HAYNES BOONE

# Law of Shipbuilding Contracts

## Update 2022

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Since publication of the fifth edition of The Law of Shipbuilding Contracts in 2020, there has been a number of significant cases, both directly relating to the law of shipbuilding contracts and in the context of general commercial law, which impact on shipbuilding and related contracts.

This paper briefly discusses some of the new cases and developments in the following areas:

- Liquidated damages and rescission
- Guarantees
- Confidentiality
- Termination rights
- Assignment
- Limitations of Liability
- Force majeure clauses and payment terms
- Ship conversion contracts.

# Liquidated damages and rescission

Liquidated damages are typically payable to the buyer by way of a reduction of the contract price for delay in delivery of the vessel, insufficient speed, excessive fuel consumption, inadequate deadweight capacity and other deficiencies. As a result, and in the event of rescission pursuant to the terms of the contract, Article III.5 of the SAJ Form states that "*It is expressly understood and agreed by the parties hereto that in any case, if the buyer rescinds this Contract under this Article, the buyer shall not be entitled to any liquidated damages.*"

Where a shipbuilding contract does not include such a provision, and subject of course to the precise wording of the liquidated damages clause, the generally accepted position had been that liquidated damages would accrue under the contract up until the point of termination, and that these accrued damages would not be lost following termination. This had been rejected by the Court of Appeal in *Triple Point Technology v. PTT Public Company*[1] where the court found, on the particular facts, that liquidated damages would not generally be payable where a contract was terminated prior to the completion of the work in respect of which liquidated damages were payable. However, the Supreme Court has now overturned that decision and returned to the orthodox position[2].

In *Triple Point v PTT*, an IT company ("Triple Point") agreed to develop and provide a Thai commodities trading company ("PTT") with trading software. Work was to be completed in a number of phases and a liquidated damages clause provided that, in the event of delay in the completion of a milestone:

> "[Triple Point] *shall be liable to pay the penalty at the rate of 0.1% (zero point one percent) of undelivered work per day of delay from the due date for delivery* ***up to the date PTT accepts such work****...*" (**our emphasis**).

Triple Point were delayed in the completion of stages 1 and 2 of phase 1 and, following extensive further delays in the 7 remaining stages of phase 1 and all stages of phase 2, the contract was terminated by PTT under a contractual provision.

Triple Point claimed that they were only liable to pay liquidated damages on the work that was *actually* completed (i.e. only stages 1 and 2 of phase 1), on the basis that there was no "*date PTT accepts such work*" from which liquidated damages could be calculated in relation to the other stages/phases. This made a significant impact to the damages that would be recoverable[3].

## *The Court of Appeal decision*

The Court of Appeal accepted Triple Point's arguments, relying on the decision of the House of Lords in *British Glanzstoff*[4]. Sir Rupert Jackson held that the current liquidated damages clause "*like* [the clause] *in Glanzstoff, seems to be focused specifically on delay between the contractual completion date and the date when Triple Point actually achieves completion*" and, as such, had no application where the works were never completed.

1 *Triple Point Technology, Inc v PTT Public Company Ltd* [2019] EWCA Civ 230

2 [2021] UKSC 29

3 $3,459,278.40 would be payable if liquidated damages were due in respect of *all* delayed work, while only $154,662.00 would be payable if liquidated damages were due only in respect of stages 1 and 2 of phase 1.

4 In *British Glanzstoff* [1913] SC (HL) 1 the House of Lords considered a clause which provided that "*If the contractor fail to complete the works by the date named... the contractor shall pay... the sum of £250 sterling per week for the first four weeks, and £500 per week for all subsequent weeks as liquidated and ascertained damages for every week beyond the said date or extended time, as the case may be, during which the works shall remain unfinished.*" Lord Haldane LC held that the clause was only intended to provide for liquidated damages "*if the contractors have actually completed the works, but have been late in completing the works, then, and in that case only*".

