High Court limits use of the “Prevention Principle” in shipbuilding delay disputes

The English High Court recently handed down judgment in the case of Jiangsu Guoxin Corporation Ltd (formerly known as Sainty Marine Corporation Ltd) v Precious Shipping Public Co. Ltd [2020] EWHC 1030 (Comm). This judgment effectively marks the end of the ‘prevention principle’ under many standard shipbuilding contracts.

What is the ‘prevention principle’?

The basis of the prevention principle is that a party to a contract cannot benefit from its own wrongdoing. In the construction context, this principle has become relevant in relation to project delays. For example, a yard may be able to rely upon it to excuse a delay with the project if it can show that the delay was caused by the actions of the buyer. This was helpfully summarised in Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board [1973] 1 W.L.R. 601 at 607:

> *“It is well settled that in building contracts - and in other contracts too - when there is a stipulation for work to be done in a limited time, if one party by his conduct - it may be quite legitimate conduct, such as ordering extra work - renders it impossible or impracticable for the other party to do his work within the stipulated time, then the one whose conduct caused the trouble can no longer insist upon strict adherence to the time stated. He cannot claim any penalties or liquidated damages for non-completion in that time.”*

Yards have on numerous occasions sought to invoke the prevention principle to avoid liability for liquidated damages under the shipbuilding contract, or to preclude the buyer from terminating the contract for excess delay, by arguing that the delays were caused by the buyer.

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One key hurdle yards have faced with these claims is that the wording of the building contract may limit the applicability of the prevention principle. Specifically, if the contract contains a time extension regime for the delay in question, the prevention principle may be excluded. This was demonstrated in Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848 (Comm) at [243]:

> *"… the prevention principle does not apply if the contract provides for an extension of time in respect of the relevant events. Where such a mechanism exists, if the relevant act of prevention falls within the scope of the extension of time clause, the contract completion dates are extended as appropriate and the Builder must complete the work by the new date, or pay liquidated damages (or accept any other contractual consequence of late completion)."*

This was precisely the problem encountered by the yard in Jiangsu Guoxin v Precious.

Facts of the case

The buyer contracted with the yard for the construction of fourteen bulk carriers. Each of the shipbuilding contracts was on an amended version of the Shipbuilders' Association of Japan ("SAJ") form and included a typical regime whereby the delivery date for the ships could be extended by permissible and non-permissible delays.

The first two ships were delivered without issue. However, ships three to six, with hull numbers 17B, 18B, 19B and 20B respectively, were rejected by the buyer on the grounds that they were defective. The yard disputed that rejection and, further, argued that the rejection had itself delayed the construction of ships seven and eight (hull numbers 21B and 22B) by reason of the fact that hulls 17B-20B were left occupying berth space at the yard.

In the event, the yard failed to deliver hulls 21B and 22B by their contractual due date, taking into account an allowance of 150 extra days for non-permissible delays. The buyer sought to terminate the shipbuilding contracts and recover its pre-paid instalments. The yard treated the buyer's termination as a repudiatory breach of the contracts, arguing amongst other things that the allegedly unlawful rejection of hulls 17B-20B was an act of wrongful prevention. In other words, the yard argued that the prevention principle applied to excuse the delays to hulls 21B-22B. In answer to this, the buyer contended that the wording of the shipbuilding contracts effectively excluded the prevention principle by setting out a complete code for how such delays were to be dealt with.

The dispute was first referred to London arbitration. On the issue of the prevention principle, the tribunal found that if the buyer's rejection of hulls 17B-20B was indeed wrongful, then it would amount to a permissible delay under the relevant clause (Art. VIII.1) of the contracts, falling into the category of "other causes beyond the control of the SELLER or of its sub-contractors". It would accordingly have been open to the yard to extend the delivery date in accordance with the permissible delay mechanism set out in Art.VIII. It was not open to the yard to instead try to invoke the prevention principle. The contracts themselves set out the process to be followed for this type of delay, thereby precluding the applicability of the prevention principle. The yard appealed to the High Court.

The High Court's decision

The High Court upheld the tribunal's decision. It accepted that there was an implied term in the shipbuilding contracts that neither party should prevent the other from performing its obligations under the contract. Nevertheless, in relation to the delays said to be caused by the alleged wrongful rejections of hulls 17B-20B the court confirmed that these fell within the definition of permissible delays under Art. VIII.1 of the amended SAJ form, being delays beyond the control of the yard. The effect of the court's conclusion was that the contract provided for an extension of time for such delays and so the prevention principle could not apply.

Furthermore, the court confirmed that buyer-induced delays, whether or not they correctly fall within Art.VIII.1, are subject to the notice provisions under Art.VIII.2. In other words, for the yard to claim an extension to the delivery date as a result of buyer-induced delays, it would be required to give notice of such delays to the buyer as set out in Art.VIII.2.

Comments

The judgment offers some helpful clarity for parties to shipbuilding disputes. Where a shipbuilding contract adopts a permissible delay provision containing a catch-all category for delays beyond the control of the yard, such as Art. VIII.1 of the SAJ form, and where the shipbuilding project experiences delays caused by the buyer, there is no room for a yard to argue that the prevention principle excuses its delay. Instead, the yard must follow the contractual regime for extending the delivery date. If it fails to do so, no such time extension will be in place. The judgment is a welcome result for buyers which should remove some scope for disputes, and is an example of the courts holding the parties to the bargain they made under their agreed contract terms.

It is worth noting that not all shipbuilding contracts will contain such a broad catch-all category. The equivalent clause at 34(a)(10) of BIMCO's NEWBUILDCON, for example, may not have the same effect since it requires that causes of delay beyond the yard's control must be of a similar nature to the other causes already listed such as strikes, floods, riots and explosions. A buyer-induced delay, depending on the precise facts, may not be of a similar nature to those causes. In these circumstances, there remains scope for the prevention principle to apply.

If Members have any questions in relation to the above issues, they are invited to contact the Association for further information.

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