

RODYK & DAVIDSON LLP

MANAGING DISPUTES IN OFFSHORE VESSEL CONSTRUCTION CONTRACTS

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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” or “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)

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THANK YOU

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