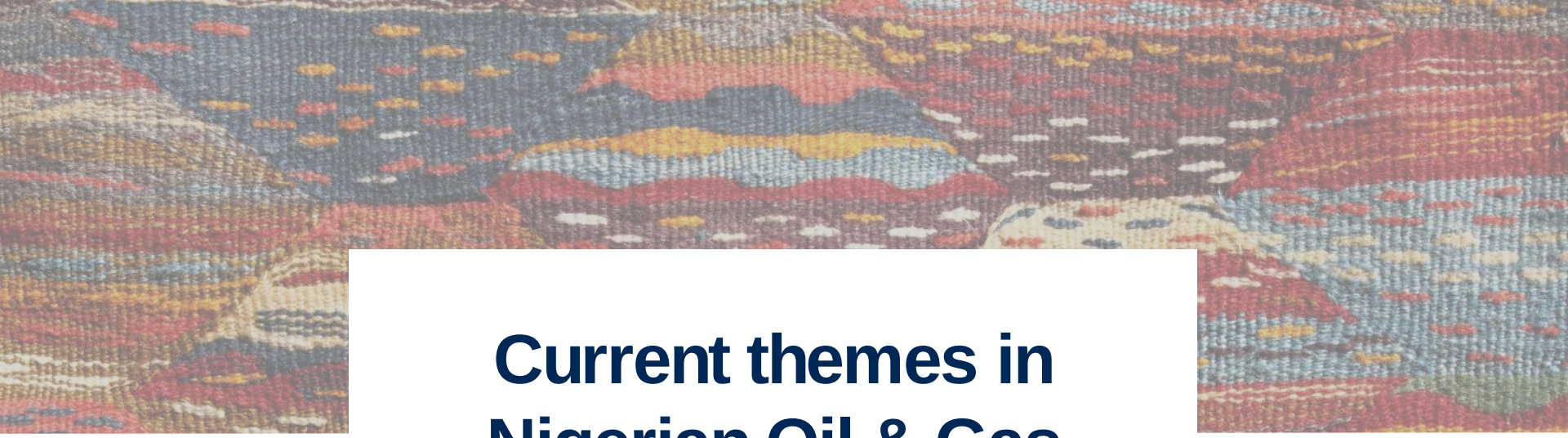
Microsystem (Internal Application)	Tools
Policies are derived from legal or regulatory requirements. ▪ Usually very detailed and specific to the industry of the organization. A well written policy can provide protection from liability. ▪ Without well-structured policies an organisation will be unstructured and probably operationally and financially ineffective.	**Annual attestation**
Procedures (provide details of the steps required to implement the policy). Sometimes called "Practices".	**Compliance management software**
Code of Conduct or Ethics ▪ Soft law. ▪ More effective when it is principles based rather than solely instructive.	
Training	**Regular, tailored for an organization's risk levels**
Sanctions	**Clear and implemented**

4

Managing risk in Oil & Gas Construction Projects in the wake of COVID-19 and the Nigerian oil market's decline

Speaker

Kate Corby
Partner, Baker McKenzie
London



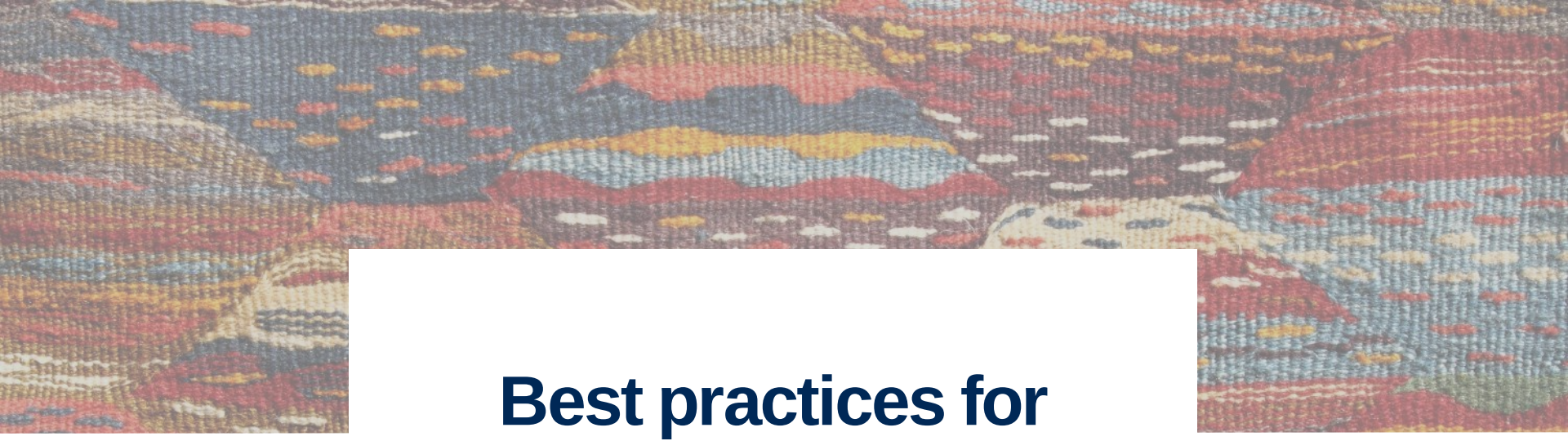
Current themes in Nigerian Oil & Gas Projects

Current themes in Nigerian oil

- Turbulent start to the year even before COVID-19:
  - January 2020 - International oil companies delay final investment decisions for oil projects (valued at circa USD 58.4bn) in Nigeria citing regulatory uncertainty.
  - 1 June 2020 – Nigerian government launches bid round for marginal fields (forming the basis of much smaller projects), first such round in 18 years.
  - 10 June 2020 – long awaited Petroleum Industry Bill (PIB) is delayed even further due to COVID-19 disruption.
- Delays to forthcoming large oil projects will likely continue for some time due to the combined impact of (1) the sharp fall in oil prices, (2) economic uncertainty arising from COVID-19 and (3) delays to long-awaited reform.

