ISSUES ON SHIPBUILDING CONTRACT

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ISSUES ON SHIPBUILDING CONTRACT

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Abstract

A shipbuilding contract is a contract executed between a buyer and a shipbuilder for the construction of a ship. In other words, a shipbuilding contract is a contract for a ship that is not yet in existence. Therefore, by definition, a shipbuilding contract is a contract for future goods as the property cannot pass at the time the contract is concluded.

The contract covers a wide range of commercial, technical and financial matters which need to be negotiated and discussed between the buyer and eligible shipbuilders before the contract can be made. During the pre-contract stage an invitation to bid is issued by the buyer to the eligible builders and the bid most suitable for the buyer's purpose is selected. Further negotiations between the buyer and the successful bidder (builder) eventually lead to the making of the shipbuilding contract. The contract establishes the rights and responsibilities and the assignment of risks between the parties regarding all technical, cost, delivery and financial matters.

Given these varied aspects of a shipbuilding contract, and the extensive period of time required for construction, the parties to the contract are bound to be faced with numerous issues pertaining to coast overruns, changes in design, delays in delivery of material and equipment and other unforeseen obstacles, like the insolvency of one of the parties, damage and loss due to force majeure or others circumstances, etc.

Abbreviations

AWES	-	The Association of West European Shipbuilders
BIMCO	-	Newbuildcon Standard New Building Contract
CDS	-	Construction-Differential Subsidy
CMAC	-	China Maritime Arbitration Commission
DoT	-	Department of Trade
EU	-	European Union
FAR	-	Federal Acquisition Regulations
IMCO	-	Inter-governmental Maritime Consultative Organization
IMO	-	International Maritime Organization.
JCON	-	Japanese Standard Shipbuilding Contract
LMAA	-	London Maritime Arbitrators Association
MARAD	-	U.S. Department of Transportation Maritime Administration
P&I	-	Protection and Indemnity
RFP	-	Request for Proposals
SAJ	-	The Ship-owners Association of Japan
NSA	-	The Norwegian Ship-owners Association
SOGA	-	Sale of Goods Act
SOLAS	-	International Convention for the Safety of Life at Sea
SSGA	-	Sale of Supply of Goods Act
SWBS	-	Ship Work Breakdown Structure
UCC	-	Uniform Commercial Code
UK	-	United Kingdom
USA	-	United States of America

Introduction

The ultimate outcome of the work product of vessel design engineers, shipbuilding contractors, equipment suppliers, vendors and subcontractors are controlled through the mechanisms defined by a shipbuilding contract. Shipbuilding contracts by definition concern the sale of future goods so the property obviously cannot pass at the time the contract is concluded. Therefore, a shipbuilding contract in practice can never amount to more than an agreement to sell. Accordingly, shipbuilding contracts are generally regarded as contracts for the sale of goods rather than those for the provision of work and materials. Moreover, when a person gives such an order he makes an agreement for the purchase of a ship not yet in existence, he buys what are called future goods. The contract is construed not as an agreement to sell a completed ship but as a contract for the sale from time to time of a ship in its various stages of construction. There is provision for progress payments at various stages of construction. Upon full completion of the entire hull, the vessel is then launched and a bill of sale is issued and given by the shipbuilder to the buyer. Materials delivered and approved by the buyer are not part of the hull of the ship. The hull at the shipyard is referred to as the incomplete vessel under construction. Materials may be earmarked for the specific building project and will be part of the shipbuilding contract if they are appropriated to (i.e., fixed to) the hull of the ship.

The larger the vessel, the greater the cost involved and the longer is the time the builder has to wait for the payment of the purchase price. In view of, this extensive payment period, one issue is that as often as not he will not be able to finance the whole construction himself and he will be obliged to apply to other quarters for help. These other quarters will usually be a bank and they will require a security for their advance. A specific equitable mortgage of the existing ship must be arranged, registered mortgages can only be effected when the ship is completed and registered. The builder may also require the buyer to arrange for third parties to guarantee payment of the purchase price. Problems may also arise concerned with advances on the price by the purchaser. The buyer must safeguard himself against the builder’s possible supervening insolvency. This is usually done by a term in the building agreement, providing for the passing of the property to the purchaser of portions of the ship as construction goes on, in accordance with the instalments he

pays on the price. Compared with the sale of an existing thing by instalment, the position is just the reverse. In instalment sales the vendor retains the property until the last instalments is paid, in the present case the purchaser with each instalment acquires portions of property. Thus, numerous issues requiring financial and legal settlement may occur during the process of shipbuilding. These may be as varied as issues concerning title and management of risk, claims for liquidated damages and arranging for comprehensive insurance coverage for both parties, etc. Also, it might happen that one of the parties needs to protect himself from financial loss brought about by the default or insolvency of the other. Such protection is usually achieved by the provision of refund guarantees, contractual guarantees or builder's guarantees, since ordinary insurance cover may not always protect them to get indemnified for their loss. Issues resulting from delay may have to be addressed. The doctrine of frustration can apply to shipbuilding where the contract is frustrated/ delayed by unavoidable circumstances such as delay as a result of "force majeure".

Furthermore, various regulations allow inspectors to inspect ships during and upon completion of construction to check if safety and other requirements are complied with. Therefore, if a defect is not detected by the buyers inspectors, and it causes damage in the future, the buyer is held responsible for such damage.

Issues arising for the unseaworthiness of a vessel may be settled by legal action brought by the owner against the builder. Also the complexities involved in shipbuilding give rise to a variety of legal issues which may relate to commercial, technical, financial or legal matters that require settlement in a court or by arbitration. In view of the international nature of shipbuilding, it is important to ascertain the appropriate place in which to commerce proceedings, appropriate law to be applied, and the matters which may appropriately be accepted for legal settlement in the dispute resolution clause. This dissertation contains an account of the legal disputes involved in shipbuilding contract.

Issues that can result in the process of making a shipbuilding contract are contained in Chapter I, whereas, Chapter II addresses the issues arising from breaches of the contractual terms of a shipbuilding contract. Chapter III and IV are respectively, about issues on the ship acquisition process and the rights and obligations under shipbuilding contracts.

Chapter 1
Issues on Making of Shipbuilding Contracts

The making of a shipbuilding contract is a complex process involving a variety of commercial, technical and financial issues which have to be negotiated and agreed to between the parties at the pre-contract stage. This stage is particularly important to both parties. During this stage, detailed negotiations take place between the buyer and potential builders regarding the design specifications, pricing and timing. Formal invitations to bid are sent to eligible shipbuilders in order for the buyer to obtain competitive bids. The bids received by the buyer are then analyzed and the most eligible bidder in selected. Before the execution of the contract an agreement is formed between the parties which describes the nature of the whole project and the general role of each party. The agreement is the primary document of a shipbuilding contract. It contains a list of 31 components of the contract, in order of precedence, on matters such a delivery, project schedules, price, liquidated damages, inspection, progress payments, etc. The contract contains the agreement, the contractual terms and conditions, the contract specifications of plans, standards, international and domestic regulations. Due to the wide scope of shipbuilding contracts, issues concerning any of the mentioned components are very likely to arise during any stage of a shipbuilding contract. These and other issues, such as the passing of property, financial risk cover, the rights and obligations of the parties, etc., are reviewed and presented in this Chapter.

1.1 Nature of Shipbuilding Contracts

Shipbuilding contracts are commercial contracts under which a ship-owner or buyer makes a contract with a contractor or shipyard for the construction of a ship. Since the construction of a ship involves a variety of commercial, legal, technical and financial matters, shipbuilding contracts are extremely complex by nature.

A shipyard and a ship-owner enter into a Shipbuilding contract for mutually beneficial reasons; namely, the Ship-owner wishes to acquire a ship which is suitable for the ship-owner's needs, and the Contractor wishes to construct, for payment, a ship within its shipbuilding capabilities in order to earn a return on its investment in shipbuilding facilities. In other words, a shipbuilding contract is entered into by the parties to achieve the development and delivery of a ship from the shipyard to the ship-owner.[1]

Therefore, contracts to construct entirely new ships are non-maritime because they are insufficiently related to any rights and duties pertaining to sea commerce and/or navigation.[2]

Shipbuilding Contracts, by definition concern the sale of future goods as the property obviously cannot pass at the time the contract is concluded. Thus, a shipbuilding contract cannot in practice ever amount to more than an agreement to sell.[3]

According to the Myanmar Contract Act 1872, an agreement enforceable by law is a contract.[4]Section 10 of the Myanmar Contract Act 1872 also defines the term contract as, "all agreements are contracts if they are made by the free consent of parties, competent to contract, for a lawful consideration and with a lawful object and are not hereby expressly declared to be void". The Act also defines that the following are essential elements of a valid contract:

(1) Proposal or offer and acceptance of such proposal or offer

(2) The parties must be competent to contract.[5]

(3) Free consent of the contracting parties[6]

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1 Dr. Kenneth W. Fisher, Fundaments of Shipbuilding Contracts, Fisher Maritime Consulting Group www.fishermaritime.com revised July 2008, p. 4.
2 Christopher Hill, Maritime Law, Lloyd's of London Press, 5th Edition, 1998, p. 78.
3 Ibid.
4 Section 2(h) of the Myanmar Contract Act 1872.
5 Section 11 of the Myanmar Contract Act 1872.
6 Section 13 to 22 of the Myanmar Contract Act 1872.

(4) Lawful consideration and with a lawful object[7]

(5) The agreement must not be expressly declared to be void.[8]

(6) In writing if so required by law

With regard to the law applicable to a shipbuilding contract, a ship is a form of moveable property, and under Section 2(7) of the Sale of Goods Act of Myanmar, goods are any kind of moveable property, therefore the law relating to the sale of goods is to be applied. Under English Law, the Sale of Goods Act, 1979 and its amended law the Sale and Supply of Goods Act, 1994 are the applicable laws. A contract for the sale of goods is defined in Section 2(1) of the Sale of Goods Act, 1979 (U.K) as: "A contract of sale of goods is a contract by which the contract seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price".

According to section 61 (1) of the Sale of Goods Act, 1979 (U.K) a contract of sale is defined as including an agreement to sell as well as a sale. But, where the proper law of the contract is Myanmar law, then the Myanmar law relating to the sale of goods is to be applied to the contract of sale and the Myanmar law relating to the sale of goods is to be found primarily in the Sale of Goods Act 1930, which is similar to the Sale of Goods Act, 1979 of the U.K.

Section 4 of the Sale of Goods Act 1930, Myanmar provides;

(1) "A contract for the sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price". There may be a contract of sale between one part-owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

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[7] Section 23 of the Myanmar Contract Act 1872.

[8] Sections 20, 26 to 30 of the Myanmar Contract Act 1872.

From Section 2 (1) of the Sale of Goods Act 1979 (U.K) and Section 4 (1) of the Myanmar Sale of Goods Act 1930, mentioned above, it is clear that the essence of a contract for the sale of goods is a transfer of property in goods for money consideration.

From the above, it is clear that the difference between a sale and agreement to sell is that in a sale, the transfer of property passes from the seller to the buyer at the time the sale is made. But, in an agreement to sell, the transfer of property is made at a future date after agreed conditions are fulfilled.

It should also be mentioned that, although shipbuilding contracts are basically contracts for the sale of goods, they do not come within the scope of the United Nations Convention on Contracts for the International Sale of Goods. Article 2 of the Convention clearly states, that the Convention does not apply, *inter alia*, to sales of ships, vessels, hovercraft or aircraft.

As to the shipbuilding contract, a significant part of the contract is the specification. It covers the details of how the ship is to be constructed and includes the following general items:

(a) a detailed description of the type of ship, her hull and equipment, including the builder's scale plan and drawings;

(b) the materials to be used, depending on the wish of the buyer and the cost he is prepared to pay;

(c) the way in which the ship is to be constructed, configuration of engine and fittings, details of officers' cabins, details of the piping system, method of welding, etc.;

(d) the specification must meet mandatory regulations of the country of the ship's intended registration, as well as international regulations of safety imposed by conventions (for example, the International Convention for Safety of Life at Sea 1974) and the regulations of the ship's intended classification society;

(e) sea trials and how they will be carried out.[9]

The specification is of equal significance as the main contract, but in the event of conflict between the two, in the absence of an express agreement, the contract will prevail.[10]

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[9] Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, pp. 430-431.

[10] Ibid.

When a person gives an order for a ship to be built, he makes an agreement for the purchase of a ship not yet in existence, he buys what are called future goods. The contract is construed not as an agreement to sell a completed ship, but as a contract for the sale from time to time of a ship in its various stages of construction.[11]

In the case of *Lading & Sons Ltd v. Barclay, Curle & Co Ltd*,[12] a contract was entered into to build two ships on the Clyde.

It contained a provision for the purchase money to be paid by instalments at specified stages as construction work proceeded. Another clause stipulated that the ship should not be deemed as having been delivered to the buyers until construction was complete and they had performed successfully their pre-acceptance trials. It was held that the property in the ships passed only when they were completed and not before official trials. The contract was a complete ship.[13]

The decision in this case shows that when a ship is to be built, the property, generally speaking, passes to the buyer only when the ship has been completed. This can create issues, and to avoid them provision can be made for the property to pass in stages in the process of development and construction. It is usually coupled with a counter-obligation of the buyer to pay instalments on the price. This can be a different principle to most hire-purchase agreements where the seller retains property in the whole until the payment of the final instalment.[14]

Essentially, the contract establishes the rights, responsibilities, rules of conduct and assignment of risks between the two parties pertaining to all foreseeable technical, cost and schedule matters, as well as questions or disputes that may arise between the parties. The assignment of risks does not end, however, upon contract execution; each Change Order that may be executed later as an amendment to the contract also may carry with it risks which must also be assigned. For the Contractor, usually there are the risks of cost and/or schedule overruns for fixed price contracts or fixed price Change Orders; for the Ship-owner usually there are the risks of performance of the basic or altered elements of the Contract Work Scope.[15]

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[11] Otto Charles Giles, N. J. J. Gaskell, Charles Debattista and Richard J. Swatton, Chorley & Giles Shipping Law, Pitman Publishing, 8th Edition, 1987, pp. 50-53.

[12] (1908) AC 35, PC.

[13] Otto Charles Giles, N. J. J. Gaskell, Charles Debattista and Richard J. Swatton, Chorley & Giles Shipping Law, Pitman Publishing, 8th Edition, 1987, p. 79.

[14] Christopher Hill, Maritime Law, Lloyd's of London Press, 5th Edition, 1998, p. 79.

[15] Dr. Kenneth W. Fisher, Fundaments of Shipbuilding Contracts, Fisher Maritime Consulting Group www.fishermaritime.com revised July 2008, p. 4.

The form of a contract determines which party is accepting, to some degree or other, the risk of cost overruns. In the fixed price form of contract, the contractor is obliged to complete the ship and the other deliverables all for the contractually defined fixed price. However, when a new ship type is being created, or when new technologies are being implemented, it may be impracticable for a shipyard to offer a competitive fixed price since there are too many unknowns. In such instances, potential contractors may not be willing to accept the risks of offering a fixed price contract within a range acceptable to the ship-owner. In order to obtain the vessel, the ship-owner may offer to use a cost-plus contract, in which the ship-owner will pay all costs incurred by the shipyard, and in which the 'plus' payable to the shipyard is determined according to either a formula or a fixed amount per the contract language. It is also possible for the parties to use a contract form which leads to the sharing of cost overruns.[16]

The important point is that the form of contract determines how the parties allocate the risks of cost overruns. The purpose of a shipbuilding contract is to achieve the delivery of ship from the shipyard to the ship owner. Accordingly, the contract established the rights, responsibilities, and assignment of risks between the parties with regard to technical, cost and schedule matters, as well as dispute settlement measures.

1.2 Process Prior to Making of Contract

Prior to making the contract, the parties to the contract have several details to negotiate and arrange regarding the various aspects of the contract. This pre- contract stage is therefore, very important to the successful execution of a shipbuilding contract.

The pre-contract stage process mainly involves commercial activity. It includes bidding, negotiating, contracting and financing. This phase requires the expertise of professionals in these areas. The extent to which the shipowner may need to reach outside for assistance depends on the skill levels and experience within the owner's organization. It is likely that, an admiralty attorney, naval architect, or a

[16] Dr. Kenneth W. Fisher, Fundaments of Shipbuilding Contracts, Fisher Maritime Consulting Group www.fishermaritime.com revised July 2008, p. 5.

purchase and sale broker probably will be involved in a great number of new building transactions. Their experience will greatly assist the buyer in the initial process.[17]

Accordingly, following detailed discussions with his commercial and technical departments to define in outline the size, type and standard of outfitting of the required vessel, the buyer will usually seek outside advice from a firm of shipbrokers with relevant new building expertise. The part played by the new building broker, is vital to the development and ultimate success of the project. Drawing on extensive, day- to-day contacts with the shipbuilders specializing in the type of vessel in question, the broker will advise the buyer on the availability of the construction berths to meet his timing requirements for delivery, on the price and on the terms of payment likely to be offered by those shipbuilders with relevant capacity. In light of this advice, the buyer will thereafter normally authorize the broker to approach one or more of the shipbuilders he has recommended in order to establish the extent of their interest in the project.

Where the shipbuilders contacted by the broker have previously developed a standardized design for the vessel in question, they will often be in a position to supply to him immediately a "resume" of the specifications, usually known as "Principal Particulars" describing in outline the vessel, the standards to which she will be built and the major items of her machinery and equipment.[18]

In view of the above, it is clear that during the period prior to contracting to build a ship, in order to avoid future issues of commercial, technical and legal matters, it is important for a buyer to consult a firm of experienced shipbrokers who can give him valuable advice for the success of the build.

The buyer will then decide upon the specifications he requires and will formally request proposals or bids from eligible shipbuilders.

1.2.1 Invitation to Bid

In order to enable the shipowner to select the most suitable builder to construct his ship , the usual process is for the shipowner to invite bids from a number of shipbuilders, inviting them to submit offers or proposals from which he selects the one most suitable for his requirements.

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[17] Charles R. Cushing, The Ship Acquisition Process, New York, 2011, p. 60.

[18] Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, p. 478.

The invitation to bid is sometimes called a "request for proposals (RFP)". The necessity for inviting bids formally includes a consideration of the fact that the relationship between requester and bidder has legal liability implications. Also, unless the responders submit proposals or offers in a consistent manner, such as on a standard form, the following step, analysis of bids, becomes extremely complex. The formal request for proposals also helps the project managers to maintain consistent and reliable schedules for the commercial phase of the acquisition process.[19]

When all the bids have been received by the requester, the next step, analysis of bids, is carried out and the successful bidder is selected.

1.2.2 Bidding on Government Project

Bidding procedures followed in most governmental shipbuilding projects are essentially the same as those in commercial projects, except that they usually are governed by laws and hence are more formal. For example, in the United States, government ship acquisitions are carried out under the Federal Acquisition Regulations (FAR) and have the full effect of law. Similar regulations exist in the U.K., Germany, France and elsewhere. Under government procedures, contracts are executed or terminated for the government by a contracting officer. The contracting officers have the authority to bind the government; are responsible to see that all laws, executive orders, regulations and appropriate procedures are followed; may exercise business judgment and must see that the contracts "receive impartial", fair and equitable treatment.[20]

Hence, in shipbuilding contracts where the buyer is the government, all matters are handled by a contracting officer who is authorized by the government to deal with all matters concerning the execution or termination of the contract. Whereas, in a commercial shipbuilding contract, the buyer to deals with such matters.

1.2.3 Negotiations

Following analysis and selection of bids, the next step in the commercial process involves negotiations. There are several reasons for having more than one bidder involved during the negotiation.

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[19] Charles R. Cushing, The Ship Acquisition Process, New York, 2011, p. 63.
[20] Ibid, p. 66.

The first is to provide a back-up in the event that the negotiations with the primary candidate reach an impasse on some issues, or in the course of the negotiations, hidden issues cause the real price to rise or the bid to become less desirable than originally presented.[21]

It is also possible that because of other business opportunities (they may be bidding on several other projects, which materialized); the primary bidder may withdraw its bid.

A second reason for having back-up bidders is that it is important from a psychological point of view. If the negotiating efforts are to further reduce price or improve terms, it is helpful to the buyer for the primary bidder to know that his competitors are "waiting in the wings".[22]

It is in the buyer's own interest to enter into the negotiations carefully prepared with as much knowledge of not only what he can afford to pay, but also with knowledge of, or best estimate of the bidder's cost factors, including worker wage rates projected inflation allowances, worker productivity (such as man-hours required per ton of steel produced or per compensated gross ton), the steel weight of ship (both plate and shape; both mill and special steels), steel and main engine prices, etc.[23]

The commercial ship acquisition process starts with an invitation to shipbuilders to submit their bids, followed by an analysis of the bids and the selection of the successful bidder. This stage is followed by the negotiation process between buyer and bidder. Government bidding procedures follow the commercial procedures except that they usually are governed by laws, e.g. the Federal Acquisition Regulations (FAR) of the US.

1.3 Commercial Shipbuilding Agreement

The results of negotiations between the parties that take place at the pre-contract stage are set out in an Agreement which forms part of the shipbuilding contract.

So, the Agreement is formed prior to executing the Contract and is often mislabeled as the contract, but as illustrated in Table 3 on page (17), the Agreement is

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[21] Charles R. Cushing, The Ship Acquisition Process, New York, 2011, p. 70.
[22] Ibid.
[23] Ibid.

only one of the major components of a contract, though it is unique to each particular contract.[24]

The Agreement first identifies the parties, their corporate names, the legal form of the organization (corporation, partnership, privately held, nonprofit, state or federal agency, etc.), the jurisdiction of their existence, for example, incorporated in the State of , and the nature of their business as it pertains to this particular contract.

The Agreement goes on to describe the nature of the project which is guided and controlled by this Agreement (new ship construction, ship conversion, etc.), and then describes the general role of each party.[25]

The principal location of the work is also included, but this does not necessarily bind the Contractor to performing all work at that location. The role of the Ship-owner is, of course, primarily financial, in addition to having certain rights of inspection, drawing review, etc., which rights are spelled out in other parts of the contract documents. The Contractor, of course, will be described as capable of constructing, testing and delivering the vessel. One essential element of this description is that the shipyard is obligated to complete the design of the vessel from the status of the design as represented by the other contract documents. Ordinarily, a shipyard will understand that it must produce the detail plans and working drawings that are necessary to achieve construction of the ship. But often some design development efforts are needed between the Contract Plans and Contract Specifications, on one hand, and the detail plans and working drawings, on the other. This part of the Agreement should mention that the Contractor has responsibility to complete the design, as necessary.[26]

During formation of the Agreement and other components of the contract, a fundamental principle of contract management should be borne in mind: “Contract management should commence the moment a contract is contemplated, not after it is signed.[27]

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[24] Dr. Kenneth W. Fisher, Fundamentals of Shipbuilding Contracts, Fisher Maritime Consulting Group www.fishermaritime.com revised July 2008, p. 6.

[25] Lamb, Thomas, Editor, "Ship Design and Construction," Chapter 9: Contracts and Specifications, by K. W. Fisher, SNAME, August 2003, p. 365.

[26] Lamb, Thomas, Editor, "Ship Design and Construction," Chapter 9: Contracts and Specifications, by K. W. Fisher, SNAME, August 2003, p. 365.

[27] Fisher, K. W., "Responsibilities Pertaining to Drawing Approvals During Ship Construction and Modification," SNAME Marine Technology, Vol. 28, No. 6, November, 1991, p. 41.

The significance of that principle during Agreement formation is that it reminds the parties that any contract rights, obligations that either party may wish to be able to exercise during contract performance, have to be built into the contract documents from the outset. After the contract is signed, it is too late to ask the other party to give you contract rights that are not already spelled out in the Agreement or other components of the contract. Every contract has a set of contract deliverables, in addition to the ship itself. Some of these deliverables may include drawings, correspondence, comments, inspection reports, calculations, test results, and similar documentation. Other deliverables may be spare parts, manuals, or other hardware related items, in addition to training of vessel operating personnel on the use of ship-specific equipment. It is essential that the parties anticipate what the entire set of contract deliverables is to be prior to contract execution. The creation of each contract deliverable has a cost associated with it; and it is impractical, if not unreasonable, to expect one of the parties to agree to produce a deliverable that was not already included in the contract's work scope.[28]

Thus, every form of contract communication and deliverable that will be developed under each party's contract management staff should be identified in advance of contract execution by inclusion in the Agreement.

1.3.1 Contents of an Agreement

The Agreement is also the primary document in the hierarchical list of the components of the contract, with the hierarchy being stated within the Agreement to set an order of precedence in the event of inconsistencies between the various components of the contract. An example table of contents of a commercial shipbuilding Agreement is illustrated in Table 1.

Several organizations have standard forms of agreements, but they may refer to them as contracts. Those forms are the starting points of negotiations and development of the final form of the Agreement. The Association of West European Shipbuilders (AWES), the Ship-owners Association of Japan (SAJ), and the Norwegian Ship-owners Association (NSA) are among those organizations that have such standard form agreements. In the United States, due to significant government involvement in many shipbuilding contracts, the U.S. Maritime Administration has had standard form agreements, too. Of course, major government agencies also have their own forms for acquisition of their own ships.[29]

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[28] Fisher, K. W., "Responsibilities Pertaining to Drawing Approvals During Ship Construction and Modification," SNAME Marine Technology, Vol. 28, No. 6, November, 1991, p. 41.

