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Greening the Shipyards – the limits of regulation and the scope for contractual devices

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Definitions

- Green Shipping
- Where legal direction from law and regulation
 - Where non legal, more problematic
 - Scope for contractual intervention?
 - Scope for normative intervention?

Quick recap of a few prevailing IMO regulations

- MARPOL 73/78
- Annex VI contains the Convention on the Prevention of Pollution by Air Pollutants, which limits the emission of sulphur oxides (SO_x), nitrogen oxides (NO_x), and volatile organic compounds (VOCs) (IMO, 2016)
- Other regulations – including ballast water management (all new ships to meet D-2 standard and IOPCC renewal survey post 8 Sep 2019 ships too); D-2 as required by flag state or at the latest 8 Sep 2024
- GHG emissions. Three means of control:
 - Energy Efficiency Design Index (EEDI), a technical measure of GHG emissions reduction.
 - Energy Efficiency Operational Indicator (EEOI) and the Ship Energy Efficiency Management Plan (SEEMP), which together are GHG mitigation measures from an operational perspective.
 - market-based measures (MBMs), which consider the carbon market, such as the emissions trading system, in terms of complementary technical and operational measures

Defining a shipyard

- A shipyard can be considered as an industrial production facility, where certain input is used to design, develop, construct, repair or dismantle a ship.

Green shipyards – meaning?

- As a minimum – building and repair standards compliance with regulations and using “green” materials (eg. "Performance Standards for Protective Coating" (PSPC)); and health and safety (esp. with dismantling)
- As good practice – green contract management principles
- Other aspects for consideration
 - Social responsibility as regards avoidance or loopholes – for example, open loop scrubbers
 - Adoption of green technology and state involvement in technology promotion (but must regard state aid limits); standardised shipbuild concept?
 - Onshore green credentials – Pipavav (now Reliance) Shipyard (largest shipyard in India – green technology) uses static frequency converter (to enable cold steaming for dry docked vessels)
 - Labour standards
 - Financing and supply chains – so-called “developing vendors schemes”

Green Shipyards? – Pipavav (now called Reliance) in 2013



Role of the 'newbuilding broker' in the green narrative

- Information gathering – owner's background (two types – traditional owners and financial asset players); owner's trading areas and patterns; owner's motivation; yard's track record and specialism, position and financial status. Note too some builders insist on certain C.S.
- Forging the letter of intent (will often state that the signing of the contract will be subject to financing and/or a charter and/or to the buyer's board approval.) Is this legally binding?
- Common contractual matters:
 - Implied duties of an agent
 - Reasonable care and skill
 - Confidentiality
 - But may act for more than one principals
 - No liability for market reports
 - Right to remuneration

Standard forms

- Several in the market:
 - Shipbuilders' Association of Japan – the so-called “SAJ Form”
 - BIMCO's Standard Newbuilding Contract (so-called the “NEWBUILDCON Form”)
 - The PRC's CMAC Standard Newbuilding Contract (so-called “Shanghai Form”)
 - The Community of European Shipyards' Association's “AWES Form” 1999
 - Standard Form Norwegian Shipbuilding Contract 2000

Standard forms – Description related terms

- Preamble
- Description of the vessel
- Design matters and technical specifications
- Guaranteed performance
- Classification and regulatory matters
- Sub-contracting rights
- Registration – by the buyer but using documents issued by the builder
- Liquidated Damages provisions

Information in the Preamble

- Sets out the scope of the project to which the parties have agreed, reciting in general terms their respective obligations to build and purchase the vessel, and identifying the shipyard at which her construction is to be undertaken.
- Legally binding?
- Identity of the contracting parties
- Often English law takes a strict approach as to what is legally binding; fearing to re-write the contract

The design contract

- Usually the buyers' design; contract between buyers and ship design company
- Ship builder may then have a sub-contract with the design company. In such a case, the builder is not liable for design problems. Duty of cooperation? Good faith?
- If the design is assigned by the builder, builder held liable.
- Builder usually decides with finality which suppliers to source from a list approved by Buyer; NEWBUILDCON pro builder.

