PANORAMIC

SHIPBUILDING

Netherlands

LEXOLOGY

Shipbuilding

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PARTICIPATION AND OWNERSHIP

Restrictions on foreign participation and investment

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 Netherlands has an open economy that depends heavily on foreign trade, with the export value reaching a total of €711 billion in 2021 (most recent available figures).

The Dutch shipbuilding industry is open to foreign participation and investment. Dutch tax law provides an attractive fiscal climate for foreign investors. For innovative shipbuilders, companies in the field of R&D can benefit from the 'innovation box', resulting in an effective corporate tax rate of 9 per cent instead of the normal 19 or 25.8 per cent (from 1 January 2024), as well as an allowance for income tax and social security contribution deductions.

There are two taxable income brackets for the calculation of the corporate tax rate. A lower rate of 19 per cent applies to the first income bracket, which consists of taxable income up to €200,000 (as from 1 January 2024). The standard 25.8 per cent rate applies to the excess of the taxable income. There are no restrictions on foreign participation.

Law stated - 26 februari 2024

Government ownership of shipbuilding facilities

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 development and building of ships for governmental activities like defence and security is also a key aspect of the Dutch shipbuilding industry. Many companies are active in the wider commercial market as well as the defence and security markets. The Dutch government, however, has not retained ownership or control of any shipbuilding facilities. In recent years, the Dutch government did facilitate a refinancing and restructuring attempt of maritime engineering company Royal IHC, by allowing a short-term bridging loan and guarantee facility from the Dutch Ministry of Economic Affairs and Climate Policy, and an export credit insurance contribution from the Ministry of Finance. In this way, the Dutch state supports the preservation of high-quality technology and employment in the Netherlands.

Law stated - 26 februari 2024

KEY CONTRACTUAL CONSIDERATIONS

Statutory formalities

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

Dutch law considers freedom of contract as a great asset and parties are free to negotiate the terms and conditions of a shipbuilding contract and to design the contract as they

wish. The general rule is that the formation of contracts and other juridical acts are not subject to requirements as to form. Contracts may even be concluded orally, or even tacitly by the conduct of the parties from which the parties' intentions can be inferred. Contracts concluded orally are legally enforceable, provided of course that the terms and conditions of the oral contract can be proven.

For certain specific contracts, Dutch law prescribes certain specific statutory requirements, but this does not apply to shipbuilding contracts. There are no statutory formalities to be met when entering into a shipbuilding contract.

A shipbuilding contract is formed by an offer of one party and the acceptance thereof by the other party. Acceptance is a declaration of will on the part of the offeree addressed to the offeror, which establishes the consent of the offeree to the terms of the offer. Acceptance can be expressed by means of a statement, express or implied, or by conduct. An act of the performance of the proposed contract may also result in acceptance. An acceptance at variance with the offer is considered to be a new offer and a rejection of the original offer. In principle, offers are revocable by the offeree up until accepted. Where an offer indicates that it is made without obligation, it may even be possible to revoke the offer after acceptance, provided that the revocation occurs without delay. In some cases, an offer will be irrevocable. For example, where a time limit for acceptance is specified in the offer, the offer will be irrevocable during this period. 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.

Law stated - 26 februari 2024

Choice of law

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 select the law applicable to their contract. The choice of law shall be made expressly (preferably), or at least must be clearly demonstrated by the terms of the contract or by the circumstances of the case. The parties have the option of selecting the law applicable to the whole contract, or to parts thereof.

The Rome I Regulation (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 Dutch courts and the existence and validity of the consent of the parties as to the choice of law applicable shall be determined in accordance with the provisions of articles 10, 11 and 13 of the Rome I Regulation.

In the majority of cases, though, Dutch law is chosen as the governing law for projects being realised at shipyards in the Netherlands. It is a fact that without a choice of forum the contract will be governed by the laws of the country in which the builder is domiciled. This means that without another choice of law, Dutch substantive law will apply to construction projects realised in the Netherlands.