[29] Dr. Kenneth W. Fisher, Fundamentals of Shipbuilding Contracts, Fisher Maritime Consulting Group www.fishermaritime.com revised July 2008, p. 6.

Table 1 Commercial Shipbuilding Agreement Typical Headings

No.	Categories
1.	Introduction
2.	Entire Agreement
3.	Coordination of Contract Documents
4.	Definitions, Abbreviations, Interpretations
5.	Delivery of Vessels
6.	Options of Additional Vessels
7.	Project Schedule
8.	Scope of Work and Representations
9.	Intellectual Property Rights
10.	Materials and Workmanship
11.	Regulatory and Classification
12.	Industry Standards
13.	Contract price
14.	Unit Prices
15.	Delivery of Vessel(s) to Ship-owner
16.	Liquidated and Actual Damages (Delivery)
17.	Liquidated Damages (Performance, Design)
18.	Representatives of the Parties
19.	Examination of Plans
20.	Inspection of Workmanship and Materials
21.	Changes in Specifications, Plans, Schedule
22.	Adjustment of Contract Price and Schedule
23.	for Change Orders
24.	Extension of Time
25.	Final As-built Drawings and Calculations
26.	Operating and Technical Manuals
27.	Tests and Trials
28.	Warranty Deficiencies and Remedies
29.	Progress Payments
30.	Contract Retainage
31.	Special Retainages

The commercial shipbuilding agreement which is formed before signing the contract is the primary document of a shipbuilding contract, it contains a list of components of the contract in order of precedence.

1.3.2 Liquidated and Actual Damages for Delayed Delivery

The place and condition of delivery of the completed ship should be identified in the Agreement. Usually, the place of delivery is alongside the shipyard's dock but sometimes for tax or financial reasons, the place of delivery may be at another location. If the vessel is not designed for open ocean service, it may require some temporary, contractor-installed modifications to sail to the place of delivery.

Also, some government agencies, in seeking competitive bids from geographically diverse shipyards, will require delivery from the successful bidder, wherever located, to be at the agency's service dock. The condition of delivery is usually that of a warm ship; that is, one that is not cold with none of the auxiliaries running and no heat or other services already in operation on the ship. For smaller vessels, such as tugs or other service craft, this differentiation is minor; but for larger ships, especially if steam powered, it may be more significant.[30]

The purpose of this Agreement is to set forth an acknowledgment by the Contractor that if the ship is delivered later than either the original Delivery Date or any agreed upon contract extensions, the Ship-owner will incur financial damages; and the parties agree in advance that the damages are approximated by a certain sum per day of delay, payable by the Contractor. For legal reasons, this is not necessarily a penalty clause, although it may give the Contractor similar incentive to achieve timely delivery.[31]

If, however, it is phrased as a penalty clause for late delivery, then there should be a bonus clause for early delivery. If it is phrased as a liquidated damages clause, a bonus clause is unnecessary. Some contracts may include a clear statement that the Contractor is not entitled to any bonus for early delivery.[32]

Another way of looking at this same clause is that it protects the shipyard in two ways. First, the shipyard knows in advance that its liabilities for delay in delivery are limited to the liquidated damages; and that the Ship-owner cannot suddenly claim

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[30] Fisher, K. W., "Responsibilities Pertaining to Drawing Approvals During Ship Construction and Modification," SNAME Marine Technology, Vol. 28, No. 6, November, 1991, p. 42.
[31] Ibid.
[32] Ibid.

significantly-greater damages if the delivery is late. Second, the shipyard can view the daily amount of liquidated damages as the cost of "buying" a day of contract extension when it is not otherwise entitled to a contract extension. In some instances, that daily cost is less than the cost of accelerating the work to complete the ship on time. The liquidated damages may accrue for a stated maximum number of days, thus placing a "cap" on the liquidated damages. The existence of a cap on liquidated damages does not, by itself, limit the damages that a Ship-owner may claim from the Contractor if the delay extends beyond the number of days used to achieve the cap.[33] Unless further provisions are stated, the cap means that the Contractor is exposed to additional, actual damages that the Ship-owner incurs after the cap is reached. The contracting parties may wish to negotiate on this matter, possibly eliminating such consequential damages for the Ship-owner if the Contractor is similarly prohibited from seeking consequential damages due to the actions of the Ship-owner. Occasionally, shipbuilding contracts will allow the Ship-owner to not take delivery of the ship if the delivery date is unilaterally extended by the Contractor, without the Ship-owner's agreement, beyond a stated number of days; in which case the Contractor refunds to the Ship-owner all progress payments.[34]

Liquidated damages regarding delivery, are damages payable by the shipbuilder to the buyer for any delay in delivery of the ship beyond the original delivery date or any agreed upon contract extension date. Liquidated damages are calculated at an approximate rate per day of delay and are agreed to by the parties at the time of making of the agreement.

1.4 Terms and Conditions of the Shipbuilding Contract

The terms and conditions of a contract, none of which are unique to a particular shipbuilding contract, are often standardized by Ship-owners, especially if the Ship-owner is a governmental agency or commercial entity which frequently acquires ships. If a term or condition has to be unique to a particular contract, it would probably be best to include it in the Agreement, not in the Terms and Conditions. However, some governmental agencies must select specific provisions from a list of potentially applicable ones.

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[33] Fisher, K. W., "Responsibilities Pertaining to Drawing Approvals During Ship Construction and Modification," SNAME Marine Technology, Vol. 28, No. 6, November, 1991, p. 42.

[34] Ibid.

In some contracts, the Terms and Conditions are integrated into the Agreement. In any event, prior to finalizing the form of the contract in its entirety, the Terms and Conditions have to be reviewed to ensure their relevance and applicability to the project. An example table of contents of a commercial shipbuilding contract's Terms and Conditions is illustrated in Table 2.[35]

Table 2 Commercial Shipbuilding Contract Terms and Conditions

No.	**Categories**
1.	Agreement
2.	Care of Vessel(s)
3.	Access to Vessel(s)
4.	Responsibility for Shipyard Work and Risk of loss
5.	Insurance requirements
6.	Responsibilities and Indemnities
7.	Contract Security (Performance & Payment Bonds)
8.	Termination of Work (Contractor Default)
9.	Termination of Work (Purchaser Default)
10.	Disputes and Claims
11.	Consequential Damages
12.	Assignment
13.	Successors in Interest
14.	Liens
15.	Notices
16.	Title
17.	Permits, Licenses and Taxes
18.	Applicability of Law
19.	No Waiver of Legal Rights
20.	Computation of Time

If the Terms and Conditions are integrated into the Agreement, the consolidated table of contents of the Agreement would include all of the components

[35] Dr. Kenneth W. Fisher, Fundamentals of Shipbuilding Contracts, Fisher Maritime Consulting Group www.fishermaritime.com revised July 2008, pp. 6-7.

of Tables 2 and 3. When contract packages are being assembled, a review of recent, prior contracts may indicate that certain Terms and Conditions could be adjusted to achieve more meaningful compliance or easier to understand requirements.[36]

The terms and conditions of contract are often standardized in the contract. But, in the case of a term or condition that is unique, it should be included in the agreement and not in the terms and conditions. Standardized terms and conditions are employed by government agencies and commercial entities who frequently order ships. However, some government agencies select only the terms and conditions that are applicable for their purpose from the list.

1.4.1 Defining Contractual Relationships

The success of a shipbuilding contract depends on the proper definition of the contractual relationship of the parties to the contract. Therefore, it is important that every aspect of the relationship is defined in the shipbuilding contract.

Typically, contracts are written documents, which address all, or nearly all, of the potential elements of the contractual relationship. Sometimes, however, the shipbuilding contracts are oral to some extent, with certain elements of the contractual relationship having been established, orally, while other components of the same contract may be in writing. It is not uncommon for written contracts to be incomplete; that is, some of the components of the contractual relationship remain undefined at the time the contract is initiated.[37]

If the two contracting parties have mutually decided to not reduce all of the potential components of their contractual relationship to writing, it indicates that they are each taking a risk if an unaddressed aspect of the contractual relationship becomes important at a later time. For example, if a contract requires that the Contractor ensures that the new ship achieve a speed of say, 28.0 knots, but in fact the vessel can achieve only 26.2 knots, the parties will have to look to the contract to understand what remedies are available to the Ship-owner and what rights remain for the Contractor. The Ship owner's remedies may be financial damages or the right to reject

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[36] Dr. Kenneth W. Fisher, Fundamentals of Shipbuilding Contracts, Fisher Maritime Consulting Group www.fishermaritime.com revised July 2008, pp. 6-7.

[37] Fisher, K. W. "Shipbuilding Specifications: Best Practice Guidelines, "International Journal of Maritime Technology, Royal Institution of Naval Architects, London, UK, March 2004, p. 33.

the ship; but if the contract did not address what remedies would be available to the Ship-owner, neither party can be certain of what will be the outcome of the almost inevitable litigation.[38]

As another example, suppose the Ship-owner is not timely forthcoming with several progress payments. If the matter is sufficiently severe and creates a critical cash flow problem for the Contractor, the Contractor may wish to take some action to minimize the consequences of the lack of contractually defined progress payment. To the extent that the contract addresses the rights of the Contractor under such circumstances, the Contractor has a clear understanding of what can be done to deal with that lack of progress payments.[39]

If, however, the contract does not address that potential aspect of the relationship, then there is no predictable outcome to the consequential dispute. These limited examples are presented to illustrate that many potential aspects of a contract may never have to be defined; but by failing to define those components of the contractual relationship in advance, the parties may have implicitly accepted risks.[40]

Thus, it is clear that to have a clear understanding of the contractual relationship between the parties, i.e., their rights and responsibilities, a contract must address potential sources of dispute so that the parties have, in advance, a clear understanding of how they must act in the event a potential dispute arises, and to understand their contractually defined choices in courses of action.

1.4.2 Commercial Shipbuilding Contracts

There are three aspects of shipbuilding contracts and specifications (a) formation of the contract; (b) formation of the specifications and plans of the central technical components; and (c) management of the contract during ship construction.[41]

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[38] Fisher, K. W. "Shipbuilding Specifications: Best Practice Guidelines, "International Journal of Maritime Technology, Royal Institution of Naval Architects, London, UK, March 2004, p. 33.

[39] Ibid.

[40] Ibid.

[41] Dr. Kenneth W. Fisher, Fundamentals of Shipbuilding Contracts, Fisher Maritime Consulting Group www.fishermaritime.com revised July 2008, p. 2.

Table 3 Major Components of Commercial Shipbuilding Contracts

No.	Categories
1.	Agreement
2.	Terms and Conditions
3.	Contract Specifications
4.	Contract Plans
5.	International Regulations
6.	Domestic Regulations
7.	Classification Rules
8.	Referenced Standards

These eight components illustrated in table 3, and possibly some others, constitute the contract. If any component of the contract refers to other standards or other regulations, then those other standards and/or regulations are also part of the contract, This paper focuses on new ship construction agreements, nearly all the elements of it are also applicable to major ship conversion projects, and many of its elements are also pertinent to ship repair.

The contract is the document that establishes the technical, as well as non-technical, understandings, obligations, rights and responsibilities between the Ship-owner and the constructing shipyard, i.e., the Contractor. The contract is also the instrument by which the design of designing naval architects and marine engineers are used by the shipbuilder to construct the ship required by the buyer.

1.4.3 Government Shipbuilding Contracts

The form of contracts issued by government agencies is often different from commercial contracts, but the general nature of the components of them is the same as the commercial contracts discussed herein.

There are more forms of government contracts than there are government agencies; many agencies utilize multiple forms of contracts for various reasons. The form and content of contracts from government agencies must comply with the procurement regulations applicable to each particular government agency. Within the U.S, for example, contracts for the Army’s supply/logistic support ships are different from the contracts issued by the Army’s Corps of Engineers, who maintain dredged

waterways. The Navy's contracts for combat ships are a different form than those used for auxiliary ships. The National Oceanographic and Atmospheric Administration's contracts for its ships are different from other federal agencies. Coast Guard contracts for its front line cutters are different than for its support ships, such as small search-and rescue craft.[42]

Most government contracts are awarded based on either lowest bid or best value bid that fully conforms to the requirements of the contract. The criteria to establish best value vary among the agencies. In contrast, a commercial ship-owner has the flexibility to award the contract on any basis it wishes, not necessarily lowest bid or best value. Despite some differences between commercial contracts and government contracts, the fundamentals are the same. Whether given different titles or other nomenclature, the components of a government contract are the same as illustrated in Table 3. The purpose of a shipbuilding contract involving a government agency remains the same as described above for commercial contracts: defining the technical aspects of the products to be delivered and establishing the rights, responsibilities, rules of conduct, and assignment of risks between the two parties pertaining to all foreseeable technical, cost and schedule matters, questions or disputes that may arise between the parties, all for the intended delivery of a ship and the associated documentation. There are several reasons why there may be direct or indirect participation by a government agency in a contract involving a commercial ship-owner and a commercial shipyard.[43]

Nevertheless, it should be appreciated that any form of governmental financial assistance, direct or indirect, or other government role in a commercial contract may affect some of the clauses of the Agreement and some of the Terms and Conditions of the contract, and may impact the administration and management of the contract as well. Shipyards must be willing to accept those additional burdens, however, if they wish to be eligible to secure the shipbuilding contract.

Government shipbuilding contracts are basically similar to commercial shipbuilding contracts. The main difference is that whereas, government contracts are awarded on the basis of the lowest bid or best value, commercial contracts may be awarded on any basis that the ship owner wishes.

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[42] Clarke, M. A., Shipbuilding Contracts, Training Program Notebook: Fundamentals of Contract and Change Management for Ship Construction, Repair and Design, Fisher Maritime Consulting Group, Florham Park, New Jersey, USA, Revise January, 2000.

[43] Ibid.

1.5 The Making of the Contract and Good Faith

The contract to build one or more vessels is a very complex undertaking, and as such, should be approached with great care. It is complex because:

1. It is usually an international transaction, which may involve the laws and regulations of one or more countries or jurisdictions.
2. It involves an agreement to construct and the provision of services and the sale of goods, all with different implications under the law. In the UK and the US, a shipbuilding contract is regarded as a contract for the sale of goods. The goods are viewed as future goods.
3. The transaction may involve more than two parties, especially depending upon the complexities of the vessel financing.
4. The contract involves a considerable amount of money.[44]

Shipbuilding contracts are, usually made in the English Language and provide for English Law and jurisdiction. But, unlike non-common law systems, which recognise and enforce an overriding principle of good faith in both the making of and during the performance of contracts, there is no such principle under English law.[45]

In the case of *Walford v Miles*,[46] the House of Lords confirmed in stronger terms that good faith during the negotiation stage of a contract is not compatible with the adversarial position of the parties, the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations, and to advance those interests they must be entitled, if they think it appropriate, to threaten to withdraw from further negotiations, or to withdraw in fact, in the hope that the opposite party might seek to reopen the negotiations by offering improved terms.

If one party has, however, undertaken to use his best, or reasonable, endeavours to negotiate an agreement with the other party in good faith, it is possible to infer a collateral contract. Then, the good faith aspect will have a legal effect representing an undertaking. If the party who undertook to negotiate in good faith

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44 Charles R.Cushing, The Ship Acquisition Process, New York, 2011, p. 106.
45 Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, p. 457.
46 (1992) 2 AC 128, p. 138.

withdraws, his withdrawal may amount to a breach of that collateral contract, hence subject to issues of causation he may be liable to the other party in damages.[47]

The court has even held that good faith during the negotiation stage of a contract is incompatible, in other words, inconsistent with the position of the parties. This is because each party has the right to promote his own interest, provided no misrepresentation is made. In fact, in order to advance his interest, a party may even threaten to actually withdraw from the negotiations in the hope that such an action will push the other party to reopen negotiations on terms more acceptable to him. Such an action is clearly not an action performed in good faith.

The foregoing demonstrates that in making contracts and in performing them, non-common law systems enforce the principle of good faith which basically is the principle of fair and open dealing. However, the principle of good faith is not enforced in common law systems.

However, if one party undertakes to negotiate a contract with the other party in good faith, it will amount to a collateral (additional) contract representing the undertaking. So if he then withdraws, it will be seen as a breach of his collateral contract and make him liable in damages to the other party.

1.6 Insurance

A shipbuilding contract requires that the builder insures the ship for damage or loss during construction and that the buyer is the co-insured.

It is normal for the builder to guarantee the materials and workmanship used in the construction of the ship and its appurtenances, components, engines, machinery, equipment and spare parts for a period of at least 12 months from delivery. Although this period may appear relatively short in respect of an asset which should have a useful life of 20-30 years, after the warranty period the buyer may have alternative recourse to its insurers in respect of any defects depending on its insurance coverage. The exact terms of the warranty provision will need to be considered carefully and are likely to be the subject of extensive negotiation.[48]

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[47] Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, p. 457.

[48] Hill Dickinson, Shipbuilding Contracts, Shipping at a Glance' Guide 5, p. 13.

During the warranty period, the builder is responsible for the proper working of the ship he has built and delivered to the buyer. Any issues arising from the workmanship or equipment he has supplied must be settled by him.

Unless otherwise agreed in the contract, the builder retains property and risk in the ship until delivery. Even if property is agreed to pass to the buyer gradually during the stages of construction, the risk of total loss of the ship in the yard remains with the builder. He has an insurable interest to insure the ship for damage or loss during construction, either as owner, or as bailee as the case may be. He has a duty under the contract to insure. The buyer will be a co-assured, so he will have to make sure that the contract does not become vitiated for breach of the duty of utmost good faith by the builder, or his broker, when placing the insurance and that the premium is paid by the builder during the currency of the policy . The buyer can also insure separately for other risks in the event of rescission of the contract and the consequential losses, which he will be unable to recover from the builder, if a claim for damages at large is excluded, as is normally the case under shipbuilding contracts. Most importantly, the buyer should obtain cover for any latent defects in the ship which may be discovered after the guarantee period and which will be excluded from the obligation of the builder under his guarantee to correct them.[49]

Issues arising in shipbuilding contracts are by and large, settled through arbitration, the cost of which is usually borne by the parties. In English arbitration proceedings it will be open to the respondent to apply for security for its costs in defending the proceedings. This however may lead also to an application by the claimant for an order for security for the costs of any counterclaim which the respondent may have brought. Not infrequently, the possibility of an order for security for costs will result in a good deal of bargaining between the parties to establish which is the true claimant in the proceedings. This may not necessarily be the party which has given notice of arbitration. It may also involve an examination of whether the respondent's counterclaim raises different issues or whether it is really just another aspect of the claimant's claim.[50]

In view of the fact that the process of shipbuilding covers an extensive period of time during which the ship may be exposed to damage resulting in loss to the

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[49] Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, p. 450.

[50] Ian Gaunt, Common Issues in Shipbuilding Contracts Arbitrations, London Shipping Law Centre, 2010, p. 11.

builder or loss to the buyer by the builder's inability to complete the ship , both the builder and the buyer cover themselves against such risk by insurance.

1.7 Kinds of Ships

The kinds of ships contracted for under a shipbuilding contract vary according to the purpose for which they are required. The various kinds of ships are grouped under the twelve main categories of: general cargo ships, specialized cargo ships, container ships, ro- ro cargo ships, bulk carriers, oil and chemical tankers, gas tankers, other tankers, passenger ships, offshore vessels, service ships and tugs. Each of these main categories are sub-categorized into particular types which together amount to a total of 76 particular types. A list of the different types of ships is contained in Annex (6). [51]

The majority of ship types fall within the categories of cargo ships and tankers, followed by service ships, bulk carriers and offshore vessels and container ships whilst the categories of passenger ships and tugs contain only a very few types.[52]

From the many kinds of ships under the twelve main categories, it is obvious that a shipbuilding contract design is complex and involves a high level of precise technical and legal aspects which need to be accurately implemented by both the seller and buyer of a ship in order to ensure the correctness of the diverse technical details particular to each type and also the legal issues covering the interest of both the buyer and builder.

A shipbuilding contract is by definition a contract for the sale of future goods since the property cannot pass at the time the contract is made. The contract is constructed not as an agreement to sell a competed ship, but as a contract for the sale from time to time of a ship in its various stages of constructions. Shipbuilding contracts are non-maritime because they do not relate to sea commerce and navigation. They are basically commercial transactions and therefore, concern the Sale of Goods Act, 1979.

The initial step in the process prior to the making of the contract is for the buyer to invite bids form eligible shipbuilders, followed by an analysis of the bids received and the selection of the most eligible bidder. Next, negotiations on the

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[51] http://www.globalchimaks.com/files
[52] Ibid.

various aspects of the contract are undertaken and an agreement is drawn up between the parties prior to making the contract.

Given the extensive period required for construction and delivery there is the potential for issues to arise from delays in construction and cost over-runs or from financial problems due to the insolvency of either party before construction can be completed.

The contract therefore establishes the rights, responsibilities, rules of conduct and assignment of risks between the parties regarding all technical, cost, delivery and financial matters including financial cover in the form of refund guarantees, contractual guarantees and builder's guarantees which protect a party from issues arising from financial loss caused by the insolvency or default of the other party. Financial loss to the buyer due to fault of the builder which causes a delay in delivery beyond the agreed date is covered by liquidated damages, agreed in advance, calculated at an approximate sum for each day of delay.

Chapter 2
Issues on Contractual Terms of Shipbuilding Contract

A shipbuilding contract bears many similarities to construction contracts such as the larger and more complex type of heavy lift and building construction contracts involving installation works at the place of delivery. Indeed the latter type of contract bears a particular legal conceptual similarity to ship conversion. The complexity, size and cost of a new building or major conversion has meant that shipbuilding and ship-conversion contracts are of some complexity which require careful negotiation and management and a good understanding of the terms used. In this Chapter, the basic contractual terms of English Law pertaining to shipbuilding contracts are explained with examples of the leading cases.

2.1 Contractual Terms

In English Law there are contractual terms which are interpreted according to the intention and construction of each individual contract. Shipbuilding contracts contain several of these important legal terms.

Some of which may be conditions, the breach of which under English law will entitle the other party to treat the contract as at an end. Other terms agreed to may be warranties, the breach of which will result in damages, but will not entitle the other party to terminate the contract. There may be other terms, known as intermediate terms; the effect of breach of such a term depends on whether the breach goes to the root of the contract, so that the other party is entitled to treat himself as discharged. It

will depend on the nature and consequences of the breach. Whether a term is a condition or a warranty or an innominate term does not depend on the use of those words in the contract, but on the construction of the contract as a whole.[1]

2.1.1 Conditions, Warranties and Intermediate Terms

As mentioned above, the terms of a contract under English common law are divided into three categories: conditions, warranties and intermediate terms. Breach of the first will amount to repudiation entitling the innocent party to elect either to terminate the contract or also claim damages, or to go on with the contract and claim damages only.

A breach of a warranty (except in insurance contracts in which the insurer is automatically discharged from liability from the date of the breach) does not entitle the innocent party to terminate the contract, but to claim damages. The consequences of a breach of an intermediate or innominate term (lying between a condition and a warranty) will depend on the nature and seriousness of the breach. Even if the parties describe a term as a condition, it does not mean that it is a condition, it will depend on the construction of the term in the context of the whole contract. [2]

In principle, contracts are made to be performed and not to be avoided according to the whims of market fluctuations and, where there is a free choice between two constructions, the court should tend to prefer that construction which will ensure performance and will not encourage avoidance of contractual obligations.[3]

Terms and stipulations in a contract are treated as conditions, warranties or intermediate terms, and they may be either express or implied.

Section 11(2) of the Sale of Goods Act 1979 provides, that where a contract of sale is subject to a condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of the condition as a breach of a warranty and not as a ground for treating the contract as repudiated.

In Section 61(1) of the Sale of Goods Act 1979, the Act defines a warranty as a term the breach of which gives rise to a claim for damages, and not to a right to reject the goods and treat the contract as repudiated. According to Section (11) of the Sale of Goods Act 1979, whether a stipulation in a contract of sale is a condition or a

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1 Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, p. 421.
2 Ibid, p. 473.
3 Ibid.

warranty depends in each case on the construction of the contract; and a stipulation may be a condition, though called a warranty in the contract.

The Sale of Goods Act 1979, by Section 10, does not regard a stipulation as to time of payment as a term of essence of a contract of sale, unless a different intention appears from the terms of the contract. Whether any other stipulation as to time is or is not of essence of the contract depends on the terms of the contract.[4]

A condition is a fundamental term of the contract, which if there is a failure in its observance, causes the contract itself to be substantially different to that which the parties originally intended.

In other words, a breach of condition entitles the other party to refuse to perform (if he had not already performed) a contract, or to return the goods to the seller (if he had already performed). Damages may also be claimed. In cases of ship sales, the buyer is entitled to a reasonable time in which to examine the ship but once having examined her, if he retains the ship, he is deemed to have accepted her.[5]

A "warranty" is a term not fundamental to the contract, but only *collateral* to it. The innocent party is entitled to damages only for a breach of warranty; there is no right to reject the ship [6]

Generally speaking, whether any particular term is a condition or a warranty depends on the intention, interpretation and construction of each individual contract.[7]

The consequences of a breach of an intermediate term (lying between a condition and a warranty) will depend on the nature and seriousness of the breach. Even if the parties describe a term as a condition, it does not mean that it is a condition, it will depend on the construction of the term in the context of the whole contract.[8]

Therefore the terms of a contract are categorized as conditions, warranties and intermediate terms. The importance of these terms is that the breach of a condition will entitle the other party to either terminate the contract and claim damages or to continue with the contract and claim damages. A breach of a warranty does not entitle

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4 Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, p. 474.

