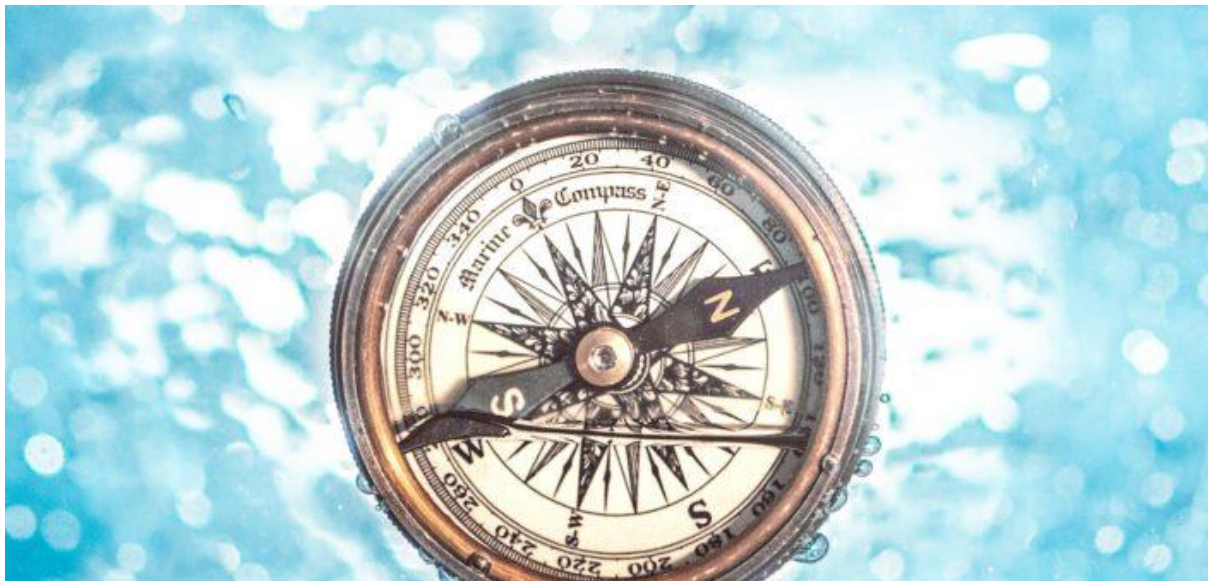


DRYDOCK



Sound legal advice for ship repair yards trying to navigate the COVID-19 pandemic

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SEAFIRST

Mark Johnson, and James Brown, Partners at Haynes & Boone updates Haynes & Boone's first article, published in the March issue of Drydock, which was written before any European country had entered into "lockdown". That article particularly concentrates on matters relating to *force majeure* in English law repair/refit contracts.

Read the original article here: – [DryDock magazine](#)



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At the time of writing this update article, whilst steps are being taken to slowly lift certain restrictions on the normal operation of economies and societies in certain countries, virtually all parts of the world continue to operate under some form of 'lockdown', restricting the movement of people and forcing numerous businesses to shut down or find alternative working arrangements. Whilst we continue to assist numerous clients with queries arising from *force majeure* related queries, we are mindful that there are encouraging signs of success in slowing the spread of Covid-19, and that there are positive developments such as an increasing numbers of shipyards around the world, including in hard hit countries such as Italy and Spain, re-opening (albeit often with new operating regimes to allow continued social distancing). The Covid-19 pandemic has given (and continues to give) rise to numerous different

(and rapidly changing) challenges for different shipyards, and significantly, also to their customers. This update article therefore does not extensively revisit our earlier comments relating to *force majeure*, but instead the focus is more to examine (in broad terms) a number of particular matters we are aware various shipyards are confronting now.

1. Problems under existing refit/repair contracts

Currently, vessel owners are under tremendous commercial pressure. The impact of the Covid-19 pandemic has been to decrease rates in all (at the time of writing) but the tanker market, and to compound existing concerns about the short to medium term prospects for the shipping market, often leading to great financial stress on owners. In addition, legal and regulatory restrictions enacted by governments, and other authorities in response to the current crisis, are impacting on the ability of owners to operate and maintain their vessels in the usual way. The circumstances have conspired to create a perfect storm, such that many owners who have committed to refit/repair contracts are not able, or no longer wish to proceed as required by those contracts. For any yard facing such a situation, the precise factual circumstances and the particular terms of the relevant refit/repair contract will always be key. However, some general remarks can be made in respect of English law refit/repair contracts.

Walk-away rights?

In the first instance, there is unlikely to be a provision in the contract entitling an owner to walk-away from the contract for convenience (ie at its option and without reason) even subject to payment of a fee. However, this should always be checked, particularly if the contract is a bespoke one, or on a standard-form that has been heavily amended by the parties.

Double-check the force majeure provisions

The previous article in this series discussed *force majeure* provisions. Usually, in a refit/repair contract, these provisions will be for the benefit of the yard, rather than the owner, operating upon the occurrence of certain events so as to provide the yard with more time to complete the works. However, it is possible that in a bespoke refit/repair contract the parties may have made provision for the owner to be provided with more time, for example, to deliver a vessel to the yard upon its ability to do so being impacted by the current Covid-19 pandemic or some related occurrence. This should always be checked.

Frustration?

It is possible that an owner might contend that the contract has been “frustrated” by the Covid-19 pandemic, or due to legislation or regulations enacted in response to it. Frustration is a doctrine existing under the English common law which brings a contract to an end upon an event which renders performance impossible, or which transforms the relevant obligations into a radically different thing from those which the parties agreed when they entered their contract. Careful consideration would have to be given to any such contention by an owner, and quickly because if such a contention is without foundation, then the owner would likely be in breach of the contract by asserting such, and the yard in question should act promptly in respect of such legal rights as would arise (likely to at least include claiming some measure of damages for losses caused and possibly also to bring the contract to an end).

