TWENTY ESSEX

The end of the 'prevention principle' and notification requirements to move the delivery and cancellation dates under the SAJ Form

Andrew Dinsmore

Andrew Dinsmore recently appeared for successful shipowners in a s. 69 application concerning the prevention principle and the requirement to give notice or communicate to move the Delivery (and Cancellation) Date under the SAJ Form.

The Commercial Court has handed down judgment in *Jiangsu Guoxin Corporation Ltd (formerly known as Sainty Marine Corporation Ltd) v Precious Shipping Public Co. Ltd* [2020] EWHC 1030 (Comm), in which Butcher J held that the prevention principle did not apply to an amended SAJ Form and that a shipyard must give notice or communicate under various provisions in the amended SAJ Form to move the Delivery (and Cancellation) Date.

Facts

The dispute concerned 'Hulls 21B and 22B' in the context of 11 arbitrations between the Seller and the Buyer concerning a series of 14 bulk carriers of SDARI 64k design which were to be designed and constructed by the Seller in China.

After the first two hulls, '09B and 10B', were delivered, the Seller tendered '17B, 18B, 19B and 20B', but they were rejected by the Buyer. The Buyer contended that all the ships had been designed and/or built in a defective manner, such that they were susceptible to stern tube bearing failures under navigation. The Seller contends that the rejection and cancellation of those hulls, which it contends was wrongful, resulted in them being left at the Seller's yard, occupying berths there, and delaying the launch and construction of 'Hulls 21B and 22B'.

The contractual Delivery Date for 'Hulls 21B and 22B' was 31 August 2015. On 29 January 2016, 151 days after the contractual Delivery Date, the Buyer stated that it was terminating the contracts for 'Hulls 21B and 22B' under Article III.1 and Article VIII.3 of the SBCs by reason of the lapse of more than 150 days of 'non permissible delays'. The Seller treated this as a repudiatory breach which it says that it accepted on 3 February 2016, thereby, on any view, bringing the contracts to an end.

The dispute

The Seller argued that the prevention principle applies and that the Delivery Date was extended by virtue of (i) late payment by the Buyer of instalments of the Contract Price; (ii) investigations and modifications in relation to the stern tube bearing issue; and (iii) the effect of the cancellation of the contracts for hulls 17B-20B.

The Buyer argued that the SBC was a complete code, such that there was no scope for the application of the prevention principle, and that the contractual machinery had not been exercised by the Seller which was required to move the Delivery Date.

In the underlying arbitration, the Tribunal held that: (i) the Seller was not entitled to extend the Delivery and/or Cancellation Date in circumstances where it failed to and/or did not operate, and/or exercise any relevant contractual machinery, and (ii) there is no scope for the application of the prevention principle in light of the express terms of the SBC (including relevant arguments on implied terms).

The key contractual terms

The key terms considered by the Court in its judgment were:

- Art. V.1 "*The Specifications and Plans in accordance with which the VESSEL is constructed, may be modified and/or changed at any time hereafter by written agreement of the parties hereto... provided further that the BUYER shall assent to adjustment of the ... time of delivery of the VESSEL... Any such agreement for modifications and/or changes shall include an ... agreement as to any extension or reduction in the time of delivery...*"
- Art. VIII.1 "*If, at any time before actual delivery, either the construction of the VESSEL, or any performance required hereunder as a prerequisite of delivery of the VESSEL, is delayed due to... causes beyond the control of the SELLER... the time for delivery of the VESSEL under this Contract shall be extended...*"
- Art. VIII.2 "*Within seven (7) business days from the date of commencement of any delay on account of which the SELLER claims that it is entitled under this Contract to an extension of time for delivery of the VESSEL, the SELLER shall advise the BUYER by telefax or e-mail confirmed in writing, of the date such delay commenced, and the reasons therefore. Likewise within seven (7) business days after such delay ends, the SELLER shall advise the BUYER in writing or by telefax or e-mail confirmed in writing, of the*

date such delay ended, and also shall specify the maximum period of the time by which the date for delivery of the VESSEL is extended by reason of such delay".

- Art. XI.4(a) "*If any default by the BUYER occurs as defined in Paragraph 1 of this Article, the Delivery Date shall, at the SELLER's option, be postponed for a period of continuance of such default by the BUYER…*"

Judgment

Butcher J held that it was an implied term of the SBCs that neither party should actively and wrongfully (in the sense of being a breach of contract or independently wrongful) prevent the other from performing its obligations under the contract (§21) and undertook a detailed analysis of the case law on the 'prevention principle' (§§22-27).

His Lordship noted that the central issue in this case was whether Art. VIII.1 was wide enough to cover the alleged delays because, if it was, then express provision has been made for an extension of time and the 'prevention principle' would not apply. The Seller's argument was that Art. VIII.1 was strictly a force majeure clause such that the events must be within the control of both parties to fall within its scope (§30).

Butcher J agreed with the Buyer noting at §31 that "*It is not called a force majeure clause. It is not, moreover, couched in terms of matters and events beyond the parties' control, but beyond 'the control of the SELLER or of its sub-contractors'. It applies, on its terms, to any of the enumerated causes and to any 'other causes' beyond the Seller's (or its subcontractors') control. Giving their ordinary meaning to the words used, it therefore covers matters caused by the Buyer, assuming that they are outside the control of the Seller or its sub-contractors.*"

His Lordship noted that this construction was a departure from *Zhoushan Jinhaiwan Shipyard Co Ltd v Golden Exquisite Inc* [2014] EWHC 4050 (Comm) where Leggatt J held that a similarly worded Art VIII.1 did not include Buyer-induced delays outside the control of the Seller. However, Butcher J noted that the reason for this is because the other delays which permitted an extension of time were dealt with elsewhere in that contract and stated that "*What the present case has highlighted, however, is that there may be other Buyer's breaches, including of the implied term as to non-prevention, which cannot readily be considered as being provided for elsewhere in the contract. In light of that, I consider that the best interpretation of the contract is to give their face value to the contested words of Article VIII.1.*" (§§35-38, 42).