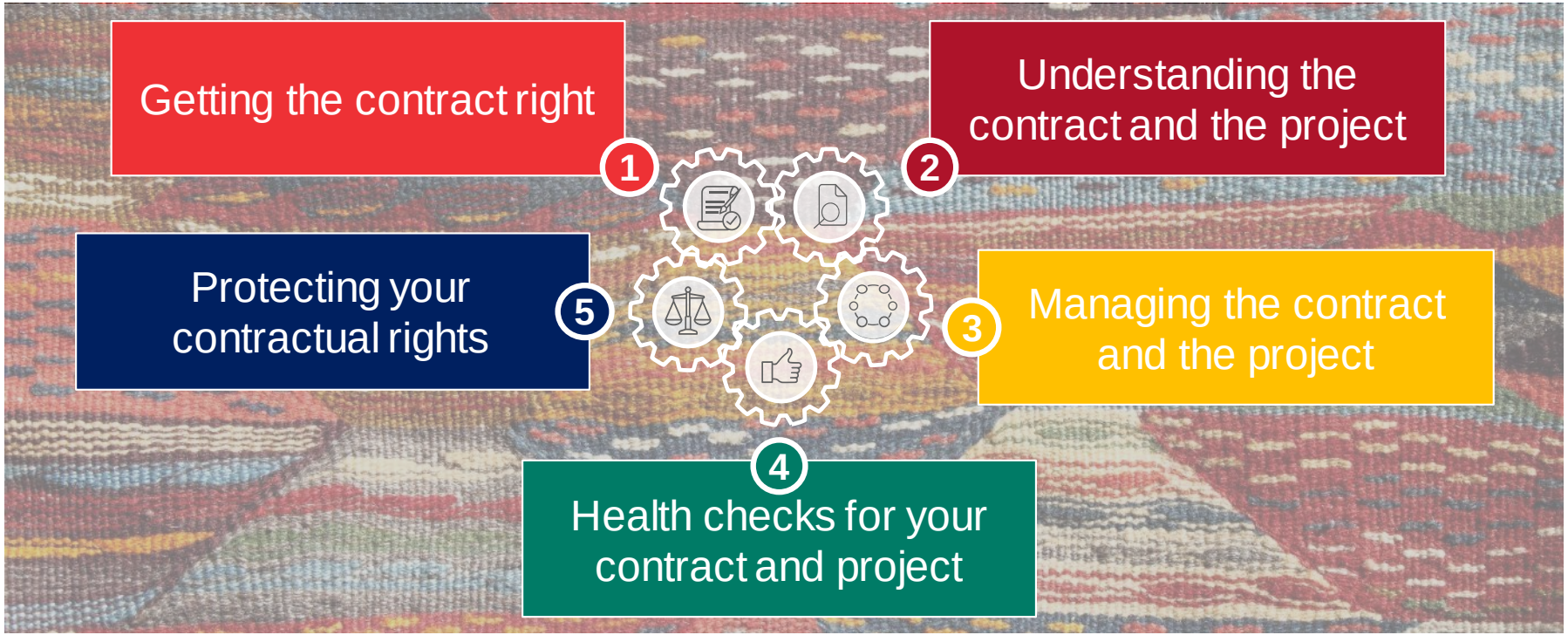
Current themes in Nigerian natural gas

- Nigeria is currently the fifth largest exporter of LNG in the world, with ample opportunity to expand capacity.
- Promising signals of resilience and vote of confidence in Nigerian LNG in current crisis:
  - 27 December 2019 – Nigeria LNG takes final investment decision on the "Train 7 Project", due to increase Nigeria's LNG output by a third.
  - May 2020 – In the midst of the global pandemic. Nigeria LNG awards engineering, procurement, and construction (EPC) contract to the SCD JV Consortium, comprising affiliates of Saipem, Chiyoda, and Daewoo.
- The EPC contract provides for a period of construction over the next 5 years. According to the May 2020 announcement, the construction schedules would only be finalised after the situation for COVID-19 stabilised. Significant challenges for contract management.



Best practices for contract management

Effective Contract Management | 5 Steps to Success



Pre-commencement (Phases 1 and 2)

1. Getting it right in tender stage and contract drafting – don't set the project up to fail

- Select an appropriate form of contract and understand the impact of the governing law and contracting model
- Beware of over-promising e.g. unrealistically short programme/low price may not deliver the best result in the end – essential in light of potential COVID-19 disruption
- Ensure communication and coordination between procurement, legal and technical teams — identify and take into account lessons from previous projects

2. Understanding the contract & project

- Capture why parties reached agreement on key terms and sensitivities in negotiations
- Hold a comprehensive handover from tender team to execution team
- Understand the contract's procedural mechanisms
- Consider preparing a contract summary/flow chart, holding a training workshop etc.
- Agree interfaces and responsibilities, especially on JV projects
- Risk allocation, risk allocation, risk allocation……..……...

During the project (Phases 3 and 4)

3. Managing the contract and the project

- Active review and validation of actual vs planned performance across all activities – design, procurement, delivery…
- Developing strong project governance and controls and implementing robust reporting and communication regimes
- Adopt a "one version of truth" approach with a single updated contract programme
- Keep full written records (agreed format and up-to-date)

4. Health checks for your contract and project

- Hold routine health checks carried out by non-project staff e.g. internal (or external) legal or technical experts
- Aim to identify potential issues as early as possible with an active rather than a re-active approach
- Make/respond to claims in compliance with contract terms; do not store them up for end of project

Start of the dispute (Phase 5)

Just because a dispute has arisen does not (always) mean you will end up in a formal dispute resolution procedure

How are your rights and position best protected?

- Don't be afraid to assert your contractual rights and protect the bargain you reached in the contract negotiations
- Follow the contract notice and DR provisions

Remember: dispute resolution = a project, with a timetable, a cost and a quality of outcome.

- The balance between cost & time –v- quality of outcome varies each time.
- The need for, and discipline of, project planning applies as equally to resolving the dispute as it did to the underlying project

Coffee Break

5

Balancing political and contractual risk in Africa

Speaker

Andy Moody
Partner, Baker McKenzie
London

1. Managing political risk in Africa through investment protections

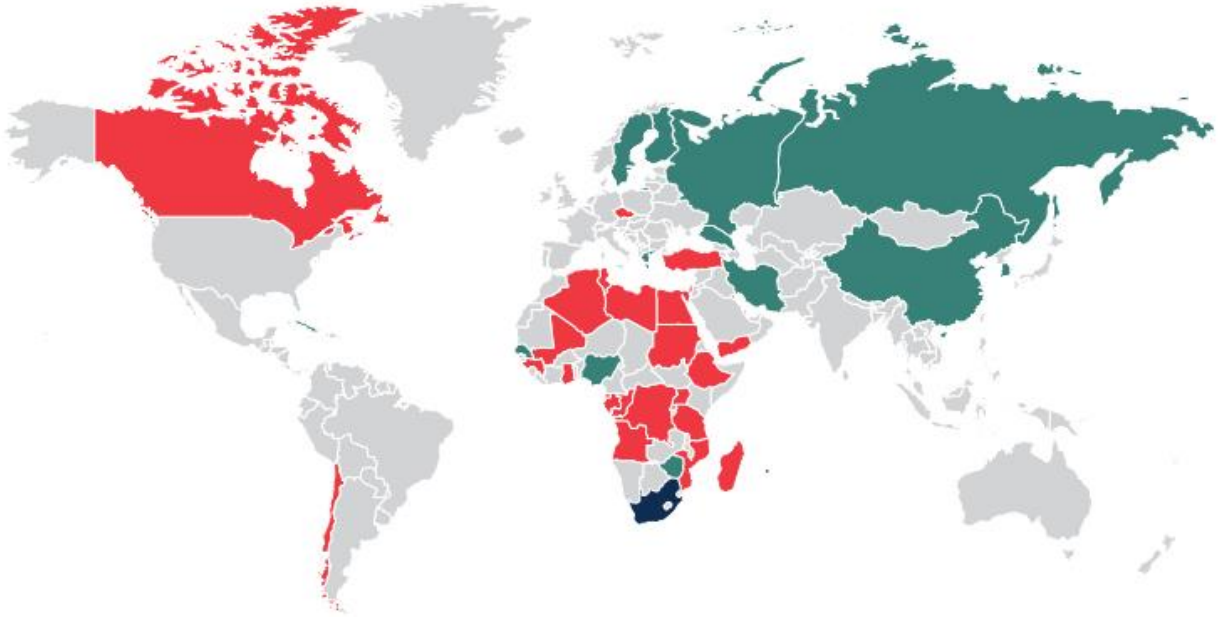
What is investment protection?