## *The Supreme Court decision*[5]

The Supreme Court, however, rejected *British Glanzstoff* as confined to its immediate facts, and held that the effect of a liquidated damages clause depends on its wording. Nevertheless, the Court found that it was extremely unlikely that parties would intend such a provision to operate so as to preclude liquidated damages becoming payable where the contract was terminated before work was completed. It considered that it was more likely that the parties would intend liquidated damages to run until termination, at which point the general law (which parties should be taken to be aware of) provides that the provision will *prospectively* cease to be of effect and parties would need to claim damages for breach of contract under the general law. As such, PTT was entitled to liquidated damages for all the delayed work up to the termination date, not just that which was actually completed prior to termination and general damages thereafter.

Guiding the Supreme Court was the concern that finding for Triple Point would run contrary to the commercial purpose of liquidated damages clauses. This was (per Lord Leggatt) to provide certainty to both parties as to the consequences of delay. The Supreme Court was also concerned that Triple Point's interpretation would provide "*a contractor who badly overruns the time specified for completion an incentive not to complete the work*", in the hope that the innocent party would terminate and thereby lose their entitlement to liquidated damages.

The position is now relatively clear; liquidated damages will generally run from the contractual date of commencement (be it the scheduled date of completion/delivery or following a grace period) up until *either* the completion of the works/delivery *or* termination of the contract (whichever is earlier). While other arrangements could be provided for, the Supreme Court has clarified that clear words would be required to displace this general position.

5 An alert, Liquidated Damages: Know the Law or Pay the Price by Glenn Kangisser and Fiona Cain discusses the Supreme Court decision in more detail.

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# Guarantees

Shipbuilding contracts will normally require both the buyer and the builder to provide security for their respective obligations. The buyer will generally need to provide security in respect of outstanding instalments and the builder will need to provide security for the return of pre-delivery instalments in the event of the buyer's lawful termination of the contract. This security will, generally, take the form of a guarantee provided by a third party (either a bank or the builder's parent company).

## *(1) Construction of guarantees*

Such guarantees can either be a "demand guarantee", whereby the guarantor's liability is not dependent on that of the party and requires only a demand be made, or a "see to it" guarantee, whereby the guarantor's liability is contingent on the claimant establishing the guaranteed party's liability. Two recent cases have considered the construction of guarantees.

### *Shanghai Shipyard v Reignwood (2021)*[6]

This case considered the interpretation of a guarantee provided to a builder, Shanghai Shipyard, which provided that the guarantor (Reignwood) "*IRREVOCABLY, ABSOLUTELY and UNCONDITIONALLY*" guaranteed "*as the primary obligor and not merely as the surety*" payment of the instalments by the buyer and that the guarantor was to pay immediately upon the "*first written demand*" of the shipyard.

The first instance court[7] found that the guarantee was a "see to it" guarantee, relying on a "*presumption*" articulated in *Paget's Law of Banking* that if (amongst other factors) the guarantee was issued by a bank it would likely be a demand guarantee. The court found that, because the guarantee at hand was not issued by a bank it was therefore unlikely to be a demand guarantee.

However, Lord Justice Popplewell, in the Court of Appeal[8], rejected this approach. He held that the "*primary focus must always remain on the words used by the parties in their context*". Two main factors pointed, with the ordinary principles of construction, towards finding that the guarantee was a demand guarantee:

a) the words "*ABSOLUTELY*" and "*UNCONDITIONALLY*", along with "*as primary obligor and not merely as the surety*" strongly suggested that liability was primary; and

b) payment was to be made "*immediately*", upon the "*first written demand*" of the shipyard and with a maximum of 60 days interest payable, which would not be appropriate if verification of the buyer's liability (which would likely take an extended period) was required.

6
[2021] EWCA Civ 1147

7
[2020] EWHC 803 (Comm)

8
An alert, On demand guarantees: don't tie your hands! Shanghai Shipyard Co. Ltd. v. Reignwood International Investment (Group) Company Ltd. [2021] EWCA Civ 1147 by Andreas Dracoulis and Jack Spence considers the Court of Appeal decision in detail.