As a result, his Lordship concluded that the allegations of delay relied on were covered by Article VIII.1 such that notice was required under Art. VIII.2 (§46). The Court then continued to hold that Art VIII.2 would apply even if the delays relied on were outside Art. VIII.1 and not covered by another notification regime stating "*On the assumption that Article VIII.1 is given a narrower interpretation, and there can be cases of Buyer-induced delay which do not fall either within it or within any of the more specific regimes in the SBC, then I would give to Article VIII.2 a construction whereby its notification requirements apply in the case of such delays. The language of Article VIII.2 is wide enough to admit of that construction, because it is in terms of 'any delay on account of which the SELLER claims that it is entitled under this Contract to an extension of time for delivery…' ".* (§§48-49).

The Court continued that it "*should lean in favour of a construction under which there are notification requirements in relation to any, or at least any reasonably foreseeable, causes of delay. In my judgment, a construction of the SBCs whereby, if the alleged cause of delay is not within Article VIII.1, nevertheless Article VIII.2 is applicable is available on the words of Article VIII.2, and is clearly preferable to a construction whereby such delays are not covered by any notification requirement.*" (§51).

In relation to modifications during construction, his Lordship held that Article V only contemplated an extension of time where such was agreed between the parties; without agreement on this, the Seller is entitled to continue with construction to the original design (§53).

As to defaults in payment, the Court held that "*the question of what is entailed by the provision in Article XI.4(a) that the postponement is 'at the Seller's option'. In my judgment what this provides for is that the Seller may choose that the Delivery Date should be postponed. If it does not so choose, then the Delivery Date is not postponed. Given that both parties need to know where they stand, I consider that it is implicit that there must be communication of whether the Seller has chosen that the Delivery Date should be postponed. In almost all cases, that choice would need to be made and communicated before the contractual Delivery Date*" (§59).

Butcher J thus dismissed the appeals and agreed with the Tribunal (§61). Further, in an unusual step for a first instance court, his Lordship gave permission to appeal to the Court of Appeal pursuant to s. 69(8) of the Arbitration Act 1996.

Commentary

Art. VIII.1 of the unamended SAJ Form includes a series of causes that fall within its scope and states "*or due to*

causes or accidents beyond control of the BUILDER". This judgment makes clear that unless this phrase is removed, there is no scope for the 'prevention principle' on the basis of Buyer-induced delay. Further, and in any event, the judgment is significant in holding that Art. VIII.2 goes beyond the causes contained in Art. VIII.1 such that notice must be given to move the Delivery and Cancellation Date.

Taken together, it is clear that the SAJ Form provides a clear regime in which notification and communication are critically important to moving the Delivery (and Cancellation) Date. This accords with commercial common sense because, as the Court noted, "*both parties need to know where they stand*" (§59).

This is particularly important in the context of the COVID-19 pandemic where there are likely to be shipyards that have had to cease construction and buyers that are unable to take delivery (e.g. they cannot get a crew to the shipyard to man the vessel). This judgment makes clear that where the seller seeks an extension of the delivery date, it must give notice in accordance with Art. VIII.2.

The judgment is also important in finding that (i) if a seller wishes to rely on delays due to modification then it must agree the extension of time, and (ii) the Seller's exercise of its option to postpone the delivery date under Art. XI requires a communication that it is doing so.

It is, however, important to note that the wording "*at the Seller's option*" does not appear in Art. XI.3(a) in the unamended form (the equivalent of Art. XI.4(a)). It is thus unclear if the postponement can occur under the unamended SAJ Form without any communication where the delay is said to be buyer's default within Art. XI. It is suggested that future tribunals and courts would not accept such a submission because it would allow the Delivery Date to move without the buyer having been informed leading to uncertainty for buyers seeking to cancel the contract for delay.

Finally, the judgment is significant because it was one of the first Commercial Court hearings by telephone following the COVID-19 lockdown. As the Court noted, this was "*highly effective. Each counsel made focused, clear and helpful submissions, and [the Court] did not consider that anything of significance was lost by reason of the fact that the parties were not in the same physical location as the judge*" (§16).

Andrew is part of the counsel team in the underlying arbitrations led by Duncan Matthews QC, with Josephine Davies and Michal Hain, which recently completed a four-week hearing in March 2020 where arrangements had to be made to address COVID-19 risks, as noted in 'Arbitration in a time of COVID-19: my experience so far', by Josephine Davies.

This article does not constitute, and should not be relied upon as, legal advice. The views and opinions expressed in this article are those of the author and do not necessarily reflect the position of other members of Twenty Essex.

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Andrew has extensive international commercial litigation and arbitration experience. He has recently advised numerous businesses on their business interruption coverage for COVID-19 under Combined 'All Risks' Policies and advised on whether COVID-19 constitutes a force majeure in a charterparty dispute.

His practice focuses on cybersecurity fraud, insurance, banking, shipbuilding, shipping, energy and sport.

He is often instructed to appear both as junior counsel in complex, multi-jurisdictional, high-value cases and as sole counsel in the Commercial Court, Chancery Division and in arbitration. He also has full rights of audience to appear before the AIFC Court in the Republic of Kazakhstan.

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