An overview

- Arises from Bilateral Investment Treaties (BITs), entered into between two States and intended to bestow rights upon nationals of the Contracting States
- Their aim is to protect "investments" made by nationals of one Contracting State into the other Contracting States. Potential recourse to arbitration for the investor.
- No pro forma/standard BIT – their terms differ but there are some general trends and common provisions
- Key question – who has BITs with whom? An ever changing situation, with some nations having extensive coverage (Switzerland, Germany), and others being notably absent (China, USA and across Middle East)

Case study – BIT coverage of South Africa

- The position in relation to each country is very different in terms of (1) signed and (2) ratified treaties.
- You cannot assume that simply because you a foreign entity in the chain, it will automatically have access to a BIT.
- South Africa is currently in the process of modernising its BIT structure, with extensive coverage across Africa once treaties come into force.



In force

China
Cuba
Finland
Greece
Iran, Islamic Republic of
Korea, Republic of
Mauritius
Nigeria
Russian Federation
Senegal
Sweden
Zimbabwe

Signed
(Not in force)

Algeria
Angola
Canada
Chile
Congo
Congo, Democratic Republic of the
Czechia
Egypt
Equatorial Guinea
Ethiopia
Gabon
Ghana
Guinea
Israel
Kuwait
Libya
Madagascar
Mali
Mozambique
Qatar
Rwanda
Sudan
Tanzania
Tunisia
Turkey
Uganda
Yemen

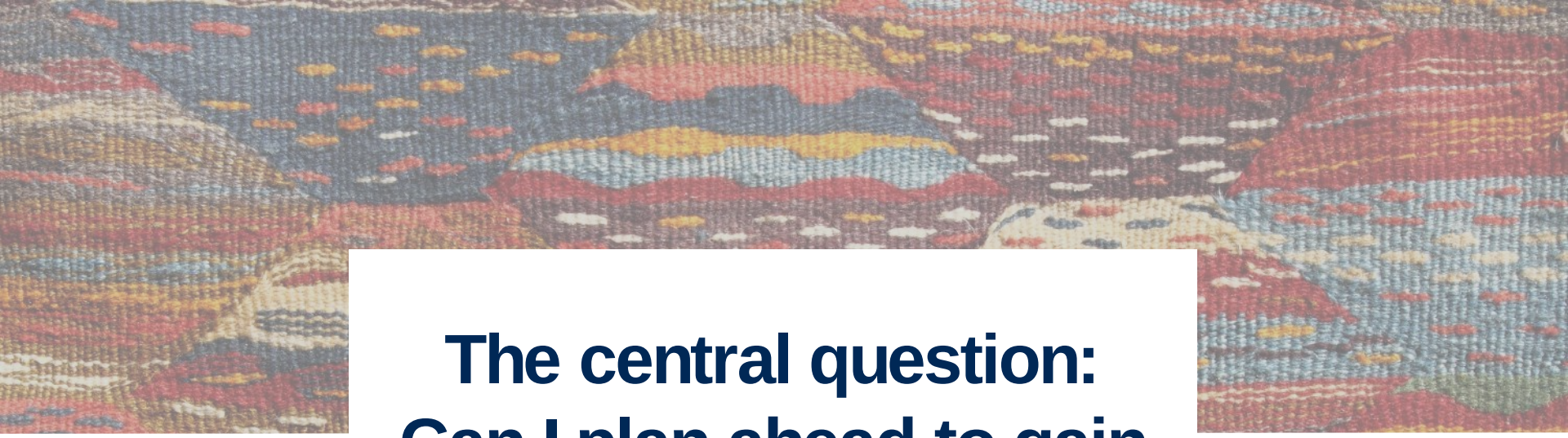
Pre-requisites of BIT claims and scope of protection

Who can claim?

- Somebody makes an "investment" into the host State (usually defined widely in BIT, separate definition in Article 25 of the ICSID Convention)
- That "investor" must be a "national" of a country that has entered into a BIT with the host State
- The "State" needs to be responsible for the harm
- There does not need to be a contract between investor and host State – BIT rights arise by treaty/public international law

Protections commonly included

- Fair and equitable treatment (FET)
- Expropriation
- Full protection and security
- Repatriation of returns
- National treatment
- Most favoured nations treatment (MFN)
- Umbrella clause
- Dispute resolution



The central question: Can I plan ahead to gain access to a BIT?

Best practices for effective treaty structuring

Considerations arising from international investment law

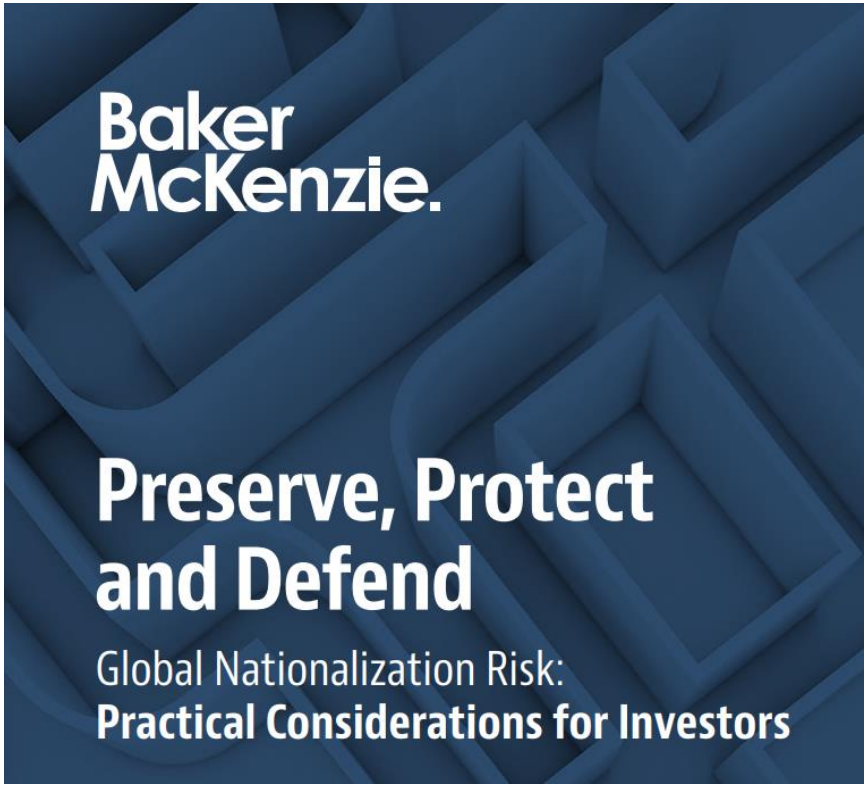
01 Ensure any structure complies with the express wording of the applicable investment treaty (or contract).

