Shipbuilding 2019

Contributing editor
Arnold J van Steenderen
Van Steenderen MainportLawyers BV

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Lexology Getting The Deal Through is delighted to publish the eighth edition of *Shipbuilding*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Turkey.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Arnold J van Steenderen of Van Steenderen MainportLawyers BV, for his continued assistance with this volume.

LEXOLOGY
Getting The Deal Through

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Netherlands

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PARTICIPATION AND OWNERSHIP

Restrictions on foreign participation and investment

1 Is the shipbuilding industry in your country open to foreign participation and investment? If it is open, please specify any restrictions on foreign participation.

The Dutch shipbuilding industry is open to foreign participation and investment. Dutch tax law provides a very attractive fiscal climate for foreign investors generally. For innovative shipbuilders, companies in the field of R&D can benefit from the 'innovation box', resulting in an effective corporate tax rate of 5 per cent, as well as an allowance for income tax and social security contribution deductions. The standard Corporate Income Tax (CIT) rate currently stands at 25 per cent. There are two taxable income brackets. A lower rate of 20 per cent applies to the first income bracket, which consists of taxable income up to €200,000. The standard rate applies to the excess of the taxable income.

CIT rates will be gradually reduced. The standard rate will be reduced in steps from 25 per cent to 22.55 per cent in 2020 and to 20.5 per cent in 2021. The lower rate will decrease from 20 per cent to 19 per cent in 2019, to 16.5 per cent in 2020, and to 15 per cent in 2021. There are no restrictions on foreign participation.

Government ownership of shipbuilding facilities

2 Does government retain ownership or control of any shipbuilding facilities and, if so, why? Are there any plans for the government divesting itself of that participation or control?

The government of the Netherlands has not retained ownership or control of any shipbuilding facilities.

KEY CONTRACTUAL CONSIDERATIONS

Statutory formalities

3 Are there any statutory formalities in your jurisdiction that must be complied with in entering into a shipbuilding contract?

The parties are free to negotiate the terms of a shipbuilding contract and design it as they wish. The general rule is that the formation of contracts and other juridical acts is not subject to requirements as to form. They may be concluded orally, or even tacitly by conduct of the parties from which the parties' intentions can be inferred. For certain specific contracts, statutory requirements of form exist, but shipbuilding contracts do not belong to this category. There are no statutory formalities to be met in entering into a shipbuilding contract.

A shipbuilding contract is formed by an offer and its acceptance. An acceptance at variance with the offer is considered to be a new offer and a rejection of the original offer. Where offer and acceptance refer to different general terms and conditions, the second reference is without effect, unless it expressly rejects the applicability of the general terms and conditions indicated in the first reference. The contract will be legally enforceable even if concluded orally, provided the terms and conditions can be proven.

Choice of law

4 May the parties to a shipbuilding contract select the law to apply to the contract, and is this choice of law upheld by the courts?

The parties to a shipbuilding contract are free to make a choice of the law applicable to their contract. The choice of law shall be made expressly or clearly demonstrated by the terms of the contract (preferably) or by the circumstances of the case. By their choice the parties can select the law applicable to the whole or to parts of the contract. The parties may at any time agree to subject the contract to a law other than that which previously governed it as a result of an earlier choice. The Rome I Regulation (EC No. 593/2008 of 17 June 2008) on the law applicable to contractual obligations applies. The choice of law made by the parties will be upheld by the court and the existence and validity of the consent of the parties as to the choice of the law applicable shall be determined in accordance with the provisions of articles 10, 11 and 13 of the Rome I Regulation.

Nature of shipbuilding contracts

5 Is a shipbuilding contract regarded as a contract for the sale of goods, as a contract for the supply of workmanship and materials, or as a contract sui generis?

Although the wording of a specific shipbuilding contract will be decisive to conclude whether it should be construed as a contract for the sale of goods or as a contract for the supply of workmanship and materials, generally speaking a shipbuilding contract is qualified as a contract to construct a vessel in accordance with construction law principles. If the vessel does not meet the specifications, which usually include certain performance criteria, there is a breach of contract on the builder's side. A shipbuilding contract amounts to an obligation for the builder to meet the targets (specifications). From the builder's perspective, it is not a contract to use its best endeavours to construct a vessel.

According to a decision handed down by the Dutch Supreme Court (Dutch Supreme Court 13 March 1981, NJ 1981, 635), the interpretation of contractual clauses and Dutch law is not merely governed by the grammatical interpretation of the text of a contract, although the textual analysis may be persuasive. Furthermore, it comes down to the intention of parties, given the particular circumstances, and what they could reasonably expect of one another. In this regard, which social or business field of expertise the parties belong to, and what knowledge is involved, is of importance. This criterion is leading in Dutch case law.

The Netherlands Maritime Technology (NMT) trade association is the primary representative of the Dutch maritime technology sector. The 400+ members include shipyards, marine equipment suppliers and service providers. NMT has issued certain standard trade terms (VNSI General Yard Conditions 2018), which are frequently used by its members. By entering into the agreement, the other party or customer shall be deemed to waive other conditions or stipulations, even if the same are expressly referred to or are stated expressly in or on any offer, acceptance or other documents.

Hull number

6 | Is the hull number stated in the contract essential to the vessel's description or is it a mere label?

The hull number stated in the contract is an essential element to identify and apportion title to building materials and equipment. The builder should label any building materials and equipment with the hull number for identification purposes upon their arrival at the builder's premises. All goods labelled with the hull number are identifiable as belonging to the particular building project unless there is a reservation of title in materials and equipment (see question 33) from a supplier.

Deviation from description

7 | Do 'approximate' dimensions and description of the vessel allow the builder to deviate from the figure stated? If so, what latitude does the builder have?

The use of the word 'approximate' in the dimensions and description will allow the builder to deviate slightly from the figure stated. A court will have to decide case by case the exact latitude the builder has. If it is of paramount importance that a certain measurement (eg, the draft of a vessel) is met precisely, the use of 'approximate' should be avoided.

