

## Legal Briefing

### Had the parties to a shipbuilding contract achieved a binding settlement?

*Goodwood Investments Holdings Inc v Thyssenkrupp Industrial Solutions AG [2018] EWHC 1056 (Comm)*

Before Mr Justice Males

In the Commercial Court

Judgement delivered 3 May 2018

#### The facts

During 2006 Goodwood engaged Thyssenkrupp to construct a super yacht. Following delivery in September 2010, cracks began to appear in the paint coverings. Goodwood subsequently commenced arbitration claiming declaratory relief and an order for specific performance or damages. The main issue in the arbitration concerned whether or not the paint system should be replaced or repaired.

The arbitration hearing was due to start on 9 October 2017. On 8 September 2017 Goodwood proposed a settlement on the basis of a lump sum payment. On 26 September Thyssenkrupp counter-offered a lower sum indicating for the first time their requirements that there be a formal settlement agreement that would also be subject to board approval. These requirements were reiterated in a further offer made on 9 October 2017 whereby Thyssenkrupp proposed to remove and replace the existing paint system.

On 11 October Goodwood responded that the 9 October offer was accepted subject to points of clarification that included confirmation of the timing and the location of the proposed repair works and confirmation of the supervisory role of Goodwood's own consultants. Goodwood also said that the 9 October offer should be set out in a formal settlement agreement in full and final settlement of all disputes. The arbitration hearing was adjourned at midday and later on 11 October, Goodwood provided a draft settlement agreement.

Thyssenkrupp did not respond until 24 October 2017 when it denied that there had ever been a clear acceptance of its 9 October offer. In reply on 24 October Goodwood purported to again accept the 9 October offer but also maintained that the 9 October offer had been accepted on 11 October. The parties

agreed that pursuant to Section 45 of the 1996 Arbitration Act, the court should determine the question of law as to whether or not a settlement agreement had been reached.

#### The issue

Did Goodwood's responses of 11 October or 24 October create a legally binding settlement agreement.

#### The decision

The judge found that the 9 October offer was an offer to settle the arbitration on terms which were subject to the approval of Thyssenkrupp's board and subject to the execution of a formal settlement agreement. Whilst this was primarily because the wording of the 9 October offer made this expressly clear the judge also noted that where the settlement proposed repair works rather than a cash payment, it would make good commercial sense for the parties to be clear as to the timing and location of the work and the extent to which Goodwood's consultants could be involved. Accordingly the 9 October offer was not capable of being accepted so as to give rise to an immediately binding settlement agreement.

The judge acknowledged that where the 9 October offer was expressed to be without prejudice save as to costs then this indicated that it was an offer capable of acceptance or rejection, with costs consequences, but that in itself was insufficient to override the effect of the express terms.

Furthermore, the judge found that where Goodwood's 11 October response was expressed to be subject to the requirement for clarification and also required that a formal settlement agreement be executed, this response was not a clear acceptance in any event.

Finally, the judge noted that looking at the whole course of the parties' negotiations, all the indications were consistent with there being no shared understanding that a binding settlement had been reached: for example, the arbitration had been adjourned in order to allow the parties to engage in settlement negotiations and there were references to a requirement for the arbitration hearing to be resumed if no agreement could be reached.

#### Commentary

The principles considered in this shipbuilding dispute will equally apply to any contested settlement agreement arising out of a building contract.

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Where a settlement is disputed the court will be required to consider the whole course of the negotiations and to see, by means of an objective appraisal of the parties' words and conduct, whether or not the parties ever reached agreement. As the judge noted, where settlement exchanges are expressed to be "subject to contract" or "subject to board approval" these qualifications are classic indications that the parties do not agree to be bound. Equally, where the response to an offer includes a list of significant items that require clarification, this will also suggest that a binding agreement has not been reached. If the underlying dispute concerns quality of work and the settlement offer proposes the carrying out of repairs then uncertainty over the timing, organisation and supervision of the proposed works may also point to the absence of a binding agreement.

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May 2018