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English Contract Law in Practice Case study: Shipbuilding Arbitration

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Introduction

- About Thommessen
 - One of Norway's leading law firms
 - Specialist Shipping & Offshore department
- English law in a Norwegian practice
 - Especially relevant in shipping, offshore, oil and gas and financing transactions
 - English law is a neutral and familiar choice of law in contracts, also regarded by many international businesses as a commercial and predictable alternative with highly qualified judges and arbitrators
 - "London arbitration" for dispute resolution is an established concept
 - The London market is key to brokerage, insurance, financing etc.
 - Many of the biggest global law firms have their main offices there
- My view: knowledge of English law concepts – even if you cannot formally advise in it – is essential in practice in a department like ours

Today's topic: a shipbuilding arbitration case study

- The issues:
 1. Interpretation of a performance standard – breach?
 2. Obtaining a remedy: quantifying an (uncertain) loss
- A typical arbitration under English procedure:
 1. Appointment of arbitrators
 2. Written submissions
 3. Evidence/witness statements and disclosure
 4. Expert evidence
 5. Oral hearing
 6. Arbitral award / costs award
- Questions before we begin?

Case study Issue I: Interpretation

Basic principles of contractual interpretation to keep in mind

- The point of departure: words are to be given their ordinary and natural meaning, but:
 - *"A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used."* (Holmes J., in *Towne v Eisner* (1918) 245 U.S. 416)
- Interpretation of commercial contracts should have regard to the custom in the trade and "business common sense":
 - *"If a detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must yield to business commonsense"* (Lord Diplock in *The Antaios* [1984] AC 191)
 - *"where a term of contract is open to more than one interpretation, it is generally appropriate to adopt the interpretation which is most consistent with business common sense"* (Lord Clarke in *Rainy Sky SA and ors v Kookmin Bank* [2011] UKSC 50)

Case study Issue II – Quantum

Basic legal principles

- Remedies (the basics)
 - action for an agreed sum or liquidated damages
 - equitable remedies: specific performance, injunction etc.
 - restitution
 - **damages**
- Damages (the basics)
 - the claimant has to show (i) a loss resulting from the breach that is not too remote, and (ii) the amount of loss suffered
 - in the arbitration, only (ii) was really an issue, i.e. "**the measure of damages**"
- The measure of damages (aka. "quantum")
 - The point of departure: *loss or bargain / "loss of expectations"* : the injured party claims to be put "**so far as money can do it...in the same situation...as if the contract had been performed.**" *Robinson v Harman* (1848)
 - In Norwegian: *oppfyllelsesinteressen / positiv kontraktsinteresse*

Case study Issue II – Quantum

Basic legal principles (cont.)

- The measure of damages continued...
 - damages are compensatory – but for what?
 - difference of value vs. cost of cure
 - *Peevyhouse v Garland Coal Co* (1962) (US)
 - presumed (i): that where a seller delivers goods which are not of contract quality, damages are usually assessed on a difference in value basis
 - presumed (ii): where a defendant is in breach of an obligation to do building work, he must put the defects right or complete the work – the cost of cure
 - however: depending on the circumstances, both presumptions can be rebutted
 - Sometimes, a different method altogether needs to be applied, cf. "loss of amenity" in *Ruxley v Forsyth* (1995)
- Difference in value calculations can be particularly difficult
 - Where there is a market: difference between market value and the contract value
 - But what if there is no market?
- Damages assessed on a reliance or restitutionary basis

THANK YOU FOR YOUR ATTENTION