Law stated - 26 februari 2024

Nature of shipbuilding contracts

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, a shipbuilding contract is qualified as a contract to construct a vessel in accordance with Dutch 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 agreed targets (specifications). From the builder's perspective, it is not a contract to use its best endeavours to construct a vessel.

Briefly put, interpretation of a contract is generally conducted on the basis of the ***Haviltex*** criterion, named after the 1981 Supreme Court judgment in case ***Ermes/Haviltex***. Upon application of the (subjective-objective) ***Haviltex*** criterion, the question that needs to be answered is what the parties thought and could think they agreed to; in that context all circumstances of the case are relevant. However, in some cases, notably, when interpreting collective bargaining agreements, a merely objective criterion is applied. According to this collective bargaining agreement criterion, the question is what third parties think the disputed text means; in that context not only textual arguments are relevant, but other arguments also, provided they are objectively apparent.

It comes down to the intention of the parties, given the particular circumstances, and what they could reasonably expect of one another. In this regard, the social or business field of expertise to which the parties belong (and what knowledge is involved) is of importance. This criterion is leading in Dutch case law.

The Dutch trade association Netherlands Maritime Technology Association 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 document (such as an invoice).

Law stated - 26 februari 2024

Hull number

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 shipbuilding contract is an essential element to identify and apportion title to the building materials and equipment. The builder should label any building materials and equipment with the hull number for identification purposes upon arrival of the same at the builder's premises. All goods labelled with the hull number are identifiable as belonging to the particular shipbuilding project unless a supplier has made a reservation of title in respect of materials and equipment.

Law stated - 26 februari 2024

Deviation from description

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 of the vessel will allow the builder to deviate slightly from the figure stated. A court will have to decide case by case the exact latitude that 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.

Law stated - 26 februari 2024

Guaranteed standards of performance

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

Clauses guaranteeing certain standards of performance are frequently included in shipbuilding contracts. If upon delivery of the vessel, the guaranteed performance standards are not met by the builder, the shipbuilding contract may allow for payment of liquidated damages or a penalty by the builder. If a certain benchmark cannot be met, rescission of the shipbuilding 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 stipulates that an obligor, should they fail in the performance of their 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 the reasonableness and fairness principle 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, 7 December 2004, NJ 2005, 271). Penalty clauses can have two different functions: to act as an incentive to ensure compliance by the obligee; or to function as a liquidated damages clause (eg, in a situation where it may be difficult to substantiate the amount of damages incurred as a consequence of a breach of contract). A combination of these two functions is possible, depending on the way in which the penalty clause was drafted.

In accordance with 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 considered fair and reasonable to do so. However, the court may not award the obligee less than the damages due by law for failure in the performance. This underlines the importance of being clear about the function of a penalty clause when drafting. 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. A penalty that was intended as an incentive only may be more susceptible to reduction than a penalty intended to recover (liquidated) damages.

In the luxury yacht industry, the HISWA/COT standard for the paint aesthetics of luxury yachts and the ICOMIA Technical Guideline are frequently used as guaranteed standards of performance in respect of coatings.

Law stated - 26 februari 2024

Quality standards

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. Quite often in the shipbuilding agreement reference will be made to other previous ship- or yacht-building projects of the yard, with the notation that the new build will have to be built in accordance with the standard of performance of said previous projects. Reference to 'highest North European shipbuilding standards' or 'highest Dutch shipbuilding standards' will eventually have to be demonstrated to the court or the arbitral tribunal by an expert opinion should there be a dispute between the parties as to what the scope or application of the standard is.

In this respect, Directive 2013/53/EU on recreational craft and personal watercraft should also be mentioned. 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 are 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.

The Regulation Safety Seagoing Vessels is applicable to seagoing vessels from the day on which the keel of the ship is laid or the day on which a stage of construction similar to the laying of the keel has been reached in compliance with the relevant provisions of the Codes, resolutions or guidelines that are applicable under this Regulation. Unless explicitly stated otherwise, the Regulation is applicable to ships that are entitled to fly the flag of the Netherlands. This Regulation, containing further rules with respect to the safety and certification of seagoing vessels registered in the Netherlands, as well as rules with respect to the safety of foreign ships in Dutch estuaries, also contains quality standards applicable to seagoing vessels.

