



Defects Aboard! Defending Defect Claims in Vessel Construction Disputes

Matthew A. Moeller
The Moeller Firm LLC
650 Poydras Street, Suite 1207
New Orleans, LA 70130
www.moellerfirm.com
matthew@moellerfirm.com

Shipyard



Liftboat



Offshore Supply Vessel



Vessel Construction Contract – What type of Contract is it?

- Is a vessel construction contract a maritime contract?
- How is it that a contract to build or sell a ship is not a maritime contract?
- The answer goes back at least as far as 1857, when the United States Supreme Court decided *People's Ferry Company of Boston v. Beers* and held: **“So far from the contract being purely maritime, and touching the rights and duties appertaining to navigation, (on the ocean or elsewhere,) it was a contract made on land, to be performed on land.”**

Vessel Construction Contract – What type of Contract is it?

- To invoke admiralty jurisdiction, the contract must be a maritime contract, which is a contract relating to a ship in its use or to commerce or navigation on navigable waters, or to transportation by sea or to maritime employment. *Thurmond v. Delta Well Surveyors*, 836 F.2d 952, 954 (5th Cir.1988),
- For a contract to be “maritime”, there must be a direct link between the contract and the operation of a ship. *Theriot v. Bay Drilling*, 783 F.2d 527, 538 (5th Cir. 1986)
- Admiralty jurisdiction will not entertain suits where the rights of the parties flow from a contract to sell or construct a vessel. *Jones v. One Fifty Foot Gulfstar Motor Sailing Yacht*, 625 F.2d 44, 47 (5th Cir.1980).

Consequences of a Non-Maritime Contract

Effects on the Defense Strategy:

- Jurisdiction and venue
- Bench trial versus a jury trial

Defective Workmanship – Louisiana law

In order to prevail on a claim for defective workmanship or defective materials, the Owner has the burden of proving:

- 1) The existence and nature of any defects;**
- 2) The defects were due to contractor's faulty materials or unworkmanlike performance; and**
- 3) The cost of remedying the defects.**

Shelter Ins. Co. v. Broan–Nutone, LLC, 39, 625; (La. App. 2d Cir. 5/11/2005); 902 So. 2d 1146

Acceptance (and Waiver)

Accepting work without complaint about the method or quality of the workmanship serves as a waiver of recovery by the Owner for defective workmanship.

Eastover Corp. v. Martin Builders, 543 So. 2d 1358 (La. App. 4th Cir. 1989)

Acceptance (and Waiver)

However, even if the Owner proves all three elements, the Owner is barred from recovering the costs if there was an unqualified acceptance despite imperfections that were discoverable upon a reasonable inspection.

Osborne v. Vulcan Foundry, Inc., 95-2766; 675 So. 2d 837; (La. App. 4th Cir. 5/29/1996)

Failure to Communicate!

If the Owner closely monitored construction (Owner's Representative) and failed to promptly complain when such a complaint would have facilitated a correction, Owner is precluded from complaining at the end of the project when the correction would entail major construction.

Elite Homes, Inc. v. Herrmann, 242 So. 2d 614
(La. Ct. App. 4th Cir. 1970)

What about a Qualified Acceptance?

- A “**qualified acceptance**” is evidenced by a punch list clearly delineating incomplete or unsatisfactory items as of the time of acceptance. However, courts have closely scrutinized such lists and have permitted little expansion.

Dumas and Associates, Inc. v. Lewis Enterprises Inc., 29-900; (La. App. 2d Cir. 12/22/1997); 704 So. 2d 433

- A qualified acceptance and can also be demonstrated by a definite agreement between the parties that certain items will be remedied subsequent to acceptance.

West v. Collins, 94-0682; (La. App. 4th Cir. 12/28/1994); 648 So. 2d 500

A Qualified, Qualified Acceptance?

Despite a qualified acceptance, an Owner may recover for:

- 1) Defects not readily discoverable by ordinary inspection;
- 2) Defects that manifest themselves subsequent to the acceptance; and
- 3) Defects that are explicitly excluded from the terms of the acceptance.

State v. Wilco Const. Co., Inc., 393 So. 2d 885, 897
(La. App. 4th Cir. 1981)



KEY PROVISIONS OF THE VESSEL CONSTRUCTION CONTRACT

The Contract Documents

ARTICLE II - CONTRACT DOCUMENTS

The Contract Documents shall include and consist of the following:

- 1) Vessels
- 2) Exhibits:
 - a) Specifications;
 - b) Drawings;
 - c) Certificate of Delivery and Acceptance;
 - d) Change Order Requests;
 - e) Owner Furnished Equipment; and
 - f) Wiring Instructions

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constitute the entire agreement between the parties. Any other provision, condition or requirement inconsistent or in conflict with the provisions of this Contract are superseded by this

Contract
there
Speci

All provisions, conditions or requirements contained in the Contract Documents shall constitute the entire agreement between the parties. Any other provision, condition or requirement inconsistent or in conflict with the provisions of this Contract are superseded by this Contract, it being the intent of the parties that the provisions of this Contract shall prevail. If there is any conflict or inconsistency between the Drawings and Specifications, the Specifications shall control.

