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Research Article

"Force Majeure", extension of time clauses and the prevention principle in shipbuilding contracts

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ABSTRACT

Under English law, it is entirely up to the contract parties to agree on "force majeure" events that are beyond the builder's control. Under an old English law principle known as the "prevention principle", no party to a contract should be allowed to benefit from its own failure to perform. In the context of shipbuilding contracts, this principle should give protection to a shipyard in the case of delays in the delivery of a vessel that are caused by the buyer's defaults. It is the builder's fundamental duty to deliver the vessel to the buyer on the delivery date set out in the shipbuilding contract. If the builder demands to be released from that duty, it will have to follow certain requirements imposed by English law.

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1. INTRODUCTION

One of the most common disputes arising under shipbuilding contracts relates to delays in the delivery of a vessel.

The fundamental obligation of each shipyard is to deliver within the contract time a vessel in a condition that complies with the contract. Subject to certain conditions, set out in this article, the fixed contract time or delivery date can be postponed, suspended or extended only for the following reasons:

- The occurrence of one or more of the events set out in the shipbuilding contract as "force majeure" events that have actually caused a delay in construction and/or delivery of the vessel; and/or
- The application of the extension of time clauses set out in the shipbuilding contract; and/or
- The application of the prevention principle.

Since the shipyard's fundamental obligation is to deliver the vessel on the delivery date set out in the shipbuilding contract, the burden of proof that the shipyard is entitled to be exempted from such contractual liability, for any of the above reasons, lies with the shipyard.

English law governs most international shipbuilding contracts. Disputes arising from such contracts are usually referred to LMAA arbitration in London. This is because English law and so-called "legal London" are the most common choice of law in international shipbuilding contracts.

The shipbuilding contract under English law is a complex sales agreement with elements of a building contract (Stocznia Gdanska S.A. v. Latvian Shipping Co. and Others, 1998).

2. "FORCE MAJEURE"

Unlike European continental laws, English law does not recognise "force majeure" as a doctrine of law. "Force majeure" provisions are normally included in a clause

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of the shipbuilding contract governing situations in which the shipyard would not be liable for delays in the construction and/or delivery of the vessel and it would be entitled to extend the period of construction and the agreed date of delivery.

It is entirely up to the shipyard and the buyer to agree upon the events that are beyond the shipyard's control and that could not be foreseen or anticipated before or at the time the contract is executed and which might cause delays in the construction and/or delivery of a vessel.

Such events normally include war or warlike events, terrorist attacks, riots, the imposition of embargoes, actions by the government with jurisdiction over the shipyard prohibiting or preventing the shipyard from proceeding with its business activities, extraordinary weather conditions, strikes, lockouts, explosions, fires, disruptions of power supplies, defects in materials and equipment, etc.

However, the shipyard will have to prove that the "force majeure" event has actually caused delays in the construction and/or delivery of the vessel (Jerram Halkus Construction Ltd v. Fenice Investments Inc., 2011).

3. EXTENSION OF TIME CLAUSES

Examples of extension of time clauses (permissible delays) in a shipbuilding contract:[1]

- The buyer's late payment of the contract price:

"*The Builder has the right to extend the Delivery Date of the Vessel for the same number of days equal to the delay in the payment of any Instalment, or a part of thereof.*" This is a good example of automatic extension without the need to show or argue causation between the buyer's delay and the extended delivery date of the vessel.

- Buyer's modifications:

"*If the dispute (about the Buyer's modifications) is resolved in favour of the Builder, any time lost due to the dispute shall be deemed a permissible delay.*"

Or

"*Any time lost in achieving an agreement regarding any modifications, deletions or additions (including the consequences of the same) … shall be deemed as permissible delay under this Contract.*"

- Buyer's supplies:

"*Should the Buyer fail to deliver any of the Buyer's Supplies within the time designated, the Delivery Date shall be automatically extended for a period of such delay in delivery.*"

Extensions of time are rarely or never as automatic as they seem as they are usually subject to certain conditions: primarily, causation and notice to the buyer, save for the suspension of construction and the extension of the delivery date due to delays in payment of the contract price.

4. CAUSATION

It is always a question of fact whether a relevant event has caused or is likely to cause delay to the works beyond the completion date. Causation is not always easy to prove and very often shipbuilding experts are involved to assist the arbitrators, or commercial judges, as the case may be, to determine whether the shipyard's claim for extension stands.

In Adyard Abu Dhabi LLC v. SD Marine Services (2011), the Court has considered whether the changes in design of the vessel demanded by the buyer caused the delay in delivery as alleged by the shipyard. It was established that the construction of the vessel was already before that in delay and the shipyard was not entitled to additional time because the alleged demands did not cause delay in delivery. What has caused delay in delivery was concurrent delay in the vessel's construction caused by the shipyard.[2]

It is a difficult task for the shipyard to demonstrate the impact of a delay on the delivery date. It should bear in mind that it is usually easier for the buyer to reject the shipyard's claim for permissible delay than for the shipyard to support its case.