Guaranteed standards of performance

8 | May parties incorporate guaranteed standards of performance whose breach entitles the buyer to liquidated damages or rescission? Are there any trade standards in your jurisdiction for coating, noise, vibration, etc?

Clauses guaranteeing certain standards of performance are frequently included in shipbuilding contracts. If upon delivery the guaranteed performance standards cannot be met by the builder, the building contract may allow for payment of liquidated damages or a penalty to be paid by the builder, and if a certain benchmark cannot be met then rescission of the contract can be applied for. In article 6:91 of the Dutch Civil Code, Dutch civil law defines a penalty clause as any clause that provides that an obligor, should he or she fail in the performance of his or her obligation, must pay a sum of money or perform another obligation, irrespective of whether this is to repair damage or only to encourage performance. Penalty clauses as described above are enforceable, but the constraining function of reasonableness and fairness principles may prohibit the obligee from claiming the benefit of a full penalty when such a claim may be unreasonable in the circumstances (Dutch Supreme Court 17 December 2004, NJ 2005, 271). The correct phrasing of a liquidated damages clause is of great importance. Dutch courts can mitigate contractual penalties upon request of the builder, whereas a liquidated damages clause reflecting a genuine compensation for the loss of the owner cannot easily be set aside in whole or in part.

In the luxury yacht industry, the HISWA COT Standard for Luxury Yachts Coating Work and ICOMIA Technical Guideline are frequently used.

Quality standards

9 | Do statutory provisions or previous cases in your jurisdiction give greater definition to contractual quality standards?

The inclusion of a certain contractual benchmark will make the standard of performance of the builder more transparent. Reference to 'highest North European shipbuilding standards' will eventually have to be demonstrated by an expert opinion to the court, should there be a dispute between the parties as to what the scope or application of the standard is. In this respect, we should also mention Directive 2013/53EU on recreational craft and personal watercraft. Products covered by this Directive may be placed on the market or put into service only if they meet the general requirement not to endanger the health and safety of persons, property or the environment, and only if they meet the essential requirements set out in the Directive. The CE marking, indicating the conformity of a product, is the visible consequence of a whole process comprising conformity assessment in a broad sense. The general principles governing the CE marking are set out in Regulation (EC) No. 765/2008. Rules governing the affixing of the CE marking to watercraft, components and propulsion engines should be laid down in the Directive. It is appropriate to enlarge the obligation to affix the CE marking also to all inboard engines and stern drive engines without integral exhaust that are regarded as meeting the essential requirements set out in the Directive.

Classification society

10 | Where the builder contracts with the classification society to ensure that construction of the vessel leads to the buyer's desired class notation, does the society owe a duty of care to the buyer, or can the buyer successfully sue the classification society, if certain defects in the vessel escape the attention of the class surveyors?

The party commissioning construction of a newbuilding will decide upon the intended flag of the vessel once delivered and also upon the preferred choice of classification society. The contract with the classification society, however, will be concluded between the builder and the classification society. In this regard the commissioning party is a third party and the classification society does not owe a contractual duty of care to him or her. If any defects in the vessel are attributable to errors or omissions of the classification society, the claim should be directed to the builder based on contract. A claim from the commissioning party directly against the classification society should be based on tort. If a claim is brought in tort by the commissioning party, the classification society may seek to rely on any exonerating clauses contained in the contract concluded with the builder.

The responsibility and liability of statutory certification as a public task was addressed in the *Duwbak Linda* case (Dutch Supreme Court 7 May 2004, NJ 2006, 281). Although no classification society was involved, the grounds of this judgment are illustrative of the hesitant attitude of the Dutch legislature to make inspection and certification institutes liable. In this case a claim was directed against the Dutch government as well as the surveyor involved, who had assumed the delicate task of certifying a tug-pushed barge. One year after the certificate was extended, the barge *Linda* capsized, sunk and took with her a dredge-combination that had been lying moored next to her. The owner of the dredge-combination claimed damages on the grounds that a careful inspection would have prevented extension of the certificate for the barge *Linda*. After the claim had been rejected by the District Court and the Court of Appeal, this case was brought before the Dutch Supreme Court. Here, the owner of the dredge-combination argued that the legal standard that had been infringed by the surveyor, being the requirement of a survey under the Rhine Vessel Inspection Regulations, is intended to offer protection

against damages as suffered here by him being the injured party. The Court of Appeal had made a distinction in two standards: a general standard that concerns advancing safety within the territorial waters (in this case, the aforementioned Rhine Rules); and a code of conduct that concerns the standards of due care to be exercised when inspecting and certifying.

This distinction has been confirmed by the Dutch Supreme Court, which also outlined that the standards of due care may envisage contributing to the general standard of safety of shipping within the territorial waters, but are not intended to protect the individual assets and interests of third parties.

In other words, although in the Netherlands the state has a duty to take care of safety within its territorial waters and has to that purpose introduced a certification system, neither an intention for introducing a liability for damages towards third parties can be derived nor has such a liability been caused by operation of law. In theory, this decision will probably also be relevant for all other situations of testing, survey and inspection.

Flag-state authorities

11 Have the flag-state authorities of your jurisdiction outsourced compliance with flag-state legislation to the classification societies? If so, to what extent?

The flag-state authorities of the Netherlands have outsourced compliance with flag-state legislation to the classification societies. In the Netherlands, the government agency responsible is the Human Environment and Transport Inspectorate of the Ministry of Infrastructure and Water Management. The Dutch Shipping Act applies to all seagoing vessels flying the Dutch flag, and the Human Environment and Transport Inspectorate monitors vessels flying the Dutch flag, but also foreign vessels, crews, shipping companies and classification societies. The Inspectorate has authorised a number of organisations, including classification societies, to perform certain inspections. These are the 'Recognised Organisations'. These organisations conduct inspections and certification on, for example, seagoing vessels, marine equipment, recreational crafts and rescue boats. Supervision of these organisations is the responsibility of the Inspectorate. Thirteen classification societies are recognised by the European Commission. The Netherlands has appointed seven recognised organisations to act on its behalf. The working method and procedures are laid down in an agreement combined with a mandate. It concerns inspections and certification required by international conventions such as SOLAS, MARPOL, Tonnage Measurements, Load Lines and ILO 152 on Dutch seagoing vessels. The Inspectorate continues to perform inspections on vessels that are not or partly within the scope of the international conventions. The Inspectorate also conducts inspections based on national legislation, the STCW, inspections not mentioned in the agreement and as part of the Flag State Control requirements.