The decision has now been appealed to the Supreme Court, who are due to hear the appeal later this year and determine the following issues:

(i) Whether on the true construction of the guarantee it is a demand guarantee such that, subject to issue (ii) below, the guarantor's liability arises upon and by reason of a demand, regardless of the buyer's liability under the terms of the shipbuilding contract; or it is a "see to it" guarantee such that the guarantor's liability arises only if the buyer was liable to pay the final instalment under the terms of the shipbuilding contract.

(ii) Whether the guarantor can refuse payment under the guarantee pending the outcome of an arbitration between the builder and the buyer concerning the buyer's liability to pay, and the builder's entitlement to claim, the final instalment under the terms of the shipbuilding contract.

### *Black & Veatch Corp v Kazstroy Service Global BV (2021)*[9]

The second case considers the interpretation of a guarantee provided by KazStroyService ("KSS"), in favour of B&V, guaranteeing the performance of KSS Petron ("Petron") (a subsidiary of KSS) in an EPC contract that B&V and Petron were providing services under, joined in an unincorporated consortium. The guarantee provided (1) that "*the Guarantor irrevocably and unconditionally guarantees… the due… performance and discharge by the Subsidiary of all its obligations under or arising from the Consortium Agreement*" and (2) that "*the Guarantor shall, on demand by the Beneficiary, perform or discharge or cause the Subsidiary to perform or discharge the obligation*" which had not been performed.

After Petron became insolvent, B&V made a claim under the guarantee, claiming that KSS were primarily liable for Petron's breach, such that KSS could not rely on the defences that would be available to B&V themselves.

The High Court rejected this argument, finding that the guarantee was a "see to it" guarantee – so KSS' liability depended upon establishing Petron's liability. Affirming that "*the wording of the guarantee is what matters*", the court found that section (1) above was "*in the classic form*" of a "see to it" guarantee. This having "*set the scene*", it was "*unrealistic*" to argue that section (2) was intended to also impose an obligation on KSS to perform, as well as guarantee Petron's performance. The complexity this would create was said to be "*improbable and uncommercial*". As a result of this, KSS were entitled to rely on the defences that would have been available to Petron.

It is worth noting that the court distinguished the authorities cited by B&V (which suggested liability was primary) on the basis that these cases considered simple obligations to pay sums of money, unlike the present case with substantive obligations in a complex contract. It may have been that the court would have reached a different conclusion, if KSS' obligations under a similarly worded guarantee had been only to pay sums of money.

9 [2021] EWHC 2104 (QB)

## (2) Making demands under guarantees: how and when?

As well as understanding the nature of a guarantor's liability under a guarantee, the beneficiary of the guarantee must ensure that the requirements of the guarantee are complied with and that a claim under the guarantee (if required) is brought in time. *Korea Shipbuilding & Offshore Engineering Co, Ltd & Anor v Whale Corporation TMT Co Ltd (2020)*[10] offers an illustration of these requirements. Without venturing into the facts of the case, which are complex and involve numerous claims under multiple guarantees, a number of points can be distilled.

### *"Written demands" – not particularly demanding.*

Guarantees will frequently, although not inevitably, require the making of a "*written demand*" before the guarantor is liable to pay. Where this is the case the court noted that "*a clear intimation that payment is required*" is needed, but that the word "*demand*" need not be used.

A "*written demand*" (with nothing more) need not be made in any particular written medium: a letter, email or fax will suffice and the courts will not look to notice requirements under the contract in respect of which obligations are guaranteed (in *Korea Shipbuilding* this required fax to be used).

Nevertheless, a demand must still be delivered to the correct entity and, in *Korea Shipbuilding*, an argument that delivery to a party authorised as agent to receive service of proceedings sufficed was not successful. As Teare J noted, "*service of a demand is different from service of proceedings*".

