

## Inpex loses bid for split trial in spat with insurers over Ichthys LNG defects



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Japanese oil company Inpex has lost its bid for a split trial in a dispute with insurers AIG Australia and Mitsui Sumitomo over coverage for litigation related to defects at the \$45 billion Ichthys liquefied natural gas project in the Northern Territory.

In a judgment handed down on Friday, Western Australia Supreme Court Justice Michael Lundberg denied Inpex's bid to split its dispute with the insurers into two trials, with the first dealing with whether AIG and Mitsui are liable to cover the damage and the second focusing on the amount of damages that should be covered.

The judge said splitting the trial could result in “pursuing a deceptive attractive short-cut that ultimately serves to complicate and lengthen proceedings.”

“The apparent benefits of a separate trial of issues can prove to be illusory. It is a course that can cause the very delay, expense and uncertainty it was intended to avoid,” said Justice Lundberg.

“At least in part, the separate trial proposal developed by the plaintiff would operate as some form of *‘filtering’* mechanism of the plaintiff’s claims. That is not the role of the separate question process.

“Ultimately, it seems to me the plaintiff’s suggested approach that the issues in the proceedings should be split is too blunt an instrument for the court to wield at this stage.”

## **\$45B project spawned many lawsuits**

A consortium comprising CIMIC unit UGL, General Electrics and Jacobs Engineering subsidiary CH2M entered into a contract in 2012 with JKC Australia — a joint venture including Japanese firms JGC Corporation and Chiyoda Corporation and the US-based KBR, Inc — to design, construct and commission a combined cycle power plant for Ichthys LNG Pty, a company affiliated with Inpex Corporation. Inpex first contracted the project out to JKC in a US\$13 billion agreement.

Thus far, the Ichthys project has been plagued with delays, cost blowouts and lawsuits.

As of 2021, Inpex and JKC had settled all disputes between them relating to the Ichthys project, according to a December 1, 2021 judgment by Supreme Court of Western Australia Justice Jeremy Allanson in Inpex and JKC’s lawsuits against their insurers. The companies brought substantially identical indemnity claims against their insurers over the alleged defects in the coating used on the LNG project.

Under the settlement, which was made without admission of liability, the companies agreed to make efforts to maximise recovery from their insurers.

Justice Allanson denied a bid by the insurers to prevent Inpex from taking over JKC Australia’s lawsuit against AkzoNobel. JKC [filed its own lawsuit against AkzoNobel](#) in the Federal Court in July 2021.

AzkoNobel’s Intertherm 228 coating allegedly caused degradation and discoloration to the Ichthys pipes after use. The project required 889km of subsea pipeline to

connect the onshore liquefaction plant, near Darwin, with the offshore Ichthys field in the Timor Sea.

In their lawsuit against their insurers, filed in May 2020, Inpex and JKC claim the damages should be covered under the Construction RISKS Insurance Policy, under which they were both insured between November 16, 2012 and December 31, 2017.

In his judgment, Justice Allanson found replacing JKC with Inpex to be the proper exercise of the court's discretion.

## **Inpex should be able to determine remediation costs, judge says**

In his decision on Friday, Justice Lundberg said while the case against the insurers was “undoubtedly complex”, it was not inevitable that Inpex will need to prepare evidence about the amount of damages payable in an “indeterminate” number of scenarios.

“This approach presumes that further work cannot now be undertaken by the plaintiff to refine the claims for damage (and the remediation costs) which it seeks,” the judge said.

“That work should, with respect, not be undertaken only *after* a series of findings and conclusions are made by the court on the substantive issues.”

The judge said there was no logical reason why Inpex could not now determine the costs of remediation work required to be done on the lines of piping and equipment.

“I do not accept that there is merely a stark choice for the court, between an inefficient and wholly unmanageable piece of litigation, on the one hand, *and* a decision to accede to the split trial applications proposed by the plaintiff, on the other,” said Justice Lundberg.

“By having the plaintiff undertake further work on the remediation issues and costs, the impossible and unmanageable task of preparing the quantum evidence (as the plaintiff puts it) may well become possible and manageable.”

## **No ‘clear demarcation’ between liability and quantum**

Justice Lundberg also rejected Inpex's arguments that there should be a split trial because there was a "clear demarcation" between issues of liability and quantum.

The judge said if there were two separate trials, they would both need to deal with the proper construction of two key exclusion clauses in the insurance policies which deal with novel issues.

"This court will ultimately be called upon to construe these exclusion clauses in circumstances in which their proper construction is something of a *greenfield site*," said Justice Lundberg.

"That means the court should proceed cautiously, given the interpretation and application of the clauses may have significance beyond the instant litigation and the present parties.

"The splitting of the case across two trials will require the court to address the construction of these exclusions on two occasions with the potential for different evidentiary circumstances presented on each occasion. That creates a significant risk, in my view, that the process of construing these important exclusion clauses will miscarry."

The judge also found splitting the trials could shorten the overall time required for trial but that the reduction in legal costs was likely to be "modest" and that the judicial resources needed could increase.

Justice Lundberg accepted the insurers' evidence that the case was unlikely to settle until Inpex had given information on the quantum of damage in the claim.

Ichthys is expected to remain in operation for 40 years, producing 8.9 million tonnes of LNG, 1.6 million tonnes of LPG, and 100,000 barrels of condensate each year.

Inpex is represented by John Rowland KC and Richard Price, instructed by Allen & Overy. AIG is represented by Geoffrey McArthur KC and Todd Marskell, instructed by Wotton + Kearney. Mitsui Sumitomo is represented by Stuart Donaldson SC and Alan Hershowitz, instructed by Gillis Delaney.