02 The earlier any (re)structuring is done in the life-cycle of an investment, and in particular if this takes place before the alleged breach occurs (or is anticipated), the less likely it is to be viewed as an abuse of process.

03 A (re)structuring has more chance of being recognised as legitimate if the investor can point to some economic justification or merit for holding the investment in this particular way (for example, tax or internal reorganisation).

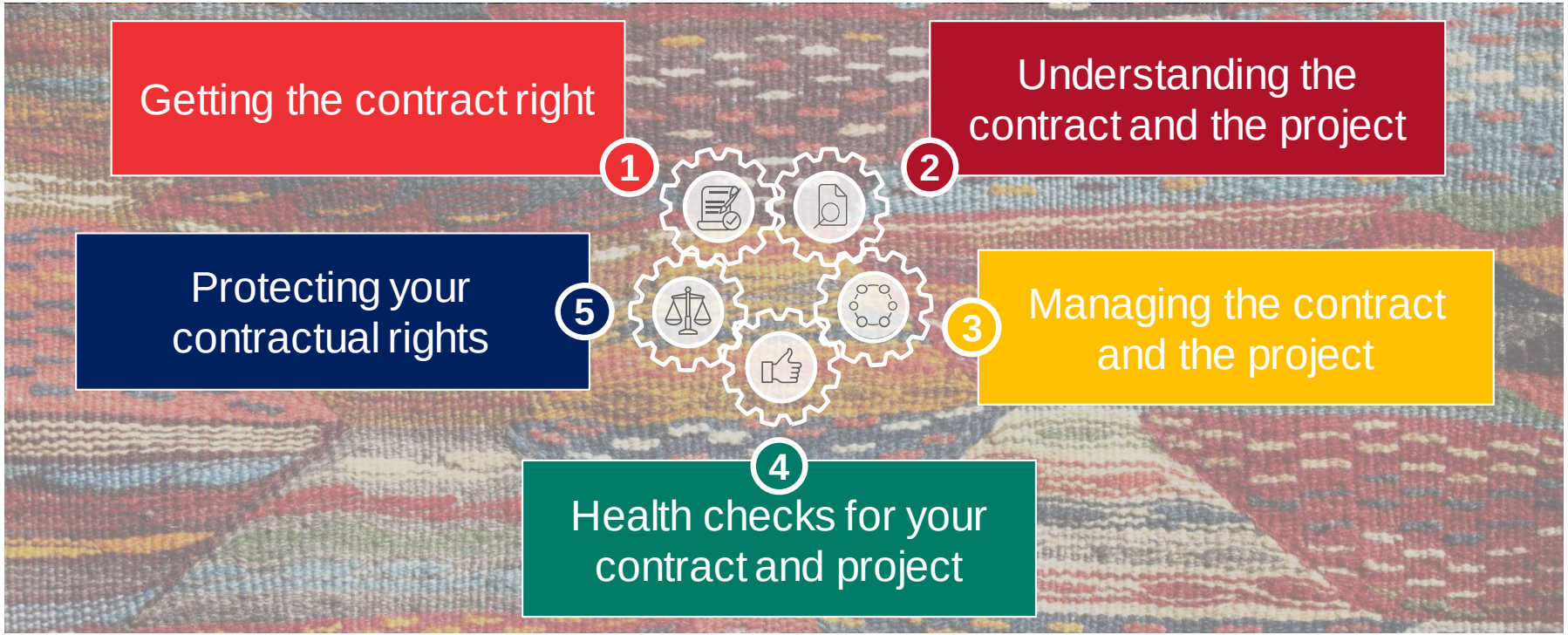
04 Ensure that the relevant treaty is applicable at all material times (critically, at the point of making an investment or contribution).

Thought leaders on treaty structuring



2. Managing political risk through contractual structuring

Effective Contract Management | 5 Steps to Success

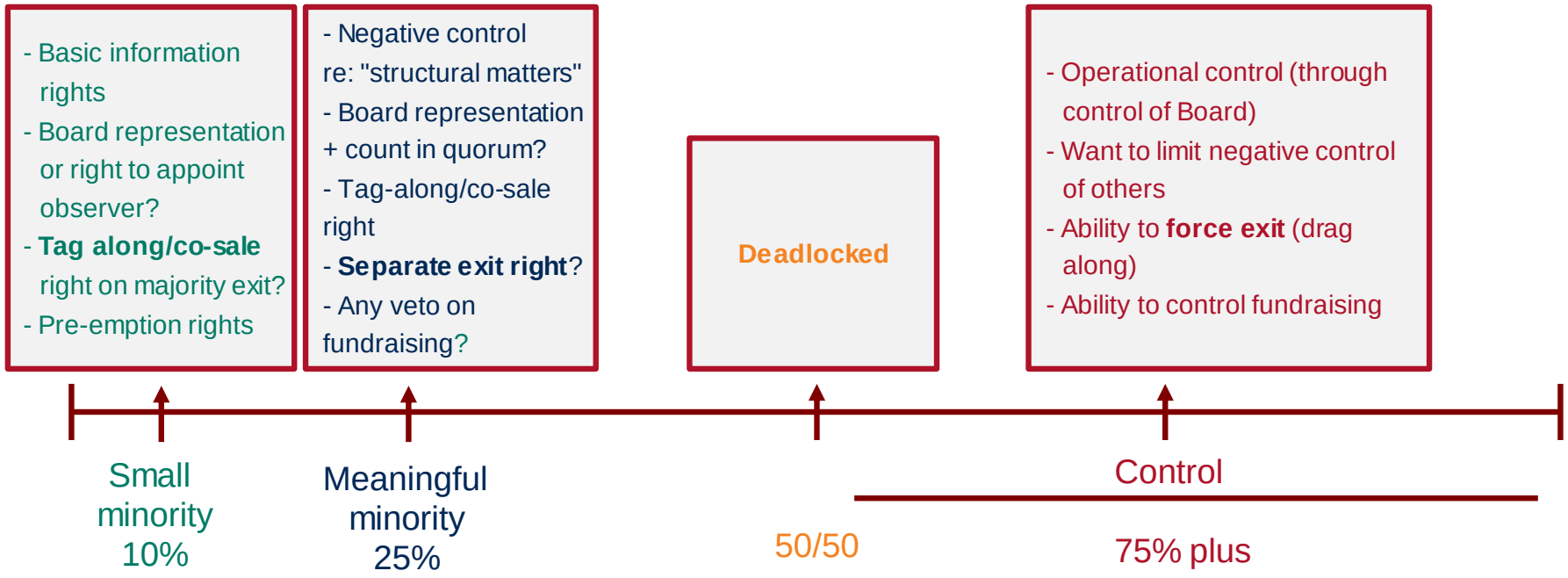


Contractual structuring – focus on joint ventures

Checklist of key considerations

- Selecting the right JV partner for your project and tailoring protections accordingly
- Think about your own exit rights, and whether to include rights to buy out a minority JV partner
- Funding and governance considerations – what happens if your partner doesn't pay?
- Where possible, push for a neutral governing law and forum (i.e. arbitration)