Scope of Work

ARTICLE III – SCOPE OF WORK AND DESCRIPTION OF VESSEL

Builder, for and in consideration of the obligations of Owner hereinafter set forth, agrees to build, construct, complete and warrant free and clear of any liens, claims and encumbrances, the Vessel which shall be constructed in accordance with the Contract Documents, which have been identified by the parties and made a part of this Contract. As set forth in this Contract, “Contract Documents” are defined within Article II. The obligations of Builder shall be referred to herein as the “Scope of Work”, “Work” or “Works.” Builder shall perform all Work under this Contract in a good and workmanlike manner and in accordance with good marine practices, according to this Contract. All Work shall be free from faults and defects and in conformance with the Contract Documents, including any additions and modifications agreed by the parties.

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Owner's Representative

ARTICLE VIII - INSPECTION BY OWNER'S REPRESENTATIVE

Builder will furnish reasonable space at its yard for one (1) duly authorized representative of Owner who shall have reasonable access to the work of Builder during normal yard hours. Owner's representative shall promptly inspect and accept in writing all workmanship and material which is in conformity with the Contract Documents and shall, with equal promptness, reject in writing all workmanship and material which do not comply with the Contract

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Delivery

ARTICLE V - TIME AND CONDITIONS OF DELIVERY

The Vessel, after required sea trials have been completed in accordance with the Contract Documents, shall be delivered to Owner, **FIFTEEN (15)** months from the date Builder receives payment of the First Installment. The delivery date shall be extended pursuant to Article VII or by any force majeure event as defined in Article VI.

Builder shall deliver the Vessel to Owner at ex-yard Lafitte, Louisiana (the "Place of Delivery"). Upon delivery of the Vessel, Builder and Owner shall execute a Certificate of Delivery and Acceptance in the form of Exhibit "C" to this Contract. All costs and expenses of transporting the Vessel from the Place of Delivery to the Place of Shipping to final destination, if

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of all documents as may be required by the Contract Documents, including all regulatory and operational documents necessary for the commercial operation of the Vessel

Change Orders

ARTICLE VII - CHANGE ORDERS

Owner has the right to request deletions or additions to the Drawings or Specifications for the Vessel upon notice in writing to Builder, provided, however, no change order requested by Owner hereunder shall modify the general design, overall structural design, or integrity, of the Vessel unless Builder consents in writing to such modification. A statement of the increase or decrease to the Contract Price and the number of days of extension, if any, to the Date of Delivery necessitated by the requested change shall be submitted to Owner by Builder within twelve (12) working days of receipt of the change request and shall be approved by Owner in writing before Builder shall be obligated to make any such change in the Drawings or Specifications. All change orders executed by Builder and Owner shall be in the form attached hereto as Exhibit "D".

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Warranty

ARTICLE XI - LIMITED WARRANTY

During the Warranty Period as defined hereafter, Builder warrants that the Vessel, all workmanship of Builder, its employees and subcontractors shall be free from defects and shall conform to the requirements of the Contract documents.

Upon discovery, Owner shall give prompt written notice to Builder of any defects hereunder. Owner's notice shall describe with particularity the nature and extent of the defects. Builder shall have no responsibility whatsoever with respect to any claim under this Warranty not reported in writing to Builder within one hundred eighty (180) days from the Delivery Date as specifically defined in this Article XI (such 180 day period being hereinafter referred to as the

Builders shall have no responsibility whatsoever with respect to any claim under this Warranty not reported in writing to Builder within one hundred eighty (180) days from the Delivery Date as specifically defined in this Article XI (such 180 day period being hereinafter referred to as the "Warranty Period"), regardless of when such claim was discovered by the Owner.

Other Standard But Important Provisions

- **Consequential Damages Waiver** – Market volatility impacts the importance of this provision
- **Dispute Resolution** – Builders (and their attorneys) tend to prefer mediation and/or litigation versus arbitration



COMMON DEFECT CLAIMS

The Paint



The Paint



Defense Considerations and Tactics

- Did the Owner obtain a **FREE** warranty from the paint manufacturer?
- Scale of the problem?
- Product problem or manufacturing problem?
- Testing and sign off?
- Was there a collision or a reverse impact event?