5 Christopher Hill, Maritime Law, Lloyd's of London Press, 5th Edition, 1998, p 57.

6 Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, pp. 473-474.

7 Christopher Hill, Maritime Law, Lloyd's of London Press, 5th Edition, 1998, p 57.

8 Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, pp. 473-474.

the other party to terminate the contract but to claim damages. The effect of a breach of an intermediate term will depend on the seriousness of the breach.

2.1.2 Issues on Breach of Conditions, Warranties and Intermediate Terms

Due to the fact that the breach of a condition, warranty and intermediate term does not always relate to the stipulation in dispute , issues arise with regard to the damages the injured party is entitled to.

The use of the actual words "conditions" or "warranty" in the agreement is irrelevant to determining the status of any particular stipulation in dispute. It is the intention of the parties which matters and the way in which the breach of the particular stipulation affects the whole purpose of the contract.[9]

In the case of *Wills v. Ambler*[10], a four-berth motor boat had been sold. An innocent statement by the seller that the hull was sound was held to be a warranty; the buyer had entered into the contract in reliance on that statement and the hull was in fact rotten. He was awarded damages.

In this case, because the buyer had bought the boat relying on the sellers statement that the hull was in sound condition, the statement was deemed to be a warranty. Therefore, when the hull was found to be, in fact, rotten, the court was justified in awarding damages as a breach of warranty, entitles the plaintiff only to damages but not to the right of rejection.

In the case of *Sullivan v. Ambler*[11], a yacht was the subject of sale and an assurance as to its seaworthiness was a condition but as the yacht had been accepted the assurance could only, under the circumstances, be treated as a warranty. [12]

It can be assumed that although a breach of the condition of assurance regarding seaworthiness had been made, since the buyer had already accepted the yacht he could not return it to the seller. But by treating the assurance as a warranty, he was entitled to damages.

In the case of *Wills v. Claxton*[13]a speedboat was advertised as having had 'a complete overhaul' and was sold. A receipt for the purchase money stated that the engine had been 'reconditioned'. It was held that the buyer was not entitled to

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9 Christopher Hill, Maritime Law, Lloyd's of London Press, 5th Edition, 1998, p. 57.
10 (1954) 1 Lloyd's Rep. 253.
11 (1932) 48 TLR 369.
12 Christopher Hill, Maritime Law, Lloyd's of London Press, 5th Edition, 1998, p. 57.
13 (1951) 1 Lloyd's Rep.

damages for breach of warranty in respect of their having been no complete overhaul since the buyer's agent had been fully aware of that when negotiating the sale. But since the engine had not been reconditioned the buyer was entitled for breach of warranty *ex post facto* on the receipt.[14]

It is clear that the statement on the receipt for the purchase money stating that the engine had been "reconditioned" was in this case, held to be a warranty. Consequently, the buyer was entitled for damages for breach of warranty as no reconditioning had been made.

An apt example, with regard to an innominate term which became a cause of an issue is the case of *The Action*[15]. The ship was to be delivered in the same physical condition as she was when she was inspected. The buyers alleged that there were defects when notice was given to them for delivery. Although the sellers agreed to make repairs, the buyers cancelled the contract before the sellers completed the repairs. The court construed the term of the condition of the ship on delivery as an innominate term and not as a condition precedent. If the parties wanted to make it a condition, they should expressly set out in the contract the right to cancel in the event of a breach of a term. There was judgment for the sellers.[16]

The breach of a condition, warranty and intermediate term in the contract of sale of a ship does not always relate to the situation in dispute. Whether these words relate to an actual condition or warranty depends in each case on the intention of the parties.

Therefore, when issues arise regarding breaches of conditions, warranties and intermediate terms the issue will be decided depending on the construction of the term in the contract of the whole contract. For example, if the parties want the right to repudiate in the event of the breach of a condition, they should expressly set out in the contract the right to cancel in the event of a breach.

2.1.3 Implied and Express Conditions and Warranties

The conditions and warranties contained in a contract may be either (a) implied conditions and warranties or (b) express conditions.

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14 Christopher Hill, Maritime Law, Lloyd's of London Press, 5th Edition, 1998, p. 58.
15 [1987]1 Lloyd's Rep 283.
16 Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, p. 473.

(a) Implied Conditions and Warranties

Under the Sale of Goods Act 1979, so far as a ship is 'goods' within the meaning of the Act, certain conditions and warranties are implied if the contract contains no express provisions to the contrary.

According to Section (12) of the Sale of Goods Act 1979, there is (1)an implied condition on the part of the seller that in the case of a sale he has a right to sell the goods at the time when the property is to pass; (2) an implied warranty that the goods are free, and will remain free until the time when the property is to pass, from any charge or encumbrance not disclosed or known to the buyer before the contract is made; and (3) an implied warranty that the buyer will enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known.[17]

According to Section 14(2) of the Sale of Goods Act 1979, provides for goods to be of merchantable quality but rarely, if ever applies to contracts of sale of ships.

According to Section 13 (1) of the Sale of Goods Act 1979 covers the situation of a sale by description and provides for an implied condition that where the goods are sold by description they will correspond with that description.[18]

By Section 14(3) of the Sale of Goods Act 1979, there is an implied condition that a ship is reasonably fit for the purpose for which it is bought (e.g. Sea-going) if the seller sells the ship in the course of his business and the buyer, expressly or by implication, makes known to him the particular purpose for which the ship is being bought. This condition is not implied, however, where it is shown that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill or judgment. As such skill and judgment are not inherent in every shipowner, the seller must be a person whose business it is to supply ships for this legal rule to have effect. This leaves virtually only shipbuilder's, as ship-dealers' as such rarely, if ever, exist.

Breach of an implied warranty of fitness for the purpose intended was found by the Supreme Court of Ontario in March 1977 when they considered a plea of *caveat emptor* (let the buyer beware) by the seller in answer to an allegation that the latter had committed a fundamental breach of contract or alternatively a breach of warranty in that the boat which was the subject of the sale was found, after having

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[17] Christopher Hill, Maritime Law, Lloyd's of London Press, 5th Edition, 1998, p. 58.
[18] Ibid, p. 59.

been used for a period by the buyer, to be blistered on the hull below the waterline. The sellers brought an action claiming the balance of the purchase price which by the terms of the sale contract was payable in instalments.[19]

The Court of Appeal confirmed the trial court's decision which was that although the buyer had taken the opportunity of examining the boat at a boat show and had not noticed any defects in the exterior of the hull, nevertheless the plea of *caveat emptor* could not be applied to the facts since it could not be reasonably expected of the buyer that he should have retained a consulting chemist to analyse the hull. Nothing less than that would have revealed the defect which was eventually said to be a defect in the composition to the skin material which reacted adversely when in contact with the water. This was vital to the fitness of the craft and there had been a breach of the implied warranty as to the fitness of the boat for the purpose for which it was sold, thus entitling the buyer to damages which were assessed at $ 5,000, being the estimated cost of putting the boat in a fit condition.[20]

In this case, since the seller had sold the boat with a defect which adversely affected the fitness of the boat, the court held that there had been a breach of the implied warranty under Section 14 (3) of the Sale of Goods Act 1979, as to the fitness of the boat for the purpose for which it was sold. Hence, the buyer was entitled to damages but not to reject the boat.

In the case of *Cammell Laird & Co Ltd v The Manganese Bronze and Brass Co Ltd* [21], a firm of shipbuilders agreed to build for and sell to the UM Company, two sister ships (A and B) designed for carrying petroleum or molasses, with main propelling diesel engines, each ship to be classed A1 at Lloyd's.

The shipbuilders entered into a contract with the MB and B Company, who were makers of ships' propellers out of manganese bronze prepared by a special process, for the manufacture of two propellers for these ships. Each propeller was to be finished, chipped, and polished in style of the highest class, all in accordance with the shipbuilders' blue print, to be ready for fitting to the shaft on delivery; and to be to the entire satisfaction of the UM Company's representative and the shipbuilders themselves. They were to be delivered on a certain agreed date. The working drawings gave the information necessary to enable the work to be carried out,

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19 Christopher Hill, Maritime Law, Lloyd's of London Press, 5th Edition, 1998, p. 59.
20 Candian Yacht Sales v Mac Donald (1977) 2 Lloyd's, Rep. 298.
21 (1934) AC 402 (HL).

including the thickness required along the medial lines of the blades; but beyond this and apart from the direction that the 'edges' were 'to be brought up to fine lines', further details as to the thickness of the blades were left to the skill and judgment of the MB and B Company.

On trials, the propeller fitted onto vessel A made so much noise that the vessel could not be classed A1 at Lloyd's. The propeller which had been fitted onto B, the second vessel, was tried on A and it worked satisfactorily. Without prejudice to the rights of the parties, a second propeller was made for A to the correct specifications and free from fault in other respects, but proved equally unsatisfactory as the first. Finally, a third propeller was made for A (also without prejudice to the rights of the parties) and this one worked quite silently. The shipbuilders sued the engine constructors for delay in executing the work and the expenses incurred as a result of delay. It was found that nothing in the specification or plan could account for the trouble in the propellers or the engines. It seemed reasonable to infer that the problems lay with the finishing which was a matter left to the discretion of the defendants and not given in the plan and particulars.

The House of Lords held that the agreement was a contract of sale of future goods under Section 14(1) of the Sale of Goods Act 1979. In as much as the plaintiffs had made known to the defendants the purpose for which the propeller was required, and relied upon their skill and judgment, it was not necessary, for the purposes of this sub-sections, that the buyer should rely totally and exclusively on the skill and judgment of the seller for every detail in the production of the goods. It was sufficient, if reliance was placed on the skill and judgment of the seller to some substantial extent.[22]

In the present case, it can be said that with regard to that part of the work which was left to the skill and judgment of the sellers, there was a breach of the implied condition that the propeller should be reasonably fit for the purpose for which it was required as contained in Section 14(3) of the Sale of Goods Act 1979.

And with regard to the other parts of the work, however, since these were produced "all in accordance with the shipbuilders blue print", it can be said that these parts corresponded with the description and therefore, complied with Section 13 (1) of

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[22] Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, p. 427

the Sale of Goods Act 1979 which provides for an implied condition that where the goods are sold by description, they will comply with that description.

From the above two cases it is clear that when an issue results from the failure of the shipbuilder to deliver a ship that is reasonably fit for the purpose for which it was bought or to deliver a ship that corresponds with the description in the situation of a sale by description, although such a breach is a breach of a implied condition under the Sale of Goods Act , the issue will be settled by treating the breach not as the breach of an implied condition, but as a breach of an implied warranty, entitling the shipowner to damages that not to rejecting the goods.

(b) Express Conditions

A condition in a contract, may be an implied condition as explained above, or the condition may be an express condition. The meaning of an express condition and the consequences arising from its breach are given below.

One Type of express condition is that which must be fulfilled before the agreement itself can ever become effective. For example, an agreement stated to be 'subject to contract' is not binding and either party can withdraw.[23]

In the case of *Howard (John) & Co (Northen) v. Knight (JP)*[24], in the sale of a ship there was an alleged breach of contract. The buyer agreed to buy 'subject to satisfactory running trials' and the agreement generally was 'subject to contract'. A dispute arose as to whether a binding agreement had been reached.

It was held that the relevant correspondence between the two parties merely confirmed that what was said was subject to contract. The minds of the two respective parties were not *ad idem.* There was no binding agreement at law. It is clear that the decision that there was no binding agreement was based on the fact that an agreement which is "subject to contract" is not binding.

But the words in a contract for the sale of a ship 'subject to satisfactory survey' have been held to be of no legal significance and the matter is one of the proper interpretations of the word 'satisfactory' by the buyer.

In the case of *Astra Trust v. Adams and Williams*[25], the sale of a ship was 'subject to satisfactory survey'. A dispute arose as to whether a contract had been

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[23] Christopher Hill, Maritime Law, Lloyd's of London Press, 5th Edition, 1998, p 60.
[24] (1969) 1 Lloyd's Rep. 364.
[25] (1969) 1 Lloyd's Rep. 81.

concluded and whether the dissatisfaction of the buyers entitled them to withdraw from the contract.

It was held that the word 'satisfactory' did not detract from what would have been the meaning and effect in law in the absence of the word. The court said (*obiter*) that dissatisfaction must in any case be *bona fide*. Even if an objective test was applied, the plaintiffs were not unreasonable in taking the view that the survey report was not satisfactory. Judgment was given for the plaintiffs.

In this case, since the court decided that the dissatisfaction of the buyer was *bona fide*, it can be assumed that no contract had been concluded since the sale of the ship was "subject to satisfactory survey".[26]

Where the expression 'if any material defect shall have been found' appears, the word 'found' means 'found in fact', that is to say the test is objective and to be determined by arbitration and, if not so found to be material, there will be no right of rejection by the buyer. [27]

Another expression commonly used is 'subject to satisfactory running trials'. A clause stating that a vessel is to be delivered 'free from average' means 'free from claims against her'. It is not equivalent to the mere everyday expression 'free from damage'.

In the case of *Kelman v. Livanos*[28], a contract of sale of the stream trawler *Goodmar* was entered into in March 1953. The sale was on 'Priam terms' ('Priam terms' include provisions for an inspection of a vessel's bottom and underwater parts) which provided , *inter alia*, that the sellers should deliver the steamer to the buyers 'free from average and with clean swept holds and class maintained'. Other provisions included drydocking and drawing of the tail shaft and express agreement that if any bottom damage was found the purchasers could require it to be made good to the satisfaction of a Lloyd's Register surveyor (Clause 6 of the agreement). A Lloyd's classification certificate after special survey of the vessel in September 1949 referred to some bottom damage but said that it did not affect the maintenance of the class. A surveyor to Lloyd's Register made a further inspection in accordance with the sale agreement provisions and was of the view that there was no deterioration and that the ship was fit to maintain her classification. A dispute arose between buyer and

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[26] Christopher Hill, Maritime Law, Lloyd's of London Press, 5th Edition, 1998, p. 60.
[27] Ibid, p. 60.
[28] (1955) 1 Lloyd's Rep,120.

seller as to the cost of repairs and an estimated sum was paid into a joint account pending a decision by arbitrators. The buyers argued that they were entitled to refuse to accept the ship until repairs were effected. They also contended that the sellers had broken their obligation to deliver the vessel 'free from average'. The arbitration was in favour of the sellers but a case was stated.

It was held that Clause 6 must be construed in the light of the entire range of clauses and as such there were two contingencies: (1) if the surveyor after inspection approved the condition of the underwater parts and found the ship to be generally seaworthy then she should be deemed ready for delivery; (2) if after underwater inspection he found parts damaged to the extent that the condition of the ship was inconsistent with seaworthiness then she should not be deemed ready for delivery until such time as the repairs were carried out to his satisfaction. It was also held that 'free from average' in this context meant free from claims against the ship and the sellers were not in breach of that provision.

The decision in favour of the seller can be said to be based on the surveyor's report which in the first instance, stated that there was some bottom damage which did not affect the maintenance of the class and in the second instance, stated that there was no deterioration and that the ship was fit to maintain her classification. These statements confirm that the seller had complied with his obligation in the sale contract to deliver the steamer with class maintained. Also since there were no claims against the ship, the seller's were found not to be in breach of the express condition requiring that the ship be delivered' free from average.

Thus, the express condition "free from average" means "free from claims against the ship" and the condition "free from average damage" means "free from damage affecting class".

In issues resulting from the breach of a implied condition, the breach is held to be the breach of an implied warranty and the plaintiff is entitled to damages but not to a rejection of the contract. In the event that the matter at issue arose from the breach of an express condition, the condition must be fulfilled. Otherwise, the contract is ineffective and may be rejected.

2.2 Contractual Term implied by Court to Give Business Efficacy

In order to add substance to and give ' business efficacy' to a particular contract it may be necessary for a court to imply a term in the contract that both

parties should reasonably be deemed to have intended even though it was not expressly included, as in *The Lady Tahilla.*

In the *Lady Tahilla Case*[29], the plaintiff sold his yacht to the defendant in April 1960 for £ 8,000. The defendant paid £5000 and it was agreed that the balance should be met, at the defendant's option, in one of three ways; (a) by allowing the plaintiff free use of the yacht for one month during each of the years 1962, 1963 and 1964, subject to the plaintiff giving the defendant three months' notice of the month in which he required the yacht; or (b) by paying the plaintiff £ 1,000 for any year in which the yacht was not available for use under method (a) ; or (c) by payment in cash if the vessel was disposed of by the defendant. In April 1960 the defendant secured the balance due from him by executing a mortgage in favour of the plaintiff. In 1966 the plaintiff sued. The defendant denied liability and contended that the yacht was made available for the plaintiff in 1962, 1963 and 1964, but the plaintiff had not given notice of the month he required her.[30]

It was held that the plaintiff was entitled to the £ 5,000 plus interest. As a general proposition where X had an option to perform a contract in more than one way and the obligations of Y depended on which way X chose and could only effectively be performed by Y if he had notice beforehand, then X would be under an implied obligation to give Y proper notice. So on these facts, in order to give business efficacy to the contract, it was necessary to imply a term that the defendant would give the plaintiff reasonable prior notice whether or not he was choosing method (a) in respect of any of three relevant years. No notice had been given, therefore the mortgage remained undischarged and the plaintiff was entitled to judgment.[31]

The facts of the present case show that, under normal contractual circumstances, the defendant should have informed the plaintiff of the method he had chosen for the performance of his part of the contract. For the sake of Business Efficiency, he was under an implied obligation to give the plaintiff proper notice of this choice. But he had failed to do so. Thus, the contract lacked "Business Efficiency". So, in order to give business efficiency to the contract, the court held that it was necessary to imply that the defendant should have informed the plaintiff. His failure to do so made him liable for damages.

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[29] (1967) 1 Lloyd's Rep. 591.
[30] Christopher Hill, Maritime Law, Lloyd's of London Press, 5th Edition, 1998, p. 61.
[31] Ibid, p. 62.

2.3 Exclusion Clauses

The Unfair Contract Terms Act (1977) does not apply to international supply contracts and those contracts in which the parties choose English law to apply, which, otherwise, would be governed by the law of another country.[32]

Where the Act applies, it provides a statutory prohibition of exclusion or limitation of liability clauses for death or personal injury resulting from negligence. Otherwise, it does not prohibit exclusion or limitation of liability clauses relating to other forms of loss or damage provided they satisfy the test of reasonableness (Section 2(1) and (2)) of the Unfair Contract Terms Act (1977).[33]

Insofar as consumer contracts of sale of goods are concerned, Section 6(2) of the Unfair Contract Terms Act (1977) prohibits exclusion or limitation of liability for breach of the statutory conditions implied by Sections 13, 14 and 15 of the Sale of Goods Act 1979 and Section 1 of the Sale and Supply of Goods Act (SSGA)1994 (referring to description, quality and fitness for purpose). Insofar as non-consumer contracts are concerned, Section 6(3) of the Unfair Contract Terms Act (1977) makes such exclusion or limitation subject to the requirements of reasonableness.[34]

The majority of shipbuilding contracts, however, are undertaken outside the United Kingdom and neither the buyer nor the builder has any connection with the United Kingdom. Being characterised as international contracts, the Unfair Contract Terms Act 1977 will have no application, even if the parties choose English law as the law of the contract. In the absence of express or implied choice of law by the parties, the Rome Convention 1980 will apply to the law of the country with which there is the closest connection.[35]

In the case of *Rasbora v JCL Marine*[36], the contract was for the building and sale of a power boat and included a clause excluding the application of any implied condition or warranty, and liability 'for any loss, damage, expense or injury condition howsoever arising' except as accepted under the terms of the warranty certificate. Although the builders agreed to build the boat for a private buyer in England (A), the contemplated purchaser was a company registered in Jersey, which was wholly owned by A this was to avoid paying UK tax. After the sale was completed, the vessel caught

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[32] Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, p. 429.
[33] Ibid.
[34] Ibid.
[35] Ibid.
[36] (1977) 1 Lloyd's Rep 645.

fire during a cruise and the plaintiffs, who had now been substituted for the original buyers, claimed damages from the sellers for breach of the implied condition under Section 14(2) of the Sale of Goods Act 1979 that the boat was not of merchantable quality. They contended that the fire was caused by defective electrical installations on the boat. The sellers sought to rely on the exclusion clause.

It was held that by novation, the company, as plaintiffs, were party to the contract originally made between A and the defendants. The substitution was amply supported by consideration.

An inference can be made that the Court's decision was made by applying Section 55 of the SOGA 1979, contracting out of the implied term of merchantability was prohibited except in the case of international sales of goods, and in the case of non-consumer sales where the test of reasonableness would be applicable. This was clearly a consumer sale and did not involve an international sale of goods. Therefore, the implied condition could not be excluded when the boat was not of a merchantable quality.

It was further held that the sellers could not rely on the exclusion clause in the contract because the seller's breach and the consequences of the breach were fundamental in character.

2.4 Implied Terms

Other important terms are implied by statute for instance terms pertaining to description and to the merchantable quality of goods. Section 13 of the Sale of Goods Act 1979 provides that where there is a contract for the sale of goods by description, there is an implied condition that the goods will correspond with the description[37], and Section 14(2) of the Sale of Goods Act 1979 of United Kingdom provides that, where the seller sold goods in the course of a business, there is an implied condition that the goods supplied under the contract were of merchantable quality.[38]

2.4.1 Terms of Description

As it was mentioned earlier, a shipbuilding contract is a contract for the construction and sale of a ship by description. If the relevant terms in the description

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[37] Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, p. 422.

[38] Ibid, p. 425.

do not conform with the vessel when it is eventually delivered, the buyer is entitled to reject the ship for non-compliance.

An important factor, with regard to non-conformity of delivered goods with the contractual description is whether any non-conformity entitles the purchaser to reject the goods even if the non-conformity may not have caused him loss had he accepted them: English law has in the past treated the term of description strictly.

In the case of *The Diane Prosperity*[39], it concerned a charterparty, entered in Shelltime 3 form, with respect to a new building of a tanker constructed in Japan. At the time of construction, the oil market was strong. The description of the vessel was referred to by the owners in the charterparty and in the documents as being built by Osaka Shipbuilding Co (a reputable Japanese builder) with the hull number. Due to some difficulties at the Osaka yard the vessel was actually built at Oshima yard (a company in which Osaka owned 50% of shares) and with the hull number 004. All other physical attributes of the vessel corresponded with those required under the charterparty. At the time of delivery to the charterers, the oil market had fallen sharply and the charterers rejected the vessel, contending that the vessel tendered did not correspond with that on the documents.

It was held that the hull number of the vessel had no special significance for the parties, so as to raise it to a matter of fundamental obligation. The words 'hull number 354' was not intended to be part of the description of the vessel. The vessel contracted for was the vessel tendered.

The purpose of the hull number in the context of this contract was without a significant meaning, other than to identify the vessel. Lord Wilberforce said that he was not prepared to accept that the authorities as to 'description' in the sale of goods cases should be extended or apply to the contract in question. In his view, the question of importance was whether a particular item in a description of goods whether in sale of goods, or in other contracts constituted a substantial ingredient of the 'identity' of the thing and, only if it did, he was prepared to treat it as a condition.

Lord Wilberforce further stressed that, it has no longer been necessary to adhere to rigid categories of breach which do or do not automatically give right to rescind. It is rather a question of attending to the nature and gravity of a breach, he said.

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[39] (1976) 1 WLR 989 (HL).

In view of extreme consequences that might result, even if the breach is slight, it was thought appropriate to amend the Sale of Goods Act 1979 Act. By Section 4 of the Sale and Supply of Goods Act 1994, Section 15 (A) was inserted in the Sale of Goods Act 1979. It relates to modification of remedies for breach of a condition in non-consumer contracts and provides:

> (1) where in the case of a contract of sale (a) the buyer would, apart from this sub-section, have the right to reject goods by reason of a breach on the part of the seller of a term implied by Sections 13, 14 and 15 … but (b) the breach is so slight that it would be unreasonable for him to reject them, … then, if the buyer does not deal as consumer, the breach is not to be treated as a breach of condition but be treated as a breach of warranty. [40]

The new Act came into force on 3 January 1995, so only contracts entered after that date are affected by it.[41]

Thus, in a non-consumer contract for sale of goods by description, as in a shipbuilding contract, where a breach of an implied description has occurred and the said breach is very slight, it will not be grounds for rejection of the contract. The breach is treated not as a breach of condition, but as a breach of warranty for which the remedy of damages would be awarded.

2.4.2 Terms of 'merchantable quality'

Section 14 (2) of the SOGA 1979 of UK provides that, where the seller sold goods in the course of a business, there is an implied condition that the goods supplied under the contract were of merchantable quality, except that there was no such condition as regards defects specifically drawn to the attention of the buyer. Goods of any kind would be of merchantable quality within the meaning of this Act, if they were as fit for the purpose or purposes for which goods of that kind were commonly bought, as was reasonable to expect having regard to any description applied to them, the price and all the other relevant circumstances (Section 14(6)) Sale of Goods Act 1979. The implied condition would be broken, if the defect was so serious that a commercial man would have thought that the purchaser was entitled to reject them.

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[40] Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, p. 425

[41] Ibid, p. 425.