JV structuring overview – implications of various levels of shareholding for control and exit



6

Liquidated Damages Explained in Oil & Gas Construction Projects

Speakers

Engr. Kayode Akiode
Total, FNSE
(ACEN representative)

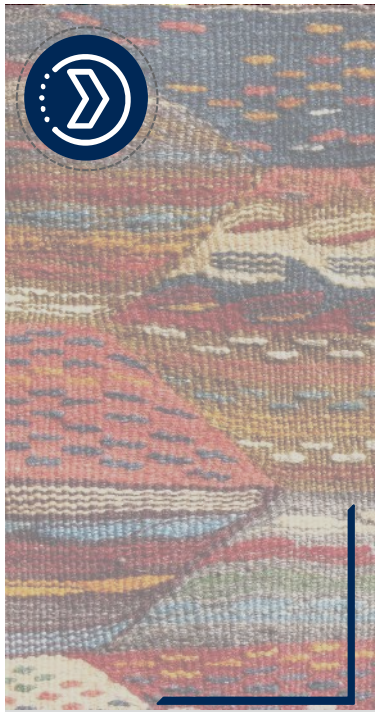
Darryl Bernstein
Partner, Baker McKenzie
Johannesburg

Background & Context

- Construction Projects in Oil & Gas is focused basically at developing new production facilities or modifying/upgrading of existing ones.
- The Health, Safety and Environment requirements is also of very high standard
- These are activities that are highly schedule bias
- There is no room for trial & error. Professionalism is the Hallmark
- They require experienced and very competent personnel
- LDs are used in specific context in Oil & Gas Projects (unlike in other sectors)

Consequently a watertight Contract that sets defined performance metrics, schedule and cost target is put in place

Liquidated Damages Defined



- Every Contract have clearly defined requirements expressed as Clauses in the Contract Agreement. A breach of any of these clauses could lead to or be interpreted as Damages.
- When any of those pre-defined damages occurs, the party that has suffered the damage will be compensated with a pre-determined monetary value.
- The monetary payment is what is referred to as Liquidated Damage (LD)
- LDs are covered by specific Clauses in the Contract Agreement
- The clauses are defined such that it mitigates against poor performance, arbitrary changes of key personnel in the Contractor's Organization, etc.
- There are provisions of the Contract that covers other types of breaches
- LD is not the same as Penalties or Fines

LD is a pre-determined amount which is usually a percentage of the Contract Sum, that will be paid by the Contractor in the event of a breach of previously agreed performance metric such as, but not limited to, Completion Date(s) and change/replacement of Key Personnel.

Example of Contract Document in Oil & Gas Construction Project

Typically, an Oil & Gas Construction Contract would consist of, but not limited to the underlisted documents:

- Agreement along with its Annexes
- Exhibits which provides detailed requirements in areas such as;
  - Scope of Work
  - Schedule of Prices
  - Work Time Schedule
  - Performance Guarantee
  - Technical Design Dossier
  - Specific Conditions for the Works
  - Quality Assurance/Quality Control Requirements
  - Coordination Procedure
  - Contractor Organization
  - HSE Requirements, etc.

Typical Liquidated Damages Clauses

- Should Contractor fail to complete the work as defined in the Scope of Work and QA/QC requirements in accordance with the Contract, and satisfy all of the conditions necessary for the issuance of the Interim Certificate by the Completion Date specified in the Work Time Schedule and as such date may have been adjusted by Change Order, Client shall have the right to apply the following LDs provisions.
  - In such case and without any prior notice or demand from Client and without any proof of loss, Contractor shall pay to Client damages for such failure at 0.5% for each week of delay or prorate thereof for periods less than 1 week calculated as of the Completion date up to and including the effective date of the relevant Interim Certificate, up to a maximum value equivalent to 5% of the Final Contract Value.
- If Contractor substitute any of the key personnel listed in Contractor's Organization & Key Personnel, in violation the Contract Agreement, Contractor hereby accepts to pay to Client LD as follows;
  - US$80,000.00 for non-compliant substitution of Level 1 Key personnel
  - US$60,000.00 for non-compliant substitution of Level 2 Key personnel
- Subject always to the right of Client to terminate the Contract, the payment of LD does not relieve the Contractor from his obligations to diligently complete the Work or from any other obligations and liabilities under the Contract or at Law.

Concept of Change Order

An element of Management of Change from Project Cost & Schedule Control perspective

- Change Order can be at the instance of the Contractor (COR) or the Client (COI)
- CO is the instrument used to capture changes in terms of scope of work or services which can lead to changes in terms of Cost, Schedule or Quality
- Any change that leads to significant change to the Initial Contract Value or Schedule will result in the issuance of a Change Order.
- In order to be protected from the application of LD when changes lead to cost and schedule increase, Contractor has the right to request for an "Extension of Time (EOT)

Key Takeaways

- LD's provision in the Contract serves to motivate the Contractor to respect his obligations
- It is a means of giving guarantee to the Client that the project will be delivered timely
- In the oil & gas Industry, it ensures the right caliber of personnel are deployed to work on the project for its duration
- The Client is not focused on LD application but knows his losses can be mitigated by its application when necessary
- The Contractor being aware of the provisions of LD Clauses, is committed to respect the contract and deliver on time
- Application of LD is at the prerogative of the Client when a breach has been committed.

Practical Value of Liquidated Damages

- Encourage timely performance against risk of financial penalty
- Ensure compensation in the event of delays

These outcomes can only be achieved if you have considered certain key risks when negotiating and drafting LDs.

Key Risks to Consider

Ensure that these have been considered during negotiating and throughout the implementation of the contract

A “genuine pre-estimate of loss”

- Is one test in the bigger armoury to help in ascertaining whether a clause is a penalty.
- Is the sum agreed out of all proportion to the greatest loss likely to be suffered?

Staged Completion (or what happens in the event of Termination prior to Completion)

- Recent case law in the event of non-completion by the Contractor.
- Uncertainty regarding the application of the LD clause.

Key Risks to Consider (continued…)

Governing Law

- Balance encouraging timely performance with the limits of the prevailing law.
- Follow the general rule: genuinely attempt to pre-estimate losses.

Maintain Records of Actual Loss

- Track losses suffered to confirm that LDs bear a resemblance to actual losses.
- Courts may not assist in extracting parties from a bad bargain, but records help!