5. NOTICE OF DELAY

It is common practice for every buyer to expect the shipyard to advise him of any new, extended delivery date. Shipbuilding contracts normally require the shipyard to notify the buyer in writing of the occurrence of such an event, within a number of days of the occurrence of the event. The shipyard is required to indicate the likely duration thereof. The shipyard should notify the buyer when the event or events have ceased to exist, and about the number of days of delay in the vessel's delivery caused by the occurrence of the event. The shipyard should also set out a new delivery date (BIMCO, n.d.).

However, if the shipyard demands that the contractual delivery date be extended, postponed or suspended due to the occurrence of a "force majeure" event, it will have to prove that such an event is the cause of the delay in the construction and/or delivery of the vessel. It will need to prove that the alleged event is in the critical path of construction and/or delivery of the vessel for a number of days beyond the agreed delivery date. In addition, the shipyard will need to prove that it has done all it can to avoid or minimise the actual delay in the delivery of the vessel.

Such a written notice to the buyer is a condition precedent to the application of the extension of time provisions in the shipbuilding contract.

In this context, the buyer has the right to know when the vessel will be delivered. The buyer is also entitled, where appropriate, to reject the shipyard's notice of delay. The rejection of the shipyard's notice of delay is very common. In such circumstances, the question of whether or not the

[1] https://www.bimco.org/Contracts-and-clauses/BIMCO-Contracts/NEWBUILDCON#

[2] https://www.bailii.org/ew/cases/EWHC/Comm/2011/848.html adyard-abu-dhabi-v-sds-marine-services/.

notice itself and the shipyard's claim for an extension of time are valid should be referred to arbitration in London.

By sending a written notice of delay to the buyer, the shipyard seeks to reserve its right to exclude or limit its liability for delays in the construction and/or delivery of the vessel.

However, sending a notice of delay is not enough for the shipyard to exclude or limit its liability for delays in the construction and/or delivery of the vessel. The application of extension of time provisions is normally subject to the provision of a notice by the shipyard to the buyer of the shipyard's intention to claim an extension of the delivery date.

In the above said Adyard Abu Dhabi LLC v SD Marine Services (2011), the shipyard failed to send a notice to the buyer claiming an extension of time due to the buyer's alleged acts of prevention. It was noted that "*a shipyard seeking extra time must be sure to give notices where these are contractually required*". In this case, the shipyard's claim for an extension of time failed due to its failure to give a notice of delay pursuant to the terms of the shipbuilding contract.[3]

In Zhousan Jinhaiwan Shipyard Co. v Golden Exquisite and Others (2014), delays caused by the buyer were governed by extension of time clauses in the form of permissible delays, providing the shipyard send a notice at the commencement and at the end of such delays. Since the shipyard failed to send such a notice it lost the right to claim delays allegedly caused by the buyer. Judge Leggatt stated: "*Delays in construction are prima facie the responsibility of the Builder, unless they are excused by a provision of the contract. The basic default position under the contract, in other words, is that delay is 'non-permissible' unless a term of the contract classifies it as permissible (or, in the case of excluded delays, deems it not to be delay at all)*".

The notice of delay should be given to the buyer even if it is not initially clear whether there is an impact on the delivery date. This will provide useful evidence in any future arbitration. Otherwise, the shipyard faces the risk that it would not be allowed to rely on extension of time provisions and the prevention principle will not be applicable.

Regardless of whether or not the extension of a delivery date is automatic, every court would expect a shipyard to advise its buyer of any new, extended contractual delivery date.

6. THE PREVENTION PRINCIPLE

"Prevention" means the action of stopping something from happening.

Lord Ellenborough CJ nicely set out the prevention principle in the case of Rode v Farr (1817, pp. 124–125):[4]

If the buyer has by its own wrongdoing prevented the shipyard from tendering the vessel for delivery on a contractual delivery date, the buyer should not be entitled to claim liquidated damages or cancel the shipbuilding contract and claim a refund, interest and damages. This is because in such a case the contractual date of delivery becomes "time at large".

"Time at large" is, subject to contract, a matter of law that replaces the contractual delivery date by an implied obligation to deliver the vessel within a reasonable period of time "in the light of all relevant circumstances" (Shawton Engineering v. DGP International Ltd., 2005).

In the case of Multiplex Constructions UK Ltd. v. Honeywell Control Systems Ltd. (2007), the court held:

If the buyer interferes with the work so as to delay its completion, this is an act of prevention and the contractor is no longer bound by the strict requirements of the contract as to time; for example, the instruction of variations to the work can amount to an act of prevention.

The ultimate consequence: no liquidated damages and time for the completion of the vessel's construction becomes time at large.

7. EXTENSION OF TIME CLAUSES AND THE PREVENTION PRINCIPLE

The application of the prevention principle can be excluded by the inclusion of extension of time provisions in the shipbuilding contract either in the form of permissible delays allowing the shipyard to extend the delivery date or in the form of provisions adjusting the date of completion in the event of modifications to the technical specification.

This was confirmed in the case of Multiplex v. Honeywell (2007). The prevention principle does not apply if the contract provides for an extension of time in respect of the relevant events. In addition: "Acts of prevention by an employer do not set time at large if the contract provides for an extension of time in respect of those events."

