

CONTRACTUAL CLARITY



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The English court has confirmed the construction of standard language used in a drilling rig charter between BP Exploration Operating Company Ltd and Dolphin Drilling Ltd ([2009] EWHC 3119 (Comm)).

During contractual negotiations, the day rate for the semi-submersible rig, the *Byford Dolphin*, was agreed at \$410,000 in September 2008 for a three-year contract, with drilling operations commencing in the first quarter of 2010.

BP wished to terminate the contract prior to the commencement date and sought a declaration from the court that it was entitled to terminate the work or the contract at any time for a number of specified reasons, including its own convenience, and that its liability for payments to Dolphin would only include sums due for work done prior to termination. The commercial implications for Dolphin of the termination were considerable.

Dolphin argued that there was no contractual entitlement to terminate the agreement for BP's convenience until after the commencement date and that any purported termination would be a repudiatory breach leaving Dolphin with the remedy of damages, including a claim for loss of profits.

S22.1 of the contract stated:

"The COMPANY shall have the right by giving notice to terminate all or any part of the WORK or the CONTRACT at such time or times as the COMPANY may consider necessary for any or all of the following reasons:

(a) to suit the convenience of the COMPANY."

Dolphin argued that something had gone wrong with the language of the contract and that a reasonable person would have understood it to be read subject to an implicit proviso that this right could only be exercised after the commencement date. The court had difficulty with this approach. The relevant contractual provision is based on the industry's standard LOGIC Conditions of Contract. The fact that these conditions have been used by the oil and gas industry since 1997:

"... greatly undermines the suggestion that an open ended liberty to terminate at the convenience of the charterer both before and after the commencement of the drilling operations makes no commercial sense."

A number of other scenarios permitting termination were accepted as not being subject to a requirement that they occur before or after the commencement date. The court concluded that:

"The outcome (in the aftermath of an unexpected financial crisis) may be highly unattractive from Dolphin's perspective. But it arises from a standard term.... In my judgment whether the motivation for termination is the fall in the market on the one hand or, say, the absence of drilling opportunities in the designated area on the other, it is not made out that the consequences are commercially absurd."

The fact that the construction of a contract would lead to a commercially unattractive outcome for one party should not then mean that such a construction should be rejected as being irrational. The parties used standard industry terms in a formal document to regulate their relationship; whilst acknowledging that the result was very favourable for one party, the court was not prepared to depart from the ordinary meaning of the language used.

Thankfully, litigation upon the construction of industry standard wordings is rare. It is recommended that members closely examine their contractual terms and ensure that their pre-contract risk/benefit analysis includes contingencies such as early termination.