Thus, ‘merchantable’ quality was made synonymous to ‘fitness for purpose’ and other aspects of quality were left ambiguous.[42]

The Sale and Supply of Goods Act 1994 modified the effect of the consequences of breach of implied terms under the Sale of Goods Act 1979 and, by the insertion of Section 15 (A) in the 1979 Act, a non-consumer buyer will not have the right of rejection if the breach is slight.[43]

In addition, in recognition of the difficulties created in the interpretation of the term ‘merchantable quality’, Section 1(1) of the Sale and Supply of Goods Act 1994 introduced the term ‘satisfactory quality’ and substituted Section 14(2) of the Sale of Goods Act 1979 with the following:

The definition was adopted from the Section 7(2) Supply of Goods (Implied Terms) Act 1973.

Where the seller sells goods in the course of his business, there is an implied term that the goods supplied under the contract are of satisfactory quality. For the purpose of this Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking into account of any description of the goods, the price (if relevant) and all the other relevant circumstances.[44]

For the purpose of this Act, the quality of the goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of the goods:

- the fitness for all the purposes for which goods of the kind in question are commonly supplied;
- appearance and finish;
- freedom from defects;
- safety and durability.

All other references to ‘merchantable quality’ in the 1979 Act have been substituted, accordingly, by the term satisfactory or unsatisfactory as the case may be.[45]

But, if the goods are sold second hand, then the buyer must judge what is satisfactory for him considering the price he pays, unless there is something radically

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[42] Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, p. 425.
[43] Ibid.
[44] Ibid, p. 426.
[45] Ibid.

wrong with them. Whether a defect renders the vessel unsafe or unable to operate in the market for which she was built will be judged in the view of a commercial man.[46]

Thus, the term merchantable quality with regard to a shipbuilding contract would mean that the ship must be of a quality that is satisfactory to the buyer with regard to fitness for purpose, appearance and finish, freedom from defects and safety and durability.

2.5 Vessel Hull Design Copyright

Contract Design involves the preparation of both plans and contract specifications. The primary purpose for preparing contract plans and specifications is to create a set of documents which accurately describe the vessel to be built, and can be used as a basis for agreement between the buyer (or owner) and builder (shipyard). The level of specificity at this stage is not fixed by industry practice. Rather, it depends on a number of factors, including the size and complexity of the vessel, the presence of novel features, the contractual risks in dealing with certain shipyards etc.

Ship design is usually undertaken by a design organization. When a design organization commences a project, they are usually doing so because there is a contract with the party that will be using that design to procure a vessel or complete some desired work on a vessel. That is, a contract of some form between builder / buyer and design organization is the mechanism that is used to engage the service of a design organization; and later a different contract between buyer and builder will be the mechanism that is used to obtain the product (ship) based on that design. In as much as there has to be complete compatibility between the design and the two contracts, it is important that design organizations understand what objectives have to be achieved in order to be, not only technically appropriate, but contractually appropriate.[47]

The level of detail in the plans and specifications should be just sufficient for both parties to fully understand the requirements of the other, i.e. a meeting of the minds. The specifications are meant to be a companion document to the contract plans and the contract itself. In the event that there are contradictions between the contract,

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[46] Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, p. 426.

[47] Dr. Kenneth W. Fisher, The Impact of Contracts on Ship Design Preparation. Publish by the Society of Naval Architects and Marine Engineers in the Journal of Ship Production and Design,Vol.28, No.2 May 2012, p. 3

specifications and drawings, the generally accepted hierarchy, is that the contract terms prevail, followed by the specifications and lastly the drawings. This is usually explicitly stated in the contract and specifications.[48]

There is no generally agreed hierarchy upon format for specifications. The U.S Maritime Administration's standard specification has been found to be thoroughly and logically arranged. When given the opportunity, Japanese and Koreans shipyards prepare their specifications, divided into three volumes, namely hull, machinery and electrical.[49]

The Norwegian Ship Research Institute has organized their standard specification so as to simplify design, purchasing and manufacturing. Each of the specification is coded to a standard.

The specifications should be prepared by engineers, since many of the features described in the specifications involve or impact upon engineering decisions. There is prevalence on the part of many owners to have non-technical operating staff prepare the specifications. This is to be deplored as it can lead to serious mistakes or weaknesses in the design.[50]

Contract design includes the preparation of plans and specifications. Therefore, contract designs are important because they accurately describe the vessel to the built and can thus be used as the basis for agreement between the buyer and builder. The specifications complement the contract plan and the contract itself. Since contract design includes the preparation of plans and specifications, it is clear that contract design improves the accuracy of the technical and economic aspects of the design.

Regarding the IP aspects of ship design, the Vessel Hull Design Protection Act, Title 17, Chapter 13 of the United States Code, was signed into law on October 28, 1998, providing for protection for original designs of vessel hulls. The law grants an owner of an original vessel hull design certain exclusive rights provided that application for registration of the design with the Copyright Office is made within two years of the design being made public. Protection is afforded only to vessel hull

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[48] Charles R. Cushing, The Ship Acquisition Process, New York, 2011, p. 53.
[49] Ibid.
[50] Ibid.

designs embodied in actual vessel hulls that are publicly exhibited, publicly distributed, or offered for sale or sold to the public on or after October 28, 1998.[51]

The Vessel Hull Act differs in many aspects from traditional notions of copyright registration and protection. Although the Vessel Hull Design Protection Act provides copyright protection for "Vessel Hulls." Chapter 13 resembles a mix between copyright, patent and trademark. The Act positions copyright protection in opposition to patent protection, as copyright design protection is not available for hulls, which have been patented.[52] Also Chapter 13 contains language, which is similar to the Trademark Act's cancellation provisions except that, under the Boat Hull Act, the cost of the cancellation shall be borne by the non- prevailing party; a sanction which is not mandatory with trademark.

If a songwriter desires to register a song she wrote 20-years ago, there is no time bar to copyright registration but the same is not true with boat hull registration. Chapter 13 Registration provided a period of (2) years within which to register a hull design. If a design is not registered within two (2) years of the hull's creation, the opportunity to register for design protection is lost.[53]

The typical duration of copyright for a work is that of the life of the author plus 70-years. However, the same is not so for boat hull designs. The Act provides only 10-years of protection for boat hull designs.[54]

Publication marks are another distinct difference between the typical copyright registration procedure and boat hull copyright. Boat hull design protection, like trademark, is announced by publication.

The above shows that the copyright protection of ship design differs in several aspects from the usual copyright registration and protection system.

For instance, there is no time bar to copyright registration, but hull design copyright registration must be made within two years of creation. The typical duration of copyright is the life of the author plus 70 years. For boat designs the period of protection is only 10 years. Unlike copyright protection for a work, boat hull design protection is announced by publication.

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51 Special information about vessel Design, www.uspto.gov.index.html
52 The Vessel Hull Design Protection Act, Title 17 Chapter 13.
53 Carl J. Spagnuolo. Two Perspective on Vessel Hull Design Protection Act, Intellectual Property Law Newsletter, January 2002 Issue.
54 Ibid.

To sum up, the terms of a contract under English common law are divided into: conditions, warranties and intermediate terms. The breach of a condition entitles the other party to either terminate the contract or claim damages or to continue with the contract and claim damages. The breach of a warranty entitles the other party to claim damages but not to terminate the contract. The effect of a breach of a intermediate term, depends on the seriousness of the breach. Whether a breach is held to be a breach of a condition or of a warranty, depends on the intention of the parties. An issue arising from the breach of a description is resolved as a breach of a warranty and not as a breach of a condition when the breach is so slight that it would be unreasonable for the buyer to reject it. Condition and warranties may be Implies or Express furthermore, a court may imply a term in a contract to give "Business efficacy" to the contract even though it is not expressly included in it. Section 6 (2) of the Unfair Contract Terms Act 1977 provides an exclusion clause that prohibits exclusion or limitation of liability for breach of the implied conditions of Sections 13,14 and 15 of the Sale of Goods Act (1979) and Section 1 of the Sale and Supply of Goods Act (1994) for non- consumer sales and for the international sale of goods. Thus, if the sale of a ship is not an international sale, the implied conditions would not apply .The principle of good faith which is the principle of fair and open dealing is not enforced in common law systems.

Other important terms are the implied term of description (Section 13 of the Sale of Good Act, 1979), which provide that in a contract for the sale of goods by description, there is an implied condition that the goods will correspond with the description, and the term of merchantable quality (Section 14(2) of Sale of Goods Act 1979), which means that to be merchantable, the ship must be of a quality that is satisfactory to the buyer.

Contract design includes the preparation of plans and specifications which are important for the accuracy of technical and economic aspects of shipbuilding. Original designs of vessel hulls are provided with copyright protection of ship design differs in several aspects from the usual system of copyright registration and protection.

Chapter 3
Issues on Ship Acquisition Process

The process of acquiring a ship built to order is an extremely complex one which includes not only engineering and technical related matters but also processes pertaining to legal, commercial and financial matters. Accordingly, during the acquisition process, the parties, the builder and the buyer, have to deal with numerous matters like the passing of property, price increases brought about by escalation of labour and/or materials costs, as well as issues arising from the builder's failure to deliver the ship within the contracted time. It also may happen that a situation may arise requiring the renovation of the contract and the resale of the ship under construction. Given the various matters involved, there may be many obstacles to be overcome by the parties in the acquisition of a ship which, in turn, could result in issues that need to be resolved. Thus specific means of dispute resolution need to be established in the case that such issues arise during the process of acquiring a ship. This Chapter contains an account of the issues on the ship acquisition process.

3.1 Passing of Property

Property in a ship to be constructed does not pass from the builder to the buyer at the time when the contract is made. Instead, property passes in stages during construction, as each stage is constructed and paid for in instalments as agreed under the contract.

When a person gives an order for a new ship to be built, he makes an agreement for the purchase of a ship not yet in existence, he buys what are called future goods. This means that as no property exists when the contract is concluded, none can pass at that time. Legally speaking, where future goods are bought or, more specifically, where an order is given for the construction of a vessel, no sale is possible, but the contract will always constitute an agreement to sell.[1]

This being so, the passing of the property will normally not occur until the completion of the vessel, but the parties may provide for its transfer by stages as building proceeds. Indeed a great number of shipbuilding disputes have turned on such provisions.[2]

The desired effect is not always wholly achieved. One has to bear in mind that whatever is thus transferred to the buyer ceases to be available to the builder's general creditors. Justice and common sense require that there should be strong evidence that materials or portions of a ship in construction in the builder's yard, and ostensibly his property, have been excluded from his assets. Therefore, the parties are not deemed to have intended the passing of' the property in stages by merely agreeing that instalments of the purchase price be paid in advance.[3]

On the other hand, a contract providing for the payment of instalments at particular stages of construction, for inspection by the purchasers or their agents, and for the passing of the property in the completed sections of the ship is effective. In a case like that, the contract is construed not as an agreement to sell a completed ship, but as a contract for the sale from time to time of a ship in its various stages of construction, or of materials to be used in the construction of a ship.[4]

The larger the vessel, the greater are the costs involved, and the longer is the time the builder has to wait for the payment of the purchase price. Given this extensive payment period, one issue is that, as often as not he will not be able to finance the whole construction himself and he will be obliged to apply to other quarters for help. These other quarters will be either the purchaser or third parties. The latter will usually be banks and they will require a security for their advance. A specific equitable mortgage of the existing ship must be arranged; registered

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1 Otto Charles Giles, N. J. J. Gaskell, Charles Debattista and Richard J. Swatton, Chorley & Giles Shipping Law, Pitman Publishing, 8th Edition, 1987, p. 50.

2 Ibid, p. 51.

3 Sir James laing& Sons Ltd v. BardayCurle Co. Ltd. (1908) A.C 35.

4 Otto Charles Giles, N. J. J. Gaskell, Charles Debattista and Richard J. Swatton, Chorley & Giles Shipping Law, Pitman Publishing, 8th Edition, 1987, p. 52.

mortgages can only be effected when the ship is completed and registered. The builder may also require the buyer to arrange for third parties to guarantee payment of the purchase price.[5]

Problems may also arise concerned with advances on the price by the purchaser. The buyer must safeguard himself against the builder's possible supervening insolvency. This is usually done by a term in the building agreement, providing for the passing of the property to the purchaser of portions of the ship as construction goes on, in accordance with the instalments he pays on the price. Compared with the sale of an existing thing by instalments, the position is just the reverse. In instalment sales the vendor retains the property until the last instalment is paid, in the present case the purchaser with each instalment acquires portions of property.[6]

One instance illustrative of this fact is the sale of apartment buildings in Myanmar. In Myanmar, contracts for the sale of apartment buildings are of three kinds: sale of entire buildings, sale of individual apartments and sale of apartments by instalments. Under the first kind, the cost of the entire building to be constructed is calculated and then sold to the buyer upon his full payment of the cost.

Apartments in a building being constructed by a contractor (the so- called Contract Buildings) are sold either as foresaid, on an immediate purchase upon payment basis, or under the payment by instalments method which is also the method used in shipbuilding contracts.

As shown in the attached copies of apartment building contracts (Annex 1 and 2), under this method, purchasers pay a refundable deposit on the day on which the agreement to purchase is signed followed by instalment payments each time one stage of the construction begins. For example, the first instalment when the ground is excavated for laying of the foundation, the second instalment when construction: begins, the next instalment when the second floor construction begins, and so on; the final payment being made when the building is completed and the builder hands over title to the buyer. In view of the above, it can be said that a contract for the building of a ship and a contract in Myanmar for the construction of an apartment building have certain similarities. Both types of contract involve undertaking substantial long-term

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5 Hundai Shipping and Heavy Industires Ltd v. Pournaras 1978, 2 lloyed's rep. 502.

6 Otto Charles Giles, N. J. J. Gaskell, Charles Debattista and Richard J. Swatton, Chorley & Giles Shipping Law, Pitman Publishing, 8th Edition, 1987, p. 51.

construction projects for a considerable amount of money and provide for payments to be effected in instalments.

However, the difference in these two types of contracts is that in a shipbuilding contract payment is made in instalments on the completion of certain stages of construction and title in each of these completed stages passes to the purchaser on payment of each instalment. But in instalment sales of an apartment, payment is made at the beginning of each stage of construction and the builder retains the whole property until the last instalment is paid.

The practice of passing property in parts of the ship to the buyer as construction goes on was laid down by House of Lords a long time ago,[7] and it was expressly recognized in the original 1893 Sale of Goods Act now Section 18 Rule 5(1) of the Sale of Goods Act 1979. According to this Rule the property in future goods, in the absence of evidence to the contrary, will pass to the purchaser under two conditions, (i) goods complying with the contractual description must exist in such a state that the buyer is bound under the contract to take delivery of them, (ii) such goods must be unconditionally appropriated to the contract by the consent of the parties.[8]

Moreover, the buyer will not only desire that as building proceeds the vessel shall become his, but that if the builder becomes insolvent the completion shall take place in due course. He will usually attempt to secure this by a term in the contract that the materials brought into the shipyard for the purpose of constructing the ship shall become his property.[9]

The law on this is clear and it will be difficult for parties to circumvent this by stating in the shipbuilding agreement that materials and equipment ear-marked for the shipbuilding project will pass to the buyer at specific times. This is due to the fact that any shipbuilding contract pertains to a 'sale of future goods.[10] Building materials and equipment specifically earmarked for a specific hull in the shipyard do not form part of the incomplete ship. Even in the event of a shipyard placed under receivership or subject to a winding up, such materials do not belong to the buyers. They belong to the liquidators.[11]

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7 Seath v. Moore (1886) ii app Cas. 350, 370.
8 Section 18, Rule 5(1) & S. 61 (5).
9 Reid v. Macbath& Gray (1904) A.C 223.
10 Section 18 rule 5(1) of Sale of Goods Act, 1979 (Sale of Goods Act (1979))
11 Christopher Hill, Maritime Law, Lloyd's of London Press, 5th Edition, 1998, p. 80.

In the case of *Reid v Macbeth and Gray*,[12] the steel plates were approved by Lloyd's surveyor at the manufacturers' yard and they were marked with the number of the hull. The steel plates were not lying at the shipyard but in various railway stations. However, the proceeds realized from the sale of the steel plates belonged to the liquidators and not the ship-owners despite the shipbuilding contract containing a provision that "all materials from time to time intended for her.... shall immediately as the same proceeds become the property of the purchasers".

In the case of *Re Blyth Shipbuilding and Dry docks Co Ltd*,[13] certain building materials were brought to the shipyard and approved by the buyers' surveyors. There were also materials not approved by the buyers' surveyor. In either case, building materials did not belong to the owners unless "they were inextricably part of the vessel as to be "appropriated to her".[14] Pollock M.R provided the cogent standard:

"These worked materials, although worked up and suitable for placing into the vessel at the appropriate time and accepted, it may be, by the surveyor, have not yet taken their place and become so inextricably a part of the vessel as to have satisfied the meaning of the word "appropriated".[15]

Lord Halsbury L.C said this in *Reid v Macbeth and Gray*[16], "there is another principle which appears to me to be deducible from these authorities and to be in itself sound, and that is that materials provided by the shipbuilder and portions of the fabric, whether wholly or partially finished, although intended to be used in the execution of the contract cannot be regarded as appropriated to the contract or as "sold" unless they have been affixed to or in a reasonable sense made part of the corpus."[17]

In the case of *Seath and Co v More*[18], shipbuilders had contracts with Compell and sons to supply them with engines, bodies and machinery. Compbell became bankrupt and the shipbuilders commenced an action for delivery of pieces of machinery in a more or less limited condition and materials obtained for such machinery but lying loose on the bankrupt contractor's premises.

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12 [1904] AC 223.
13 (1926) 24 LIL Rep. 139.
14 Section 18 of Sale of Goods Act, 1979.
15 (1926) Ch. 494 [515].
16 [1904] AC 223 at p. 230.
17 [1904] AC 223 at p. 230.ReBlyth Shipbuilding & Dry Docks Co Ltd (1926) 24 LILRep. 139, CA. Seath& Co v. Moore (1886) App 350 HL.
18 (1886) 11 App Cas 350, HL.

It was held that it is in order for parties to agree for a valuable consideration that a specific article shall be sold and become the property of the purchaser as soon as it has reached a certain stage but it is a question of construction in each case at what stage the property shall pass and a question of fact whether that stage has been reached. However, materials provided by the builders, whether wholly or partly finished cannot be regarded as appropriated to the contract and sold unless they have been affixed, or in a reasonable sense made part of the "rest". [19]

The courts' findings in the cases presented above confirm point of Section 18, Rule 5(2) of the Sale of Goods Act, 1979 which states that for the sale of future goods, "Such goods must be unconditionally appropriated to the contract by the consent of the parties."

In the cited cases the goods were not "appropriated" to the vessels, i.e., not inextricably fixed on the vessel. Therefore, the courts ruled that they did not belong to the ship-owner.

Thus with regard to a ship under construction, the materials provided by the shipbuilder, intended to be used in the construction of the ship, cannot be regarded as "sold" to the buyer until they are appropriated to the vessel, i.e. fixed on it.

Thus, the seller, is under an obligation of working up the things sold into a complete ship for the purpose of putting them into a deliverable state.[20]

This means that property in materials intended to be built into the vessel and approved by the purchaser does not pass to the latter whenever is mentioned in the contract. To produce this effect the material has to be 'appropriated' within the meaning of Section l8, Rule 5(1), of the Sale of Goods Act. If the court comes to the conclusion that the whole contract is not for materials to be worked up into a ship, a case which will rarely arise, but a contract for the sale 'from time to time of a ship in its various forms of construction', or for a complete ship, something more than intention, however definite, is necessary for the appropriation of material not yet worked into the vessel. In addition, "there must be some definite act, such as the affixing of the property to the vessel itself, or some definite agreement between the

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[19] Christopher Hill, Maritime Law, Lloyd's of London Press, 5th Edition, 1998, p. 71.

[20] Otto Charles Giles, N. J. J. Gaskell, Charles Debattista and Richard J. Swatton, Chorley & Giles Shipping Law, Pitman Publishing, 8th Edition, 1987, p. 52.

parties which amounts to an asset to the property in the materials passing from the builders to the purchasers".[21]

In such a case, both buyer and shipbuilder state in their shipbuilding contract that the property in the materials shall pass to the buyer with precise, clear and unambiguous wording.[22]

Furthermore, when the ship is finally completed, and not delivered to foreign buyers, the builder has to give a certificate in accordance with Section 10 of the Merchant Shipping Act 1894. And, where the property has not already vested in the purchaser (in stages, or under any other special contract) the builder must apply for registration and transfer the property to the purchaser by a bill of sale.[23]

For a ship under construction, the main contract is the shipbuilding contract. It is executed between the shipyard ("the shipbuilder") and the buyer. As mentioned above, there is provision for progress payments at various stages of construction. So, although the property in a ship under construction may pass to the buyer upon completion of the build under an agreement to sell a completed ship, the more common method is for the parties to contract for the sale from time to time of a ship in its various stages of construction and property in each of these competed stages passes to the buyer on payment for each stage. Upon full completion of the entire hull, the vessel is then launched and a bill of sale is issued and given by the shipbuilder to the buyer.

Property in the materials bought by the builder, intended to be built into the ship remain with the builder until they are fixed on the ship, unless there is specific agreement between the parties that such material shall pass to the buyer.

With regard to a contract for a new ship, that is, for the sale of specific goods in a deliverable state the sale is by a contract of sale", and the property in the goods passes to the buyer when the sale contract is made, since a deliverable state" according to Section 61(5) of the Sale of Goods Act, 1979, is such a state that a buyer is bound to take delivery under the contract.

With regard to the sale of a second hand ship, sale is by an "agreement to sell". The seller is obliged to carry out repairs and put the ship in a deliverable state.

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[21] Otto Charles Giles, N. J. J. Gaskell, Charles Debattista and Richard J. Swatton, Chorley & Giles Shipping Law, Pitman Publishing, 8th Edition, 1987, p. 52.

[22] Christopher Hill, Maritime Law, Lloyd's of London Press, 5th Edition, 1998, p. 71.

[23] Otto Charles Giles, N. J. J. Gaskell, Charles Debattista and Richard J. Swatton, Chorley & Giles Shipping Law, Pitman Publishing, 8th Edition, 1987, p. 52.

When the ship is in a deliverable state, on the date of delivery, property in the goods passes to the buyer upon payment. But when the sale is an “outright sale” on an “as is where is” basis the seller is not obliged to make repairs after the conclusion of the contract, and the property in the goods passes to the buyer.

As already mentioned, a shipbuilding contract is a contract for the sale of future goods and the property passes to the buyer as construction goes on. By way of contrast, in the case of ascertained good (existing goods), by Section 17(1) of the Sale of Goods Act 1979, where there is a contract for the sale of specific or ascertained goods, the property on them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. Section 17(2) of the Sale of Goods Act 1979 provides that, for the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

By Section 18 of the Sale of Goods Act 1979, unless a different intention appears, the intention of the parties as to the time at which the property in the goods is to pass to the buyer is ascertained in accordance with five rules depending on the circumstances of the case. Two of these rules are mentioned below, by way of a contrast, the second of which is relevant to the sale of second hand ships.

Rule 1: where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, is postponed. This rule is relevant to the first category of sale contracts made by Section 2 of the Sale of Goods Act 1979, namely, the sale contract and not the agreement to sell. Section 61(5) defines a ‘deliverable state’ as being such a state that a buyer would be bound to take delivery under the contract.

Rule 2: where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until the thing is done and the buyer has notice that it has been done. This rule refers to an agreement to sell, the second category under Section 2 of the Sale of Goods Act 1979, where the property passes at a future date.

The sale of second hand ships is normally an agreement to sell, in which the parties provide in the sale form that, in the event of deficiencies found at the inspection stage, the seller will be obliged to carry out repairs and put the ship in a deliverable state. Before notice of delivery, the ship is not yet in a deliverable state

and the parties' intention is that property shall pass upon payment on the day of delivery. Property cannot pass when the contract is made, unless the agreement is for a sale 'as is where is', which means that the buyer has chosen an 'outright' sale, if he had already inspected her before the contract was concluded. In such a case, the seller is not required to do repairs on the ship after the conclusion of the contract, but, even in this situation, property shall pass when the parties intended it to pass.[24]

In the case of *Naamlooze Vennootschap Stoomvaart Maatschappij 'Vredoobert' v European Shipping Co Ltd*[25], an agreement for sale of five second hand ships provided that buyers were to 'buy now'. Before any part of the purchase price had been paid, one of the vessels was sunk by a collision, and the insurance company paid the seller on the policy. The buyer claimed that property had passed to him, and he was, therefore, entitled to the benefit of the insurance policy. The House of Lords, affirming the decision of the Court of Appeal, held that the words 'buy now' did not mean an immediate transfer of property. This was an agreement to sell and not a sale. Viscount Dunedin remarked that "using the phraseology of the Sale of Goods Act 1979, he looked on this contract as a 'contract agreement to sell' and not a 'sale' " in determining whether a contract is a sale or an agreement to sell, is to see whether there remains something to be done. [26]

In this case, since the agreement for sale was not an outright sale on an "as is where is" basis, it is clear that there was still something left to be done. Therefore, the property could not pass to the buyer.

3.1.1 Renovation of Contract and Resale

Due to certain reasons, a shipowner who has a contract with a shipbuilder, may want to sell the ship to another party while it is still under construction which would require the agreement of the shipbuilder.

With regard to renovation and resale of a ship under construction, a ship-owner with a vessel under construction can sell his vessel to a third party for a higher price. He can do such a resale with a direct sale using a Memorandum of Sale under the Norwegian Sale Form or he can transfer all his rights and obligations in the

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[24] Aleka Mandaraka-Sheppard, LLM, PhD, Solicitor, Modern Admiralty Law with Risk Management Aspects, first Edition, 2001, p. 476.

[25] (1926) 25 LIL Rep 210.