Registration in the name of the builder or the buyer

12 Does your jurisdiction allow for registration of the vessel under construction in the local ships register in the name of the builder or the buyer? If this possibility exists, what are the legal consequences of this registration?

Registration of a seagoing vessel under construction is only possible if it is under construction in the Netherlands (article 8:194, section 1 of the Dutch Civil Code). Registration must be requested by the shipowner and he or she must submit a declaration signed to the effect that, to the best of his or her knowledge, the vessel is registrable as a seagoing vessel. If it concerns a request for registration as a seagoing vessel under construction, this declaration must be accompanied by proof that it is a vessel under construction in the Netherlands. Shipbuilding contracts in this jurisdiction usually contain a provision allowing the commissioning party to register the vessel in its name as a seagoing vessel under construction upon payment of a certain milestone instalment. The earliest possible moment, therefore, is the laying of the keel of the vessel. The legal consequences of registration of the vessel are mainly in respect of the possibility to register a mortgage over the vessel under construction. If the vessel under construction has not been registered yet, a right of pledge could be created as a security for a financial institution.

Title to the vessel

13 May the parties contract that title will pass from the builder to the buyer during construction? Will title pass gradually, upon the progress of the vessel's construction, or at a certain stage? What is the earliest stage a buyer can obtain title to the vessel?

The parties are free to contract that title will pass from the builder to the buyer during construction. The earliest moment during construction that this passing of title can be recorded in the ships register is the laying of the keel of the vessel or reaching a similar milestone in construction. Title will pass immediately to the buyer. Title will not pass gradually.

Passing of risk

14 Will risk pass to the buyer with title, or will the risk remain with the builder until delivery and acceptance?

After delivery, the vessel constructed shall be at the risk of the buyer. The risk of loss and damage will remain with the builder until delivery and acceptance of the vessel.

Subcontracting

15 May a shipbuilder subcontract part or all of the contract and, if so, will this have a bearing on the builder's liability towards the buyer? Is there a custom to include a maker's list of major suppliers and subcontractors in the contract?

Unless otherwise agreed upon in the shipbuilding contract, the builder will be entitled to have the works performed by one or more subcontractors under his or her supervision and, with respect to parts of the works, the builder will also be entitled to delegate the supervision to others, without prejudice, to his or her responsibility for the proper performance of the contract (article 7:751 of the Dutch Civil Code). If an owner wants a certain subcontractor to be involved in the project, this will usually be agreed upon with the builder. The same agreement is required with the exclusion of a certain subcontractor or supplier. It is common practice to negotiate a maker's list of suppliers and subcontractors and to include this list in the contract as an annex.

Extraterritorial construction

16 Must the builder inform the buyer of any intention to have certain main items constructed in another country than that where the builder is located, or is it immaterial where and by whom certain performance of the contract is made?

Subject to any express term of the building contract to the contractee, and also provided that the contract does not otherwise restrict the ability of the builder as main contractor to subcontract the construction of certain items without the commissioning party's prior approval, the builder is under no obligation to inform the buyer of an intention to have certain main items constructed in another country, but to avoid claims

for misrepresentation ('highest Dutch build quality') it is advisable that the builder discloses this fact, should he or she have the intention to construct main sections outside the country where the builder is located.

PRICING, PAYMENT AND FINANCING

Fixed-price and labour-and-cost-plus contracts

17 Does the law in your country have different provisions for 'fixed-price' contracts and 'labour-and-cost-plus' contracts?

Where, at the time of entering into the building contract, no fixed price has been set or only a target price has been set, the law provides that the commissioning party owes a reasonable price (article 7:752 of the Dutch Civil Code). In setting the price, account shall be taken of the prices usually stipulated by the builder at the time of entry into the contract and the expectations the builder has raised with respect to the presumed price. Where a target price has been set, it may not be exceeded by more than 10 per cent, unless the builder has warned the customer of the possibility of a further cost overrun in reasonable time to afford the customer the opportunity to limit or simplify the works at that stage. Within reasonable limits, the builder must cooperate with such limitation or simplification.

Price increases

18 Does the builder have any statutory remedies available to charge the buyer for price increases of labour and materials despite the contract having a fixed price?

Where, after entry into the building contract, circumstances arise or become apparent that increase costs and that are not attributable to the builder, the court may, upon the demand of the builder, adjust the stipulated price to the cost increase in whole or in part, provided that the builder, in setting the price, was not obliged to take the likelihood of such circumstances happening into account (article 7:753 Dutch Civil Code). This shall apply only if the builder has warned the customer of the necessity of a price increase as soon as possible, so that the latter can exercise in good time the right to which he or she is entitled to make a proposal to limit or simplify the works (article 7:753, section 3 of the Dutch Civil Code).

The duty to warn is considered to be particularly relevant in construction contracts and design contracts. This duty follows from the general duty to carry out the works with reasonable care and skill. If the builder fails to perform his or her duty to warn, he or she will become liable towards the commissioning party for the consequences of that failure. However, the supply of inadequate materials or directions may serve to render the client liable for negligence. The expertise of the commissioning party can be a relevant factor here.