Top Tips in Drafting and Applying Liquidated Damages

In summary

Estimate Loss

Apply LDs to Stages of Completion

Beware the Governing Law

Track Actual Losses

7

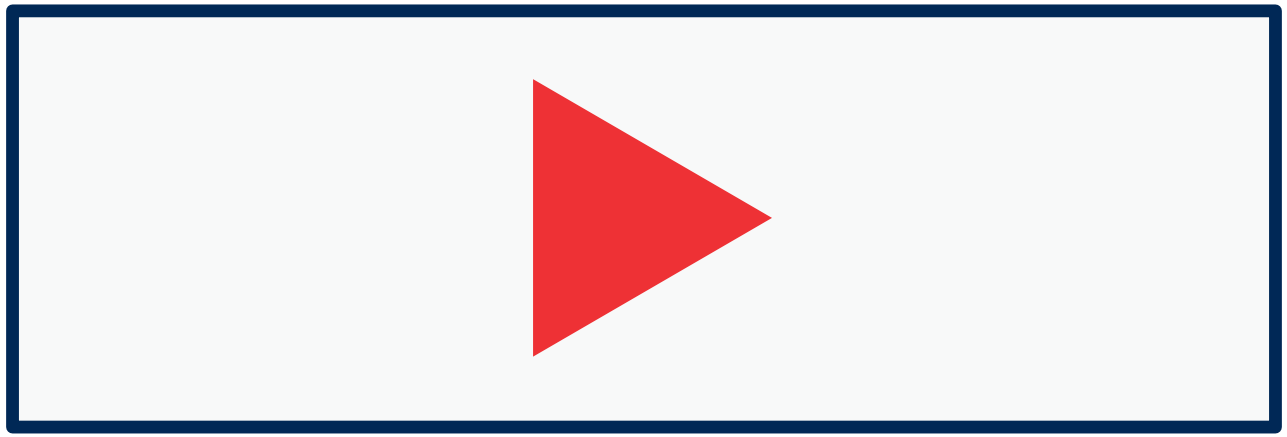
Fast Track Arbitrations in Oil & Gas Construction Projects

Speakers

Andrew Mackenzie
Partner, Baker McKenzie Dubai

Funmi Iyayi
Managing Director, LACIAC

Video Tour



8

Panel Session / Q&A

Speakers

Moderator

Funmi Roberts
Partner, Funmi Roberts & Co.

Panelists

Engr. Kayode Akiode
Total, FNSE (ACEN representative)

Kate Corby
Partner, Baker McKenzie London

Darryl Bernstein
Partner, Baker McKenzie Johannesburg

Yindi Gesinde
Partner, Baker McKenzie London

Funmi Iyayi
Managing Director, LACIAC

Andy Moody
Partner, Baker McKenzie London

Feyisara Obayemi
Company Secretary and Head, Legal Services of Midwestern Oil & Gas Company Ltd.

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Closing Remarks

Speakers

Kemi Oladipo
Partner, Funmi Roberts & Co.

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Dispute Management in Africa Infrastructure Projects

Oil & Gas Week

DAY 2 - Mediation Case Study and Principles

21 October 2020

[Please click here to watch the recorded session]

Passcode: BMDiMAP.2

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Dispute Management in Africa Infrastructure Projects

Oil & Gas Week

DAY 2 - Mediation Case Study and Principles

21 October 2020

Speakers

TUNDE FAGBOHUNLU SAN
Chairman, LACIAC

JUDITH MULHOLLAND
Senior Associate, Baker McKenzie London

SALLY KOTB
Counsel, Baker McKenzie Dubai

JACKIE LAFLEUR
Senior Associate, Baker McKenzie Johannesburg

ANJULI PATEL
Senior Associate, Baker McKenzie London

TITILOPE ADETONA
Senior Legal Officer, LACIAC

Agenda

Mock Mediation Case Study	**1:00 pm – 3:00 pm**
Coffee Break	**3:00 pm – 3:10 pm**
Discussion on Mediation Styles and Tactics	**3:10 pm – 3:30 pm**
The LACIAC Mediation Rules and the CADRI	**3:30 pm – 3:50 pm**
Closing Remarks	**3:50 pm – 4:00 pm**

1

Mock Mediation

POLL QUESTION 1

Have you been involved in a mediation before?

Yes / No

What is Mediation?

An overview

- Mediation is a flexible, confidential process which involves a neutral assisting parties to reach a resolution.
- Mediation is not adjudicative! No suggested or imposed solutions.
- Whether any resolution is reached is entirely within the hands of the parties.

Court Ordered Mediation

- This is where a dispute has been filed at Court but the Judge directs that the parties should engage in mediation to settle the dispute.
- In some jurisdictions, unreasonable refusal to participate in court ordered mediation may attract an adverse costs order.
- Any mediation settlement agreement will be entered as the judgment of the Court.
- These settlement agreements can then be enforced as contracts or through a court recognition process, provided that the contents are not contrary to public policy.

Principles of Mediation

How Successful is Mediation?

- There has been a 20% increase in the use of mediation to resolve civil and commercial disputes since 2016.
- UK mediators report an aggregate settlement rate of 89%:
  - 74% of cases achieving settlement on the day of mediation; and
  - 15% settling shortly after mediation.
- Online mediation during Covid-19 has had similar success with 76% of cases being settled on the day and 91% of cases being settled within two weeks of the mediation taking place.

Mediation Case Study

Key Points

The Claimant is Neptune Technologies ("**Neptune**"), a company which specialises in developing technology to assist with the storage and transportation of LNG, they developed a device that would reduce the natural evaporation rate of LNG when being stored (the "**Boil Off**").

The Respondent is Ocean Oil and Gas ("**Ocean**"), an international energy company principally engaged in the business of exploration for and extraction of oil and gas. As part of their operations, Ocean need to store natural gas is liquid form ("**LNG**").

Ocean agreed to purchase 4 devices during a test year and a further 10 devices if they successfully reduced Boil Off. Ocean state that the devices worked well on two vessels but their tests showed no effect on the Boil Off rate in vessel 3 and an increase in Boil Off rates in vessel 4.

Neptune is claiming USD 25 million and threatening to issue proceedings if Ocean do not purchase the remaining 10 Devices. Ocean is counterclaiming USD 12 million in respect of the Devices claiming that they were induced to buy on the basis of false representations made by Neptune. **They have agreed to mediation in an attempt to resolve the dispute.**

