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TERMINATING CONTRACTS  
AND CALLING ON BANK  
GUARANTEES

Offshore Vessel & Rig  
Connect Asia  
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- Parties to a contract may wish for it to continue rather than terminate.
- Broadly, the options include:
  - postponing performance of the contract until a later date;
  - assigning or novating the contract (i.e. 'giving' it to a third party, perhaps an entity within the same group); or
  - renegotiating the terms of the contract.



## When does the right to terminate arise?



- Contractual rights of termination
  - Default of certain prescribed obligations (eg payment, failure to meet milestones)
  - Non-permissible delays
  - Insolvency
  - "No fault" right of termination (eg Supplytime)
  
- Legal rights of termination
  - Breach of a contractual condition
  - Breach of a term that "*goes to the root of the contract*"
  - Breach of a term that "*deprives the innocent party of substantially the whole benefit of the contract*"

## Life After the Call



- Relevant documents:
  - Contract
    - Governing law?
    - When does it permit calls to be made?
    - Are there circumstances in which calls are expressly prohibited?
  
  - Security instrument
    - Governing law?
    - Does it refer to the relevant contract clauses permitting calls to be made?
    - Does it refer to the relevant contract clauses preventing calls to be made?

Options:

1. Injunct the beneficiary to prevent them from making the call
2. Injunct the surety to prevent them from paying
3. Freeze the received funds



- The dispute has started under the project contract.
- Does your project contract entitle you to make a demand?
- When can a demand be made under the guarantee?
- Is your guarantee expiring soon?
- Do you feel pressured into making a demand?
- What does your demand cover – refund or performance?

- After the call is made, the guarantor is likely to be out of the picture.
- Your contracting party under the project contract will either negotiate with you or start arbitration / court case.
- One issue will be whether you were entitled to call on the guarantee.
- Another issue will be whether you, in any event, have losses which are equal to or in excess of the sum recovered under the guarantee.

- How will the standard offshore exclusion clauses operate to exclude your claims?
- Principles of recovery under English law.
- Your contracting party may have counterclaims and set-offs.
- The end result may be that having made a valid demand under the guarantee, under any subsequent arbitration or court proceedings, you may be ordered to refund the monies paid.



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Chanaka is an English lawyer and specialises in offshore contract negotiation and disputes. He advises a broad range of actors within the offshore sector across a wide spectrum of contracts including offshore construction, PRE-FEED, FEED, EPC, EPCIC, installation, operations, supply, services, logistics, drilling contracts, maintenance, various standard form, amended or bespoke charterparties, FPSO leasing agreements and decommissioning.

Chanaka joined the London office in 2002 and has been based in the Singapore office since 2005. Chanaka's 10 year experience in this region ensures that he has an unrivaled depth of understanding of the needs of clients within this industry and the business cultures having also handled matters for various clients with their claims in Indonesia, China, Thailand, India and Sri Lanka. He has advised a range of parties on regional issues relating to the recovery of claims, cabotage issues, vessel flagging requirements, logistics contracts, injunctions, shipbuilding contract termination disputes and structuring of charter contracts for offshore operations.

Chanaka is also regularly appointed as an arbitrator and he is on the reserve list of arbitrators at the Singapore International Arbitration Centre. He is an accredited mediator and member of the Chartered Institute of Arbitrators. He has represented clients in mediations and arbitrations across the world. Selected experience below:

- Regularly advising on drafting multiple building / conversion contracts for jack-ups, semi-submersible drilling units, FPSOs and drill ships for owners and yards from various jurisdictions and attending various tender negotiations.
- Completing contract and risk review for leading US offshore contractor in respect of pollution indemnities and liabilities; and advising on contract management and drafting to minimise exposures to pollution liabilities.
- Advising leading European FPSO owner and operator on newbuild FPSO in respect of minimising risk in project management and drafting multiple addenda to the project contract (total contract value in excess of US\$700 million).
- Advising a drilling contractor on recovery of claims from oil major consortium partners arising out of multiple drilling contracts and assignments.
- Acting for yard in contract termination arbitration and securing injunctions against owner's calls of refund bonds.
- Acting for an offshore contractor in respect of multiple Singapore arbitration proceedings relating to a detention of an offshore vessel by a shipyard, bringing claims for, amongst other things, loss of vessel earnings.
- Drafting a bespoke time and material costs contract for a leading European FPSO owner and operator for the repair and outfitting of a damaged FPSO.
- Advising a leading US FPSO owner in respect of the negotiation and drafting of a turret upgrading agreement with a leading Singapore offshore builder.

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