Retracting consent to a price increase

19 Can a buyer retract consent to an increase in price by arguing that consent was induced by economic duress?

In general, a juridical act may be annulled when it has been entered into as a result of economic duress, fraud or undue influence (article 3:44, section 1 of the Dutch Civil Code). Duress occurs where a person induces another person to perform a specific juridical act by unlawfully threatening him, her or a third party with harm to their person or property. The duress must be such that a reasonable person would be influenced by it. Duress in Dutch law comprises not only threats to the person but also to property. A threat of committing an unlawful act against any person may be sufficient, provided that it is such as would influence a reasonable person. This means that the person exercising economic duress will most probably also act in tort towards his or her victim. The economic and financial downturn after the summer of 2008 has led to a number of cases where parties have tried to invoke economic duress (eg, the extreme price increase of steel), but as far as we know these attempts have not been successful.

It should be mentioned that, upon the demand of one of the parties, the court may modify the effects of a contract, or it may set it aside in whole or in part on the basis of unforeseen circumstances that are of such a nature that the other party, according to the criteria of reasonableness and fairness, may not expect that the contract be maintained in an unmodified form (article 6:258 of the Dutch Civil Code). The test to be met for a party invoking this provision is to successfully argue that the contract has no allowance for the occurrence of these circumstances in the first place and this largely is a matter of interpretation of the contract.

Exclusions of buyers' rights

20 May the builder and the buyer agree to exclude the buyer's right to set off, suspend payment or deduct certain amounts?

It is a principle of Dutch contract law that the parties have autonomy to agree upon the contents of the contract, and to submit it to a form and application of a chosen law.

The parties are free to (contractually) exclude the buyer's right to set off, suspend payment or deduct certain amounts when it is time for the buyer to make a milestone payment.

Refund guarantees

21 If the contract price is payable by the buyer in pre-delivery instalments, are there any rules in regard to the form and wording of refund guarantees? Is permission from any authority required for the builder to have the refund guarantees issued?

Until the builder hands over the completed vessel at delivery, the buyer's deposit and stage payments made during construction are at risk. Under Dutch law this risk may be mitigated to a certain extent by passing title from the builder to the buyer during construction (see question 13), but depending on the stage of construction, the buyer is likely to have an unsecured claim against the shipyard should the shipyard default or become insolvent during construction. A refund guarantee from a creditworthy bank is usually used to cover this risk.

If the contract price is payable by the buyer in pre-delivery instalments according to certain milestones, a refund guarantee from the builder will usually be in the form of an undertaking from his or her bank to refund the relevant instalment upon the buyer's first written demand.

Article 7:850, section 1 of the Dutch Civil Code defines the contract of suretyship as a contract whereby one party, the surety, obliges himself or herself towards the other party, the creditor, to perform an obligation to which a third person, the principal debtor, is or will be bound towards the creditor. Suretyship is therefore a solidary liability but the surety presents himself or herself towards the creditor as a person only willing to provide security in his or her relationship towards the principal debtor. The debt does not concern himself or herself. The bank guarantee on the basis of which a bank is obliged to pay if the conditions contained in the guarantee are met is different in the sense that the bank guarantee is detached from the underlying juridical relationship, namely, the contract between the creditor and the principal debtor. In the case of suretyship there is always a link between the obligation of the principal debtor and the surety, although suretyship for future obligations can be agreed upon. The contract of suretyship is between creditor and surety and therefore the validity of suretyship does not require that a principal debtor be aware of it. Where the principal obligation is not valid, there is no suretyship and where the

principal obligation comes to an end, the suretyship will in general also come to an end.

Advance payment and parent company guarantees

22 What formalities govern the issuance of advance payment guarantees and parent company guarantees?

As for advance payment guarantees, there are no formalities to be met prior to issuance of the letter of guarantee. The articles of association of the guarantor should allow the guarantor to issue letters of guarantee and the same applies for parent company guarantees intended to guarantee the performance of a daughter company. Under Dutch law, such a letter of guarantee is usually in the form of a contract of suretyship, whereby one party, the guarantor, obliges himself or herself towards the other party, the obligee, to perform an obligation to which a third person, the principal obligor, is or will be bound towards the obligee. Suretyship is dependent upon the obligation of the principal obligor in respect of which it has been entered into. Because the guarantor may also avail himself or herself of the defences that the principal obligor has against the obligee if they relate to the existence, content or time of performance of the obligation and the guarantor is not obliged to perform until such time as the principal obligor has failed in the performance of his or her obligation, these defences are usually explicitly excluded in the wording of such a letter of guarantee.

Financing of construction with a mortgage

23 Can the builder or buyer create and register a mortgage over the vessel under construction to secure construction financing?

During construction of the vessel, the builder or the buyer can create and register a mortgage over the vessel under construction if the buyer or the builder owns the vessel.

The owner of the seagoing vessel shall make a request for registration and in doing so, he or she must submit a declaration signed to the effect that, to the best of his or her knowledge, the vessel is suitable to be registered as a seagoing vessel. Where it concerns a request for the registration of a seagoing vessel under construction, this declaration shall be accompanied by proof that the vessel is under construction in the Netherlands. When making a request for registration, the applicant shall elect a domicile within the Netherlands. As long as the registration has not been deleted from the Dutch registers, the registration of a seagoing vessel in a foreign register or the creation abroad of rights (titles or interests) in the vessel, for which creation a registration in the public registers would have been required in the Netherlands, shall have no legal effect. In derogation from this, a registration or creation of rights (titles or interests) shall be recognised when it took place under the condition of deletion of the registration in the Dutch registers after the registration of the vessel in the foreign register.

DEFAULT, LIABILITY AND REMEDIES

Liability for defective design (after delivery)

24 Do courts consider defective design to fall within the scope of poor workmanship for which the shipbuilder is liable under the warranty clause of the contract?