### *Determining limitation periods*

A number of guarantees provided in *Korea Shipbuilding* did not require the making of a demand and rendered the guarantor liable as soon as instalments fell due and were not paid. This meant that the beneficiary's cause of action accrued as soon as instalments were due and claims in respect of instalments due more than 6 years before the claim was brought were therefore time-barred.

## (3) Discharge of guarantees on variation

Under English law the liability of a guarantor will typically be discharged if the underlying contract, the performance of which it guarantees, is varied without its consent.

*Geoquip Marine Operations AG v Tower Resources Cameroon SA and Others*[11] required the Commercial Court to consider what the position would be where the representative of the party to the original (guaranteed) contract was the CEO of both that party *and* the guarantor but had only signed the contract variation on behalf of the party to the original contract.

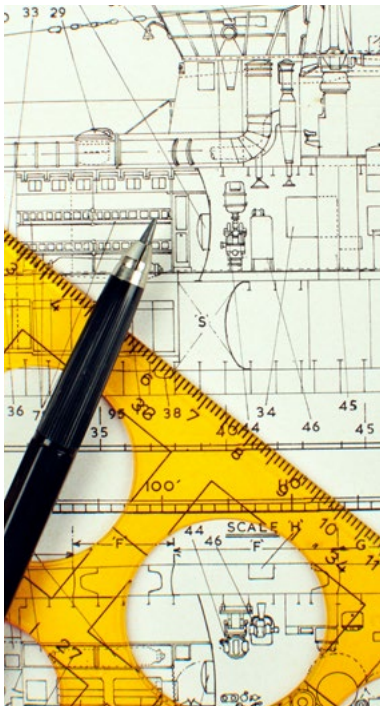
It was found that the CEO must have been aware of the guarantee, and therefore have also approved the extension on behalf of the guarantor, as well as the original party. This conclusion was supported by a clause within the underlying contract, which required amendments to be signed by all parties (including the guarantor) in order to be effective. The guarantor's obligations were therefore not discharged by the modification of the contract, as they were deemed to have consented to the variation.

10 [2020] EWHC 631 (Comm)

11 [2022] EWHC 531 (Comm)

# Confidentiality

A builder and a buyer will regularly share confidential information and shipbuilding contracts almost invariably provide for such information to be held in confidence and not be used for purposes other than those for which it was provided. *Salt Ship Design v Prysmian Powerlink*[12] provides a recent example of a breach of this obligation and the potential implications this can have, both in terms of monetary liability and reputational damage.



Salt Ship Design ("Salt") are a company which provide ship design services. They were awarded a contract by Prysmian Powerlink ("Prysmian") for the design of a new cable laying vessel ("the Vessel"), which would ultimately be called the Leonardo Da Vinci, in 2017, and provided documents in connection with their design to Prysmian. This contract had a confidentiality clause under which Prysmian was not entitled to disclose the general arrangement and/or building specification to third parties without Salt's consent.

In April 2018 Vard Group (a shipbuilding and design group) were awarded the design and build contract by Prysmian and, rather than Salt, Vard Design ("Vard" - a subsidiary of Vard Group) was to provide the design work. Vard Group ultimately manufactured and delivered the Vessel to Prysmian. It transpired, however, that Prysmian had provided Vard with the designs originally produced by Salt, in an effort to ensure that the Vessel designed by Vard was at least as good as that designed by Salt.

In a judgment in the Commercial Court, Jacobs J accepted that the documents were confidential and had been provided by Prysmian to Vard in breach of Prysmian's contractual obligations and its equitable obligations of confidence. The court found that the contractual obligations of confidentiality did not oust the equitable duty of confidence and that these could co-exist. The test in equity, which was uncontroversial, was whether the use of the information would "*plainly excite and offend a reasonable man's conscience*"[13].