Mock mediation – Meet the parties

OCEAN

ANJULI PATEL
Anne Harris
Director of LNG Operations

JUDITH MULHOLLAND
Susan Deng
Technical Manager

RICH MOLESWORTH
Collin Philips
In-house Lawyer

RUI LOPES
James Wilde
External Counsel

Mock mediation – Meet the parties

NEPTUNE

SJEF JANSSEN
Peter Campbell
Managing Director of Neptune

SALLY KOTB
Mandy Wilson
Head Engineer

OLIVER POYNTON
Alexander Richards
External Counsel

JACKIE LAFLEUR
Christine Taylor
General Counsel

Mock Mediation – meet the mediators

Mediator 1

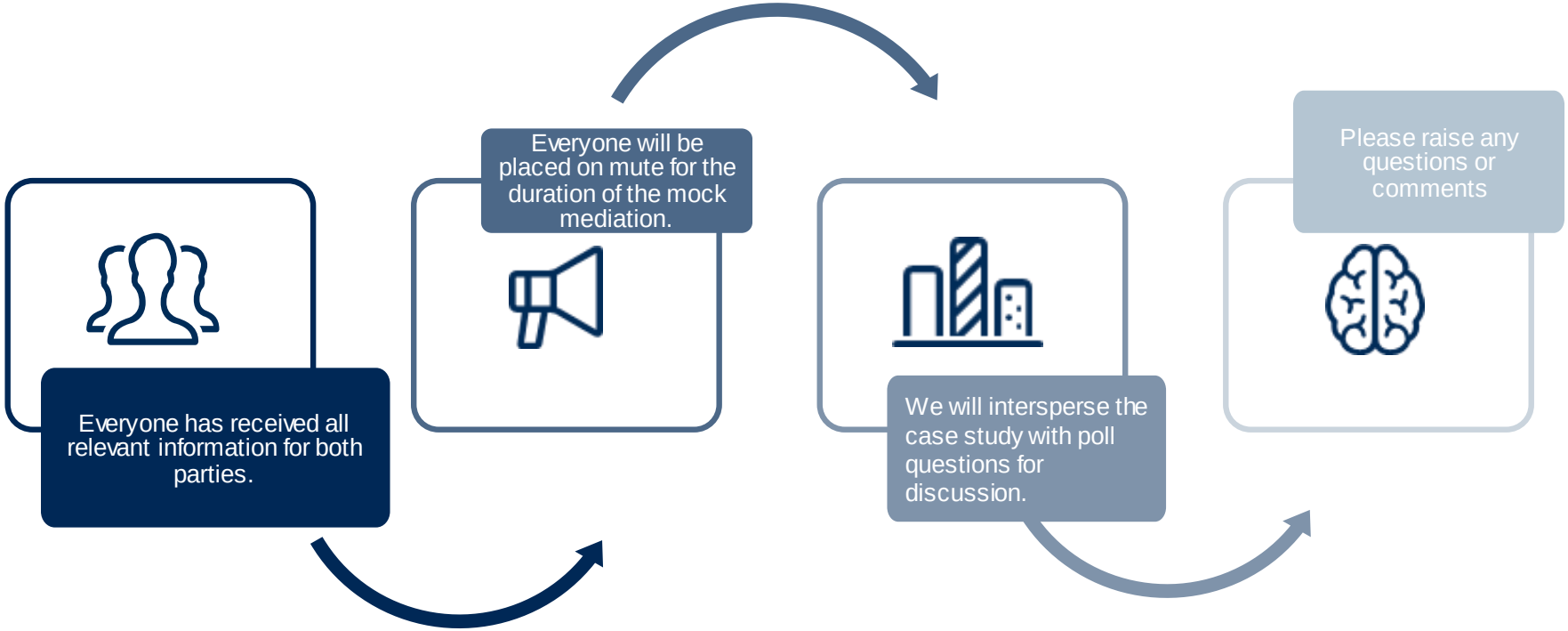
LAURA PATTISON
Associate, Baker McKenzie London

Mediator 2

DR. ADEYEMI AGBELUSI
Principal Partner, Berean Associates, Nigeria

Mock Mediation

Practical Points



POLL QUESTION 2

Which party's opening statement did you prefer?

Ocean / Neptune

POLL QUESTION 3

Which party's attitude do you think is more conducive to settlement?

Ocean / Neptune

POLL QUESTION 4

Which party do you think has the biggest blockers to settlement?

Ocean / Neptune

POLL QUESTION 5

Do you think the mediators asked enough questions to draw out the information necessary to make settlement likely?

Yes / No

POLL QUESTION 6

Which party do you think did better out of the agreed settlement?

Ocean / Neptune

POLL QUESTION 7

Is that consistent with how you thought the matter would settle when you read the papers?

Yes / No

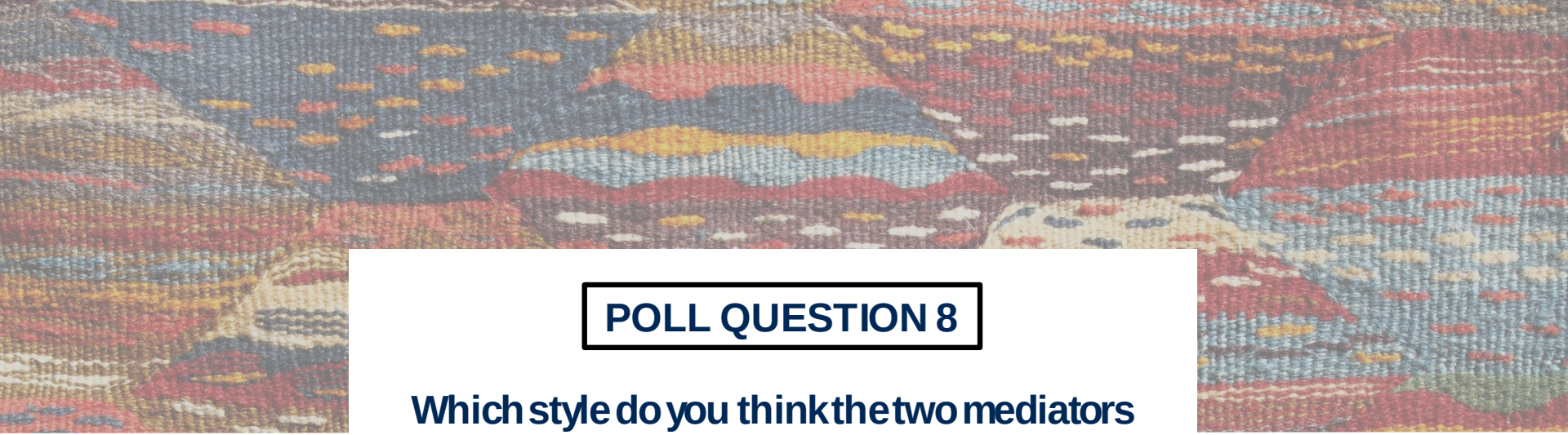
Coffee Break

2

Discussion on Mediation Styles and Tactics

Mediation styles

- Facilitative Mediation
- Evaluative Mediation
- Transformative Mediation
- Narrative Mediation
- The Toolbox Approach



POLL QUESTION 8

Which style do you think the two mediators predominantly adopted?

Facilitative / Evaluative / Transformative / Narrative / 'Toolbox'

POLL QUESTION 9

How effective do you think the mediators were at gaining the trust of the parties and establishing a rapport?

0 = Not at all / 5 = Excellent

COVID-19 and Online Mediation

Key Points

- The outbreak of COVID-19 has rapidly increased the demand for online mediation.
- Mediation can bring certainty in uncertain times.
- Mediation allows for creative solutions to emerge and for economic interests to be considered and placed in the forefront.
- Mediation is a more comfortable, flexible and supportive process.

Ground Rules for Online Mediation

Transparency builds trust and confidence

Security - Research the platform provider to ensure compliance with applicable internal policies.

Privacy - Ensure that only individuals listed on the participant form may attend or be present in the rooms where each party member is joining.

Recording - Agree in writing that recording is not permitted.

Planned or Possible Interruptions – Know in advance and discuss with the parties.

Joint meetings - Keep microphones on mute as default.

Use of Phones/Checking Emails - Agree ahead of time if participants should have email and messenger functions closed and off during the mediation or parts of the mediation.

Online Mediation Top Tips

01

Familiarise yourself with the technology

- Have an introductory call with the mediator to see how the tech will be used on the day.
- Test it out on other calls.

02

Prepare for a different process

- Raise possible interruptions in advance.
- Take frequent breaks.