Law stated - 26 februari 2024

Classification society

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 the construction of a new build will decide which flag the vessel will fly and will also nominate the classification society to be used. 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 the commissioning party. If any defects in the vessel are attributable to errors or omissions of the classification society, the claim of the commissioning party 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 between the classification society and the builder.

The responsibility and liability of statutory certification as a public task was addressed in the barge ***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 tug-pushed barge ***Linda***. One year after the certificate was extended, the barge ***Linda*** capsized, sank 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, the 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 (RVIR), 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 RVIR); 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 for 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.

Law stated - 26 februari 2024

Flag-state authorities

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

The Dutch flag-state authorities 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 (Inspectorate) of the Ministry of Infrastructure and Water Management. The Dutch Shipping Act applies to all seagoing vessels flying the Dutch flag, and the Inspectorate monitors vessels flying the Dutch flag, but also foreign vessels, crews, shipping companies and classification societies operating in the Dutch jurisdiction. The Inspectorate has authorised a number of organisations, including classification societies, to perform certain inspections. These are the recognised organisations (ROs). These ROs conduct inspections and certification on, for example, seagoing vessels, marine equipment, recreational craft and rescue boats. Supervision of these ROs is the responsibility of the Inspectorate. The European Commission recognised the relevant classification societies and also reviews their abilities and performance records on an annual basis.

The Netherlands has appointed seven ROs to act on its behalf. The working method and procedures are laid down in an agreement combined with a mandate. It concerns inspections and certifications required by international conventions such as the International Convention for the Safety of Life at Sea, International Convention for the Prevention of Pollution from Ships, Tonnage Measurements, Load Lines and International Labour Organization Convention 152 on Dutch seagoing vessels. The Inspectorate continues to perform inspections on vessels that are not or are only partially within the scope of the international conventions. The Inspectorate also conducts inspections based on national legislation and as part of the flag-state control requirements.

Law stated - 26 februari 2024

Registration in the name of the builder or the buyer
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 in the Dutch Ships Register of a seagoing vessel under construction is only possible if the vessel is under construction in the Netherlands (article 8:194, section 1 of the Dutch Civil Code). Registration must be requested by the shipowner or commissioning party. A declaration must be submitted and signed to the effect that, to the best of the shipowner's or commissioning party's 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 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.

Law stated - 26 februari 2024

Title to the vessel

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 to the vessel 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 Dutch Ships Register is the laying of the keel of the vessel or reaching a similar milestone in construction (provided that the vessel is under construction in the Netherlands). Title will pass immediately to the buyer. Title will not pass gradually.

Law stated - 26 februari 2024

Passing of risk

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 unless other contractual arrangements have been made.

Law stated - 26 februari 2024

Subcontracting

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?

Shipbuilding contracts often stipulate conditions in favour of shipyards for the engagement of subcontractors. Standard general terms and conditions often attach conditions to subcontracting. The principal can stipulate the obligation that contractors impose back-to-back conditions of the main contract on their subcontractors.

Unless otherwise agreed upon in the shipbuilding contract, the builder will be entitled to have the works performed by one or more subcontractors under its supervision and, with respect to parts of the works, the builder will also be entitled to delegate the supervision to others, without prejudice to its 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 and included in the shipbuilding

contract. 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 shipbuilding contract as an annex.

Naval architects, engineers and other consultants are generally on board early in shipbuilding projects. Information modelling (a digital working method used in this phase to share information) is of vital importance in the project. Employers are recommended to check the quality of shipyards in this respect.

Foreign professionals from outside the European Union who work on a ship construction project in the Netherlands must have a work permit requested by the employer, which is the builder or contractor employing said foreign professionals on a project.

In the absence of a valid work permit, the Netherlands Labour Authority may impose fines on contractors, but also on the principal. Further, contractors and their principal will be registered in a register open to the public for inspection.