## *Unlawful means conspiracy in the context of disclosing confidential information*

After concluding that the information disclosed was confidential, Jacobs J went on to consider whether Prysmian was party to an unlawful means conspiracy - an economic tort, the significance of which being that exemplary damages[14] would be prima facie available. The requirements to succeed with such a claim were: "*(a) A combination or understanding between two or more people; (b)An intention to injure the claimant. The intention to injure does not have to be the sole or predominant intention. It is sufficient if the defendant intends to advance its economic interests at the expense of the claimant. (c) Unlawful acts carried out pursuant to the combination or understanding; and (d) Loss to the claimant suffered as a consequence of those unlawful acts.*"

12
*Salt Ship Design AS v Prysmian Powerlink Srl* [2021] EWHC 2633 (Comm)

13
*CF Partners (UK) LLP v Barclays Bank Plc and others* [2014] EWHC 3049 (Ch)

14
Where an award of compensatory damages is inadequate, exemplary damages may be awarded to punish the defendant.

These requirements were held to be met on the present case: (a) there was an understanding between Salt and Vard; (b) by which there was an intention to injure Salt (by denying Salt their rights in the confidential information); (c) the act of sharing the information was pursuant to the understanding; and (d) loss was caused to Salt, as Prysmian was then able to continue with the Vessel project without Salt's further employment. Indeed, it would seem likely that the requirements would be met (and exemplary damages therefore, prima facie, available) every time confidential information is shared with the intention that the receiving party will utilise the information.

## *The Trade Secrets Regulations 2018*

It is also possible in certain circumstances, as was the case in *Salt Ship v Prysmian*, to rely on the *Trade Secrets (Enforcement etc.) Regulations 2018* in cases of unlawful use/disclosure of "trade secrets". For the purposes of the Regulations, information is a trade secret if: it is secret in the sense of not being generally known in relevant circles; it has commercial value because it is secret; and the person in control of it has taken reasonable steps to keep it secret.

The Regulations provide for a number of remedies that can be obtained from the English courts. This includes, at Article 18, an order requiring the infringer to publish a statement regarding a judgment. In a later judgment delivered by Jacobs J[15], the judge considered the guidelines provided by the Regulations, which require the court to take into account:

*a) The value of the trade secret;*

*b) The conduct of the infringer in acquiring, using or disclosing the trade secret;*

*c) The impact of the unlawful use, or disclosure of the trade secret;*

*d) Whether the information on the infringer would allow an individual to be identified and whether publication would be justified in light of the right of possible harm which could be caused to the privacy and reputation of the infringer; and*

*e) Whether the publication would act as an effective deterrent to future infringement by other parties.*

In this instance, and considering the remark made by Warby LJ in *Duchess of Sussex*[16] that "*it is common practice to make such orders in IP litigation, and that policy favours doing so, in view of the difficulties which owners of IP rights face in identifying and successfully pursuing infringers*", Jacobs J found that an order was appropriate. As such Prysmian were ordered to display on the Leonardo da Vinci page of their website, for 6 months, a notice to visitors with a UK associated IP address mentioning the judgment and that this found that Prysmian had misused Salt's designs. This was only possible because Prysmian was subject to the jurisdiction of the English courts and English law was the applicable law of the claims. The Regulations are not intended to be relied upon in arbitration proceedings.

15 [2021] EWHC 3583 (Comm)

16 *Duchess of Sussex v Associated Newspapers Ltd* [2021] EWHC 510 (Ch)

## Contractual termination rights and the exclusion of common law rights

Under English common law rules an innocent party to a contract will be entitled to terminate a contract if the other party has committed a repudiatory breach (i.e. a sufficiently serious breach of the contract).

Shipbuilding contracts frequently provide for express termination rights in given circumstances (e.g. the buyer may have a right to terminate the contract if delivery has been delayed by a given number of days). The question then arises as to whether these rights sit alongside, or exclude, the rights that parties would otherwise have under common law.

In *Digital Capital Limited v Genesis Mining Iceland EHF*[17] Miss Julia Dyers QC (sitting in the Commercial Court) considered this very question.

The relevant facts giving rise to this claim were that Digital Capital were significantly delayed in performing their obligations under the contract and Genesis therefore purported to terminate the contract.