Be careful what you say!

Yards will, themselves need to be very careful to avoid unintentionally providing owners with a means of exiting contracts. In the present circumstances, owners may seize upon any such opportunity. Yards therefore, should be particularly careful about ensuring compliance with provisions in contracts which allow the owner to cancel the contract – for example, there may be a provision which entitles the owner to walk away from the contract if the yard does not commence work within a specified time of the vessel being delivered to the yard.

Yards also need to be very careful how they communicate with owners concerning the ability of the yard to undertake the work in a timely fashion. Statements about anticipated difficulties the yard expects to face in performing the contract due to the current Covid-19 crisis could, under English law, potentially allow an owner to treat the contract as at an end, and to walk away from the contract, and in some cases also bring a claim for damages against the yard.

Sometimes however, similar statements by an owner – particularly statements concerning the owner’s unwillingness or inability to perform its obligations under the contract in light of the present crisis – may give the yard such a right of cancellation (and to compensation). Care should be taken by a yard when faced with any such statement from an owner that the owner no longer wishes to proceed, or is no longer able to do so. Yards should obtain legal advice promptly because a right to terminate the contract and/or to compensation may be lost if the correct action is not promptly taken by the Yard.

Payment problems

The present circumstances – with owners often under considerable financial stress – mean that payment defaults by owners under refit/repair contracts will be all too common. Again, the yard should look in the first instance to the express provisions of the contract for the potential remedies. The contract may provide that the yard is entitled to terminate the contract in certain circumstances, including in respect of payment default (for example, upon the payment default not being rectified within a specified time of the yard notifying the owner of the default).

As an alternative, the refit/repair contract may provide that the yard is entitled to suspend the works it has contracted to undertake on the vessel, and to compensation from the owner for any additional costs incurred by the yard resulting from any such suspension of works by the yard. This may be subject to express exclusions in the contract on the types of loss that are recoverable and to limits as to the total amount that is recoverable.

Consideration should also be given to the potential for the yard to exercise possessory liens in respect of the vessel as a means of securing payment (and the extent to which such rights might be lost by the yard following redelivery). Such rights may be expressly provided for under the contract, or may exist under the local applicable laws where the yard is located. The contract may, on the other hand, contain provisions that qualify or limit such rights to exercise liens as there may otherwise be.

Problems at redelivery

Assuming that the vessel has been delivered to the yard, and the works have been performed as required, refit/repair contracts typically provide for the vessel to then be redelivered back to the owner within a specified period of time. The present circumstances, however, may impact on the ability of an owner to mobilise crew to accept the vessel back on redelivery by the yard (or give rise to other problems which so hinder the owner). In such a case, the yard will want to identify whether there is a contractual *obligation* on the owner to take back physical possession of the vessel within the period in which the yard is obliged to redeliver it back to the owner. If so, the yard may have a claim for breach of contract, and to be entitled to compensation from the owner in respect of such losses the yard suffers as a result of such breach. It may be that provision has been made to quantify such losses by means of a liquidated damages amount that the owner is required to pay for each day it fails to accept redelivery of the vessel by the yard. Provided that this has been drafted so as not to infringe the English law rules concerning contractual penalties, such clauses operate to provide the parties with certainty as the damages that are payable in respect of a particular breach of contract.

2. Issues to consider when agreeing new refit/repair contracts

Finally, whilst our March article focused on the Covid-19 pandemic in the context of existing contracts, we have been assisting shipyards reviewing their standard repair/refit contracts to include appropriate references to “pandemics or epidemics”. As such, we consider finally the ongoing Covid-19 pandemic in the context of a refit/ repair contract being entered into now. One of the central elements of the drafting of most *force majeure*/delay clauses is the “un-foreseeability” of the occurrence of the *force majeure* event when the contract is entered into. Therefore, whilst including reference to pandemic or epidemic within the scope of *force majeure* events that give rise to a right to extend the contract period, and/or postpone the “re-delivery date” is a logical step and may provide protection to the shipyard in relation to future pandemics, it may well be difficult for the shipyard to establish that the ongoing Covid-19 pandemic falls within the scope of such events. Accordingly, care should therefore be taken to provide in the contract that, despite the Covid-19 pandemic being something that is now with us, its impact upon performance of

the refit/repair contract by the yard nevertheless shall excuse any failure by the yard to perform in the same way as any other unforeseen event of *force majeure*. This is particularly so with *owners* looking for fixed term contracts (ie giving a fixed re-delivery date) and given also that the Covid-19 pandemic is likely to impact on the operation of shipyards and their subcontractors/suppliers still for a protracted period.

3. Conclusions

The above highlights only some of the legal rights that may accrue to a yard under a refit/repair contract upon the occurrence of certain difficulties that may arise for owners due to the Covid-19 pandemic, and the associated law and other rule-making that is being widely undertaken by governments and other authorities to address the pandemic. The extraordinary present circumstances continue to give rise to challenges to parties to refit/repair contracts around the world. When problems arise, it is key for the yard to identify the relevant legal rights (and obligations), and to take such steps as may be necessary to best protect its position. There will be commercial considerations to accommodate of course – perhaps the prospects of further work in future from the particular owner – which might point away from enforcing such rights as the yard may have to the fullest extent possible. But the key is to ensure that the pursuit of the commercial objectives is always undertaken with reference to the rights and the obligations of the yard under the relevant contract and otherwise under the applicable law.

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