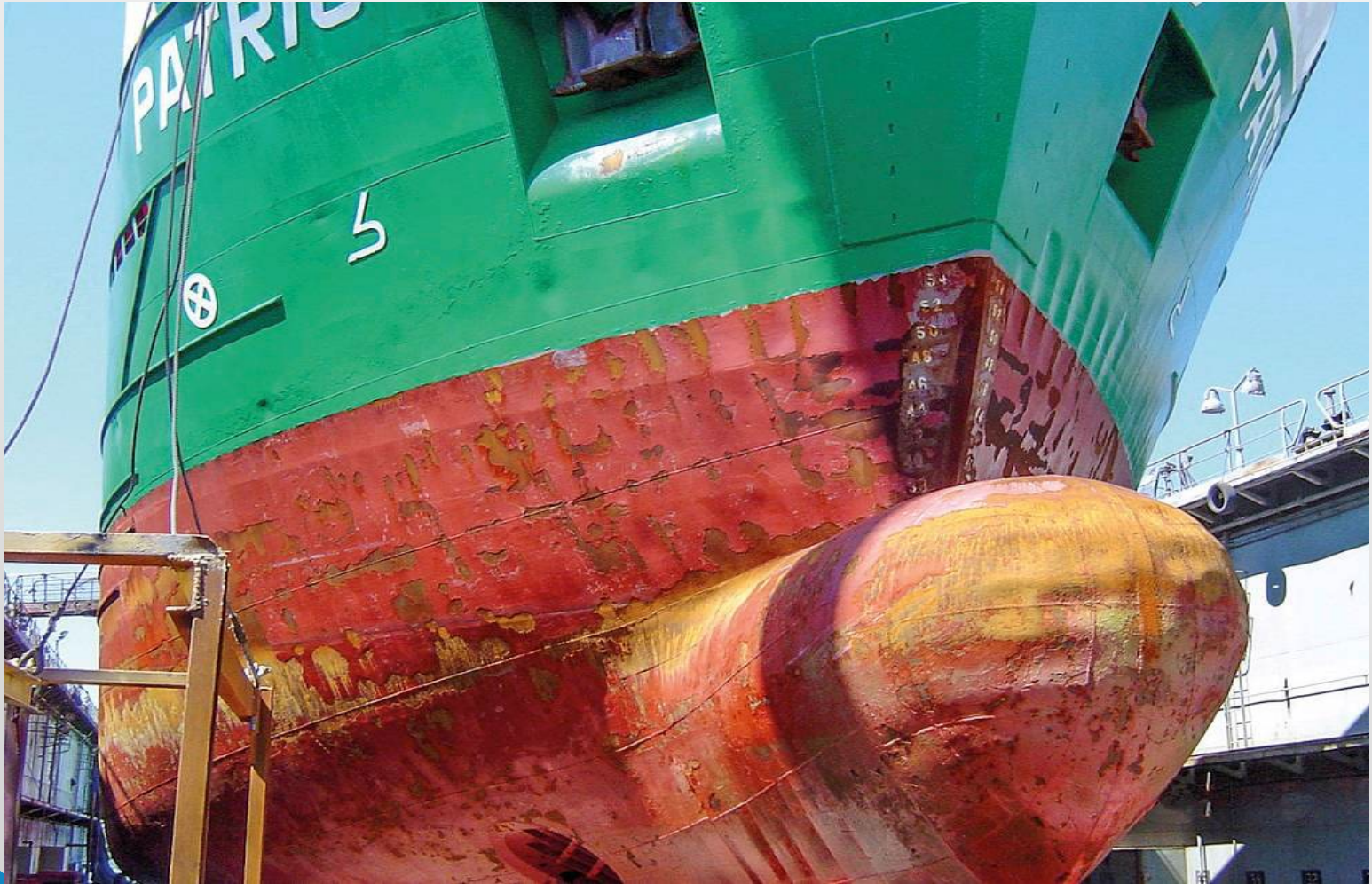
Purchased Equipment – Electrical Systems and Outfitting

- Navigation System, Entertainment System, Alarm Systems, Communications Systems
- Smaller Shipyards have been successful in limiting any warranty to their workmanship – will transfer all warranties to Owner upon delivery
- Inspection and sign off!

Contamination of Systems and Machinery

- Very Complex Machinery and Systems – Engines, Generators, Fuel Oil System, Ballast Water System
- Who tested the systems during construction and sea trials?
- Who has maintained the machinery and systems since the vessel left the yard?
- Has there been any third party work on the machinery and systems?

Hull Corrosion



Hull Electrolysis



Electrolysis and Corrosion of the Vessel

- What types of materials were used vs. what was actually specified?
- Presence of dissimilar metals?
- Were sacrificial anodes installed?
- Expert testimony

General Best Practices for Defending Claims

- Know the scope of work
- Possible various warranty protections
- Explore the numerous layers of inspection and acceptance
- Identify all third party intervention both before and after acceptance