Clause 16.1 in the contract provided that "*Either party may terminate this Agreement… after: (a) a material breach… which… the other party has failed to remedy within thirty (30) days after receipt of notice giving particulars of the breach*". Genesis had not provided the notice under this clause and so would need to show that they were entitled to terminate for repudiatory breach in order to not be in repudiatory breach themselves (by wrongly claiming to terminate the contract). A further clause, 16.5, provided that the right to terminate under Clause 16 was "*without prejudice to any other right or remedy of either party in respect of the breach*".

Digital Capital claimed that the contractual right to terminate ousted Genesis' common law right to terminate for repudiatory breach, however the judge disagreed. She held that there were "*no hard and fast rules*" as to the relationship between common law and contractual rights and that the question is one "*of construction in each individual case*".

In the present case, however, Clause 16.5 clearly showed that Genesis' common law right was not ousted by their contractual right (Clause 16.5 preserving both Genesis' other "*rights*" and "*remedies*") and it was not open to Digital Capital to argue otherwise.

17 [2021] EWHC 2462. An alert, Further Consideration of Contractual v. Common Law Termination Rights: Digital Capital Limited v. Genesis Mining Iceland EHF [2021] EWHC 2462 (Comm) by James Brown reviews this decision in more detail.

## The assignment of contracts: what is assigned?

A buyer or builder under a shipbuilding contract may need to assign the benefit of the contract to other parties. The question may then arise as to the extent of the benefits which are transferred by a given assignment.

In *Energy Works v MW High Tech Projects*[18], Energy Works ("EW") and MW High Tech Projects ("MW") had entered into a contract under which MW was to design, construct and test a power plant (the "Main Contract"). MW then subcontracted part of the supply scope of the Main Contract to Outotec (the "Subcontract"). MW later assigned the benefit of the Subcontract to EW, pursuant to a demand made by EW under a clause in the Main Contract, following delays and defects in the works.

*A buyer or builder under a shipbuilding contract may need to assign the benefit of the contract to other parties. The question may then arise as to the extent of the benefits which are transferred by a given assignment.*

Following the assignment of the Subcontract to EW, EW brought a claim against MW in respect of the delay and defects. MW then sought to claim against Outotec, arguing that MW had only assigned the *future* right to performance under the Subcontract, rather than *already accrued* rights (including the right to claim for delay/defects).

O'Farrell J, in the Technology and Construction Court, rejected this argument. Drawing on *Linden Gardens Trust*[19] she found that "*it is possible to assign future rights under a contract without the accrued rights but clear words are needed to give effect to such an intention*".

There were no such "*clear words*" in MW's documents of assignment or in respect of the right that EW had under the Main Contract to demand such assignment, which had made reference only to "*assign the Sub-Contract*". As such MW's accrued rights to claim against Outotec for defects and delay had also been assigned to EW.

It was true that MW was in the unenviable position of being liable to EW in circumstances where they had assigned away what would otherwise be back-to-back liability from Outotec. Nevertheless, it was "*not for the Court to re-write the contractual arrangements entered into by the parties or to impose what it considers would be an equitable and fair commercial bargain*".

18 [2020] EWHC 2537 (TCC)

19 *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85

## Limitation clauses: Negligence – more than a tort

Limitation of liability clauses will commonly exclude from their remit losses which are caused by the negligence of the guilty party. The Supreme Court decision in *Triple Point v PTT Public Co Ltd*[20] considered whether this restriction only applies to losses caused by negligence as an independent tort, or also applied to a breach of a contractual obligation to take reasonable care. The relevant clause in *Triple Point* provided that "*the aggregate liability of Triple Point for damages from any cause of action whatsoever, regardless of the form of action, shall not exceed the fees paid to Triple Point under the CTRM Contract and* ***except such damages caused by fraud, gross negligence*** *and wilful misconduct.*"

The Court of Appeal considered that the restriction to the limitation clause applied only to cases of "*freestanding torts or deliberate wrongdoing*"[21], however the Supreme Court disagreed. Lord Leggatt held that restricting "*negligence*" to only covering independent torts gave the word a "*convoluted meaning which the word cannot reasonably bear*". This was particularly so given that "*clear words*" are required before the court will find that a contract has taken away rights which a party would otherwise have.