There is no need for the application of the prevention principle if the contract already protects the shipyard.

This is because the shipyard is entitled to rely on such provisions only where it can prove that the project was not already in a critical delay before the buyer's delaying conduct occurred.

The shipyard should be able to prove that without prevention by the buyer it is still possible to complete the vessel by the agreed date in spite of the shipyard's own delays.

In the case of Jerram Halkus Construction Ltd. v. Fenice Investments Inc. (2011), Judge Coulson expressed his views as follows:

… for the prevention principle to apply, the contractor must be able to demonstrate that the employer's acts or omissions have prevented the contractor from achieving an earlier completion date and that, if that earlier completion date would not have been achieved anyway, because of concurrent delays caused by the contractor's own default, the prevention principle will not apply.

[3] Ibid.

[4] Lord Ellenborough C.J. said, "In this case, as to this proviso, it would be contrary to a universal principle of law that a party shall never take advantage of his own wrong."

Even if the buyer's acts of prevention were concurrent with the delays caused by the shipyard's own default, the prevention principle will not apply.

Concurrent delay is "a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency" (Marrin, 2012).

In the case of North Midland Building Limited v. Cyden Homes Ltd. (2018), the contractor raised an interesting argument. The parties included a provision in their contract pursuant to which any delay caused by a Relevant Event (caused by the employer) which is concurrent with another delay for which the contractor is responsible shall not be taken into account.

Although the contractual provision on concurrent delay was clear, and although the shipyard partly caused the delay, it still argued that the prevention principle was a matter of legal policy which should operate to the benefit of the contractor and set aside the clause to which it had agreed in the contract.

The Court of Appeal rejected that argument because (inter alia) "the prevention principle is not an overriding rule of public or legal policy" and the contract contained a clear provision as to what happens in the event of concurrent delay (North Midland Building Ltd v Cyden Homes Ltd., 2018).

8. CONCLUSION

As stated at the beginning of this article, the shipyard would be in breach of contract if it fails to tender for delivery the vessel that complies with the shipbuilding contract within the contract time.

The consequences of such a breach may be that the shipyard would be required to pay liquidated damages to the buyer as compensation for loss caused by the late delivery. Another consequence might be the termination of the contract by the buyer and the buyer's claim for the refund of the pre-delivery instalments, together with interest thereon, and, sometimes, damages.

In order to avoid liabilities for delays in performing their shipbuilding contracts, many shipyards, as well as their suppliers, claim the application of extension of time provisions (permissible delays) in their shipbuilding contracts.

If shipyards wish to rely on extension of time clauses in their shipbuilding contracts, they should ensure that they have a very strict documentary policy in place, a system of prompt notifications to the buyer, a system of recording relevant events that are causing or may cause delays in the construction and/or delivery of the vessel, and critical path diagrams.

DATA AVAILABILITY STATEMENT

The published publication includes all graphics and data collected or developed during the study.

CONFLICT OF INTEREST

The author declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

ETHICS

There are no ethical issues with the publication of this manuscript.

FINANCIAL DISCLOSURE

The authors declared that this study has received no financial support.

REFERENCES

Adyard Abu Dhabi v. SDS Marine Services. (2011). EWHC 848 (Comm). https://www.bailii.org/ew/cases/EWHC/Comm/2011/848.html. Accessed on Dec 12, 2023.

BIMCO. (n.d.). *Contracts*/NEWBUILDCON. Retrieved from https://www.bimco.org/Contracts-and-clauses. Accessed on Dec 12, 2023.

Jerram Halkus Construction Ltd v. Fenice Investments Inc. (2011). EWHC 1935 (TCC). https://www.bailii.org/ew/cases/EWHC/TCC/2011/1935.html. Accessed on Dec 12, 2023.

Marrin, J. (2012, December 12). Concurrent delay revisited. Paper No. 179 presented at the *Society of Construction Law*. London, UK.

Multiplex Constructions UK Ltd. v. Honeywell Control Systems Ltd. (2007). Adj. L.R. 03/06, EWHC 447 (TCC). https://www.isurv.com/directory_record/4329/no_2. Accessed on Dec 12, 2023.

North Midland Building Ltd v Cyden Homes Ltd. (2018). EWCA Civ 1744. https://www.fenwickelliott.com/research-insight/newsletters/dispatch/archive/. Accessed on Dec 12, 2023.

Rede v. Farr. (1817). 6 M. & S. 121. 105 ER 1188.

Shawton Engineering v DGP International Ltd. (2005). AII ER (D) 241, CA; CILL 2306 CA. https://www.isurv.com/directory_record/4509/. Accessed on Dec 12, 2023.

Stocznia Gdanska S. A. v. Latvian Shipping Co. and Others. (1998). House of Lords judgment. www.publications.parliament/uk. Accessed on Dec 12, 2023.

Zhousan Jinhaiwan Shipyard Co. v Golden Exquisite and Others. (2015). Lloyd's Rep. 283. https://www.i-law.com/ilaw/doc/view.htm?id=352316. Accessed on Dec 12, 2023.