Law stated - 26 februari 2024

Extraterritorial construction

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 shipbuilding contract, 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. However, to avoid claims for misrepresentation, for example, 'highest Dutch build quality', it is advisable that the builder discloses this fact, should it have the intention to construct main sections of the vessel outside the country where the builder is located.

Law stated - 26 februari 2024

PRICING, PAYMENT AND FINANCING

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

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 shipbuilding contract, no fixed price has been agreed upon or only a target price has been set, Dutch 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 shipbuilder at the time of entering into the shipbuilding 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 commissioning party of the possibility of a further cost overrun in reasonable time to afford the commissioning party the opportunity to limit or simplify the works at that stage. Within reasonable limits, the shipbuilder must cooperate with such limitation or simplification.

Law stated - 26 februari 2024

Price increases

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 the shipbuilding contract has been concluded, circumstances arise or become apparent that increased costs 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 of the Dutch Civil Code). This shall apply only if the builder has warned the commissioning party of the necessity of a price increase as soon as possible, so that the latter can exercise in good time its right 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 its duty to warn, the builder 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 commissioning party liable for negligence. The expertise of the commissioning party can be a relevant factor here.

Law stated - 26 februari 2024

Retracting consent to a price increase

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 when a person induces another person to perform a specific juridical act by unlawfully threatening them 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 under Dutch law comprises not only threats to a person but also to property. A threat of committing an unlawful act against any person may be sufficient, provided that it is such that it would influence a reasonable person. This means that the person exercising economic duress will most probably also act in tort towards their victim.

Upon the demand of one of the parties, the court may modify the effects of a contract, or 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 the contract to 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. This largely is a matter of interpretation of the contract.

Law stated - 26 februari 2024

Exclusions of buyers' rights

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 principle of freedom of contract forms the basis of Dutch commercial and contract law. This means that, in principle, contract parties are only bound by the rules agreed between themselves. However, a contract that violates public morality or public policy is null and void.

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

Law stated - 26 februari 2024

Refund guarantees

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 milestone 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; however, 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 its bank to refund the relevant instalments 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 itself 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.

Another possibility is the issuance of a bank guarantee, on the basis of which a bank is obliged to pay if the conditions contained in the guarantee are met. A 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 builder does not require permission from any Dutch authority to have refund guarantees issued.

Law stated - 26 februari 2024

Advance payment and parent company guarantees

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 to parent company guarantees when a parent is supposed 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 themself 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 themself 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 their obligation, these defences are usually explicitly excluded in the wording of such a letter of guarantee.

Law stated - 26 februari 2024

Financing of construction with a mortgage

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

During the construction of the vessel, the builder or the buyer is able to create and register a mortgage over the vessel under construction, provided that the buyer or the builder owns the vessel.

The owner of the seagoing vessel shall make a request for registration, accompanied by a declaration signed to the effect that, to the best of the owner's 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 Ships Register, 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 of 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 Ships Register after the registration of the vessel in the foreign register.

Law stated - 26 februari 2024

DEFAULT, LIABILITY AND REMEDIES

Liability for defective design (after delivery)

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 shipbuilding 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 shipbuilding 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 shipbuilding 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 (in 2018, renamed 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 hull 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 do not follow 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.

Law stated - 26 februari 2024

Remedies for defectiveness (after delivery)

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 non-existent under Dutch law.

Third parties suffering loss or damage because of the 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.

Law stated - 26 februari 2024

Liquidated damages clauses

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?

Any clause that provides 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. This is irrespective of whether the penalty is to repair damage or acts as 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 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.

The statutory authority of the court to reduce a penalty cannot be excluded by the parties in their agreement. Although the wording ofarticle 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. More 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.

Law stated - 26 februari 2024

Preclusion from claiming higher actual damages

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 its actual losses despite the fact that the contract contains a liquidated damages clause limiting the liability of the party in breach of 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.

Law stated - 26 februari 2024

Force majeure

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 due to their fault nor accountable to them in accordance with the law, a legal act or generally accepted principles.