20 [2021] UKSC 29

21 [2019] EWCA Civ 230, paragraph 119

## Force majeure clauses and payment terms

Shipbuilding contracts usually stipulate the currency in which any payments by the buyer to the builder, such as the contract price instalments, will be made. They also include force majeure clauses that provide for "*acts of princes or rulers; requirements of government authorities*" which are considered sufficiently wide to include the imposition of sanctions.

In *MUR Shipping BV v RTI Ltd*[22], the Court of Appeal considered the impact of sanctions which prevented payments under a charterparty in the currency specified therein. A tribunal had found that it was a "*completely realistic alternative*" to accept the payment in Euros, and subsequently convert it to US dollars, the currency specified in the contract (with the charterer having offered to make good any loss suffered as a result of exchange rate fluctuations), but the Commercial Court[23] disagreed. The force majeure clause had provided that a force majeure event must not be capable of being "*overcome by reasonable endeavours*" and the Court found that the exercise of reasonable endeavours would not require the owners to "*sacrifice their contractual right to payment in US dollars, and with it their right to rely upon the force majeure clause*"[24]. The judgment was appealed and the Court of Appeal[25] who, by a majority of two to one, found that the Commercial Court's interpretation of the specific wording of the force majeure clause in this charterparty was overly narrow. The Court of Appeal considered that a commonsense approach should be used to determine whether the "state of affairs" could be overcome. The purpose of the payment clause, i.e. for the owner to receive the right amount of US dollars, was achieved by the charterer's proposal and it considered that the force majeure clause should not be relied on to prevent this.

It is worth noting that the "*overcome by reasonable endeavours*" wording does not usually appear in shipbuilding contracts, and nor are buyers typically entitled to claim force majeure. However, a failure to make a payment in the currency stipulated in the contract may amount to a breach of contract, but it is likely to depend on the state of the market and whether the payment terms amount to a condition of the contract to determine if a builder would want to and is entitled to terminate a shipbuilding contract in similar circumstances.

It is currently unclear if this will be the end of the matter or whether the judgment will be subject to an appeal to the Supreme Court, particularly when the Court of Appeal made it clear that they were not concerned with reasonable endeavours clauses or force majeure clauses in general.

22
[2022] EWCA Civ 1406

23
[2022] EWHC 467 (Comm)

24
An alert, Sanctions on Russia – a reasonable endeavours obligation in a force majeure clause does not require a party to accept non-contractual performance by Glenn Kangisser and Shu Shu Wong discusses the first instance decision in more detail.

25
An alert, Sanctions on Russia revisited: Using reasonable endeavours in the event of force majeure now excuses strict performance by Glenn Kangisser, Fiona Cain and Kayley Rousell discusses the Court of Appeal decision in more detail.

## Ship Conversion Contracts

Projects for the conversion of a ship have typically proceeded on the basis of an *ad hoc* agreement negotiated between the parties. This was because standard form contracts such as BIMCO's REPAIRCON 2018 were considered to not sufficiently address the additional risks associated with significant conversion works.

BIMCO have now launched a standard form conversion contract for the conversion of ships called CONVERSIONCON[26]. CONVERSIONCON provides a framework which parties can use as a starting point for their conversion contract negotiations (and will certainly provide a more useful starting point than REPAIRCON 2018 or NEWBUILDCON). It is expected, however, that the vast majority of conversion projects will require revisions to be made to material terms of CONVERSIONCON to fit with the particular requirements of the project (including incorporation of appropriate rights and obligations to protect the interests of parties and reflect the potential risks to the parties that may arise from a conversion project), or will continue to be based on *ad hoc* agreements.

26 For details of the structure and layout of this new standard form contract, see CONVERSIONCON – BIMCO's New Standard Form Conversion Contract by Mark Johnson and Fiona Cain.

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