[26] Aleka Mandaraka-Sheppard, LLM, PhD, Solicitor, Modern Admiralty Law with Risk Management Aspects, first Edition, 2001, p. 475.

shipbuilding contract through the process of renovation. He needs to have the consent of the ship builder as the new buyer is stepping into the shoes of the ship-owner. Apart from reimbursing the seller original buyer for all the advance payments made to the shipyard and the profit margin made by the seller, the new buyer has to bear the costs of supervising the balance of the new building contract.[27]

Thus, under the process of renovation and resale, property in a ship that is being constructed, passes from the original owner to a third party, with the consent of the ship builder.

3.1.2 Passing of Title and Risks in Property

Title to the ship under construction passes to the buyer as and when each stage is constructed and paid for by him. But risks in these completed stages remains with the builder since the ship under construction will remain in his shipyard until construction is completed.

The contract provides when property and risk shall pass to the buyer. Since the general rule that risk passes at the same moment as the property could produce unfair results to a purchaser of a partially built ship, to obviate this in a shipbuilding contract, it is customary for parties to agree expressly that the risk does not pass until delivery of the completed ship.[28]

Art VII.5 of the SAJ form stipulates that the title and risk for loss of the vessel shall pass to the buyer only upon delivery and acceptance thereof, having been completed, as stated in the contract. Until such time, it is expressly stated that title to the vessel and risk for her loss or her equipment shall be in the builder, excepting risks of war, earthquake and tidal waves. This is loss due to *force majure* events.[29]

In the absence of express or clear provision in the contract with regard to transfer of title, the usual contract rule in English law concerning specific goods is that the property in them is transferred at such a time as the parties to the contract intend it to be transferred. By Section 17(2) of the Sale of Goods Act 1979, the intention of the parties is ascertained from the terms of the contract, the conduct of the parties and the circumstances of the case.[30]

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27 Inta Navigation Ltd & Anor v Ranch Investments Ltd & Anor [2010] Lloyd's Rep. 74

28 Christopher Hill, Maritime Law, 5th Edition, 1998, p. 82.

29 Aleka Mandaraka-Sheppard, LLM, PhD, Solicitor, Modern Admiralty Law with Risk Management Aspects, 1st Edition, 2001, p. 436.

30 Ibid.

The rules of ascertaining intention are specified in Section 18 of the Sale of Goods Act 1979.Where there is a contract for the sale of future goods by description, as is the case in the construction and sale of a ship, the property does not pass until the goods are in a deliverable state and are appropriated to the contract either by the seller with the assent of the buyer or by the buyer with the assent of the seller. However, bearing in mind the hybrid nature of a shipbuilding contract, even if the ship is uncompleted, the property in it (but not in the materials which have not been appropriated to her) may, in some circumstances, pass to the buyer, if the parties have clearly stipulated it in their contract.[31]

Title to the completed ship should obviously pass to buyer upon completion and payment of the delivery instalment (unless a form of lease finance is being used in which case the buyer may need to have title to the ship passed direct to the leasing company and arrangements for a novation of the shipbuilding contract to the leasing company may be necessary).[32]

In addition the shipbuilding contract should also specify who will have title to the ship during the course of its construction. There are two possibilities:-

Either that title to the ship will remain vested in the builder until delivery and payment in full of the purchase price; or title to the ship will pass to the buyer during the course of construction as and when the ship is constructed subject to a lien in favour of the builder until the purchase price is paid. A provision of the former nature should increase the buyer's security if the builder were to get into financial difficulties or be in default under the shipbuilding contract and would be of assistance in any situation where the ship needed to be removed from the builder (or any sub-contractor's) premises for completion elsewhere. However, any attempt at repossession/ relocation of the ship (whatever the circumstances) is unlikely to be straightforward and may be subject to various provisions of local law (although, in the event of any builder's default recourse under the refund guarantee should still be available as an alternative remedy). In certain cases the builder may also be prevented from passing title to the ship to the buyer during construction as it will be required to

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[31] Aleka Mandaraka-Sheppard, LLM, PhD, Solicitor, Modern Admiralty Law with Risk Management Aspects, 1st Edition, 2001, p. 436.

[32] Hill Dickinson, Shipbuilding Contracts, Shipbuilding at a Glance' Guide 5, p. 8.

give security over the same to its bankers to raise finance for the costs of constructing the ship.[33]

The shipbuilding contract should also require the builder to maintain insurance against any loss or damage to the ship during the course of its construction. Normally, the buyer will also want a right to approve the insurance arrangements in order to ensure that such insurance is on the standard "Builder's Risks" terms available in the London Market and that where necessary the insurance cover extends to the negligence or wilful damage of the builder's employees and agents and war risks. The amount of insurance cover obtained will also need to be no less than the aggregate amount of instalments paid together with the value of any buyer's supplies (which should also be covered). The shipbuilding contract should also specify that in the event of a total loss of the ship prior to delivery the buyer shall have the option either:[34]

(i) to cancel the shipbuilding contract and receive a refund of all pre-delivery instalments; or

(ii) to require the builder to recommence construction of the ship and to apply the insurance proceeds towards the cost thereof.[35]

Title to the completed ship passes to the buyer upon completion of construction and payment of the delivery instalment. During the course of construction title will either remain with builder until delivery and payment in full of the purchase price or title will pass to the buyer as and when the ship is constructed and paid for in instalments. Risk in the ship under construction remains with the builder and passes to the buyer only upon delivery of the completed ship.

3.2 Doctrine of Frustration

The doctrine of frustration can apply to shipbuilding contracts where the contract is frustrated /delayed by unavoidable circumstances.

Such a situation is illustrated by the Fisher Renwick case, below, where supervening events rendered the contract commercially of ineffective fulfillment.[36]

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[33] Hill Dickinson, Shipbuilding Contracts, Shipbuilding at a Glance' Guide 5, p. 8.
[34] Ibid.
[35] Ibid.
[36] Christopher Hill, Maritime Law, Lloyd's of London Press, 5th Edition, 1998, p 81.

In the case of *Fisher Renwick & Co v. Tyne Iron Shipbuilding Co*[37], the issue in this dispute was whether the plaintiffs were entitled to recover damages from the defendants for failure to build a screw streamer, under a contract dated 8 February 1913, for delivery in January 1916. Default was made. The vessel was in fact not even commenced at the date she should have been delivered. The contract provided that in the event of any cause beyond the control of the builders the defendants should be allowed one day extension of the contract period for each day's delay so caused . The defendants argued that by reason of government interference the contract became impossible of performance. They contended that the Admiralty had directed them to give preference to Admiralty rather than private work and that the war had depleted their staff, etc.

It was held that the circumstances had so drastically changed from the time when the contract was entered into that the doctrine of frustration applied. Whether there has been inordinate delay so as to frustrate the mutual intentions of the parties depends on the circumstances. The plaintiffs' continued insistence on the performance of the contract was unjustified and their claim failed.

In this case, it is clear that default on the part of the shipbuilders to comply with this obligation under the contract was due to the fact that they had been ordered to give priority to work for the Admiralty. In such circumstances where the delay is caused or the contract is frustrated by unavoidable circumstances, the doctrine of frustration applies. Therefore, the buyers claim against the shipbuilders failed.

It should be noted, however that given the fact that shipbuilding contracts can extend over lengthy periods, delay, in order to be frustrating, would have to be similarly lengthy. The matter may also be covered in the contract. The AWES form provides for delay as a result of *force majeure* in Article 6 (c).[38] That is, delay caused by the fault of neither of the parties.

When delay in completing a shipbuilding contract is caused by unavoidable circumstances faced by the builder, the doctrine of frustration applies and therefore, the buyer may not claim against the builder.

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[37] (1920) 3 LIL Rep, 201-253.

[38] Christopher Hill, Maritime Law, Lloyd's of London Press, 5th Edition, 1998, p. 82.

3.2.1 Delay in Delivery and *Force Majeure*

Events beyond the builder's control frequently occur during the construction of the contract and become a cause of delay in delivery.

Under such circumstances, the builder needs protection and, although it is possible to manage such risks by insurance, it is also sensible to limit his liability for delay in delivery by an exclusion clause in the contract with regard to a range of events, which would be beyond his control. The contract provides a protection for the builder in this respect by the *force majeure* clause (Art VIII of the SAJ form). It enumerates 35 specific events, which may be beyond the builder's control and prevent the work.[39]

Upon the occurrence of any of such events, the clause provides that the time for the delivery is extended for certain days, not exceeding the total accumulated time of all such delays, after the builder has given notice to the buyer of any *force majeure* event. The burden of proof is upon the builder to show that such an event has occurred and it is within the clause.[40]

Most common events include act of God, fire, flood, hurricanes, storms or other weather conditions not included in normal planning, earthquakes, intervention of government authorities, war, blockade, strikes, lockouts, labour shortage, explosions, shortage of materials, defects in materials, machinery, equipment (which could reasonably be expected by the builder to be delivered), delays in transportation, delays in the builder's other commitments. There is a sweeping up provision at the end of the clause providing: '… or due to other causes or accidents beyond the control of the builder, its sub-contractors or supplier of the nature whether or not indicated by the foregoing words, irrespective of whether or not these events could be foreseen at the day of signing this contract[41].

Industrial action during the construction of shipbuilding is the most common incident of delay. However, as the builder may sometimes be able to control the happening of strikes and labour disturbances, this incident may become the cause of a dispute between the builder and the buyer, if the latter considers that the event does not come within the protection of the *force majeure* clause. For example, if the builder acted unreasonably in dealing with the workforce and, therefore, failed to prevent the

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[39] Aleka Mandaraka-Sheppard, LLM, PhD, Solicitor, Modern Admiralty Law with Risk Management Aspects, first Edition, 2001, p. 446.
[40] Ibid.
[41] Ibid.

strike or mitigate its consequences, it will not be regarded as being beyond his control.[42]

With regard to shortage of materials or equipment, the clause restricts the protection of the builder to circumstances in which the builder at the time of ordering could reasonably expect their delivery. Failing delivery, despite the builder's reasonable conduct in ordering from a certain supplier in whom the builder could reasonably rely and expect timely delivery, the question is whether the builder would be obliged to buy it from other sources. The House of Lords has held in a non shipping case that, provided a shortage of supply has been proved, the defendants were entitled to rely on the clause, notwithstanding the existence of an alternative source of supply. But, a mere increase in price would not be sufficient to establish a shortage in supply.[43]

The clause, in para 4 of Art VIII of the SAJ form, provides that the buyer may or may not elect to cancel the contract if the delay exceeds beyond a certain period.

Invariably, a *force majeure* event has a knock-on effect, so that delay of completion of one vessel caused by *force majeure*, may affect completion of other vessels, as was shown in the following case.[44]

In the case of *Matsoukis v Priestman,*[45] the defendants agreed to build and deliver a steamer to the plaintiff on or before 28 February 1913. The contract contained the following exceptions clause: 'If the said steamer is not delivered entirely ready to purchaser at the above mentioned time, the builders hereby agree to pay to the purchaser for liquidated damages, and not by way of penalty, the sum of 10 pounds Sterling for each day of delay and in deduction of the price stipulated in this contract, being excepted only the cause of *force majeure*, and/or strikes of workmen of the building yard where the vessel is being built, or the workshops where the machinery is being made, or at the works where steel is being manufactured for the steamer, or any works of any sub-contractor.'

As a result of a general coal strike of 1912, the works from which the defendants obtained their materials for other ships they were building got behind. The ship in turn to be built, before the plaintiff's ship, occupied the berth much longer

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42 Aleka Mandaraka-Sheppard, LLM, PhD, Solicitor, Modern Admiralty Law with Risk Management Aspects, first Edition, 2001, p. 446.
43 Ibid, p. 447.
44 Ibid.
45 (1915) 1 KB 681.

than otherwise she would have done. The same berth was intended to be occupied by the plaintiff's ship. Consequently, the plaintiff's steamer was late in being laid down. The steamer having been delivered after the contract date, the plaintiff claimed damages.

The court held that the general dislocation of the business of the defendants and of those from whom they obtained materials operating indirectly on the completion of the plaintiff's steamer, by preventing the completion of the vessel prior in turn, constituted a case of *force majeure* within the meaning of the exceptions clause and, therefore, excused the defendants in respect of the delay so caused.

It further held that, apart from delay due to bad weather, the delay due to breakdown of machinery was covered by the exception of *force majeure*.

It is obvious that the sequence of events, starting with the ground coal strike which led to the delay in building and delivery the plaintiff ship were events beyond the builders control and as such, can be categorized as force majeure events for which he could not be held liable under the exception clause of the contract. Therefore, the court's decision in this case can be said to be fair and just.

3.2.2 Destruction of Ship being Built

A shipbuilding contract may also be frustrated when a ship in the course of construction is destroyed by reason neither of fault on the part of the builder/seller nor of the buyer, one cannot look to Section 6 or Section 7 of the Sale of Goods Act 1979 for an answer for they deal with situations involving the destruction of specific goods.

The general rules of the law of contract determine who bears responsibility in the event of a partially constructed ship being destroyed through fault of neither party. In deciding whether a shipbuilding contract has thus been frustrated consideration will be given to the stage of completion reached and to the degree of urgency with which the buyer requires the completed vessel for some particular purpose of which the seller may be aware. The presence of wording in the agreement to the effect that property should pass in stages would be irrelevant to the determining of this issue which is the total destruction before risk has passed of the contemplated subject-matter of the agreement.[46]

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[46] Christopher Hill, Maritime Law, Lloyd's of London Press, 5th Edition, 1998, p. 82.

Delay as a result of '*force majeure'* may be covered in the contract. Alternatively the contract may provide for a loss of the vessel under construction. The SAJ form at Article 12, provides either for the outlay of the builders' insurance recovery on rebuilding or for the refund of the buyer's instalments.[47]

The builder is protected against delays in construction and delivery, beyond his control by the force majeure clause in the contract. The clause covers. Inter alia, events such as acts of god, fire, floods and other weather conditions, strikes, labour and material shortages etc.

3.3 Cost Escalation during Construction

The contract must address the risk of price fluctuation in costs of labour and materials. A cost escalation clause may be included in the contract where extra costs incurred by the builder with respect to fluctuation in prices for labour and materials may make it necessary for the builder to pass on such costs to the buyer. Such clauses are otherwise known as 'contract price adjustment clauses' or 'fluctuation clauses'. For those representing either the buyer's interests or those of the builder, careful drafting of such a clause is needed. The builder will require as wide a clause as possible, while the buyer must be cautious and restrict the width of such a clause with clear words for a cut off point. At the end, it will depend on the market forces, inflation and the parties respective bargaining powers.[48]

If there is no such a clause and the builder unilaterally attempts to increase the price in the course of the building, exercising pressure upon the buyer and threatening to discontinue performance unless the extra price is agreed, he will be faced with the risk of the agreement being unenforceable for lack of consideration, or be set aside for economic duress. [49]

To guard against issues arising from a cost escalation during the period of construction, the parties need to take into consideration possible increases in the price of labour and materials caused by market forces and inflation by including price escalation clauses such as contract price adjustment clauses or fluctuation clauses in the contract.

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47 Christopher Hill, Maritime Law, Lloyd's of London Press, 5th Edition, 1998, p. 82.
48 Aleka Mandaraka-Sheppard, LLM, PhD, Solicitor, Modern Admiralty Law with Risk Management Aspects, 1st Edition, 2001, p. 431.
49 Ibid.

3.3.1 Lack of Consideration and Risk Management

With regard to the lack of consideration and risk management, both of these factors are of great importance in respect of the execution of a shipbuilding contract.

The agreement may be legally unenforceable for lack of consideration if the builder undertook to perform nothing more than that which he was obliged to perform under the existing agreement.

In the case of *Stilk v Myrick*,[50] it could be said that the performance of a preexisting obligation under a building contract could not be held to constitute good consideration so as to justify increase of the contract price.[51]

In this case, two members of the crew deserted the ship before the return voyage commenced. The captain promised to reward the remaining crew with extra wages if they sailed the vessel safely home. The issue was whether the crew were entitled to that reward. It was held that the deserting two members of the crew made no difference to the duties required of the remaining crew. The latter were performing their obligations under the pre-existing contract of employment, being members of the ship's crew, and had done no extra work to have earned any extra pay. Although the captain had made a promise of extra pay, on which the crew had relied, the court was reluctant to support what was implicitly a form of blackmail or extortion.

In the shipbuilding case, *Anangel Atlas Compania Naviera v Ishika Heavy Industries Co Ltd (No 2)*,[52] the Angelicoussis group was a long standing customer of a Japanese shipbuilding yard and ordered some new buildings through their agent, a naval architect. During the shipping slump in 1984–85, he and other customers of the yard obtained substantial price reductions for their buildings. Mr Angelicoussis, being a loyal customer, obtained a variation of the original contract and letters were exchanged in which it was stated that the group would be entitled to 'most favoured customer treatment'. The group agreed to take early delivery of the new building, although it did not have to, which would encourage other reluctant customers of the yard to follow suit. However, it was later found out that a friend of Mr Angelicoussis, Mr Goumas, another customer of the yard, had obtained a better reduction in the price from the yard than the reduction granted to his group, and sued the yard for price differential or damages. The issue was whether the aforesaid letters constituted a

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[50] [1809] 2 Camp 317.

[51] Aleka Mandaraka-Sheppard, LLM, PhD, Solicitor, Modern Admiralty Law with Risk Management Aspects, 1st Edition, 2001, p. 432.

[52] [1990] 2 Lloyd's Rep 526.

binding contract. Hirst J held, on the consideration issue, applying *Williams v Roffey,* that whoever provides the services, where there is a practical conferment of benefit or a practical avoidance of detriment for the promisee, there is good consideration, and it is no answer to say that the promisor was already bound.

The consideration in this case was that the yard got a clear benefit, or avoided a detriment, since their best customers accepted an early delivery, so that the other customers followed suit.

Thus, it is clear that consideration occurs where a party to a contract secures a benefit or avoids a detriment through a promise performed by the other party. The benefit secured is said to be a consideration.

3.3.2 Economic Duress and Risk Management

In the event that the builder exercises undue pressure on the buyer to pay the extra price, his conduct may amount to economic duress, thus, being subject to the common law rule that the agreement may be held by the court to be voidable.[53]

In the case of *The Atlantic Baron*[54], Hyundai shipbuilding company entered into a contract by which they agreed to build a tanker for shipowners for a fixed price in US dollars, payment to be made in five instalments. The company agreed to open a letter of credit to provide security for repayment of instalments in the event of their default in the performance of the contract. After the owners had paid the first instalment, the US dollar was devalued by 10%, upon which the company put forward a claim for an increase of 10% in the remaining instalments. The owners, asserting that there was no legal ground on which the claim could be made, paid the second and third instalments without the additional 10%, but the company returned both instalments. The owners suggested that the company should subject their claim to arbitration, but the latter declined to do so, and requested the owners to give them a final and decisive reply to their demand for an increase by a certain date, failing which they would terminate the contract. The owners, who at that time were negotiating a very lucrative contract for the charter of the tanker, replied that, although they were under no obligation to make additional payments, they would do so 'without prejudice' to their rights, and requested that the company arranged for

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[53] Aleka Mandaraka-Sheppard, LLM, PhD, Solicitor, Modern Admiralty Law with Risk Management Aspects, 1st Edition, 2001, p. 434.

[54] [1979] 1 Lloyd's Rep 89.

corresponding increases in the letter of credit. The company agreed to do so and the owners remitted the remaining instalments, including the 10% increase, without protest. After eight months, the owners commenced arbitration claiming the return of the overpayments on two grounds: lack of consideration and economic duress. The arbitrators stated a special case for the opinion of the court.

Mocatta J gave a judgment in favour of the builder on the consideration point and in favour of the owners with respect to economic duress, but for the delay to bring the claim. In particular, he held that: … the company's threat to break the contract without any legal justification unless the owners increased their payments by 10% did amount to duress in the form of economic pressure and, accordingly, the agreement for extra payments was a voidable contract which the owners could either affirm or avoid; that, since there was no likelihood that the company would resile from the contract to build the tanker at the time she was due for delivery, the owners, by making the final payments without protest and, also, by their delay from November 1974 until July 1975 before making a claim for the return of the extra payments, had so conducted themselves as to affirm the contract and, accordingly, their claim failed.

This is a good example of making extra payments to the builder under economic duress. However, mere commercial pressure and use of bargaining power by one party to the contract will not suffice for the court to declare the contract voidable for economic duress. The Privy Council, in the case of *Pao v Lau Yiu Long*,[55] said that: although the defendants had been subjected to commercial pressure, the facts disclosed that they had not been coerced into the contract of guarantee and, therefore, the contract was not voidable on the ground of duress; in the absence of duress, public policy did not require a contract to be invalidated because a party had either threatened to repudiate an existing contractual obligation, or had unfairly used his dominant bargaining position in negotiating the agreement.

Economic duress was revisited in the case of *Huyton v Cremer*[56], in which the court redefined its ingredients. These are: illegitimate pressure and deflection, rather than coercion of the will of the innocent party. Mance J said that relief must depend on the court's assessment of the qualitative impact of the illegitimate pressure objectively assessed. He rejected the argument advanced that there was a third essential ingredient of economic duress: that is, 'no practical, alternative course open

[55] [1980] AC 614 (PC).
[56] [1999] 1 Lloyd's Rep 620.

to the innocent party'. However, he said, relief may not be appropriate if the innocent party decides, as a matter of choice, not to pursue an alternative remedy, which any and, possibly, some other reasonable persons in his circumstances would have pursued.

Examples of factors that may lead the court to find economic duress may be: evidence of the builder's knowledge that the buyer has a charter party to commence on the date of delivery and, thus, cannot afford to have the ship delivered late; or the builder's knowledge of the buyer's circumstances, by which the latter would have no option but to agree to a sudden price increase.[57]

Thus, for economic duress to be found there must be an element of coercion or illegitimate pressure present. For example, a threat by a shipbuilder to break the contract without any legal justification unless the buyer agrees to their demand for an increase of the contracted price .However, if the innocent party complies with the demand although he has an alternative course available, no duress will be found.

3.4 Delivery and Acceptance of Constructed Ship

The protocol for delivery and acceptance of a ship that has been completely constructed is usually detailed in the shipbuilding contract.

Which may be in the form of any one of a number of national, regional and trade association shipbuilding contract forms in circulation, as well as a larger number of more proprietary versions developed by individual shipyards based on the various forms. Some of the new building contract forms in use include the following: [58]

Standard Shipbuilding Contract, adopted by the Association of European Shipbuilders and Shiprepairers ("AWES")

Japanese Standard Shipbuilding Contract ("Jcon") (English version)

MARAD Form of Shipbuilding Contract

Newbuildcon – Standard New building Contract BIMCO (Annex 5)

China Maritime Arbitration Commission ("CMAC") Standard New building Contract (Shanghai Form) (English Version) [59]

The standard forms (AWES, Jcon, MARAD, etc.) are varied in their approach to delivery and acceptance of the constructed ship. Custom written shipbuilding

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[57] Aleka Mandaraka-Sheppard, LLM, PhD, Solicitor, Modern Admiralty Law with Risk Management Aspects, first Edition, 2001, p. 435.

[58] Ibid.

[59] Ibid.

contracts tend to be more detailed, as they address the particular complexities of the process.

Title passes in different jurisdictions in different ways:

- Physically delivered
- At another time, if both parties contractually agree
- Vessel registered
- Execution of bill of sale
- When both parties so declare
- When ship is in a "deliverable" state
- Bill is paid
- Builder completes his performance progressively[60]

In the United States, under the Uniform Commercial Code, title passes when the seller completes his performance with reference to the physical delivery of goods, although the buyer may obtain a special right in the ship when the ship is 'marked' or identified (as the goods referred to in the contract). In other countries, title may pass when it is in a deliverable state, or when both parties agree, or when the vessel is registered, or when it is physically delivered or through any of the other situations mentioned above. [61]

Each of these situations embrace complexities related to legal, financial and logistical matters. Therefore, this phase of the new ship acquisition process has many important aspects, but most important are legal which could trigger disputes between the parties to the shipbuilding contract.

Therefore, parties should, but often do not, clearly set forth in their dispute resolution clause the place, or seat, of arbitration, number of arbitrators, interrelationship of mediation and arbitration, the rules to apply, the nationality and experience required of arbitrators etc., since no set of institutional arbitration rules covers all these issues as shown below.

AWES

This pan-European form is silent on which body of substantive law applies to the agreement. It refers construction disputes to an expert agreed by the parties and

[60] Charles R. Cushing, The Ship Acquisition Process, New York, 2011, p. 142.
[61] www.vedderprice.com

contemplates resort to a standby appointment if the parties fail to agree to a specific person for a particular dispute. Disputes not resolved by the Technical Expert may be referred to a three-member Arbitration Tribunal. Arbitration would be final. [62]

JCon

Traditionally used in other East Asia countries as well as Japan, this form calls for application of the substantive law of the place of building. Disputes would be arbitrated under the rules of the Japan Commercial Arbitration Association. A three-member tribunal would deliver a final award. There is no separate provision for technical or expedited arbitration in the contract form itself.[63]

MARAD Form

This form originated with the Maritime Subsidy Board of the U.S. Department of Transportation Maritime Administration ("MARAD") to standardize construction contracts for vessels built with Construction-Differential Subsidy ("CDS"). The form incorporated many contract provisions then current in U.S shipbuilding. Even though CDS programs are moribund, many of the form contract provisions, with modifications, survive in the forms used by U.S shipbuilders. Most of the successor contracts contain provisions for expedited technical arbitration. [64]

BIMCO's Newbuildcon

This recently offered form provides for the default election of English governing law if parties do not enter another choice, Clause 41. Dispute Resolution, Clause 42, provides for final resolution as follows:

1. Class and regulatory issues – by class or the Regulatory Body. Cl. 42(a) (explanatory notes state that class decision does not mean local class surveyor or representative in yard).
2. If the dispute is not appropriate for the foregoing process, then either reference to a single, independent, third-party expert or to arbitration in selected venue. Cl. 42(b).