As a result of force majeure, the builder will not default and cannot be held liable for a delay in completing the project.

Parties to a contract can limit or extend the circumstances that constitute force majeure. This is common practice in some areas of the construction sector (eg, offshore projects). But the rules of mandatory law and the standards of reasonableness and fairness still apply and may restrict such arrangements.

The scope of force majeure will be a matter of negotiation and the parties to the shipbuilding contract must carefully consider the contingencies with regard to the project. Here the experience of a seasoned legal adviser drafting the clause could make the difference. The clause providing that the builder must give notice in writing specifying the events that cause contractual 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 Court of Appeal 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 who claimed circumstances of force majeure. The parties agreed on a joint expert opinion that stipulated that because of construction defects in components delivered by a third party, which generally speaking had 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 fault, and that the statement that weather conditions partially caused the further delay was non-substantiated. Therefore, these arguments did not constitute force majeure.

Law stated - 26 februari 2024

Umbrella insurance

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

The majority of shipbuilding contracts impose upon the builder an obligation to insure the vessel in respect of 'builders' risks'. The Dutch Bourse Policy for Construction Risks 1947 is the prevailing builders' risk insurance available in the Dutch insurance market. According to this policy, a shipyard can take out insurance not only in its name alone, but also on behalf of all subcontractors and suppliers involved in 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. Less used are the 1995 version of the Dutch Bourse Policy for Construction Risks (renamed Dutch Bourse Policy for Builders' Risks 1995) and the Institute Clauses for Builders' Risks 1.6.1988. The 1995 policy excludes coverage for coating, faulty welding and damage caused by volcanic activity and earthquakes. It is important to check

when the insurance starts. Is it from the signing of the contract, the start of engineering work, the first cutting of steel, or keel laying? Note that article 21 of the 1947 policy provides:

> should any loss or damage covered under this policy be insured under any other contract of insurance at the time such loss or damage arises, the present policy is to be only supplementary and therefore only to cover an excess, if any, not covered under such other contract of insurance.

Law stated - 26 februari 2024

Disagreement on modifications

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 that the 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.

Law stated - 26 februari 2024

Acceptance of the vessel

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?

Regardless of the time of passing of title, the risk of loss or damage will under most contracts remain with the builder until the vessel has been delivered to and accepted by the buyer. The buyer's signature of a protocol of delivery and acceptance evidencing the vessel is in conformity with the building contract shifts risk to the buyer but will not be final and binding in the case of defects latent at the time of delivery. It must concern latent defects that have not been discovered and were not discoverable by a prudent buyer taking reasonable precautions to avoid such defects from escaping their 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).

Law stated - 26 februari 2024

Repair location and associated costs

When repairs or replacements covered under the warranty must be carried out, may the buyer insist they be carried out at a shipyard or facility not operated by the builder? Must the buyer bear all costs associated with moving the vessel to the location selected for the repair and replacement work and any sea trials? If the remedial work requires the vessel to be docked, will the costs be covered under the warranty, or will the buyer have to pay?

Dutch (contracting) law does not contain any specific rules in this regard. In accordance with the Dutch principle of freedom of contract, the parties are entitled to make any contractual arrangements in this respect as they deem fit. Generally, unless the parties have made other arrangements in their shipbuilding contract, the warranty repairs or replacements should be carried out at the yard's premises. Parties tend to make contractual arrangements in respect of the place where warranty works need to be carried out, the rights of the buyer in this respect and the cost aspect thereof. The same applies to the costs associated with moving the vessel and the docking costs; the parties tend to make arrangements in this respect in their shipbuilding contracts.

Law stated - 26 februari 2024

Liens and encumbrances

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 assets of another party arising by a specific clause in an agreement or by operation of law.