After delivery and the commissioning party's acceptance of a vessel, the builder shall have no liability whatsoever except as set forth in the warranty clause of the building contract. Customarily, the builder warrants that the vessel and all its components and equipment – except for owner's supplies – upon delivery, shall comply with the requirements of the building contract and specification and shall be new, free from liens and encumbrances, and of the best quality, free from defects in material and workmanship. The question may arise whether defects in design are included within the scope of this warranty. Defective design does not fall within the scope of poor workmanship for which the shipbuilder is liable under the warranty clause of a building contract. Parties should explicitly include the builder's liability for defective design in the warranty clause if it is their intention that the builder will be liable for that under the warranty clause. It was held in a Transport and Maritime Arbitration Rotterdam-Amsterdam (TAMARA) (since November 2018, TAMARA is named UNUM Transport Arbitration and Mediation) arbitral award of July 2013 that the claim under the warranty provisions of a shipbuilding contract – pursuant to which the yard undertook to remedy by repairing to a new standard or, if necessary, by replacing all defects due to poor design, workmanship or materials – had to be denied, although the contract contained a provision as follows:

> *The Builder undertakes responsibility with regard to strength, stability, functionality and further shipbuilding aspects, other than sailing performance and aesthetics of the Vessel. He is obliged to review the overall Design, the Plans and the Specifications as generally being suitable for this purpose. It is expressly acknowledged that 'the builder shall not be responsible for any aesthetic aspects of the Vessel's design which shall at all times be the responsibility of the Owner and his Naval Architect'.*

Within the warranty period the whole of the vessel broke owing to slamming, but the arbitral tribunal held that the provision in the contract quoted imposes a general obligation on the yard, but cannot be understood to shift the responsibility for – and thereby the liability for any faults in – the overall design, the plans and specifications as prepared by the naval architect and the construction engineer, to the shipbuilder. Contrary to the claimant's assertion, responsibility and liability of the yard for the overall design, plans and specifications does not follow from the wording of the provision quoted. Errors or miscalculations in the overall design, plans and specifications remain for the risk of the commissioning party, who has contracted with a naval architect and the construction engineer. This arbitral award shows that contractual language aimed at making the yard liable for the design cannot be clear enough.

Remedies for defectiveness (after delivery)

25 Are there any remedies available to third parties against the shipbuilder for defectiveness?

In the absence of a contractual relationship with the builder, a third party's ability to enforce the warranty rights under the building contract is in principle not existent under Dutch law.

Third parties suffering loss or damage because of defectiveness of a vessel can try to make a claim against the shipbuilder based on tort. It will be difficult to successfully claim damages from a shipyard, as there is no obligation for the shipyard to repair the damage if the standard breached does not serve to protect against damage such as that suffered by the third party suffering the loss. Except where there are grounds for justification, the following are deemed tortious: the violation of a right and an act or omission breaching a duty imposed by law or a rule of unwritten law pertaining to proper social conduct.

In many cases shipbuilding contracts contain assignment clauses, but if no assignment has taken place prior to delivery such clause will not be of assistance to a third party for defectiveness discovered after delivery.

Liquidated damages clauses

26 If the contract contains a liquidated damages clause or a penalty provision for late delivery or not meeting guaranteed performance criteria, must the agreed level of compensation represent a genuine link with the damage suffered? Can courts mitigate liquidated damages or penalties agreed in the contract, and for what reasons?

All clauses that provide that a shipyard (obligor), should it fail in the performance of any of the performance criteria of the shipbuilding contract, must pay a sum of money or perform another obligation, is considered to be a penalty clause, irrespective of whether this is to repair damage or an incentive only to encourage performance (article 6:91 of the Dutch Civil Code). The creditor may not demand performance of the penalty clause where the failure in the performance of the obligation cannot be attributed to the shipyard. A notice will be required in order to demand performance of the penalty clause in the same cases as such is required to claim damages due by law. Under article 6:94 of the Dutch Civil Code, the court may reduce the contractually agreed penalty at the request of the obligor if it is fair to do so. However, the court may not award the obligee less than the damages due by law for failure in the performance. A penalty that was intended as an incentive only may be more susceptible to reduction than a penalty intended to recover (liquidated) damages. This statutory authority of the court cannot be excluded by the parties in their agreement. Though the wording of article 6:94 of the Dutch Civil Code suggests otherwise, this provision does not entitle the court to reduce the amount of penalties simply because it perceives the amount as being unfair. In its decision of 27 April 2007 (ECLI:NL:HR:2007:AZ 6638 *Intrahof v Bart Smit*), the Dutch Supreme Court ruled that the court should exercise its authority to reduce the penalty amount cautiously. A penalty may be reduced where there is an imbalance between the amount of penalties and the damages incurred by the breach, in the given circumstances, that is excessive and therefore unacceptable. The court should take into account not only the amount of damages but also the nature of the agreement, the content and purpose of the penalty clause and the circumstances under which the penalty clause was invoked. The Dutch Supreme Court has repeated the standard in various other cases over the past few years. Most recently, the standard for reducing penalties has been confirmed by the Dutch Supreme Court in its decision of 16 February 2018 (ECLI:NL:HR:2018:207). The Dutch Supreme Court held in *Ampatil v Weggelaar* (Dutch Supreme Court 17 December 2004, NJ 2005, 271) that claiming payment of a penalty under certain circumstances can be unacceptable according to standards of reasonableness and fairness. Dutch courts can mitigate contractual penalties upon request of the builder, whereas a liquidated damages clause reflecting a genuine compensation for the loss of the owner cannot easily be set aside in whole or in part.

Preclusion from claiming higher actual damages

27 If the building contract contains a liquidated damages provision, for example, for late delivery, is the buyer then precluded from claiming proven higher damages?

The innocent party may wish to recover his or her actual losses despite the fact that the contract contains a liquidated damages clause limiting the liability of the party in breach to the agreed amount under the clause. The innocent party may start litigation requesting the court to award supplementary damages, but such a claim would only have a reasonable chance of success if under the circumstances it is evident that principles of reasonableness and fairness so require.

Force majeure

28 Are the parties free to design the force majeure clause of the contract?

A general definition of *force majeure* can be found in article 6:75 of the Dutch Civil Code: the failure in performance cannot be attributed to the obligor if it is neither owing to his or her fault nor for his or her account pursuant to the law, a juridical act or generally accepted principles. The parties to a contract are free to include or exclude certain events from the contractual concept of *force majeure*.

