

RODYK & DAVIDSON LLP

MANAGING DISPUTES IN OFFSHORE VESSEL CONSTRUCTION CONTRACTS

Offshore Vessel & Rig Connect Asia – Singapore
9-20 April 2016

LAWRENCE TEH
SENIOR PARTNER
MARITIME PRACTICE

SHIPBUILDING CONTRACT

- > Vessel construction contracts are commonly in the BIMCO “Newbuildcon” form
- > BIMCO’s objective to produce single, comprehensive document applicable to all ship types and in all jurisdictions
- > Benchmark for key provisions that should be contained in any shipbuilding contract so as to facilitate negotiation
- > Drafted with involvement of shipowners and shipyards with the support of other relevant parties to produce a document acceptable to all
- > Propose to use this form as the basis to discuss management of risk and disputes

SHIPBUILDING RISKS AND DISPUTES

- > Shipbuilding risk and disputes commonly arise out of a lack of agreement on details concerning scope of work and the issue of appropriate price for work
- > Also arise out of delays and defects
- > One example is in the area of modifications or changes to construction of the vessel, often called “Variation Orders” of “Change Orders”
- > Shipbuilding contract often negotiated in fine detail including Specifications, Plans and Drawings
- > BUT requests for modification often not fully thought through, not properly priced and/or not properly anticipated

REQUEST TO MODIFY OR CHANGE

- > Under “Newbuildcon” Buyer can request reasonable modifications in Specifications, Plans or Drawings
- > Must request in writing and give sufficient particulars
- > Builder must give a reasonable written proposal of the consequences, e.g. change in price, delivery, capacity, draft, speed, fuel consumption, etc. and must minimise extra costs, delay, etc.
- > Or Builder may decline to give proposal if it will affect Builder’s planning or programme for other projects
- > Buyer can order Builder to proceed despite proposal or declining to proceed, with consequences decided in dispute resolution

MODIFICATIONS AND CHANGES IN REALITY

- > In reality, modifications or changes often needed urgently because either the Buyer or the Builder has a schedule to meet
- > Either a rush to issue modification request, which does not contain sufficient detail or price; or worse, no written request at all
- > Or Builder does not revert with written proposal of consequences and simply commences work
- > Builder's concern over adequacy of work and risk of rejection leads it to err on side of over-execution of requested modification
- > This leads also to a price that is unexpected by customer

DRAFTING TO ANTICIPATE MODIFICATIONS

- > Parties should anticipate urgency and agree in advance as much as possible in the event modification is requested,
- > e.g. details to be contained in modification request, schedule of rates, Builder's planning and programme for other projects, construction method and speed, use of materials, etc.

REFUND GUARANTEES

- > To secure Builder's obligation to refund Buyer's pre-delivery instalments, Builder furnishes a refund guarantee
- > Builders often make the mistake of assuming that refund guarantee is an on-demand performance bond, payable by bank or insurer upon simple demand whatever the circumstances
- > When demand made, Builder then tries to apply to court for injunction to restrain the demand of receipt of monies under the refund guarantee
- > Should ensure that refund guarantee provides that if claim/demand is disputed, guarantor's liability to pay is suspended until dispute resolved

REFUND GUARANTEES

- > e.g. "Newbuildcon" refund guarantee form provides:
- > If within 28 days of demand, guarantor receives notice that claim is disputed and that dispute will be resolved according to contract dispute resolution mechanism ...
- > then not obliged to make payment until dispute finally determined
- > Same applies to Buyer's letter of guarantee for 2nd and 3rd instalments
- > But not for letter of guarantee for performance of Buyer's obligations

PROJECT RISK MANAGEMENT

- > Whatever the state of the contract or project, Builder and Buyer can benefit from project risk management
- > Process which involves identifying a risk as early as possible, analysing it and applying steps to prevent it from becoming an issue
- > Similarly, steps should be taken early to prevent an issue from becoming a dispute and a dispute from being referred to a formal dispute resolution process, e.g. mediation, arbitration or litigation
- > These steps save time and money and also preserve goodwill and future projects

GOOD FAITH DISCUSSION AND MEDIATION

- > Draftsman may want to include clause in contract to provide that any dispute should be discussed in good faith with a view to resolution
- > Singapore law will in appropriate circumstances enforce good faith discussion clause: *HSBC v Toshin*
- > May also want to provide that if good faith discussion does not resolve the dispute, then refer dispute to mediation before resorting to arbitration or litigation
- > Mode and institution: evaluative/facilitative, SIMC/SMC/ CEDR
- > Singapore law will enforce multi-tier dispute resolution clauses: *IRC v Lufthansa*

ARBITRATION

- > Arbitration needs to be selected carefully
- > Place of arbitration – Singapore, London, New York or other place supportive of arbitration
- > Appeal against the award?
- > Which arbitral institution – SCMA, SIAC, ICC, LMAA, etc.
- > Administered or non-administered arbitration?
- > Availability of expedited procedure
- > Availability of emergency arbitrator procedure
- > Time/cost comparisons
- > Possibility that parties can change place of arbitration and institution to save time and costs?