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[62] Charles R. Cushing, The Ship Acquisition Process, New York, 2011, p. 142.
[63] Ibid.
[64] www.vedderprice.com

3. "Either party may at any time and from time to time" call for mediation, following commencement of arbitration proceedings. Cl. 42(b). If the other party rejects mediation, the requesting party may cite that refusal to the arbitrators, who may award costs in the arbitration taking such refusal into account.

Overall, the mediation process seems vulnerable to delays and imprecision in timing.

CMAC New building (Shanghai Form)

The Shanghai Form is the only form of shipbuilding contract produced by a body of commercial arbitrators. This form calls for a contract to be "governed by and interpreted in accordance with the Laws of the People's Republic of China or the laws of other state agreed by the two parties." Article XXVI of the Shanghai Form outlines steps in dispute resolutions, some of which do not appear to be crisply delineated.[65]

In order to ensure the legal issues in shipbuilding are satisfactorily settled, it is important to select the most suitable contract form and when drafting the contract to select the appropriate governing law and the location and seat of arbitration. Any contractual provisions not mention in the contract forms could be included in the agreement. [66]

In the acquisition of a ship under a shipbuilding contract providing for the payment of the instalments at particular stages of construction, property passes to the buyer in each of the completed stages upon payment for each stage.

Although title in these parts passes to the buyer, risk remains with the builder. Risk passes to the buyer only when construction is completed, upon delivery and acceptance of the completed ship.

When delay in completing construction is caused by unavoidable circumstances faced by the builder, the doctrine of frustration applies and therefore, the buyer may not claim against the builder for issues caused by the delay even if the ship is destroyed in the course of construction by no fault of the Builder. The Builder is protected against delays beyond his control by the force majeure clause in the contract.

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[65] www.vedderprice.com
[66] Ibid.

Since the construction of a ship requires an extensive amount of time, to guard against issues arising from cost escalation during construction, a contract price adjustment clause or a price fluctuation clause needs to be included in the contract.

If such a clause is not included, to cover his loss due to the price increase, the builder may get the buyer to agree to the extra price by threatening to discontinue the contract if he does not agree to pay the extra price. Such an agreement would be unenforceable for lack of consideration or for economic duress.

The delivery and acceptance of the constructed ship is contained in the protocol for delivery and acceptance contained in the shipbuilding contract which may be in the form of any one of a number of shipbuilding contract standard forms in circulation, such as the AWES form, the Jcon form, the MARAD form, etc. These forms vary in their approach to delivery and acceptance, stating variously that title passes on physical delivery, at a time agree by the parties, upon registration, upon execution of the bill of sale, etc. Whichever of the standard forms is used, a comprehensive dispute resolution clause should also be drawn up since none of the standard contract forms covers all the issues.

Chapter 4

Issues on Rights and Obligations under Shipbuilding Contracts

Just as in any contract for the sale of goods, the rights and obligations of the buyer and the seller (shipbuilder) are set out in a shipbuilding contract. The obligations generally pertain to matters such as price, specifications, delivery and payment and in the event of an issue arising from the default of one party to adhere to its obligations, certain rights and remedies are available to the other party. This Chapter sets out the rights and obligations of the parties to a shipbuilding contract, the default or failure of a party to perform his contractual obligations and, in such a case, the rights and remedies available to the injured party. Financial and legal issues and the means available for resolving disputes are also addressed.

4.1 Basic Rights and Obligations of the Parties

The relationship between the buyer and the builder is governed by the terms of contract provided for in the Standard Form Contract. The basic obligation of the builder is agreed to build, as agreed, a ship for a fixed price made to specification, to perform trials and to deliver on time.[1]

So, no responsibility can rest upon a shipbuilder if he fulfills his obligation and builds in accordance with the design and specification given to him by the buyer. He must however, always warrant that the materials he uses are fit for the purpose

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[1] Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, p. 435.

required and must carry out the work to the general standard of skill and safety expected of a shipbuilder.[2]

In other words the shipbuilder is a person on whose skill or judgment the purchaser relies so there is an assumed obligation that the builder gives an implied undertaking as to fitness for a particular purpose within the meaning of Section 14(l) of Sale of Goods Act 1979.

The principle is that when the buyer asks a builder to build him a ship, he, the buyer, is entitled to rely on the builder's skill and judgment in supervising the construction.

The process of supervision begins at the construction stage and is therefore, the builder's duty to arrange. Hull, machinery and equipment of UK registered sea-going ships measuring not less than 500 gross tons, or even smaller vessels where the DoT has made an appropriate order, must comply with stringent standards. The detailed provisions are contained in Regulations made under the Merchant Shipping Acts. The Regulations run into hundreds of pages and are often amended to take into account international developments. The main Regulations in use now give effect to the International Convention for Safety of Life at Sea 1974/78, as amended, and include the following: Merchant Shipping (Passenger Ship Construction and Survey) Regulations 1984; the Merchant Shipping (Navigational Equipment) Regulations 1984; the Merchant Shipping (Radio Installations) Regulations 1980, the Merchant Shipping (Radio Installations Survey) Regulations 1981, the Merchant Shipping (Fire Protection) Regulations 1980, the Merchant Shipping (Cargo Ship Safety Equipment Survey) Regulations 1981. There are also special rules for fishing vessels.[3]

Certain aspects of maritime conventions, such as the International Convention for Safety of Life at Sea 1974, the International Convention for the Prevention of Pollution from Ships 1973/78, Load Lines Convention 1966, Tonnage Convention 1969 and The International Convention for the Prevention of Collisions at Sea 1972 laws and rules relate directly to the design and structure of a vessel which is impossible to be altered after a vessel is built. [4]

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2 Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, p. 435.

3 Otto Charles Giles, N. J. J. Gaskell, Charles Debattista and Richard J. Swatton, Chorley & Giles Shipping Law, Pitman Publishing, 8th Edition, 1987, p. 85.

4 Simon Curtis, The Law of Shipbuilding Contracts, Taylor & Francis Group Press, 2002, p. 12

Other duties and obligations of the builder are contained in the Cargo Ship Construction and Survey Regulations which provide for such matters as structural strength; watertight bulkheads and doors; boilers and steering gear; fuel specification and installations; control, monitoring and alarm systems; electrical installations for lighting systems and emergency power; means of escape; survey. On completion there is a full survey, as a result of which the DoT issues a Cargo Ship Construction Certificate. The builder's duty is also to arrange for intermediate, periodic and annual surveys. This ensures that the ship is kept up to standard by regular checks.[5]

In view of the fact that the construction regulations need to be observed while the ship is being built, it can be assumed that a failure of the builder to do so would be a breach of his obligations under the contract and would in turn give rise to issues between the Buyer and Builder.

Furthermore, until registration, shipbuilders are liable in case of damage to persons or property caused by ships in the course of construction.[6]

They also owe a duty of safety to their workmen and employees under the Shipbuilding and Ship-Repairing Regulations 1960 and that any contravention will lay them open to criminal prosecution.[7]

In the case of *Dixon Kerly v. Robinson,*[8] a new design of yacht was built by the plaintiff in the action. During the negotiations the builder/ seller wrote to the buyers enclosing drawings and specifications of class. He wrote again later confirming that the vessel was built generally in accordance with marine specifications. The buyers argued that they were entitled to off-set damages for breach of express terms of the contract and implied terms that the vessel should be seaworthy and reasonably fit for sailing at sea and/or for cross Channel trips.

It was held that the builder's obligations were to build generally according to the drawings. The defendant buyers had failed to establish any of the allegedly implied terms. [9]

The Court's decision in this case confirms that no responsibility can rest upon a builder if the fulfills his obligation by building according to the design.

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5 Otto Charles Giles, N. J. J. Gaskell, Charles Debattista and Richard J. Swatton, Chorley & Giles Shipping Law, Pitman Publishing, 8th Edition, 1987, p. 85.

6 Ibid, p. 55.

7 Ibid.

8 (1965) 2 Lloyd's rep 404.

9 Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, p. 435.

The buyer's principal obligation is to pay the instalments on the purchase price when they fall due.

Thus, in the event of the buyer defaulting on payments or failing to take delivery of the ship in time, the builder has the right to sue for the outstanding amount by exercising his possessory lien and retain or sell the ship.

However, the buyer also has a right to cancel the contract in the event of a protracted delay or a major non-compliance with specification.[10]

With regard to shipbuilding contracts in Myanmar, as seen in the attached copies of shipbuilding contracts (Annex 3 and 4), shipbuilding contracts in Myanmar follow international practice with regard to payment terms.[11]

The schedule of payment contained in the contracts specifies that payment for each instalment must be made on completion of certain stages of construction.

Also, the contracts mention that "it is the responsibility of the Buyer to pay out the specified payment according to the specified form or type". The responsibility of the builder is mentioned as, "to build it according to the specified design". These obligations of the buyer and builder, respectively, are similar to those in international shipbuilding contracts.

With regard to the rights of a buyer, in order to ensure that the agreed materials are used and a minimum level of workmanship is maintained throughout construction, buyers have the right to require that their representatives be allowed to inspect construction at all times.

In *The Amoco Cadiz*, the VLCC *Amoco* Cadiz[12] went aground as a result of steering failure and caused enormous pollution damage on the French coast. The French claimants sued the shipbuilders (A) and ship-owners (B) for over US $2 billion. Five (7 cm long) studs had fractured under pressure. Their design called for a thickness of half an inch as opposed to the three-quarters of an inch necessary to withstand possible pressure. Some of the studs were also below specification. The detailed design specifications were made by A who were reputable shipbuilders. The design was checked for B by the American Bureau of Shipping. B also had a naval architect to check general compliance with specifications. The general design was

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[10] Hill Dickinson, Shipbuilding Contracts, Shipbuilding at a Glance' Guide 5, p. 15.
[11] Christopher Hill, Maritime Law, Lloyd's of London Press, 5th Edition, 1998, p. 81.
[12] [1984] 2 Lloyd's Rep. 304.

common for such ships at that date. B later tried to cut costs by delaying essential maintenance work on the steering.

It was held that (US District Court) A and B were respectively liable for failure to meet specification and to carry out proper maintenance. A and B were also liable for the faulty design and construction. B was also liable for operating the ship without a secondary steering system.

The *Amoco Cadiz* decision in the USA is a significant extension of liability so far as owners are concerned. For it suggests that an owner may still be liable for defects even if he employs one of the recognized classification societies and a reputable shipbuilder who uses 'state of the art' technology.[13]

From this case it can be seen that the buyer, it not only responsible for issues arising from his failure to operate the ship in accordance with set rules and regulations, but he also may be held responsible for damages caused by a defect in the construction of a ship, when he has employed his right of inspection of the ship being built but, his inspectors failed to detect the defect, or when his own naval architect fails to detect the fault in the design.

In short, the builder's obligations are to build the ship in accordance with design and specifications given to him by the buyer for a fixed price, to perform trials, to deliver on time, to warrant that the materials he uses are suitable for the purpose required and to carry out the work to the general standard of skill and safety expected of a shipbuilder, to bear the liability for damages caused by the ship during construction and to ensure the safety of his workmen and employees. The builder has the right to retain or sell the ship in the event that the buyer defaults or fails to take delivery of the ship in time. The buyer has the right to cancel the contract if there is a protracted delay or major non-compliance with specifications by the builder. The buyer is obliged to make payment of instalments on the price in time.

4.2 Defaults by the Buyer

The defaults by the buyer pertain mainly to his defaults in payment of the instalments under the contract and his failure to take delivery of the ship when it is tendered for delivery by the builder.

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[13] [1984] 2 Lloyd's Rep. 304.

The meaning of a buyer's default is defined in the SAJ form of the contract first, as failure in payment of first, second and third instalments within three days after the due date, second, failure in payment of the fourth instalment, concurrently with delivery of the vessel by the builder to the buyer; and third, failure by the buyer to take delivery of the vessel when the vessel is duly tendered for delivery by the builder.[14]

Other defaults for which a Buyer may commonly be liable are delays in approving plans and drawings and in delivering Buyer's supplies to the Builder for incorporation into the ship. In both cases the normal consequence of such a default is that there will be a permitted delay to the date of delivery for which the Builder will not be responsible.[15]

4.2.1 Protection of Builder from Buyer's Default

The ship is the builder's ultimate security. Therefore, in the event of a default by the buyer, the builder is entitled to contractual protection under the Sale of Goods Act, 1979.

With regard to contractual protection, the builder is normally protected by a third party guarantee, by which the guarantor guarantees irrevocably and unconditionally due and faithful performance by the buyer of all its liabilities and responsibilities under the contract and any subsequent amendment change or modification made including, but not limited to, due and prompt payment of the contract price by the buyer (cl XXI of the SAJ form).[16]

The contract also provides what is to happen in the event of buyer's default in payment (cl XI.3 of the SAJ form). The effect of default will automatically postpone the delivery date for a period of continuance of such default by the buyer. But, if any default continues for more than 15 days, the builder has the option to rescind the contract by giving notice of such effect to the buyer. Upon receipt of such notice, the contract shall become null and void and any of the buyer's supplies shall become the

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[14] Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, p. 437.

[15] Hill Dickinson, Shipbuilding Contracts, Shipbuilding at a Glance' Guide 5, pp. 14-15.

[16] Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, p. 437.

property of the builder. In addition, the builder shall be entitled to retain any instalments paid by the buyer to the builder on account.[17]

If the builder is unpaid, his statutory rights are determined in Sections 38 to 43 of the Sale of Goods Act 1979.

4.2.2 Builder's Remedies

The buyer's principal obligation is to pay the instalments of the purchase price as and when the same fall due and any unjustified delay in payment of these instalments will normally have the following consequences:

(i) the Builder would become entitled to charge interest for late payment;

(ii) the Builder would be entitled to suspend work if the delay in payment extends beyond a specified number of days; and

(iii) the Builder would become entitled to cancel the contract for an extended delay.

(iv) the Builder would become entitled to recoup unpaid instalments from the guarantor.

(v) the Builder would have the right to exercise his possessory lien;

(vi) the Builder would have the right to resell as a result , of exercising his lien;

(vi) the Builder would have the right to resell as a result of exercising a common law right of stoppage in transit

(viii) the Builder would have the right to sue for the price[18]

(a) Builder's Remedy to Suspend or Cancel Contract

With regard to (ii) and (iii) above, under the contract, default in payment will not excuse the builder from his obligation to continue construction, but it will postpone delivery, unless the default by the buyer constitutes repudiation of the contract (for example, the buyer evinces an intention not to fulfil his obligation under the contract), whereupon the builder has an option whether or not to accept the same as terminating the parties' primary obligations.[19]

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[17] Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, p. 437.

[18] Hill Dickinson, Shipbuilding Contracts, Shipbuilding at a Glance' Guide 5, pp. 14-15

[19] Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, p. 437.

The question that has recently arisen in the context of repudiation of contract is whether mere failure to perform a contractual obligation by the aggrieved party is capable of constituting acceptance of anticipatory repudiation. In other words, whether there can be acceptance of repudiation by conduct.[20]

The House of Lords has clarified this issue in *The Santa Clara*[21], (a sale of goods case), in which it was held that: on repudiation of a contract the aggrieved party could elect whether to accept the repudiation or affirm the contract; an acceptance required no particular form provided the aggrieved party clearly and unequivocally demonstrated to the repudiating party that he was treating the contract as determined, and notification, either personally or by an agent, was not necessary where the fact of election came to the attention of the repudiating party. Failure to perform was capable of signifying to a repudiating party, an election by the aggrieved party to treat the contract as at an end.

However, in the context of a shipbuilding contract, the builder has to be cautious before deciding to discontinue performance on the basis of the buyer's default, because he may be in repudiation of the contract himself, if the contract contains a specific warranty by the builder that the construction of the vessel shall proceed continually until delivery, unless there is a suspension clause for non-payment. The mere commencement of proceedings by the one party to determine his rights does not necessarily mean that he repudiates the performance of the contract in any event. He may submit to perform it, if the court comes to the conclusion that he is bound to perform it, and it cannot be taken to be an absolute repudiation. Wrongful exercise of the contractual right of rescission is not to be treated as a repudiatory breach provided there is no manifestation by conduct of an ulterior intention to abandon the contract.[22]

This case makes it clear that even though the buyer defaults on payments the builder must continue with construction of the ship under his contractual obligations. He may cease construction only if the contract contains a suspension clause for non-payment.

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[20] Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, p. 437.

[21] Vitol SA v Norelf Ltd [1996] AC 800 (HL).

[22] Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, p. 438.

If the buyer repudiates the contract, the builder may choose to continue with construction or accept the repudiation as terminating both their obligations under the contract and stop construction activities. Such conduct is sufficient to show the buyer that he is terminating the contract. No official notification of termination needs to be given to the buyer.

(b) Builder's Remedy to Recoup Unpaid Instalments

With regard to the Builder's remedy of recouping unpaid instalments from the guarantor, (iv) above, it should be noted that the contract contains a cancellation clause when there is default by the buyer. This is normally linked to a contractual guarantee given to the builder to recoup unpaid instalments from the guarantor, if the cancellation clause became operative. The issue as to the builder's accrued rights of payment prior to cancellation of the contract came before the House of Lords in the following case:[23]

In the case of *Hyundai Heavy Industries Co v Papadopoulos*,[24] the plaintiffs (builders) entered into a contract with buyers for the construction of a vessel. A contract clause gave the builders the right to rescind the contract if an instalment remained unpaid for more than three days after the due date and the builder notified the buyer that, if the default continued for seven days after the builder's notification, he would exercise such a right by giving notice of rescission. Such a right had been agreed to be in addition to any other rights, powers and remedies that the builder might have under the contract, and or at law, at equity or otherwise. The defendants had guaranteed to make payment on all sums due under the contract in default of the buyers. The contract did not state what was to happen with regard to rights, which had accrued prior to cancellation. When the buyers defaulted in payment, the builders rescinded the contract and claimed under the guarantee. The defendants contended that, by exercising the right to rescind before the writ was issued against them, liability to pay instalments which had become due and had not been paid ceased and was replaced by a claim, not in debt, but in damages. The cancellation deprived the builder of his accrued right to payment of the unpaid instalment either from the buyer or the guarantor.

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[23] Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, p. 439.

[24] (1980) 2 Lloyd's Rep 1.

The House of Lords (and the courts below) held unanimously that it was difficult to believe that commercial men could have intended that the guarantors were to be released from their liability for payments already due and in default just because the plaintiff, builders, had used his remedy of cancelling the shipbuilding contract for the future.

The default of the buyer was the very event that gave rise to the liability of the defendants under the letter of guarantee. The defendants' promise that they would forthwith make the payment in default showed that the obligation arose immediately upon default by the buyer and was not merely an obligation to pay any deficiency brought about in the final accounting. The defendants could not be released from their liability for payments already due, just because the plaintiffs exercised their rights of cancellation under the contract. It was also held that the cancellation by the Plaintiff's did not release the buyer of his liability under the second instalment. The builder could rely on his remedies at common law.[25]

The decision in this case was justified by the fact that the defendants (the guarantor) had guaranteed to make payment on all sums due under the contract in default of the buyers. So, their obligation to pay arose immediately upon default by the buyer. The builder's subsequent cancellation of the contract did not release them from this obligation nor the buyer from his obligation to pay the second instalment of the contract price which had become due before the cancellation.

In the case of *Stocznia v Latvian Shipping Co*[26], contracts were agreed for the construction and purchase of six refrigerated vessels.

Under the contracts, payment was structured into four instalments so that: (a) 5% of the contract price was to be paid seven banking days after receipt by the buyer of the bank guarantee to be furnished by the builder; (b) 20% was to be paid within five banking days after the yard had given notice to the buyer of keel laying;(c) 25% was to be paid within five banking days after the builder had given notice of the successful launching of the vessel; (d) the balance of the contract price (50%) was to be paid upon delivery of the vessel. The first instalment was paid for all six vessels. Thereafter, the owners began to have financial problems because of downturn in the reefer market and proposed to the builder a 20% reduction in the price for each vessel,

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[25] Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, p. 440.

[26] (1998) 1 Llyod's Rep 609.

together with a five year deferral of payment of the new reduced price and delayed delivery. Otherwise, the buyers informed the builder during these negotiations, that although they wanted the vessels, taking delivery of them would be impossible. However, the proposal would have disrupted the yard's cash flow and work programme.

The yard did not treat that as repudiation, but completed the keel laying of the first vessel, and served notice claiming the second instalment. The money was not paid and the yard gave notice that they were treating the contract as repudiated. The same thing happened with the second vessel. The keel was laid, the second instalment was demanded, but remained unpaid and the builder served notice treating the contract as being repudiated. Later, he brought an action claiming instalments of the remaining four vessels on the basis of repudiation by the buyer.[27]

The issues for the House of Lords were these: (1) whether the yard acquired accrued rights to the second instalments of the contract price in respect of vessels 3–6; (2) the impact of the yard electing for contractual rescission on the yard's right to recover the second instalments of the price;(3) whether the yard's action to recover the second instalments of the price must fail because, if recovered, they would have to be immediately repayable on the ground of total failure of consideration.[28]

With regard to the first and second issues, it was held that by exercising the right of rescission under the contract, the yard did not express an intention that they abandoned their right at common law to recover as a debt unpaid instalments of the price, which had already accrued due, and it made no difference whether there was a sale of the ships or not. This right at common law was not inconsistent with the contract terms, and the yard was entitled to recover accrued and unpaid instalments.

As regards the third issue, the fact that the contract had been brought to an end before the property in the vessel or any part of it had passed to the buyers, did not prevent the yard from asserting that there had been no total failure of consideration in respect of an instalment of the price which had been paid before the contract was terminated. To put it differently, an instalment which had then accrued due could not, if paid, be recoverable on that ground.[29]

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[27] Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, p. 441.

[28] Ibid.

[29] Ibid.

It was further held that the yard did not have any rights under the contract with respect to non-accrued instalments. The yard was entitled to make an alternative claim in damage for anticipatory repudiation in relation to contracts for vessels 1 and 2.

In the case of *Hyundai v. Pournaras*[30], the plaintiffs were shipbuilders who had entered into contracts of shipbuilding and sale with two buyers who were Liberian registered companies. Having little knowledge of the integrity or financial capabilities of the buyers, the plaintiff's yard accepted guarantee from Pirraeus-based guarantors the subject-matter as an inducement for them to conclude the contracts. There were four building contracts and, under the terms of the contracts, payment was to be in five instalments .The buyers in fact defaulted on the first instalment and failed totally to pay the second instalment. Exactly a year after the contracts were entered into, the plaintiff builders registered the contracts as at an end and sought to recover under the guarantees.[31]

The trial judge, (confirmed later by the Court of Appeal) found for the plaintiffs. The guarantees had to be construed upon commercial lines. The fact that the contracts were at an end did not free the buyers from their duty to pay what was already due and thus did not absolve the guarantors' several liabilities for the accrued but unpaid instalments. It was right to hold the guarantors' to their guarantees and wrong that they should be granted any form of equitable relief from having to pay over huge sums, although ultimate performance of the contracts had failed.

On facts very similar to the *Hyundai v. Papadopoulos*[32], case the House of Lords emphasized their full endorsement of the judicial reasoning given in the earlier Hyundai case. It would be difficult to believe that commercial men would have intended that the guarantor was to be released from his liability for payments already due and in default just because the plaintiff builder had made use of his contractual remedy to cancel the contract for the future. The buyer's default indeed had the effect of triggering the defendant guarantors' liability and made the letters of guarantee operative at that moment and not at some final day of account-reckoning in the distant future.[33]

The case also confirms that the builder may bring the contract to an end in the event that the buyer defaults on payment and that in such a situation, the builder is

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30 (1978) 2 Lloyd's Rep 502.
31 Christopher Hill, Maritime Law, Lloyd's of London Press, 5th Edition, 1998, p. 83.
32 (1980) 2 Lloyd's Rep 1.
33 Christopher Hill, Maritime Law, Lloyd's of London Press, 5th Edition, 1998, p. 83.

entitled to the remedy of claiming the accrued but unpaid instalments from the guarantor immediately after the default occurs.

(c) Builder's Remedy of Resale

In the event that the buyer defaults in payment, the builder is entitled to the remedy of reselling the ship.

With regard to this remedy (vi) above, by cl XI. 4 of the SAJ form, the builder would be entitled to sell the ship either uncompleted or to sell it after completion. In either case, he shall apply the proceeds to cover, first, his expenses incurred attending such sale and, then, to payment of all unpaid contractual instalments, plus interest. In either case, any surplus of the proceeds shall be paid to the buyer, provided that such payment does not exceed the total amount of the instalments paid by him and the costs of the buyer's supplies, if any on the other hand, if the proceeds are not sufficient to pay the expenses and costs of the builder, the buyer shall promptly pay the deficiency to the builder Sub-clause 4.c provides for reimbursement of the builder with respect to his cost of construction up to the incomplete state of the vessel, less the instalments already retained and any compensation to the builder for loss of profit due to the rescission of the contract.[34]

Finally, in respect of the Buyer's default to take delivery of the vessel when the vessel is duly tendered for delivery by the Builder, the builder is entitled to sue the buyer for failure to accept. The Builder also, of course has the usual remedies available where the buyer has been in breach of a warranty.

