

# Soundings

## Shipbuilding and COVID-19

**As the COVID-19 pandemic continues to affect global trade, this briefing considers the particular issues facing parties to shipbuilding contracts.**

The disruption caused by COVID-19 is being felt harshly by some shipbuilders and buyers, as yards struggle to maintain their significant workforce and encounter difficulties in securing materials.

Added to the concerns over delay and disruption at the yard, buyers and builders are also confronted by the oil price crash, the declining financial outlook, and a likely drop in demand for certain types of ships, including passenger and off-shore ships.

### **Yard lockdown and force majeure**

Many yards have been forced to close and those that remain open face workforce reductions, a lack of materials and delays in equipment delivery, all of which raise the spectre of liquidated damages claims by buyers and even cancellation for delay.

With many yards giving notice of force majeure and some governments issuing so-called “force majeure certificates” or blanket announcements of force majeure on “all projects

and contracts", it will be of primary importance for builders and buyers to consider the contractual force majeure and cancellation provisions in their shipbuilding contracts.

The SAJ form (Articles III and VIII), BIMCO's NEWBUILDCON (clause 34), the AWES form (Article 6), and the CMAC Standard Newbuilding contract (Article XV) all contain familiar force majeure provisions that expressly cover "epidemics", in addition to a range of other related causes of delay such as import restrictions, government action and other similar causes beyond the builder's control. There is little doubt that these express provisions will come into play in light of the COVID-19 crisis, but significant disputes are still likely to arise as to the buyer's right to claim liquidated damages or to cancel the contract, re-claim any pre-paid instalments and wasted expenditure and recover any buyer's supplies.

In particular, shipbuilding contracts typically contain strict notice requirements for those seeking to rely on force majeure events, which are likely to preclude a yard's claim for permissible delay if it fails to give proper or timely notice. Issues of causation (such as the extent to which the delay can be attributed to COVID-19) will also arise and require expert evidence, especially if the yard was already struggling to maintain the construction schedule or where it could have avoided or mitigated the impact of the current pandemic by increasing manpower, outsourcing tasks or seeking alternative sources for the supply of materials.

A declaration of force majeure may also prove to be of limited assistance to some yards if the delays push the delivery date back by several months. Most shipbuilding contracts give the buyer a right to cancel after a long period of permissible delay (e.g. 180 days under the SAJ form).

It should be noted that, unless covered by an express term of the shipbuilding contract, buyers are likely to struggle to rely on COVID-19 as a frustrating event or as an excuse for the delayed payment of instalments.

### Inspections

The specific problems likely to be encountered in the context of shipbuilding contracts include practical difficulties in ship inspection and getting crew on-board due to social distancing or travel restrictions.

Most shipbuilding contracts provide the buyer with a right to attend inspections, tests and trials, with the builder coming under obligations to provide reasonable notice of inspections as well as unimpeded access to the yard (e.g. clause 23 of BIMCO's NEWBUILDCON). Some contracts provide for the buyer's rights of attendance to be waived if they fail to attend the inspection.

The scope of these provisions is likely to be tested, especially in circumstances where some yards are returning to business as usual but buyer's representatives may remain in lockdown or otherwise be unable to travel. Parties may wish to consider agreeing specific inspection protocols during the COVID-19 pandemic, such as drone or unmanned aerial vehicle inspection, which are being increasingly accepted by classification societies as methods of remote inspection, though this may not be an appropriate solution in all cases.

### Delayed delivery

Technology is, however, unlikely to solve the problem of achieving physical delivery to the buyer.

Where delivery is thwarted by COVID-19 both the buyer and the yard are likely to escape liability for breach of contract. For the builder, the construction contract is likely to provide for force majeure and permit an extension to the time for delivery. For the buyer, there is likely to be an express or implied term excusing a failure to take physical delivery where this is impossible or there is a justifiable reason for delay.

There will, however, be downsides for both parties if delivery is delayed. For the yard, there will be the risk and expense of keeping and maintaining the largely completed ship at the yard, giving rise to both added expense and the risk of delay to the construction schedule for other projects that might require the space. For the buyer, a delayed delivery date has obvious implications for charterparties, which might be cancelled or renegotiated.

### SOLAS goal-based requirements

Then there is the difficulty that ships scheduled for delivery prior to 1st July, 2020 might not have been designed in compliance with the new goal-based requirements of SOLAS regulation II-1/3-10 (for bulk carriers and oil tankers). The IMO has issued COVID-19 guidance that ships originally scheduled to be delivered before 1st July, 2020 which are delayed due to "unforeseen circumstances beyond the control of the shipbuilder and owner" might be accepted by flag administrations on a case-by-case basis, as if they had been delivered prior to that date. Although this clarification offers some reassurance to buyers, the remaining uncertainty seems likely to trigger further disputes.

Ultimately, although the familiar express terms of the shipbuilding contract are likely to address most of the COVID-19 concerns of yards and buyers, marginal cases, regulatory risks, and significant losses may lead to a spike in claims.

**Please contact the Managers for further advice in relation to any of the issues discussed above.**

### The UK Defence Club

Thomas Miller Defence Ltd, 90 Fenchurch Street, London, EC3M 4ST  
tel: +44 207 283 4646 fax: +44 207 204 2131  
email: [tmdefence@thomasmiller.com](mailto:tmdefence@thomasmiller.com) web: [ukdefence.com](http://ukdefence.com)