The scope of *force majeure* will be a matter for negotiation and the parties to the shipbuilding contract must carefully consider the contingencies with regard to the project. The clause providing that the builder must give notice in writing specifying the event that causes *force majeure*, estimating the time the *force majeure* situation will probably last, could be of assistance. Under Dutch law, it is beyond doubt that there is also *force majeure* in cases of 'relative impossibility': cases in which performance is possible in theory but, reasonably speaking, cannot be expected of the debtor in question.

Force majeure was discussed in the case ECLI:NL:GHSHE:2013:BZ9854. There was a shipbuilding contract for the construction of the dredger Simson. The completion date was not achieved by the shipbuilder, owing to – according to the shipbuilder – circumstances of *force majeure*. The parties agreed on a joint expert opinion that stipulated that owing to construction defects in components delivered by a third party, which generally speaking has a good reputation, the shipbuilder faced delays. The court considered that, based on the expert's opinion, there were circumstances that constituted *force majeure*. However, the shipbuilder was liable to pay liquidated damages owing to further delays, which could have been reduced by the shipbuilder. In a nutshell, the shipbuilder argued that weather conditions partially caused further delays. The court considered that further delays were caused by the shipbuilder's own faults, and that the statement that weather conditions have partially caused the further delay were non-substantiated. Therefore, these arguments did not constitute *force majeure*.

Umbrella insurance

29 Is certain 'umbrella' insurance available in the market covering the builder and all subcontractors of a particular project for the builder's risks?

The Dutch Bourse Policy for Construction Risks 1947 is the prevailing builders' risk insurance available in the insurance market of the Netherlands. According to this policy a shipyard can take out insurance not only for itself, but also on behalf of all co- and subcontractors and suppliers in connection with the construction, conversion or repair of a certain named vessel. The insurance is to cover all risks, including fire and theft, in buildings, yards and shops of the assured, while under construction, fitting out and during trials, and it includes materials while in transit – except by sea – to and from the works or the vessel wherever it may be laying.

Disagreement on modifications

30 Will courts or arbitration tribunals in your jurisdiction be prepared to set terms if the parties are unable to reach agreement on alteration to key terms of the contract or a modification to the specification?

The parties have contractual freedom, but if there is disagreement on the proper construction of a contractual term, a court or arbitral tribunal will have to establish the presumed intentions of the parties. In *Vodafone Libertel NV v European Trading Company CV* (Dutch Supreme Court 19 October 2007, JOL 2007, 686), the Dutch Supreme Court held

that in finding the proper interpretation of a contractual clause, a mere linguistic approach will not suffice. The test must be to try to establish the meaning parties reasonably have given to the disputed clause, taking into account each other's position. The rights and obligations of parties in relationship with one another are not only determined by the explicit contractual terms prevailing between them, but also by principles of reasonableness and fairness.

Acceptance of the vessel

31 Does the buyer's signature of a protocol of delivery and acceptance, stating that the buyer's acceptance of the vessel shall be final and binding so far as conformity of the vessel to the contract and specifications is concerned, preclude a subsequent claim for breach of performance warranties or for defects latent at the time of delivery?

The buyer's signature of a protocol of delivery and acceptance will not be final and binding if defects latent at the time of delivery have not been discovered and were not discoverable by a prudent buyer taking reasonable precautions to avoid such defects from escaping his or her attention. The liability of the shipyard for latent defects known to the shipyard and not disclosed cannot be excluded or limited and neither can it be made subject to a shorter prescription period as provided for by law (article 7:761 of the Dutch Civil Code).

Liens and encumbrances

32 Can suppliers or subcontractors of the shipbuilder exercise a lien over the vessel or work or equipment ready to be incorporated in the vessel for any unpaid invoices? Is there an implied term or statutory provision that at the time of delivery the vessel shall be free from all liens, charges and encumbrances?

A lien is a right to the property of another arising by a specific clause in an agreement or by operation of law.

The exercise of a lien over the vessel or work or equipment ready to be incorporated in the vessel as a security for payment of invoices can only be successfully obtained if the supplier or subcontractor effectively holds possession of the relevant work or equipment, and can prevent the shipbuilder, buyer or third parties from taking possession of this work or equipment without consent. The work or equipment will, therefore, need to be in the custody of the relevant supplier or subcontractor.

In the case ECLI:NL:RBROT:2013:6587 (*Aeolus v Van de Grijp*), the subcontractor of the defendant claims to have a right of retention towards the defendant. The subcontractor has the factual power over the products and refuses to issue the products to the plaintiff owing to its claimed right of retention. The contract between plaintiff and defendant contains a provision that says that the contractor may not suspend its obligations in the contract when the client does not fulfil its payment obligations. The court considers that this provision holds a prohibition for the (sub)contractor not to exercise a right to suspension. Furthermore, the court considers that, regarding the rights of third parties, a contracting party whose performance has become of such importance to the interests of third parties cannot neglect these interests that are largely dependent on the performance of the contracting party. The standards that are considered acceptable in society according to general principles of civil law may entail that the contracting party needs to respect these interests, when these interests are closely related to a proper performance of the agreement. In its judgment, the court will need to consider the position of the parties involved, the contents and meaning of the contract, and the way the interests of third parties are involved (Dutch Supreme Court 24 September 2004, NJ 2008, 587 (ECLI:NL:HR:2004:AO 9069)).

Reservation of title in materials and equipment

33 Does a reservation of title by a subcontractor or supplier of materials and equipment survive affixing to or incorporation in the vessel under construction?

Suppliers and subcontractors engaged by the shipbuilder in constructing the vessel will lose any right retaining their title to the goods supplied and the work performed as from the moment the goods supplied or work performed are incorporated in the vessel. There is no implied term or statutory provision that a vessel at the time of delivery shall be free from all liens, charges and encumbrances. This has to be agreed upon in the shipbuilding contract.

