
# Shipbuilding

1. Italy is a leading market in shipbuilding, especially for cruise ships and yachts.

Although contracts entered into with Italian Shipyards are mostly made subject to English law, it is not unfrequent for the parties to choose Italian law as the governing law of the contract.

In any event Italian law plays a role as lex loci even when the contract is governed by a foreign law.

2. The Shipbuilding contract is governed by the rules on "appalto" (broadly speaking the equivalent of a contract for works and materials in common law) under sects 1655 through 1677 of the Italian Civil Code (Cod. Civ.) and under sects 232 through 244 of the Italian Code of Navigation (Cod. Nav.) respectively.

English law categorizes shipbuilding as a "sale by description of future goods" contract (although recent judgments have recognized similarity between the shipbuilding contract and the construction contracts) and is thus subject to the Sale of Goods Act 1979 as amended.

3. There are a number of significant differences between the two regimes, the most relevant are the following ones:

3.1. subcontracting is expressly regulated by sect 1656 Cod. Civ. providing that the "Contractor" (in our case the Shipyard) cannot subcontract unless he is authorized by the "Employer" (in our case the Shipowner).

3.2. Variations are subject to a detailed regime.

In particular:

a) variations which are necessary to make the work according to the "rules of art" as defined at sect 1660 Cod. Civ.: in the absence of agreement between the parties the Judge will determine what variations are necessary and the relevant price.

The above provision as such does not cater appropriately for variations compulsorily required by changes in legislation as it is frequently the case for ships.

If the cost of the variation exceeds 1/6$^{th}$ (one/sixth) of the contract price the Contractor/Shipyard can terminate the contract and is entitled to obtain an equitable indemnity.

If the variations are substantial the Employer/Shipowner can terminate the contract and must pay an equitable indemnity;

b) variations ordered by the Shipowner (sect 1661 Cod. Civ.): the Shipyard is not obliged to carry them out if their cost exceeds 1/6th (one/sixth) of the contract price.

3.3. Unlike common law, Italian law contemplates the revision of the contract price under certain circumstances:

a) where, as a consequence of unforeseeable circumstances, the costs of material and workmanship are increased or decreased in an amount exceeding 1/10th (one/tenth) of the total contract price, each party may demand a revision of the contract price for the excess over 1/10th;

b) where, during the execution, unforeseen difficulties arise due to geological, hydrogeological or other events of similar nature/characteristics (*eiusdem generis*: for example collapse of a pier) which make the work more burdensome, the Contractor is entitled to an equitable compensation.

4. Italian law provides at sect 1667-1668 Cod. Civ. a comprehensive regime governing the liability of the Contractor for defects of the work (which are intended to include non-conformity to the project/description as well as defective design).

Defects discoverable with ordinary diligence must be notified at the time of acceptance of the work (viz the vessel).

Latent defects must be notified to the Contractor within 60 days from their discovery and claims arising thereunder are time barred two years after delivery.

The practical effect of this rule is that the two year period is at the same time the limitation period and the duration of the technical warranty.

According to a reputable scholar(G. RIGHETTI, Trattato di Diritto Marittimo, 1982, II-2, p. 1269-1270) the 60 days notification deadline should not apply to shipbuilding contracts as the corresponding provision of the Code of Navigation (sect 240 Cod. Nav.) does not mention such a deadline, but only the two year time-bar period. However, this opinion is debatable.

The Contractor/Shipyard is bound to rectify the defects, but the Employer/Shipowner is entitled to claim a reduction of the price in lieu of having defects remedied by the Contractor.

In the event that a fault of the Shipyard is proven, the Shipowner is entitled to be compensated for the damage/loss resulting therefrom (for example loss of hire).

Liability for defects is fault based but fault is presumed, whilst compensation for damage/loss requires positive evidence of fault.

In the event that the defect is such as to make the ship wholly unfit to its use the Shipowner can terminate the contract.

This expression is construed to include also defects or non-conformity that are serious enough to substantially limit the ship employment without making it wholly unfit.

As a general proposition the above rules provide a comprehensive protection for the Employer/Ship-owner more than he can enjoy under common law.

5. Italian law contemplates the right of the Employer's/Shipowner's to terminate for convenience subject to refund to the Contractor/Shipyard of the costs incurred, payment for the part of works already carried out at the time of the termination notice and compensation to the Contractor for loss of earning (sect 1671 Cod. Civ.).

6. Rules are given to govern impossibility of execution for reasons beyond the parties' control.
In that case the Employer/Shipowner is to compensate the Contractor/Shipyard for the work done in accordance to the proportion which it bears to the overall contract work and price, provided the portion performed carries some utility for the former (sect 1672 Cod. Civ).

7. In the event of loss (total or partial) of the subject matter, before its acceptance, not attributable to either party, costs of materials are borne by the party who has supplied them and no consideration for works carried out is due to the Contractor/Shipyard.

8. A general provision of our Civil Code (sect 1229 Cod. Civ.) provides that clauses excluding or limiting liability in case of willful misconduct (*dolus*) or gross negligence are void.
This rule may apply in the event of clauses of the contract of shipbuilding limiting the Employer's/Shipowner's rights. One possible example is if a latent defect is notified beyond the two year time limit: if the defect is attributable to gross negligence of the Contractor/Shipyard, it is arguable (albeit somewhat debatable) that the cut off consequence of limitation applies.

9. Under Italian bankruptcy law (art. 81) as a general rule bankruptcy of one of the parties causes the contract to terminate unless the Bankruptcy Trustee takes the decision to step into the contract giving notice to the other party within 60 days from declaration of bankruptcy. However, the other party is entitled to apply to the judge for ordering the Bankruptcy Trustee to take such a decision earlier.
In the event of bankruptcy of the Shipyard a specific rule provides that the contract is terminated (irrespective of the Trustee's decision) if the "quality" of the Contractor (viz: skillfulness, financial standing) has been a decisive reason to enter into the contract unless the Employer is willing to continue.
Art. 81 is considered a public policy rule. Clauses giving right to terminate in case of bankruptcy of the other party would be considered void by an Italian Judge, irrespective of the governing law of the contract.

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