Regulatory compliance

- National and international regulatory requirements
- Responsibility with the builder:

Article I.3 of the SAJ Form for example requires that, in addition to meeting class requirements, the vessel should on delivery comply with the “*rules, regulations and requirements of other regulatory bodies as described in the Specifications*”

Environmental clauses

- The IMO Hazardous Materials Inventory clause (clause IV(1) Shanghai Form; or clause 4 BIMCO NEWBUILDCON))
 - Green passport to be issued
 - Endeavour to take account of disposal when designing and building
- Protective Coating Clause (Clause IV(2) Shanghai Form; clause 5 NEWBUILDCON)
- Source of Origin clause (Clause IV(3) Shanghai Form; clause 6 NEWBUILDCON)
- Should there be additional duties?

Managing sustainability in the supply chain

- Clause 4 of the Norwegian Form 2000
- The hull and major sections thereof are accepted by the Buyer to be subcontracted in a low cost country. The Builder shall remain fully liable for the due performance of such work as if done by the Builder at the Builder's yard.
- Should there be a sustainability clause? Does it work or is it merely a case of greenwashing. Key requirements for a good sustainability clause: precision, verifiability, enforceability and coverage depth.

Green provisions

- What else to incorporate in the contract?
 - Remedies not specified for breach of environmental clauses
 - Supply chain – currently only where requested by the buyers; vendor development schemes?
 - Operations
 - Role of design company and other third parties?

Green aspects and conformity requirements

- Not all Green aspects will be treated as conformity issues – but if there is a conformity complaint, contract provides for solution
- Clause 23(d) NEWBUILDCON “...the Buyer’s ..failure to notify the Builder of any non-conformity shall [not] relieve the Builder from its obligations under the Contract or be .. construed as a waiver of any objection to, or any acceptance of, faulty design, construction, material and/or workmanship, or any admission that any materials or workmanship are of the standard required for the due performance of this Contract.”
- CF. CMAC’s form Buyer to undertake that its supervisor shall act in a way to “minimize any increase in building costs and delays in the construction of the VESSEL ”

Contract management to promote green designs

- It is anticipated that the contract requirements may need to be modified from time to time and a spirit of cooperation is often required by the contract. But there is much emphasis on technicalities. Form over substance?
- Notification and rectification of design faults
- Article IV.3 of the SAJ Form following such a notice, “the BUILDER shall correct such non-conformity, if the BUILDER agrees to his [i.e., the Representative’s] view ”.
- What if no notice is given?
 - *A/B Gotaverken v. Westminster Corporation of Monrovia* (1971) contract states “claims on account of asserted defects or deficiencies of material or workmanship shall always be given immediately after such defects or deficiencies have been discovered ” – may be liable for costs
 - *Nelson v. William Chalmers & Co. Ltd* (1913) – buyer did not say anything about the way the builder was preparing the steel for the yacht - loss of right to reject?

Green norms and the contract

- Express terms
 - How the terms of the contract should be construed
 - At present, a commercial contextual approach is taken
 - Sustainability considerations?
- Implied terms
 - Implied terms by law – if there is a legal requirement which has not been explicitly incorporated then it will be treated as being part of the contract
 - Implied terms by fact – test of business efficacy; difficult to succeed
 - Gradual judicial intervention controversial and not popular
 - Role of usage and trade practice
- Role of Industry
- Role of charter standards; kitemarks etc.

Governmental initiatives to promote greening of shipyards

- Finnish model (OECD Peer Review Report 2018)
 - Export credit guarantees (Finnish Export Credit for both pre and post delivery financing - Export credits for ships accounted for 28.4% of total export credit transactions between 2005 and 2014 in Finland, more than the share of 16.3% in OECD countries)
 - Equity investments to shipyards
 - Investment aid (for retrofitting and newbuild)
 - Innovation aid
 - Maritime clusters

An aerial photograph of London, England, with a semi-transparent red overlay. The London Eye is visible in the center-left, and the River Thames flows through the city. The text is positioned in the upper left corner.

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