Third-party creditors' security

34 Assuming title to the vessel under construction vests with the builder, can third-party creditors of the builder obtain a security attachment or enforcement lien over the vessel or equipment to be incorporated in the vessel to secure their claim against the builder?

Third-party creditors can obtain a security attachment or enforcement lien over the vessel or equipment to be incorporated in the vessel, provided that these (the vessel and the equipment) are registered in the public registers.

In this context, however, a distinction must be made between vessel components and vessel accessories. Whereas vessel components will, after being affixed or incorporated, lose their independent nature and follow the ownership of the vessel and, thus, become property of the owner of the vessel, vessel accessories will not. Vessel accessories have a separate legal status in view of a possible reservation of title. (Any such reservations should be registered in the public registers.) In fact, unlike vessel components, vessel accessories may – owing to reservations of title – remain outside the right of recourse of third-party creditors of the owner of the vessel.

Such security attachment or enforcement lien does not affect the builder's right of retention, inasmuch the holder of a right of retention – the creditor – may invoke its right of retention against third parties that have acquired a right or an interest in the property after its claim arose and property had come into its possession. The creditor will lose its right of retention as from the moment it loses the possession or custody of the relevant property.

Subcontractor's and manufacturer's warranties

35 Can a subcontractor's or manufacturer's warranty be assigned to the buyer? Does legislation entitle the buyer to make a direct claim under the subcontractor's or manufacturer's warranty?

Unless the contract with the subcontractor or manufacturer contains a provision explicitly denying the shipbuilder's right to assign the warranty to the buyer, the shipbuilder and the buyer will be at liberty to agree on such assignment of the subcontractor's or manufacturer's warranty. There is no specific legislation entitling the buyer to make a direct claim under the subcontractor's or manufacturer's warranty failing a contractual assignment. Failing a contractual provision to that effect, a claim against a subcontractor or manufacturer will require a written document (deed), signed by both the creditor and the third party, whose purpose is to transfer title of the claim against the debtor by the creditor to that third party. This deed must either be executed before a notary public, or be registered at the Dutch Tax and Customs Administration, or notice of the assignment by deed must be given to the debtor. Once these requirements have been met, the claim is validly transferred (assigned).

Default of the builder

36 | Where a builder defaults in the performance of the contract, is there a legal requirement to put the builder in default by sending an official notice before the buyer's remedies begin to accrue? What remedies will be open to the buyer?

Where a builder defaults in the performance of the shipbuilding contract, the buyer will have the following remedies to choose from, unless the shipbuilding contract explicitly limits any of such rights:

- specific performance – as in most civil law jurisdictions – is the prevailing remedy. The plaintiff can request the court to impose a monetary penalty on an unwilling defendant and if ordered by the court any penalties forfeited will accrue to the plaintiff;
- as an alternative the plaintiff can request the rescission of the contract. Property should be returned if the damaged party so wants, subject to protection of bona fide purchasers of chattels; or
- in both cases of specific performance and rescission the plaintiff may also recover damages for breach of contract.

Remedies for protracted non-performance

37 | Are there any remedies available to the shipowner in the event of protracted failure to construct or continue construction by the shipbuilder apart from the contractual provisions?

In the event of protracted failure to construct or continue construction by the shipbuilder, the buyer may seek a court order by way of an interim measure to force the shipbuilder to continue construction in accordance with the building schedule agreed upon. Such court order can be enforced by a penalty, which will accrue to the plaintiff should the shipbuilder default (again). As an alternative, the buyer may at all times cancel the shipbuilding contract in whole or in part. In the event of such cancellation, the buyer must pay the price applicable to the entire works, after deduction of the savings resulting for the shipbuilder from the cancellation, against delivery by the shipbuilder of the works already completed. If the contract price was made dependent upon the costs actually to be incurred by the shipbuilder, the price owed by the buyer shall be calculated on the basis of costs incurred, the labour performed and the profit that the contractor would have made for the entire works (article 7:764 of the Dutch Civil Code).

Builder's insolvency

38 | Would a buyer's contractual right to terminate for the builder's insolvency be enforceable in your jurisdiction?

The parties have contractual freedom; therefore, it is possible to include an insolvency clause in the shipbuilding contract, which provides that in case of the builder's suspension of payments or bankruptcy the buyer may terminate the shipbuilding contract in whole or in part. Such clause may even provide that the shipbuilding contract will terminate automatically in case of the builder's insolvency. This clause provides clarity to the contracting parties; however, the downside of such a clause is that the other creditors in the bankruptcy may be disadvantaged.

An insolvency clause was discussed by the Dutch Supreme Court in the case ECLI:NL:HR:2013:BY9087. The Dutch Supreme Court considered that an insolvency clause on the basis of which a party may terminate an agreement and no longer has to perform, while the same party already received compensation from the bankrupt party, may in some cases constitute an unacceptable violation of article 20 of the Dutch Bankruptcy Act.

Judicial proceedings or arbitration

39 | What institution will most commonly be agreed on by the parties to decide disputes?

The parties to a shipbuilding contract are free to make a choice in favour of one of the institutional arbitration institutes or ad hoc arbitrators. The institutions most commonly agreed on by the parties are UNUM Transport Arbitration and Mediation and the Netherlands Arbitration Institute.

Failing a choice in favour of arbitration, the state courts of the Netherlands are competent to hear the case.

Buyer's right to complete construction

40 | Would a buyer's contractual right to take possession of the vessel under construction and continue construction survive the bankruptcy or moratorium of creditors of the builder?

If the building contract provides for the buyer having title to the vessel under construction, this provision will survive the bankruptcy or moratorium of the builder. The administrator (moratorium of creditors) and trustee (bankruptcy) may call for a cooling off period of two months, which means that the buyer is prevented from having the vessel under construction removed from the builder's yard. This will have to wait until the end of the cooling off period. A contractual right to take possession of the vessel and continue construction at the builder's site will in most cases not survive the bankruptcy or moratorium of creditors of the builder for a number of reasons. First of all, a trustee has the statutory right to terminate agreements that are not beneficial for the estate. Secondly, in this jurisdiction the land and buildings of the shipyard are in most cases leased. This can be an intercompany transaction with an associated company or it may be at arm's length. In both cases the lease agreements can be terminated on account of the moratorium or bankruptcy, which would leave the buyer empty-handed.

