

“Cash is King” Collecting unpaid invoices

Collecting unpaid invoices is becoming an increasing challenge for many commercial entities. Contractors in the offshore oil & gas industry are no exception. When amicable discussions and commercial pressure fail the creditor may seek legal assistance. The first step is not necessarily to issue a claim and become embroiled in litigation; indeed the English Court's Rules actively discourage this. Nevertheless, in appropriate cases, it can pay to take active steps in order to achieve early recovery.

Under English law and procedure it is possible to issue a claim and at the same time apply for summary judgment. Depending on the time of year it might well be possible to get a hearing within a month and the decision would normally be made on the day or very shortly thereafter.

The summary judgment application will, however, only be successful if the Defendant can be shown to have no real prospects of having a successful defence to the claim for payment. Inevitably the terms of the contract are very important in determining whether the Defendant has "no real prospects of success".

One of the most appropriate provisions that we would look to include when assisting in drafting Contracts is an anti set-off provision. Commercial agreements frequently restrict rights of set-off. For example, an exclusion of set-off rights is particularly common in vessel charterparties where payment of hire is often critical to the Owners ability to make repayments under its loan facility. By including such a clause the Owner is usually entitled to payment of hire notwithstanding the fact that the Vessel's performance has not been what was expected.

In our experience such clauses are less common with *offshore services contracts notwithstanding the fact* that a vessel (whether owned by the Contractor or on charter) is often fundamental to the provision of the

services. There is no reason, in principle, why such a provision should not be included.

A typical anti set-off provision might state: "*All amounts due under this agreement shall be paid in full and Company shall not be entitled to assert any credit, set-off or counterclaim against Contractor in order to justify withholding payment of any such amount in whole or in part.*".

Obviously the clearer the wording the better but if the above is likely to prove objectionable then it should be noted that an effective anti-set off provision could be considerably shorter and a requirement to pay invoices "*in full without set-off*" will often suffice. In the case of *Boskalis Offshore -v- Atlantic Marine*¹ the relevant language of the BIMCO Supplytime 2017 form of '*in full without discount or set-off*' was considered. The language was held to be effective in the arbitration and on appeal to the Commercial Court with the result that the charterers, Boskalis, were required to pay the hire in full and, due to the failure to serve timely notices, were precluded from running off-hire defences.²

The summary judgement application therefore affords a procedure for prompt redress of the problem of unpaid invoices and is worth considering when commercial discussions fail to achieve an amicable compromise.

On the day of the hearing the respective parties barristers will summarise the evidence and make submissions before a judge and the matter will then be decided.

Where a Claimant applies for summary judgment and the Defendant fails to promptly react by providing convincing evidence in response then the likelihood is that the Claimant will be awarded summary judgment at the hearing. In order to defend the application the

¹ *Boskalis Offshore Marine Contracting BV -v- Atlantic Marine and Aviation LLP* [2019] EWHC 1213 (Comm)

² This firm acted for the successful Owner.

Defendant, and its legal team, will typically have to work under a high degree of pressure and under significant time constraints. Whilst the Claimant will have had the time to prepare its case and has chosen when to issue its claim and summary judgment application the Defendant is not afforded such a luxury.

Expending the time, effort and cost necessary to defend an application for summary judgment is particularly unattractive if the underlying circumstances are such that the Contractor is entitled to payment, but the Company has a number of complaints in relation to their performance. Unless the Company has a credible defence and right to set off then the respective bargaining positions of the parties will have adjusted and the incentive on the Company to settle before the hearing can be compelling.

Whether this is an appropriate strategy to adopt in any particular case would depend on factors including how it may impact on the ongoing commercial relationship. There are no definitive rules and issuing a claim and summary judgment application is commonly not an easy decision to make, as it is an aggressive move. Nevertheless, in our recent experience, when taken in the early stages it can improve the prospects of a successful and quick recovery should a dispute arise regarding the entitlement to be paid.



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Simon specialises in contentious and non-contentious matters in the offshore oil and gas and insurance industries.

He has advised on offshore oil and gas projects and conducted litigation and arbitration around the world. Projects Simon has acted on include, Kwame Nkrumah FPSO (Ghana), Benguela-Belize CPT (Angola), BP Thunder Horse (GoM), BP Mad Dog (GoM), BP Mad Dog 2 (GoM), Agbami FPSO (Nigeria), Usan FPSO (Nigeria), Senje Berge FPSO (Nigeria), Akpo FPSO (Nigeria), Coral FLNG (Mozambique), Pazflor FPSO (Angola), Frade FPSO (Brazil), Ichthys FPSO (Australia) and Balder FPSO (North Sea).

Simon successfully acted for the underwriters in the marine insurance case the "*B Atlantic*" before the UK Supreme Court in May 2018 and was awarded the Solicitor of the Year Award (Private Practice) by the Law Society in October 2018.

Simon is co-author of the leading text on law and practice relating to design and construction of vessels for offshore oil & gas: *Offshore Construction Law and Practice*, published by Informa Law for Routledge.

Simon also authored the Decommissioning Contracts chapter in the text, *Oil and Gas Decommissioning: law policy and comparative practice* (Second Edition), published by Globe Law and Business.