ARBITRATION AND MEDIATION

- > Even after arbitration is commenced, parties may agree to refer the dispute to mediation
- > Mediation can take the form of neutral evaluation
- > Refusal to mediate may be something that can be referred to arbitrator on question of costs – “Newbuildcon”
- > Take legal advice on options available to save time and costs
- > New alternative in the form of Singapore International Commercial Court

LITIGATION AND THE NEW SINGAPORE INTERNATIONAL COMMERCIAL COURT

- > Jan 2015, Singapore has established the Singapore International Commercial Court (“SICC”):
 - > It is a division of High Court
 - > Panel of SICC Judges will comprise:
 - > Existing Supreme Court Judges
 - > Associate Judges (appointed for fixed terms and assigned to cases on ad hoc basis)
 - > Supported by SICC Registry

LITIGATION AND THE NEW SINGAPORE INTERNATIONAL COMMERCIAL COURT

- > Jurisdiction of SICC:
 - > Case must be international
 - > Case must be commercial
 - > Parties either agree to SICC jurisdiction pre-dispute (contractual clause), post-dispute (agreement), or have their case in High Court transferred
- > Rules and procedures:
 - > SICC rules and practice directions follow int’l best practices for comm. dispute resolution

LITIGATION AND THE NEW SINGAPORE INTERNATIONAL COMMERCIAL COURT

- > Legal representation in SICC:
 - > Singapore lawyers
 - > Ad hoc admission of Queen's Counsel
 - > Special rules allowing SICC-registered foreign counsel for cases with no substantial connection to Singapore

LITIGATION AND THE NEW SINGAPORE INTERNATIONAL COMMERCIAL COURT

- > Proceedings will generally be in open court to help develop a body of jurisprudence
 - > But, on a party's application, SICC may allow confidentiality if in interests of private parties and public
 - > Special rules may also apply to cases with no substantial connection to Singapore

LITIGATION AND THE NEW SINGAPORE INTERNATIONAL COMMERCIAL COURT

- > Enforcement of SICC judgments will be like any other High Court judgment
 - > Reciprocal enforcement
 - > Action on judgment
 - > Hague Convention

SINGAPORE INTERNATIONAL MEDIATION

- > Nov 2014, Singapore has also set up Int'l Mediation Institute ("SIMI")
 - > An independent non-profit entity to ensure professionalism and raise standards
 - > SIMI will (inter alia):
 - > Certify mediators' competency
 - > Apply & enforce standards of professional ethics
 - > Provide info about mediation and make tools available to assist parties

SINGAPORE INTERNATIONAL MEDIATION

- > And a Singapore Int'l Mediation Centre (“SIMC”)
 - > Singapore’s IM service provider (akin to SIAC) headed by panel of high quality int’l mediators
 - > Services provided should include:
 - > Pre-dispute – helping parties:
 - > avoid potential disputes when considering major deal
 - > develop processes to manage disputes effectively
 - > Post-dispute – Case management service, flexible mediation venue & acting as designating authority to select mediators when parties cannot agree

SINGAPORE INTERNATIONAL MEDIATION

- > Singapore will be enacting a Mediation Act
 - > A Mediation Act would contain provisions to:
 - > Stay proceedings pending mediation outcomes (akin to that in arbitrations)
 - > Clarify the position on confidentiality and privilege in mediations
 - > Assist in enforcing mediated settlements (possibly as court orders)

MANAGING DISPUTES IN OFFSHORE VESSEL CONSTRUCTION CONTRACTS

THANK YOU

LAWRENCE TEH
SENIOR PARTNER
MARITIME PRACTICE
+65 6885 3693
lawrence.teh@rodyk.com

This presentation is for general information purposes only. Its contents are not intended to be legal or professional advice and are not a substitute for specific advice relating to particular circumstances. Rodyk & Davidson LLP does not accept responsibility for any loss or damage arising from any reliance on the contents of this presentation. If you require specific advice or have any questions, please contact our presenter or any Rodyk partner.

© Rodyk & Davidson LLP 2012. Limited Liability Partnership Registration No. T07LL0439G

RODYK & DAVIDSON LLP

SINGAPORE

80 Raffles Place
#33-00 UOB Plaza 1
Singapore 048624
Tel +65 6225 2626
Fax +65 6225 1838
Email mail@rodyk.com

SHANGHAI

Unit 23-11 Ocean Towers
No. 550 Yan An East Road
Shanghai 200001, China
Tel +86 (21) 6322 9191
Fax +86 (21) 6322 4550
Email shanghai.mail@rodyk.com

www.rodyk.com