



# VAN STEENDEREN MAINPORTLAWYERS



# Introduction

**As with all things in life:**

**‘If it ain’t Dutch, it ain’t much!’**

# Introduction

- The Netherlands is one of the market leaders in the super yacht industry. Demand for newbuildings is still pushing delivery times into 2011-2013.
- According to statistics taken from the Yacht Register on [www.synfo.com](http://www.synfo.com) which incorporates all superyachts of >30m, the Netherlands is the No.3 yachtbuilding country with 496 yachts built (average length: 44.99m).
- But, the market has changed, causing parties to walk away! And causing hardship clauses to be invoked!





So, about shipbuilding ..



# Shipbuilding contracts - hardship

The hardship clause provided for in the Netherlands Civil Code is laid down in article 6:258, which generally provides that the effects of a contract may be set aside or modified, in whole or in part, on the basis of unforeseen circumstances. Such circumstances must be of a nature that a party – according to the standards of reasonable and fairness – may not be expected to maintain the contract in unmodified form.

# Shipbuilding contracts - hardship

This modification or setting aside may be retroactive.

In addition it can be said that the modification or the setting aside shall not be pronounced to the extent that it is common ground that the person invoking such circumstances should be accountable for them, or if this follows from the nature of the contract.

As this is in fact a fairly general rule, the question arises how to apply this concept in practice. There are a couple of essential guidelines:

# Shipbuilding contracts - hardship

- Actually unforeseen? Have the particular circumstances - that caused a party to invoke this hardship provision – not been calculated for or included into the contract in any way?
- In fact the complete balance of the contract (ual obligations) should be assessed to verify which particular risks have been accepted by (either one of) the parties, in order to establish whether this contractual balance has not been disordered by the unforeseen circumstances ...

# Shipbuilding contracts - hardship

... the Germans call this '*Wegfall der Geschäftsgrundlage*' and the English '*If the foundation of the contract goes ... the performance is to be regarded frustrated*'.

- Shipbuilding, more practice:



# Shipbuilding contracts - hardship

- Case law:

- / Was a fixed price agreed, and have the costs of equipment/supplies and labour significantly increased?
- / Or has the value of the performance to be delivered by the yard substantially decreased?
  
- / In general and on basis of Parliamentary History it can be said that Courts should exercise restraint where it comes to setting aside or the modification of contracts.
- / From 2 decisions of the Dutch Supreme Court (1984 and 1988) it can be derived that upon one party claiming a contract to be modified, a sincere burden of proof rests to substantiate and demonstrate such type of claim.

# Shipbuilding contracts - hardship

- Article 7:756 DCC: - '*Contracts for works*'

Where already before the time set for delivery, it has become probable that either the yard or the client will not perform or deliver properly, nor on time, the court may set aside the contract in whole or in part, only if the same is not the result of circumstances attributable to such party unable to perform.

# Shipbuilding contracts - hardship

- Supreme Court: *Anthea Yachting vs ABN Amro*
  - / New building of a 46.50m yacht upon instructions of Anthea
  - / Performance guarantee issued on behalf of the yard to secure its obligations, payable...
    - “upon the binding opinion of Marspec, controlled by Lloyd’s Classification Society London, that the contractor should not, or not properly execute and carry out any of the obligations under the above contract”.*
  - / However parties failed to verify beforehand whether the surveyors of Marspec would be free and available to co-operate to issue such ‘independent’ report, as it appeared not to be willing to do so.
  - / When the yard went bankrupt, Anthea claimed payment from ABN Amro under this guarantee, for the return of 10% of the purchase price.

# Shipbuilding contracts - hardship

- Supreme Court: *Anthea Yachting vs ABN Amro*
  - / Anthea argued that on basis of unforeseen circumstances the contractual provision for her to be able to rely on the performance guarantee should be modified and should include a newly named independent surveyor. In addition Anthea obtained a report from this new surveyor, confirming that as a consequence of the bankruptcy the contractor could not, or not properly execute and carry out any of the obligations under the building contract.
  - / ABN Amro refused payment and insisted on due observance of the original contractual provisions.

# Shipbuilding contracts - hardship

- Supreme Court: *Anthea Yachting vs ABN Amro*

/ While initially the Court of Appeal followed the arguments of ABN Amro, the Supreme Court reversed such decision and referred the case to another Appeal Court with the instruction to factually assess whether the facts of this case would justify a modification of this particular contractual provision. In other words, the Appeal Court failed to correctly apply this hardship concept, and the Supreme Court opened the door to apply modification in respect of this particular contract.

/ The modification of a contract however, must be – like the construction of a super yacht – made to measure !!





Thank you for your attention !!

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