03

Respect the other party's privacy and confidentiality

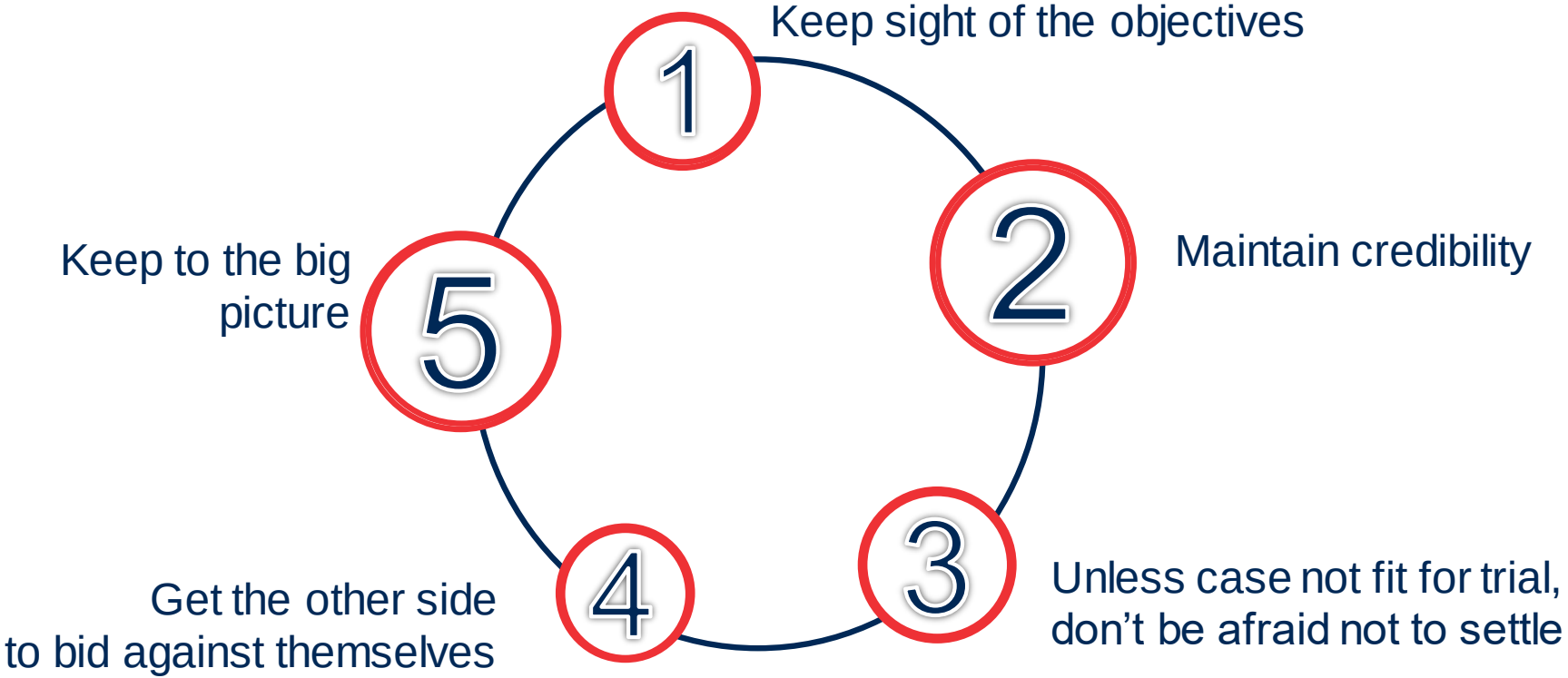
- No surprise attendees.
- No recording.

04

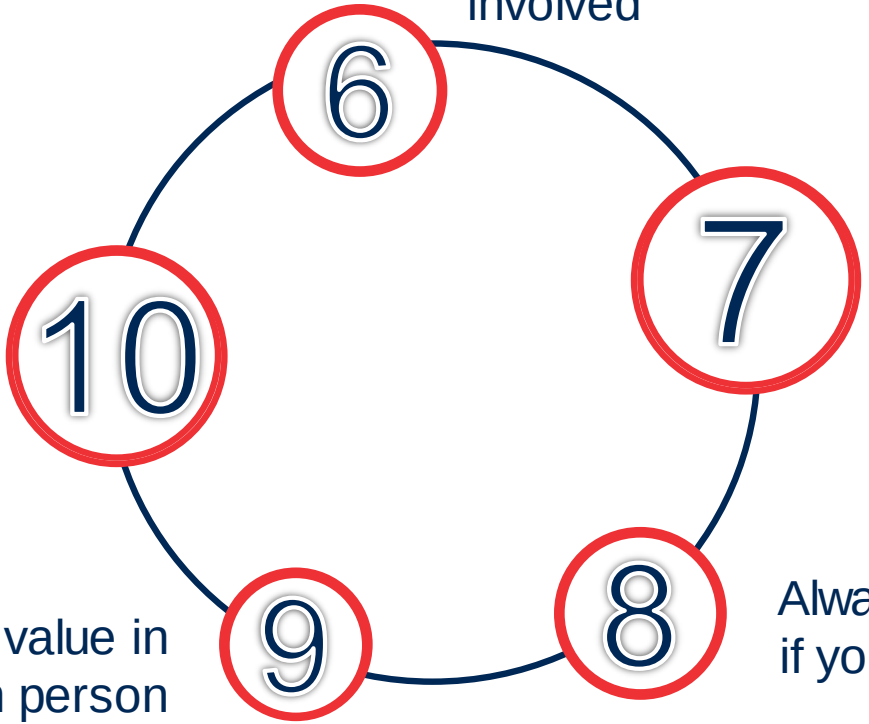
Always have a Plan B

- Agree in advance what will be done in the event the technology isn't working.

Mediation Tactics



Mediation Tactics



Don’t take those directly involved

The mediator is your enemy, and also your friend

Always give notice if you plan to walk out

Potential value in negotiating in person

Playing a weak hand

Barriers to Settlement

- One or more parties acting irrationally
- Claimant wants a precedent
- Genuine divergence of views on merits or quantum
- Respondent wants to discourage claims

3

The LACIAC Mediation Rules and the CADRI

LACIAC Mediation Rules

Lagos Chamber of Commerce International Arbitration Centre

The Mediation Rules apply irrespective of the basis upon which the mediation is carried out.

We must have regard to their international origin, the need to promote uniformity in application and the observance of good faith.

Key Provisions

- Mediation Costs
- Appointment of Mediators
- Conduct
- Communication
- Disclosure of Information
- Confidentiality
- Admissibility as Evidence
- Resort to Arbitration
- Enforceability

CADRI – The COVID-19 ADR Initiative

Key Points

- There is increase in the number of disputes going through the court system as a result of COVID-19 but not all courts are able to continue their services through virtual proceedings.
- CADRI has been created to provide **speedier, cheaper and effective** resolution of COVID-19 related commercial and contractual disputes.
- Affected businesses can access ADR and arbitration services at a **discounted** rate and the secretariat will take a more active role.
- For more information visit www.cadri.org.ng.

Questions

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Closing Remarks

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