A lien over the vessel or work or equipment ready to be incorporated in the vessel as security for payment of invoices can only be successfully exercised 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 case ECLI:NL:RBROT:2013:6587 (***Aeolus v Van de Grijp***), the subcontractor of the defendant claimed to have a right of retention towards the defendant. The subcontractor had the products in its possession and refused to hand over the products to the plaintiff invoking its alleged right of retention. The contract between plaintiff and defendant contained a provision that said that the contractor may not suspend its obligations under the contract when the client does not fulfil its payment obligations. The court considered that this provision held a prohibition for the subcontractor to exercise a right to suspension. Further,

the court considered 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 the 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:AO9069)).

Law stated - 26 februari 2024

Reservation of title in materials and equipment

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 to retain their title to the goods supplied and the work performed from the moment the goods supplied or work performed is incorporated into 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 by the parties in their shipbuilding contract.

Law stated - 26 februari 2024

Third-party creditors' security

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 Dutch Ships Register.

In this context, 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 Dutch Ships Register. 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 as 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 from the moment it loses possession or custody of the relevant property.

Law stated - 26 februari 2024

Subcontractor's and manufacturer's warranties

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, 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).

Law stated - 26 februari 2024

Default of the builder

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 buyer can request the court to impose a monetary penalty on an unwilling builder and if ordered by the court any penalties forfeited will accrue to the buyer;
- as an alternative, the buyer 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 buyer may also recover damages for breach of contract.

Law stated - 26 februari 2024

Remedies for protracted non-performance

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. That court order can be enforced by a penalty, which will accrue to the plaintiff should the shipbuilder continue to default or 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).

Law stated - 26 februari 2024

Builder's insolvency

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 the 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 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 its obligations, 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.

Law stated - 26 februari 2024

Judicial proceedings or arbitration

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 decision in favour of arbitration, the Dutch state courts are competent to hear the case.

Law stated - 26 februari 2024

Buyer's right to complete construction

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 shipbuilding 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 during this period. 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, a trustee has the statutory right to terminate agreements that are not beneficial for the estate. Second, 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.

Law stated - 26 februari 2024

ADR/mediation

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.

Law stated - 26 februari 2024

Default of the buyer

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 buyer to continue the performance in accordance with the contract agreed upon (specific performance). That court order can be enforced by a penalty, which will accrue to the builder should the buyer continue to default or default again;
- as an alternative, the builder 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 does not require the performances and payments to be undone; and
- in both cases of specific performance and rescission of the contract, the builder may also recover damages for breach of contract.

Law stated - 26 februari 2024

CONTRACT FORMS AND ASSIGNMENT

Standard contract forms

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

The Netherlands Maritime Technology Association (NMT) has published a standard form of shipbuilding contract as well as general yard conditions. The shipbuilding contracts governed by Dutch law 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.

Law stated - 26 februari 2024

Assignment of the contract

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

Under Dutch law, with the cooperation of its 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 itself 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 the cooperation of the counterparty to the contract. Failure to meet either 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 on which 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.

Law stated - 26 februari 2024

UPDATE AND TRENDS

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

Builders nowadays frequently subcontract onboard electrical and automation system integration to specialised subcontractors. These IT suppliers offer and install integrated bridge control systems and automation solutions of all sorts. After delivery of the vessel and the elapsing of the (usually 12 months) warranty, the owner should be able to order maintenance, repair and an upgrade from another supplier than the original supplier who designed and built the system, if necessary and so desired. Regarding clauses protecting the owner's position to the source codes of such software systems: for maintenance, etc, customers remain largely dependent on the supplier. The Dutch Court of Appeal in ***Bois le Duc*** decided in a judgment of 7 February 1994 that the original supplier of the software system was obliged to surrender the source codes (free of charge) if the software had been developed specifically for the customer and was financed by the customer.

The Dutch government will invest €60 million in innovative shipbuilding with the hope of re-energising the shipbuilding sector that was previously a strong point of the nation's economy. A report commissioned by the government concluded that the Netherlands has insufficient competitive construction capacity for naval ships and specialised work vessels. Figures show domestic shipbuilding has dropped from 45 per cent in 1980 to just 4 per cent in 2023. Alongside the investment, the government will introduce a National Maritime Manufacturing Office as well as employ a permanent maritime envoy.

Law stated - 26 februari 2024