ADR/mediation

41 | In your jurisdiction, do parties tend to incorporate an ADR clause in shipbuilding contracts?

There is no tendency to incorporate an ADR clause in shipbuilding contracts.

Default of the buyer

42 | Where the buyer defaults in the performance of the contract, what remedies will be available to the builder? What are the consequences of the builder's cancellation of the contract?

Where a buyer defaults in the performance of the shipbuilding contract, the builder will have the following remedies to choose from, unless the shipbuilding contract explicitly limits or excludes any of such rights:

- the prevailing remedy is to seek a court order to force the unwilling defendant to continue the performance in accordance with the contract agreed upon (specific performance). Such court order can be enforced by a penalty, which will accrue to the plaintiff should the buyer default (again);
- as an alternative, the plaintiff can request the rescission of the contract. As a consequence of the rescission the performances completed and the payments made must be undone or reversed – in this context a distinction must be made between the rescission of a contract and the cancellation of the same. The latter, in fact, does not result in the performances and payments to be undone; and
- in both cases of specific performance and rescission of the contract the plaintiff may also recover damages for breach of contract.

CONTRACT FORMS AND ASSIGNMENT

Standard contract forms

43 Are any standard forms predominantly used in your jurisdiction as a starting point for drafting a shipbuilding contract?

The Netherlands Maritime Technology Association (NMT) (previously known as the Dutch Shipbuilding Association) has published a standard form of shipbuilding contract as well as general yard conditions. The shipbuilding contracts governed by the law of the Netherlands are still mainly based on either the form of the NMT or alternatively the well-known 1999 AWES form of contract, published by the Association of West European Shipbuilders and Shiprepairers.

Assignment of the contract

44 What are the statutory requirements for assigning the contract to a third party?

Under Dutch law, with the cooperation of his or her counterparty, a party to a contract may assign the legal relationship with the other contracting party to a third party by a document drawn up between himself or herself and the third party, unless such transfer is prohibited or restricted by law or contract.

A transfer of contract is a tripartite agreement, whereby the transferor transfers its entire legal relationship with its counterparty under the contract to another party (that is, the transferee), consisting of all rights and obligations, including any and all accessory rights and ancillary rights.

Pursuant to article 6:159 of the Dutch Civil Code, a transfer of contract requires: an agreement between the transferor and transferee; and cooperation of the counterparty to the contract. Failure to meet any of these two conditions will cause the transfer of the contract to be void. No legal formalities apply in respect of the cooperation to be provided by the counterparty. Such cooperation could be provided in advance, in the transfer of contract agreement (should the counterparty be a party thereto) or following execution of the transfer of contract agreement.

A transfer of contract takes legal effect in respect of all three parties involved simultaneously. If cooperation has been provided in advance, the transfer of contract will take legal effect upon the date the transferor and transferee inform the counterparty of such transfer. If, however, the counterparty agrees to cooperate after the date the agreement by the transferor and transferee is executed, the transfer will not take effect until the date on which the counterparty agrees to cooperate.

UPDATE AND TRENDS

Hot topics

45 Are there any emerging trends or hot topics in shipbuilding law in your jurisdiction?

In a judgment of the Rotterdam District Court of 15 March 2018, Seatrade, a Dutch reefer shipping group, and two of its directors were found guilty of violating EU Regulation No. 1013/2006 of 14 June 2006 on shipments of waste (EWSR). Seatrade has been penalised with fines ranging from €50,000 to €750,000. Furthermore, two of its executives have been banned from exercising the profession as director, commissioner, advisor or employee of a shipping company for one year. A third director has been acquitted. The prison sentence, previously sought by the prosecution, has been waived amid the company's lack of a previous criminal record, which was accepted as a mitigating factor. Seatrade has appealed against the judgment.

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In 2012, Seatrade sold four reefer vessels for scrapping. The vessels sailed from the ports of Rotterdam and Hamburg to India, Bangladesh and Turkey, where they were beached and then scrapped. The Dutch public prosecutor charged the directors of Seatrade with violations of EWSR.

The court examined internal email exchanges, as well as exchanges between the accused and the shipbrokers prior to and during the last voyages of the ships, which established that it had been the intention from the very beginning to sell the vessels for scrap. The court rejected the argument that an operational ship could not be regarded as waste and found that 'waste' is defined in the EU legislation as 'any substance or object which the holder discards or intends or is required to discard'. The court further found that all the circumstances of the case must be taken into account when assessing whether the holder of an object actually intended to discard it (which, in this case, it did) and that the term 'discard' cannot be interpreted restrictively.

In the court's view, at the time that the ships left the ports of Rotterdam and Hamburg, they were within the meaning of waste under the EWSR. The court emphasised that the fact that three of the ships were still in commercial service and carried a cargo during part of the voyage to their final destination did not affect this conclusion.

The judgment of the Rotterdam District Court potentially has wide-reaching implications for shipowners based in Europe and beyond who are considering scrapping their vessels. The judgment highlights the interaction between EWSR and EU Regulation No. 1257/2013 on ship recycling (the Recycling Regulation). The Recycling Regulation clarifies that transboundary movement for the purpose of recycling ships is regulated by the Basel Convention on the Control of the Transboundary Movements of Hazardous Wastes and their Disposal and the EWSR, except for ships falling under the scope of the Recycling Regulation as defined in article 2 of the Regulation.

In accordance with the Recycling Regulation, as of 31 December 2018 seagoing vessels flying the flag of an EU member state must be recycled at a recycling facility that meets the requirements set out in the Regulation. In December 2016, the EU adopted the list of approved ship-recycling facilities, which was updated on 4 May 2018. As at September 2018, the list does not include any non-European yards. The EWSR will continue to apply to non-EU flagged vessels.

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