Refusal to take delivery was well illustrated in *The Diana Prosperity*[35], below, although it should be emphasized that in that case the contractual relationship was one of eventual owner and charterer in disagreement over a newly constructed vessel and not one between the builder of the vessel and its purchaser. The point illustrated, however, is relevant to either relationship.[36]

In 1972 the third party defendant, Sanko, planned to build 50 tankers to be delivered from 1975. They raised money by granting time-charters. In August 1972 the first defendant chartered from Sanko a vessel to be built by Osaka Shipbuilding Co. The first defendant sub-chartered it in October 1973 to the plaintiff with delivery

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[34] Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, p. 438.
[35] (1976) 2 Lloyd's Rep. 60, CA.
[36] Christopher Hill, Maritime Law, Lloyd's of London Press, 5th Edition, 1998, p. 83.

date 1 April 1976. The vessel was to be of 87600 tons. However , Osaka Shipbuilding could not handle the building of ships over 45,000 tons, for which reason the ship was built at the Oshima Yard of which Osaka Shipbuilding owned 50 per cent of the shares. The ship *Diana Prosperity* was due to be delivered on April 1976, but the plaintiff rejected the tender on the ground that the ship they had chartered had been built by a different company (Oshima) from that stated in the charter party (Osaka). A summons was taken out to determine the issue.

It was held that (in the lower court) that the plaintiff and the first defendant were not entitled to refuse to take delivery merely because the ship was built by a different shipyard to that stated in the charter. An appeal was lodged against the decision and the Court of Appeal decided that the stipulation to build in 'Osaka Yard' was not a strict condition precedent which had to be exactly fulfilled. The charterer and sub-charterer were getting in substance the vessel they bargained for and for the purpose for which they wanted it. The fact that it was not built in the stipulated yard was incidental and a mere misdescription of nomenclature.[37]

Another dispute which was very similar on the facts to The *Diana Prosperity* but yet which differed in certain respects was *Sanko Steamship Co Ltd v. Kano Trading Ltd* the Diana Prosperity rule was applied, but the actual wording of the agreement differed from that in the earlier case. In the later case charterers sought to escape from their contractual obligations because of the collapse of the tanker market due to the oil crisis of 1974.

In the case of *Sanko Steamship Co Ltd v. Kano Trading Ltd*[38], the charterers, faced with possibly disastrous results on a falling market, sought to rescind the charter they had entered into on the ground that the vessel tendered did not correspond to the contractual description. The charter agreement contained, *inter alia*, two clauses: one in the preamble to the agreement stating that it is agreed between the owners of the Good New building Company known as Osaka Shipbuilding Co Ltd to build a tank vessel hull No 352 described as per Clause 24 (which provided for the description of the vessel on a special annexed form) and the other, much later on in the document, stating this charterparty as for a motor tank vessel to be built at Osaka Shipbuilding Co Ltd hull no 352, described as about 87,600 tons summer deadweight. The vessel

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[37] Christopher Hill, Maritime Law, Lloyd's of London Press, 5th Edition, 1998, p. 83.
[38] (1978) 1 Lloyd's Rep 156, CA.

was in fact not built at Osaka but at a yard at Oshima, a half-subsidiary company of Osaka, about 30 miles away. The owners, Sanko sought US$ 11,000,000 damages. The Commercial Court of the Queen's Bench Division found for the owners and this was confirmed on appeal. The Court of Appeal said that the words in the preamble to the agreement were words of identification only and could not on any reasonable construction of the wording be said to impose a contractual obligation on the owners to provide a vessel actually construed in the Osaka yard. Nor could it of itself put a different commercial construction on the agreement and intentions of the parties therein expressed as to allow the charterers to treat the delivery of a ship built in another shipyard as a breach of the agreement. It was mere conjecture as to what would have been the commercial judgment of the charterers before they had entered into a bonding agreement if they had known that such a vessel would eventually be constructed in the Oshima yard.[39]

The Court's finding in the above two cases confirms that the builder has the right to sue a buyer who fails to take delivery of a ship which has been built to contract specifications and for the purpose for which it is required, regardless of which shipyard it was built in. Accordingly, the court decided that the buyer had no right to refuse to take delivery of the ship because the shipyard had been changed.

4.3 Defaults by the Builder

The Builder's principal obligation is to build a ship for a fixed price, made to specifications, to perform trials and to deliver on time.

Default by the Builder will be dealt with to a large extent in the liquidated damages provision of the contract which will specify the payments that will be due in the event of any failure by the Builder to deliver the ship when due or a failure by it to comply with the warranted specification. Such payments will normally be effected by a reduction to the instalment of the purchase price payable on delivery. [40]

A breach by the builder however, does not necessarily mean that the breach amounts to repudiation of the contract by him. It will depend on the magnitude of the defect and its consequences. [41]

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[39] Christopher Hill, Maritime Law, Lloyd's of London Press, 5th Edition, 1998, p. 84.
[40] Ibid.
[41] Ibid.

In the case of *McDougall v Aeromarine*[42] , it was held that, if the defect was one that could be remedied within a time, which would still permit the builder to deliver within the period of delivery permitted by the contract, the buyer would not be entitled to treat the contract as repudiated. The buyer could recover damages for delay in the delivery.

The SAJ form provides for liquidated damages. However, if the delay has been caused partly by the buyer, he will not be entitled to recover damages. The principle that no liquidated damages for delay can be claimed, if completion was in part delayed by conduct of the employer, would be applicable.

4.3.1 Protection of the Buyer from Builder's Default

The buyer is protected from loss originating from a default of the builder by provisions in the standard shipbuilding agreement forms. These are supported by statutory rights and rights at common law. For instance, the SAJ form provides for liquidated damages, while the Sale of Goods Act 1979 allows an examination of the goods by the buyer before he is obliged to signify acceptance (Section 34). Having accepted, however, the right of rejection is lost and the buyer's only redress if he discovers a fault in the build after acceptance is by way of damages.[43]

Delivery usually takes place at the place agreed for the acceptance trials. The builder must notify the buyer of the ship's readiness for trials. (In as much as this specialized arrangement is covered by the Sale of Goods Act 1979, it is by Section 29) It is up to the buyer to arrange to take delivery in the place. The costs are for his account.

The time of delivery is usually stated and indeed usually constitutes a material or essential term of the contract. If it is not mentioned at all or if the delivery date, if mentioned is not considered an essential term with the 'force' of a condition, then the builder must deliver within a reasonable time. What is reasonable in any given circumstances is relative to those circumstances only. Every set of facts may be slightly different and must be construed on its own merits.[44]

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[42] (1958) 2 Lloyd's Rep 345.

[43] Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, p. 445.

[44] Christopher Hill, Maritime Law, Lloyd's of London Press, 5th Edition, 1998, p. 85.

The most important source of law in the sale of goods in this area in England is the Sale of Goods Act 1979. The 1979 Act has since been supplemented by the Sale and Supply of Goods Act 1994.

4.3.2 Buyer's Remedies

As already mentioned, the builder's principal obligation is to build a ship for a fixed price, made to specifications, to perform trials and to deliver on time.

Testing whether the performance and condition of the ship are satisfactory and in accordance with the contract is carried out during the trials, which are an important part of the contract terms. Trials give the opportunity to the buyer to verify whether the builder has complied with the specification.[45]

In this context, the builder's guarantee that certain characteristics and condition of the ship will be met on delivery is very important. Failure by the builder to meet the minimum guaranteed characteristics might cause delay in delivery resulting in loss of profit to both parties. The guarantee is usually linked to a provision for liquidated damages in favour of the buyer as a pre-estimate of the buyer's loss, which will preclude him from relying on common law damages. A neat example of this is provided by the House of Lords' decision in *Cellulose Acetate*[46] case. A contract for delivery and erection of an acetone recovery plant provided that, if the work were not completed within a certain time, the contractors should pay to the purchasers by way of penalty a sum of 20 £ for every week that they were in default. The contractors were 30 weeks late in completing the work. In an action by them against the purchasers for the contract price, the defendants counterclaimed 5,850 £, the actual loss they had suffered through the delay. It was held that the sum of 20 £ a week was the full amount that the plaintiffs agreed to pay towards compensation to the defendants for delay in completing, and that they were liable for 600 £ and no more.

In the case of *The Seta Maru*[47], three ships were built by China shipbuilding and were delivered to the buyer. After the expiration of the guarantee period, two of them appeared defective in the erection welding, as a result of which they suffered a

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[45] Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, p. 443.

[46] Cellulose Acetate Silk Co v Widnes Foundry Ltd [1933] AC 20 (HL).

[47] China Shipbuilding Corp v Nippon Yusen Kabukishi Kaisha and Galaxy Shipping PTE Ltd (The Seta Maru) [2000] 1 Lloyd's Rep 367.

casualty, involving ingress of water through the shell plating. Following the discovery of these defects, the third vessel was inspected within the guarantee period and the same defects were discovered and corrected by the builder. With regard to the defects in the other two ships the buyer commenced arbitration and claimed from the builder the costs of repairs and depreciation in value as damages.[48]

On a preliminary issue before the arbitrators, it was decided that in view of non-compliance by the builder of the notification procedures for acceptance of the vessels, the terms of the contract did not exempt the builder from liability for the breaches. The builder appealed to the court, which was asked to construe the clause excepting the builder's liability after the guarantee period.[49]

Thomas J held that a comprehensive provision is existed forming part of what was a complete code for dealing with defects discovered after the delivery of the vessel. The terms of contract provided a guarantee for defects discovered after the buyer accepted delivery of the vessel and excluded liability for defects, arising from breaches of the express terms beyond the liability expressly assumed under the guarantee terms. The sending by the builder of a telex notification of readiness was not a condition precedent to the operation of the clause. He submitted the case to the arbitrators.[50]

The buyer's loss here arose mainly from an unfavourable drafting in the contract. In the light of this risk that defects may, and frequently do, appear after the 12 months guarantee, the buyer could perhaps protect his position by seeking to obtain a longer guarantee period. If this cannot be achieved at the stage of negotiations, particularly if the builder is in a stronger bargaining position, the buyer ought to inspect the vessel during the guarantee period for any defects that might exist in the vessel, which could be remedied by the builder under the guarantee, as was done in this case with respect to the third ship.[51]

In this case, the builder failed to comply with the notification procedures required for acceptance of the vessels by the buyer as laid down in the contract. Hence, the arbitrators held that because of this non-compliance, the builder was not

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48 Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, p. 444.
49 Ibid.
50 Ibid, p. 445.
51 Ibid.

entitled to the benefit of the clause exempting him from liability for breach beyond the guarantee period.

However, the learned judge disagreed with this finding. The judge held that the fact of the builder's failure to comply with the notification procedures did not effect the terms of the builders guarantee (exemption clause) which excluded him from liability for any defects discovered after the expiration of the guarantee period. The builder was held to be not liable.

This case emphasizes the importance of the terms of a builder's guarantee. When accepted by the buyer, these terms are valid and cannot be changed.

4.3.3 Buyer's Right of Rejection upon Builder's Default

In law a shipbuilding contract is in essence an agreement for the sale by description of future goods between the yard as seller and the prospective owner as buyer and a ship conversion contract one for the provision of work and labour by the yard to the customer's ship.

Where goods have been sold commercially, for example, sold by description, not to a consumer, a breach of description, or quality, or fitness for purpose will not be treated as a breach of a condition but as a breach of a warranty, if the breach is so slight that it would be unreasonable for the buyer to reject the goods (ship).

In this regard, it should be noted that, in view of extreme consequences that might result, even if the breach is slight, it was thought appropriate to amend the 1979 Act. By Section 4 of the Sale of Supply of Goods Act (SSGA) 1994, Section (15) A was inserted in the 1979 Act. It relates to modification of remedies for breach of a condition in non-consumer contracts and provides;

(1) where in the case of a contract of sale (a) the buyer would, apart from this sub-section, have the right to reject goods by reason of a breach on the part of the seller of a term implied by Sections 13, 14 and 15 but (b) the breach is so slight that it would be unreasonable for him to reject them, then, if the buyer does not deal as consumer, the breach is not to be treated as a breach of condition but be treated as a breach of warranty. This section applies unless a contrary intention appears in, or is implied from, the contract; the burden of showing that a breach fell within the above sub-section is upon the seller. The test is that of a

reasonable purchaser. The new Act came into force on 3 January 1995, so only contracts entered after that date are affected by it.[52]

The buyer's remedies for the builder's failure to comply with the specifications are:

- The buyer is entitled to reject the ship or reject and demand remedial work, and/or damages, or claim specific performance.
- The buyer's right to reject the vessel may arise in two situations.

First, he may reject the ship after the trials, pointing out that there are various defects which need to be remedied.

Second, he may reject the ship where there has been a serious breach of the contract by the builder. In such a situation, the buyer may accept the conduct of the seller/builder as repudiation and sue in damages.[53]

A breach by the builder however, does not necessarily mean that the breach amounts to repudiation of the contract by him. It will depend on the magnitude of the defect and its consequences.[54]

In the case of *McDougall v Aeromarine*[55] **,** it was held that, if the defect was one that could be remedied within a time, which would still permit the builder to deliver within the period of delivery permitted by the contract, the buyer would not be entitled to treat the contract as repudiated. The buyer could recover damages for delay in the delivery. The SAJ form provides for liquidated damages. However, if the delay has been caused partly by the buyer, he will not be entitled to recover damages. The principle that no liquidated damages for delay can be claimed, if completion was in part delayed by conduct of the employer, would be applicable.

- The buyer is entitled to a full refund of the pre-delivery instalment he has made (together with interest thereon since the date of payment) under the Refund Guarantee or sues for the contract price.

In the case of *Admiralty Commissioners v. Cox and King*[56], the defendants contracted to build a mortar boat for the Admiralty. The engine was to be supplied by the Admiralty but the speed was guaranteed by Cox and King. The engines had to

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[52] Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, p. 424.
[53] Ibid, p. 445.
[54] Ibid.
[55] (1958) 2 Lloyd's Rep 345.
[56] (1927) 27 LIL Rep 223.

retain the necessary brake horse power and consequently failed to reach the guaranteed speed. The Admiralty put in a claim for the return of the contract price. Their claim was allowed.

Their Lordships commented that the respective rights of the parties depend upon the inference which is to be drawn from the correspondence which forms the basis of the contract between them.

It can be inferred that the decision of the Court was based on the fact that by failing to supply the specified horse power for the engine, the builder had defaulted in complying with the specifications. Therefore, the buyer was granted the remedy of recovering the price they had paid.

- The buyer has the right to cancel the contract in the event of a major non-compliance with specifications.

In the case of *Me Dougall v. Aeromarine of Emsworth*[57], a contract for the construction of a racing motor yacht provided (a) that best endeavours be made to complete construction by 1 May 1957, but no delivery date was guaranteed. (b) that the buyer was to be notified in writing that the yacht was ready for acceptance trails; (c) that the builder should be deemed to have contracted in accordance with specification requirements and the buyer's satisfaction was to be indicated in writing after the trial run ; (d) the yacht was to become the absolute property of the buyer including all machinery , fittings and equipment earmarked for construction upon the first instalment of the purchase price being paid; and (e) any defective workmanship or defect in materials if discovered by the buyer within six months after the acceptance trials should either be made good by the builders or, alternatively, the builders should pay to the buyer a sum equal to reasonable costs of repair. Every warranty, condition or guarantee implied by statute or common law was expressly excluded from the contract.

The plaintiff buyer during construction decided to have the top-sides varnished and the defendant builder accordingly advised splining of the seams. The plaintiff agreed to meet the additional cost involved. The yacht's launching and acceptance trials were postpone until 3 June 1957. Subsequently, gaps were observed in the seams and the builder is requested to rectify them. The builder assured the buyer that the seams would close as naturally and on 5 June requested the buyer to accept. The

[57] (1958) 2 Llyod's Rep 343.

buyer refused and the builder by way of compromise agreed to spline the seams without charge. Later still, further modifications were requested by the buyer and eventually on 17 July his survey discovered defects in the bolts and seams. Again the builder offered to rectify the defect provided that the buyer would accept the yacht thereafter. The buyer refused, demanding the return of his money and disclaiming the property in the yacht. Offers and counter offers were rejected.

It was held that when the vessel was tendered for delivery on 3 June and 17 July she was neither seaworthy, nor of merchantable quality, nor fit for the use intended. The buyer was not unreasonable in refusing in July to be satisfied with the construction. No evidence was given that by November 1956 the construction of the vessel had started or that any equipment had been purchased by the builder for the construction. That even though the property had passed as the construction of the vessel proceeded and equipment was purchased the buyer was entitled to refuse to accept an incomplete vessel and, if he had so done any right of property in the incomplete vessel was revested in the builder. That the builder was under a duty to deliver within a reasonable time after 1 May 1957 and that it was a condition of the contract and not a mere warranty that the builder was to render the yacht for delivery in accordance with the contract. The builder was in breach of a condition and this entitled the buyer to rescind the contract. That the meaning of the word 'performance' in the terms of the contract included the standard of workmanship and materials and the compliance of the yacht with the specifications. Judgment was given for the plaintiff buyer.[58]

It can be seen that the builder in the cited case, had defaulted on a number of points. Apart from defaulting on delivery, he had failed to comply with the specifications as contained in the contract on three counts. Thus the ship was held to be not seaworthy nor of merchantable quality. The buyer had not accepted the ship and he therefore, had the right to the remedy of rescinding the contract.

- In the event that the builder fails to deliver, the buyer may either (a) seek specific performance or (b) sue for non-delivery.

In the case of *Gabela v. Vergottis*[59], a contract was made on 23 June 1925, but subsequently the buyer refused to be bound by the contract and claimed backs his deposit and damages.

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[58] Christopher Hill, Maritime Law, Lloyd's of London Press, 5th Edition, 1998, p. 85.
[59] (1926) 26 LIL Rep 238.

It was held that the sellers were to blame because they had delayed for an unreasonable period of time in carrying out the terms of the contract and that the deposit should be returned.

This case shows that when the delivery date is a term of the contract and not only has it passed but also a reasonable time thereafter has lapsed , the buyer is entitled to rescind the contract and recover the money he has paid as a remedy for the builder's default in not keeping to the contracted delivery date.

- Another remedy that the Buyer may seek is a right to take possession of the unfinished ship and to remove the same from the Builder's yard for completion elsewhere.

In these circumstances the Builder will have an obligation to co-operate with the removal and any assignments of sub-contracts required by the Buyer and the Buyer will continue to have a claim against the Builder for any additional costs incurred or losses suffered as a result of any delay and increased costs caused by the requirement to finish the ship elsewhere. The Refund Guarantee should also cover these claims.[60]

4.4 Financial and Legal Issues

Numerous issues requiring financial and or legal settlement may occur during the process of shipbuilding. These may be as varied as issues concerning title and management of risk claims for liquidated damages and arranging for comprehensive insurance coverage for both parties, etc. Also, it might happen that one of the parties needs to protect himself from financial loss brought about by the default or insolvency of the other. Such protection is usually achieved by the provision of refund guarantees, contractual guarantees or builder's guarantees, since ordinary insurance cover may not always protect them to get indemnified for their loss.

(a) Contractual Guarantee

The contract contains a cancellation clause when there is default by the buyer. This is normally linked to a contractual guarantee given to the builder to recoup unpaid instalments from the guarantor, if the cancellation clause became operative.[61]

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[60] Hill Dickinson, Shipbuilding Contracts, Shipbuilding at a Glance' Guide 5, p. 15.

[61] Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, p. 439.

A Contractual guarantee is provided by the buyer and is issued by a third party guarantor in the form of a letter of guarantee, by which they guarantee to make payment on all sums due under the contract in default of the buyers.[62]

The contractual guarantee is given to the Builder to enable him to recoup unpaid instalments from the guarantor in the event of a default in payment by the Buyer.[63]

(b) Refund Guarantee

A refund guarantee is provided by the shipbuilder and is issued by a commercial bank or an insurance company acceptable to both the shipbuilder and the buyer. The purpose of the refund guarantee is to enable the buyer to claim back the instalment payments made by him to the shipbuilder in the event of the ship-yard's liquidation and the shipbuilder's insolvency.[64]

However, the buyer also has a right to cancel the contract in the event of a protracted delay or a major non-compliance with specifications. In these circumstances the buyer would normally become entitled to a full refund of the pre-delivery instalments he has made (together with interest thereon since the date of payment under the Refund Guarantee. Given this right, a shipbuilding Contract may often contain a provision requiring the buyer to elect whether to continue with the contract and take delivery of the ship or exercise its right of cancellation once the right of cancellation has arisen.[65]

Sir Simon Tuckey said in *Kookmin Bank v Rainy Sky SA*;[66] that the "Insolvency of the shipbuilder was the situation for which the security of an advance payment bond was most likely to be needed. The importance attached in these contracts for the obligation to refund in the event of insolvency can be seen from the fact that they required the refund to be made immediately."

In *Kookmin Bank v Rainy Sky SA*,[67] seven identical shipbuilding contracts were made with the claimants who were either the buyers or assignee of a claimant's

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62 Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, p. 439.
63 Hill Dickinson, Shipbuilding Contracts, Shipping at a Glance' Guide 5, p. 15.
64 Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, p. 444.
65 Hill Dickinson, Shipbuilding Contracts, Shipbuilding at a Glance' Guide 5, p. 15.
66 [2010] EWCA Civ 582 [30].
67 Kookmin Bank v Rainy Sky SA [2010] EWCA Civ 582 [30].

rights under the contract. Under the terms of each shipbuilding contract, the shipbuilder would be obliged to make a full refund of all the advance payments made in the event of the shipbuilder's insolvency. There could also be a full refund due to rejection of the vessel or termination, cancellation and rescission of the contract by the buyer in accordance with the terms of the contract. The advance payment guarantee issued by the Korean bank was a mirror reflection of all these terms and expressions in the shipbuilding contract other than the issue of insolvency. The bank refused to make a refund of the advance payments due to insolvency of the shipbuilder.

The Court of Appeal unanimously allowed the appeal of the bank. Sir Tuckey said as follows:

> "There may be any number of reasons why the Builder was unable or unwilling to provide bank cover in the event of its insolvency and why the buyer was prepared to take the risk." [68]

The decision by the court of appeal that concurred with the Bank's refusal to refund the advance payments was justified in light of the fact, that a refund guarantee is normally issued to enable the shipowner to get a refund of his advance payments in the event of the shipbuilder's insolvency, or in the event that the shipowner himself cancels the contract due to a major default of the shipbuilder.

In this case, the refund was required because of the insolvency of the shipbuilder. But, the refund guarantee had been issued to cover only the issue of cancellation of the contract by the owner and not the issue of insolvency of the shipbuilder. Thus, the court found that the bank had a valid reason for refusing to refund the money.

Moreover, it was decided more than a century ago by the Privy Council in Commercial *Bank of Tasmania v Jones*[69] that once the principal debtor was substituted by a third party after the date of the guarantee and with the agreement of the beneficiary, the guarantor was not bound to make payment to the beneficiary. There was a complete novation of the debt in this case which operated as a complete release of the original debtor.

Thus, the original debtor (shipbuilder) is released from his responsibility to refund to the owner the instalment payments made by the owner, when he has been

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[68] Kookmin Bank v Rainy Sky SA [2010] EWCA Civ 582 [30].
[69] [1893] AC 313.

substituted by a third party after the date of the refund guarantee, with the agreement of the owner.

Meritz Fire & Marine Insurance Co Ltd v Jan de Nul NV,[70] in this 2011 Court of Appeal's decision, the main issue before the Court was whether the provider of the refund guarantee was liable to make payment of all the advance payments to the beneficiary despite a novation of the shipbuilding contracts for the construction of dredgers from the original company H to another company C. The original shipyard company H was dissolved and, under Korean law, all the rights and obligations under the shipbuilding contracts were transferred to company C. The Court of Appeal decided that the guarantors were liable as the owners' demand for refund was made in conformity with the contract and that the shipbuilder had failed to make the refund.
Lord Justice Longmore provided the rationale for his judgment:

"It might be that in the light of the novation, H was not liable to make the refund, but C was and it might be that in the light of the fact that H had been dissolved, it could not make the refund. But neither of those facts mattered... Questions whether the debtor was liable under the underlying contract were irrelevant to guarantees such as those in issue where payment was to be made against documents, whether certificates or awards or other documents."[71]

This case shows that under a shipbuilding contract with regard to a refund guarantee, if the original debtor (shipbuilder) is substituted by another debtor after the date of the guarantee with the agreement of the beneficiary (owner), the guarantor is not bound to make payment to the beneficiary. There is a novation of the debt and the debtor is not liable under the contract.

But in this case, it can be seen that the court found the guarantor liable to pay because payment was required according to the terms of guarantee, regardless of the terms contained in the original contract.

Thus, in such cases, it is the terms of the guarantee which decide if the debtor is liable to pay or not.

(c) Builder's Guarantee

A builder's guarantee usually provides that, following delivery, and acceptance of the ship by the Buyer, if defects in material and/or workmanship are

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[70] [2011] 2 Lloyd's Rep. 379.
[71] *Meritz Fire & Marine Insurance Co Ltd v Jan de Nul NV* , [2011] 2 Lloyd's Rep. 379, at paras 26 and 27.

discovered within 12 or 24 months, the builder shall remedy the defects at his own expense. But, if defects have not been discovered within the guarantee period, there is no remedy for the buyer, particularly when the builder has successfully exempted his liability for any other defects whatsoever. [72]

As explained above, these three types of guarantees, when put into operation, provide an important means of settling financial issues caused by default of the parties that may occur during the process of shipbuilding.

