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Shipbuilding Contract
- Excessive Delay in building the ships

In a recent arbitration case *(2018) 1006 LMLN 1*, by a Shipbuilding Contract dated 25 January 2008 as amended (the Contract) the *respondent sellers* agreed to build, sell and deliver a container carrier ("the vessel") to the *claimant buyers*. The Contract provided for the payment of the purchase price of US$56,500,000 in five instalments. The buyers paid the first four instalments between May 2008 and November 2011. By article VII.1 of the Contract, the delivery date for the vessel was 30 December 2011.

The buyers claimed repayment of the instalments paid plus interest on the basis that they were entitled to and did terminate the Contract on 28 July 2012 under article III.1(c) of the Contract as the sellers had not delivered the vessel within 210 days of the delivery date and/or 30 days before the expiry of Refund Guarantees which the sellers had procured in respect of the payments. The buyers also served notices of cancellation on 6 August 2013 and 31 October 2013 without prejudice to the validity of the earlier notice(s), on which they relied in the event that it was found that they were not entitled to cancel the Contract on 28 July 2012.

The sellers contended that the buyers were not entitled to cancel the Contract and that in purporting to do so the buyers acted in repudiatory or renunciatory breach of the Contract. The sellers, amongst others things also argued that there is an implied term, which provides that the buyers should have co-operated with them during the construction of the vessels. In addition, they argued that there are prevention principles that they were prevented and/or impeded from completing the vessel and delivering it to the buyers as a result of the buyers' actions and/or omissions and/or default. Therefore, the seller's argument was that the buyers' right to cancel had not accrued by the time of any of the notices of cancellation were sent by the buyers. Sellers counterclaimed but failed to provide security for costs and therefore, Tribunal did not take into account the counterclaims of Sellers.

The most relevant clauses from the ship building contract were:

> **ARTICLE III**
> **1. DELIVERY ...**
> (c) If the delay in the delivery of the VESSEL continues for a period of Two Hundred and Ten (210) days after the Delivery Date as defined in Article VII, then in such event, the BUYER may, at its option, rescind or cancel this Contract in accordance with the provisions of Article X of this Contract ...
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> d) For the purpose of this Article, the delivery of the VESSEL shall not be deemed delayed and the Contract Price shall not be refunded when and if the Delivery Date of the VESSEL is extended by reason of causes and provisions of Articles II, V, VI, XI, XIII, XIV and other

applicable clauses hereof. The Contract Price shall not be adjusted or reduced if the delivery of the VESSEL is delayed by reason of permissible delays as defined in Article VIII hereof ...

Article II

(c) However, in the event of any dispute between the SELLER and the BUYER with regard to the SELLER's obligation to repay the instalment or instalments paid by the BUYER and to the BUYER'S right to demand payment from the Refund Guarantor, under its guarantee(s), and such dispute is submitted either by the SELLER or by the BUYER for arbitration in accordance with Article XIV hereof, the Refund Guarantor shall withhold and defer payment under each and all Refund Guarantees until the arbitration award between the SELLER and the BUYER is published. The Refund Guarantor shall not be obligated to make any payment under any Refund Guarantee unless the arbitration award orders the SELLER to make repayment. If the SELLER fails to honour the award, then the Refund Guarantor shall refund to the extent the arbitration award orders.

If the VESSEL is not delivered to and accepted by the BUYER thirty (30) days before any of the above Refund Guarantees expire, the BUYER may cancel this Contract unless there is an agreement between BUYER and SELLER ...

In this matter, on analysis, the relevant contract provided for three types of delay: (1) excluded delays; (2) permissible delays; and (3) non-permissible delays. Except for the excluded delays, both permissible delays and non-permissible delays allowed it to be taken when considering the cancelation/termination of contracts. In the tribunal's view, it was not opened for the sellers to argue that the delay in the delivery of the vessel was caused by any failure upon the part of the buyers to act in accordance with article IV. If the buyers' supervisor(s) failed to attend tests or to inspect the vessel, or if they raised non-conformity notices with which the sellers disagreed, the sellers were contractually entitled to proceed pursuant to their own obligation to complete the project. However, the buyers could not claim the compound interest on the refund guarantees. The sellers were also ordered to return all the items supplied by the buyers.

FDD department's advice for Andrew Liu's clients is as follows:

a) The way the Contracts governed by English Law are interpreted is quite different from other laws, in particular, civil law jurisdictions like in China. Therefore, commercial people in any other jurisdiction should not assume interpretation based on their own legal system. The legal costs to fight cases can be expensive.
b) ALCO's FDD department consists of lawyers who have previously qualified in English Law and now working full-time as legal consultants for ALCO and are there to only assist ALCO's clients. Many clients have benefited from this service not just for resolving charterparty issues or bill of lading issues, but also for resolving issues arising pursuant to other commercial contracts.

Source of Information: Andrew Liu & Co., Ltd www.andrewliu.com.hk