4.5 Shipbuilder's Liability for Defective Products

Shipbuilders, as with other manufactures of goods, are liable for any defects found in the ships they have constructed.

English law is now well settled with regard to liability of a manufacturer in tort for physical injury, on the one hand, and on the other for pure economic loss to remote owners of chattels.[73]

The House of Lords, in *Murphy v Brentwood DC*[74] reached its decision that remote purchasers of a defective building had no claim in tort for economic loss against the Council, which had approved the plans of a building, by analogy with the position of a manufacturer who had no liability in tort for a defective chattel.

Lord Bridge stated the principle quite clearly as follows:

If a manufacturer negligently puts into circulation a chattel containing a latent defect which renders it dangerous to persons or property, the manufacturer, on the well known principles established by *Donoghue v Stevenson* [1932] AC 562, will be liable in tort for injury to persons or damage to property which the chattel causes. But, if a manufacturer produces and sells a chattel which is merely defective in quality, even to the extent that it is valueless for the purpose for which it is intended, the manufacturer's liability at common law arises only under and, by reference to the terms of any contract to which he is a party in relation to the chattel, the common law does not impose on him any liability in tort to persons to whom he owes no duty in contract but who, having acquired the chattel, suffer economic loss because the chattel is defective in quality. If a dangerous defect in a chattel is discovered before it causes

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[72] Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, p. 444.
[73] Ibid, p. 451.
[74] [1991] 1 AC 398.

any personal injury or damage to property, because the danger is now known and the chattel cannot safely be used unless the defect is repaired, the defect becomes merely a defect in quality. The chattel is either capable of repair at economic cost, or it is worthless and must be scrapped. In either case, the loss sustained by the owner or hirer of the chattel is purely economic. It is recoverable against any party who owes the loser a relevant contractual duty. But, it is not recoverable in tort in the absence of a special relationship of proximity imposing on the tortfeasor a duty of care to safeguard the plaintiff from economic loss. There is no such special relationship between the manufacturer of a chattel and a remote owner or hirer.[75]

While there is a duty of care owed by a manufacturer or builder to third parties for a reasonably foreseeable physical injury to a person or property caused by a dangerous defect in a chattel, with regard to economic loss, as a general rule, there is no such duty on the part of the manufacturer, unless there is a special relationship of proximity imposing a duty on the manufacturer to safeguard a third party from economic loss. A special relationship of proximity would exist, if the defendant had voluntarily assumed a responsibility to act in the matter by involving himself in the claimant's affairs, or by choosing to speak. For example, in the celebrated case of *Hedley Byrne*,[76] the defendant chose to speak and was taken to have assumed responsibility from that fact alone. Reliance by the claimant on the defendant's act or advice would be relevant in determining whether there was an assumption of responsibility and causation.[77]

As to how these principles apply in the context of shipbuilding, there is no doubt that, if a dangerously defective part, such as an engine, of a new building (whether it be a ship or an aircraft), which causes explosion resulting in death, will give rise to tortious liability. If the ship, or aircraft, is not new, however, it will be a matter of evidence whether the dangerous equipment, which caused an accident, was due to bad maintenance or developed from a latent defect.[78]

Insofar as economic loss is concerned, the application of the principles is best explained by a recent Court of Appeal decision in the case described below.

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[75] Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, p. 451.

[76] Hedley Byrne & Co v Heller & Partners [1963] 1 Lloyd's Rep 485 (HL).

[77] Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, p.452.

[78] Ibid.

In the case of *The Rebecca Elaine*[79], the appellants owned a number of fishing vessels and contracted with boat builders to build what became *The Rebecca Elaine*. Because of their good experience with Gardner engines, the appellants decided that the new vessel should be fitted with such an engine. The manufacturers did not sell engines direct and there was a chain of contracts between them and the boat builders. The new vessel was commissioned and her new Gardner engine was accompanied by a one year manufacturer's warranty against defects in workmanship or material and a manual which stated that its 'pistons would run for 20,000 hours or more without dismantling and before replacement is necessary'.

Later, the manufacturers of the engine sold their business to the respondents. The sale was of the entire undertaking, property and assets of the business as a going concern together with the respondents' right to represent that they were carrying on the business in continuation of, and in succession to, the manufacturers. Two years after the building of the boat, the respondents began to receive reports that pistons in Gardner engines had broken or cracked before they should have done. The pistons concerned had all been manufactured by an independent contractor, Wellworthy Ltd. These pistons, as the judge found, were liable to fail after only about one third of the running time stated in the manual. On the judge's unchallenged finding, the respondents were on notice of a very real problem affecting the Wellworthy pistons which they realised might cause major engine failure, or worse. However, despite this knowledge the respondents chose not to warn those with engines fitted with such pistons, which the judge held they could have done by contacting known customers, authorised distributors and service agents, or by advertising in trade journals.

When *The Rebecca Elaine* was four miles south west of the Needles, the pistons failed prematurely and the engine seized. Fortunately, the vessel was towed to safety and the only loss was the damage to the engine itself, which cost £25,972 to repair, and loss of earnings, which the judge assessed at £ 21,344.

The appellants' case could not be made in contract since the warranty had expired and any claim against the boatbuilders would have been successfully met by an exclusion clause in the boatbuilding contract and/or the fact that the appellants did not rely on the boatbuilders' skill or judgment in the supply of the engine. The case against the respondents was put solely in negligence. The essence of the appellants'

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[79] [1999] 2 Lloyd's Rep 1.

complaint was that, knowing there was a problem with the Wellworthy pistons, the respondents did nothing to warn operators/owners to carry out inspections more frequently, so as to confine any damage to the pistons themselves and avoid major engine failure of the kind suffered by *The Rebecca Elaine.*

The judge found that, if the respondents had been under a duty to warn, they were in breach of duty and that this was the cause of the appellants' loss because, if they had been given a warning, they would have acted on it. After a full review of the authorities the judge concluded that for the appellants to establish a duty of care to avoid economic loss they had to show a special relationship of proximity which involved both an assumption of responsibility by the respondents and reliance by the appellants.

He held that the respondents had not assumed any responsibility to safeguard the appellants from economic loss, although they might have assumed responsibility to avoid physical damage to persons or property.

The Court of Appeal approved the first instance decision and considered further whether in such cases there is duty to warn.

Tuckey LJ said:[80]

Under English law I do not think that there is any basis for putting failure to warn of a known danger into a category of its own … My review of the authorities shows that the general rule is that a manufacturer in the position of the respondents owes no duty of care to avoid economic loss. Exceptionally, he may be under such a duty if he assumes responsibility to his customers in a situation, which is akin to contract. That duty may include a duty to warn, but it would be much more difficult to infer in the case of mere silence than in the case of misrepresentation. Reliance by the customer is relevant to whether there has been an assumption of responsibility and essential as to causation.[81]

Thus, with regard to a shipbuilder's responsibility in respect of a defective part, if the buyer had relied on the shipbuilder's skill and judgment in the supply of the part, the builder would be liable for any loss caused by the defective part, within the warranty period. That is, there has to be a special relationship of proximity involving an assumption of responsibility by the builder and reliance by the buyer. In

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[80] [1999] 2 Lloyd's Rep 1.

[81] Aleka Mandaraka-Sheppard, Modern Admiralty Law: with Risk Management Aspects, 1st Edition, Cavendish Publishing, 2001, pp. 453-454.

the above case, there was no such relationship since the buyer had selected the part himself without relying on the builder's skill and judgment to do so. Therefore, the builder was not responsible for the loss caused by the defective part.

4.6 Resolution of Shipbuilding Disputes

During the course of commercial activities involving ships many legal questions will arise. They will be handled by the parties and their advisers as part of their day to day business, without any wish to get involved in litigation. Inevitably, disputes will occur. Most will be settled more or less amicably, taking into account commercial considerations such as the need to continue existing trading arrangements and the desire to avoid the expense and delay involved in going to court.

In the event that an amicable resolution is not achieve the resolution of shipbuilding disputes is in the main settled by arbitration. A large number of shipyard contract disputes are decided by LMAA (London Maritime Arbitrators Association) arbitration under English law. There are a modest number of commercial ships under construction in the United States and a modest number of shipbuilding contracts worldwide which provide for arbitration under U.S governing law in the United States.[82]

As the concentration of shipbuilding projects has moved through the developed and then developing world over time, China, as a relative newcomer to this industry, has seen the greatest number of vessels built in the past decade. However, it is believed that not many non-Chinese owners, have agreed to arbitrate shipyard disputes under Chinese law under the rules of the China Maritime Arbitration Commission ("CMAC") or agreed to use the new form of shipbuilding contract known as the Shanghai Form, produced by the CMAC. [83]

Also in the picture is Singapore. Singapore is able to claim both institutional integrity and a neutral's disinterest in arbitration outcomes, as well as experience in the heritage of English law. Recent reports that LMAA arbitrators are registering as arbitrators in Singapore bear witness to the threat that Singapore represents to London's recent domination in shipbuilding arbitration.[84]

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[82] www.vedderprice.com
[83] Ibid.
[84] Ibid.

Finally, consideration should be given to the involvement of other persons who are not parties to the shipbuilding contract but who are critical to the process. Equity and debt investors often have their own views on what is acceptable by way of dispute resolution. In more and more cases, these views differ from what is otherwise acceptable to a shipyard or a traditional shipowner.[85]

In connection with the previously mentioned fact that a large number of shipyard contract disputes are decided by the LMAA (London Maritime Arbitrators Association) arbitration under English Law, it should be noted that if any dispute should arise in connection with the interpretation and fulfillment of a contract, it shall be decided by arbitration in the city of the place of arbitration to be inserted in the contract. If this line is not filled in, it is understood that arbitration will take place in London in accordance with English Law and shall be referred to a single Arbitrator to be appointed by the parties. If the parties cannot agree upon the appointment of the single Arbitrator, the dispute shall be settled by three Arbitrators, each party appointing one Arbitrator, the third being appointed by the London Maritime Arbitrator's Association in London.[86]

If either of the appointed Arbitrators refuses or is incapable of acting, the party who appointed him, shall appoint a new Arbitrator in his place.

If one of the parties fails to appoint an Arbitrator- either originally or by way of substitution for two weeks after the other party having appointed his Arbitrator has sent the party making default notice by mail, cable or telex to make the appointment, the party appointing the third Arbitrator shall, after application from the party having appointed his Arbitrator, also appoint an Arbitrator on behalf of the party making default.[87]

Most disputes regarding shipbuilding are amicably settled between the parties but, where this is not achieved, the dispute is taken to arbitration. Worldwide, a large number of shipbuilding contracts provide for the LMAA (London Maritime Arbitrators Association) to decide such disputes under English Law and a few shipbuilding contracts provide for arbitration under US Law. Other than Chinese owners, very few owners use the services of the China Maritime Arbitration

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85 www.vedderprice.com

86 Ibid.

87 Otto Charles Giles, N. J. J. Gaskell, Charles Debattista and Richard J. Swatton, Chorley & Giles Shipping Law, Pitman Publishing, 8th Edition, 1987, p. 620.

Commission (CMAC). However, Singapore, which follows English Law is increasingly being used as the seat of arbitration.

An award given by an Arbitration Court is final and binding and may be enforced by the Court. The contract is subject to the law of the country agreed as the place of arbitration. This is included in the arbitration clause of the contract. Where there is such a clause, judges will not permit a party to go to court until the arbitrator has heard the dispute and may order a stay or dismissal of the court proceedings. In such a situation the court has the power to order that any ship arrested as security, be retained.

4.7 Obligations of Subcontractors

Subcontractors play an important role in the shipbuilding process, whether as suppliers of material and equipment or as executors of the work. As such, their duties and obligations need to be clearly defined in the sub-contract.

The term "subcontractor" is defined from the contractual relationships existing between three persons or legal entities. A subcontractor is entrusted by the main contractor shipbuilder with the performance of the contractual obligations of the latter resulting from a contract with a third person buyer.[88]

Under the Norwegian Shipbuilding form, the "subcontractor" is defined as "any person (not being a servant or employee of the builder) or company, with whom the builder has entered into a contract for the design, construction, manufacture or supply of any item, equipment, work or service for the vessel. In other words, under Norwegian shipbuilding contracts, subcontractors include not only persons who undertake part of the construction work but also suppliers who provide particular items and vessel's equipments.[89]

In the shipbuilding and acquisition process, subcontracting is of great importance. Since building a ship is almost like building a small factory on sea. Apparently, it is impossible for a shipyard to complete the whole project solely on their own. Usually, they have to rely on some special technological knowledge of other undertakings. It is therefore common that shipyards enter into contracts to subcontract part of the design and construction work to some other manufactures.

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[88] http:// www.shipbuilding.com.en/en/en news
[89] http://www.globalchimaks.com/files

Normally, while subcontracting, the builders are still fully responsible to the buyer for any subcontract work as if done by themselves.[90]

Although in most of the cases, it will be the builder, rather than the buyer who will seek the liberty to subcontract the construction work of the vessel, the buyer may always wish to monitor the delegated task instead of giving the builder full freedom to do so. The reason is that the buyer wants to be secured that the vessel will be in the full compliance with the quality standards of what he purchased. Therefore, where sub-contractors are to be used, the buyer will normally wish to ensure that:

(a) it has a right of approval over the subcontractors who are to be used

(b) the terms of each sub-contract will be made available to it and the Builder will be under an obligation to ensure that the same are consistent with the terms of the Shipbuilding Contract;

(c) the benefit of the sub-contracts can be assigned to the Buyer following any termination of the Shipbuilding Contract should the Buyer wish to take over and complete the ship;

(d) any subcontractors are prevented from claiming any lien over the ship or retention of title over any goods supplied to the Builder; and

(e) the Builder obtains guarantees and warranties from the sub-contractors which allow the Builder to give the required warranties to the Buyer.[91]

As almost 90 per cent of shipbuilding contracts are governed by English law and in England, there is no separate legal act specifically regulating the subcontracting like in France, it is important to clarify the nature of the contract, whether the most important contractual obligation of a subcontractor is the supply of goods or execution of work. Hence, the kind of contract law which will apply can be defined. This is, the sale of goods law or other contract law.[92]

If a subcontract concerns the construction and the sale of machinery and equipment for the vessel such as a propeller, in England, this kind of contract is categorized as a contract for the sale of goods like the main shipbuilding contract. This contract is unquestionably a contract for the sale of future goods. The most significant source of law governing contracts for the sale of goods in England is the

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[90] http://www.globalchimaks.com/files

[91] Hill Dickinson, Shipbuilding Contracts, Shipping at a Glance' Guide 5, p. 6.

[92] http://www.globalchimaks.com/files

Sale of Goods Act 1979(The "1979 Act"). The Act has since been supplemented by the Sale and Supply of Goods Act 1994 (The "1994 Act").[93]

Another important source of law relating to the subcontracting area is The Supply of Goods and Services Act 1982.[94]

Shipbuilders commonly employ the services of a subcontractor with special technical knowledge for some parts of the ship construction. However, the builder remains responsible to the buyer for any subcontract work who has the right of approval of the subcontractor that is used and of the terms of the sub-contract.

The basic obligation of the builder under a shipbuilding contract is to build a ship for a fixed price, made to specifications, to perform trials and to deliver on time. The builder also has the duty to bear the liability, until registration, in case of damage to persons or property caused by the ship in the cause of construction.

The buyer's principal obligation is to pay the instalments on the purchase price when they fall due, and to take delivery of the ship on time.

The failure of the buyer to perform these obligations, gives the builder the right to sue for the outstanding amount or to retain or sell the ship. However, the buyer, on his part also, has the right to reject he ship in the event that the builder delays delivery beyond a reasonable time or fails to comply, in a major way, with the specifications.

Furthermore, the builder's duty is to arrange for periodic surveys of the ship to check that the ship is built up to standards. On the other hand, the buyer has the right to inspect the ship during construction to check compliance with specifications.

The default of either the buyer or builder to comply with their above said contractual obligations would lead to issues arising between them which could be resolved by the remedies provided in the contract. Financial issues caused by default of the parties are resolved by third party guarantees. In brief, a contractual guarantees issued by a third party and provided by the buyer, guarantees to make payment to the builder of all sums due under the contract in default of the buyer. A refund guarantee issued by a commercial bank or an insurance company enables the buyer to claim back the instalment payments made by him to the builder in the event of the ship-yards liquidation and the shipbuilder's insolvency. A builder's guarantee enables the

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93 http://www.globalchimaks.com/files
94 Ibid.

builder to bear the cost of his contractual obligation to repair any defects found within 12 or 24 months following delivery of the ship.

Issues that arise during the course of a shipbuilding contract are usually settled amicably according to the remedies contained in the contract. Otherwise, they are resolved by arbitration. The award given by the arbitration court is final and binding. The place of arbitration is agreed between the parties and is included in the arbitration clause of the contract.

Conclusion

Shipbuilding contracts concern the sale of future goods. Therefore, it is clear the property in a ship cannot pass at the time the contract is made. Property may pass to the buyer under an agreement to sell a completed ship only when construction is completed. However, the usual practice is for the parties to contract for the sale from time to time of a ship in its various stages of construction and property in each of these completed stages passes to the buyer when he pays the instalment for each stage. However, property in any materials, bought by the builder, intended for the build, remains with the builder until they are appropriated to the vessel, i.e, fixed on the ship, unless there is a specific agreement between the parties that such materials shall pass to the buyer. It can be inferred that the reason why property in such material does not pass to the buyer is because, not being fixed on the ship, it does not form part of the ship which the buyer has contracted for.

With regard to the passing of property to the buyer at various stages of construction upon payment of the instalment, this can be understood as a means of protecting both the buyer and builder from issues arising from any possible insolvency of either of them before completion of the build. If the buyer becomes insolvent during the construction of the ship, the builder will have in the meantime received the instalment payments from the buyer for the part of the ship already constructed and so, his expenses for that portion would be to a certain extent, covered. On the part of the buyer, he will have received property in the parts of the ship covered by his instalments and thus, his right to receipt of the contracted ship would be covered in proportion to his payments.

One other point that has been noticed is that compared with the sale by instalments of an apartment under construction in Myanmar, where the builder retains the whole property until the final instalment is paid, in a sale by instalments of a ship, title in each of the completed stages passes to the buyer on payment of each instalment.

Furthermore, according to the contract, the buyer has the right to inspect the ship under construction. Therefore, it is clear that if the buyer’s inspectors fail to identify a certain defect during their inspection and this defect is the cause of some future damage, the buyer is held responsible for such damage.

The principle of good faith which is the principle of fair and open dealing is not enforced in common law systems. The court has even held that good faith during the negotiation stage of a contract is incompatible, in other words, inconsistent with the position of the parties. An inference may be made that this is because each party has the right to promote his own interest, provided no misrepresentation is made. In fact, in order to advance his interest, a party may even threaten to actually withdraw from the negotiations in the hope that such an action will push the other party to reopen negotiations on terms more acceptable to him. Such an action is clearly not an action performed in good faith.

The intellectual property aspects of ship design contained in the Vessel Hull Act differs in many aspects from traditional notions of copyright registration and protection. One difference is that although the Vessel Hull Design Protection Act provides copyright protection for "Vessel Hulls", Chapter 13 positions copyright protection in opposition to patent protection, as copyright design protection is not available for hulls, which have been patented. No protection is available under the Act for drawings of hull designs, which have yet to be built.

With regard to the making of a shipbuilding contract, since shipbuilding contracts cover a wide range of commercial, technical, legal and financial matters, in making a shipbuilding contract, other than the builder and buyer, shipbuilding contractors, equipment and material suppliers, legal advisers, vessel design engineers, banks and other guarantors also have to be involved. The different fields of work to be undertaken by each of them in the shipbuilding process have to be negotiated and coordinated prior to the making of the contract. So, it is very likely that, at this pre-contract stage, certain issues may arise between the various entities. Such issues are settled by negotiation. The results of the negotiation are contained in a formal Agreement which forms an important part of the shipbuilding contract which is then executed, and the process of shipbuilding begins.

The buyers principal obligation under the contract is to pay the instalments on the purchase price when they fall due and the main obligation of the builder is to build a ship for a fixed price, made to specifications, to perform trials and to deliver on time. Thus, it is clear that issues will arise if either party defaults on their obligations.

Given the extensive period required for the construction of the ship, some elements of the contract may require adjustment according to prevailing circumstances, causing various issues. Some of these may relate to financial matters like an increase of

the contracted prices for labour and equipment caused by market fluctuations. An issue like this can be resolved by the inclusion in the contract of a "price escalation" or "contract price adjustment" clause which sets out the liabilities of both parties in such a case. If there is no such clause and the builder tries to increase the price in the course of building, putting pressure on the buyer by threatening to stop the build unless the buyer agrees to pay the extra cost, a major issue arises which, failing an amicable settlement, would force the buyer to sue for lack of consideration or economic duress.

The buyer's financial situation may change, causing him to default on his payments. Financial issues faced by the builder by default of the buyer to pay the agreed instalments on the contract price, are usually settled by a contractual guarantee given to the builder by the buyer to recoup unpaid instalments from the guarantor. Other means are also available to the builder for resolving this issue, such as charging interest for late payment, suspending work, cancelling the contract, suing for the price, taking possession of the ship and reselling it.

A possible issue that the buyer could face is to recoup the instalments he has paid in the event of the liquidation of the ship-yard on the insolvency of the builder before completion of the build. A refund guarantee provided by the builder to enable the buyer to recoup such payments, is the usual means of resolving this issues.

Furthermore, the failure of the builder to deliver the ship on the agreed date when the delay is caused by his fault will result in financial damages to be paid to the buyer. Issues resulting from negotiating these damages when delayed delivery occurs, are avoided by including a liquidated damages clause in the contract which specifies a certain sum per day of delay, payable by the builder. But the issue of delayed delivery caused by a default of the buyer, such as delays in approving plans and drawings and in delivering supplies to the builder for incorporating into the ship, will be resolved by permitting the builder to delay delivery by a period approximately equal to the period of delay caused by the buyer's default.

In respect of the buyer's default to take delivery of the vessel when the vessel is tendered for delivery, which causes issues for the builder, the builder is entitled to sue the buyer for failure to accept when on his part, he has complied with his contractual obligations and built the ship according to specifications and fit for the purpose for which it is required. Conversely, any loss incurred by the buyer from the default of the builder to comply with the contractual specifications is dealt with mainly through the liquidated damages clause of the contract which is linked to the builder's guarantee

issued in favour of the buyer. Since a pre-estimate of the buyers loss is contained in the clause the issue of negotiating and agreeing on common law damages is avoided.

In addition, the correct interpretation of the contractual terms (conditions, warranties and innominate terms) is essential. In this connection, the Sale of Goods Act, 1979 states that whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract, and that a stipulation may be a condition, though called a warranty in the contract. The breach of a condition entitles the injured party to terminate the contract and also claim damages, or to go on with the contract and claim damages only. The breach of a warranty does not entitle the innocent party to terminate the contract, but he can claim damages. The consequence of a breach of an innominate term depends on the seriousness of the breach. Therefore, when issues arise regarding breaches of these terms, they will be resolved according to the intention of the parties and the construction of the contract. Therefore, if the parties want the right to repudiate in the event of the beach of a condition, they should expressly set out in the contract the right to cancel in the event of such a breach. Other terms are the term of description and the term of merchantability. Since a shipbuilding contract is a contract for the construction of a ship by description, when an issue arises because the vessel does not conform with relevant terms in the description, the buyer is entitled to reject the ship since the Sale of Goods Act S.13 provides that where there is a contract for the sale of goods by description, there is an implied condition that the goods will correspond with the description. But if the breach is so slight that it would be unreasonable for the buyer to reject the ship, the breach will be treated not as a breach of a condition but as a breach of a warranty and the issue would be settled by the payment of damages to the buyer.

The implied term “merchantable quality” has been substituted by the term “satisfactory quality” in S.14 (2) of the SOGA 1979. The remedy for the breach of this term is similar to that of a breach of the term of description.

Regarding issues relating to title and risk in a ship under construction, because title in the constructed parts passes to the buyer as and when he pays the instalments, but the builder continues to be responsible for all loss and risk for the entire ship under construction in the ship-yard until delivery and acceptance of the completed ship, the issue of liability for such loss clearly rests with the builder, and is covered by insurance maintained by the builder as required in the contract. Also, to prevent issues arising from the buyer’s loss on any instalment amounts he has paid, the insurance cover needs

to be sufficient to cover instalments paid plus the value of any materials supplied by the buyer.

Finally, this research has shown that as mentioned above, the complexities of a ship building contract can lead to the emergence of a great many issues that have to be resolved by the parties. Resolution is usually by amicable settlement according to the contract provisions. However, when this is not achievable, issues are resolved by arbitration.

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Annex - 1

THE BILATERAL AGREEMENT ON THE DEPOSIT PAYMENT AND THE PURCHASE UPON APARTMENT

The promissory agreement (Preliminary Payment)

Date _____

Apartment Vendor

Name _____

N.R.C No. _____

Address _____

_____

_____

Apartment Vendee

Name _____

N.R.C No. _____

Address _____

_____

_____

(The contexts entitled the vendor and the vendee mentioned above must include their heirs, heiresses, heirs apparent, inheritors, those who have had power of attorney, those who have conducted as represented, those who have been entitled to retain the inheritance and to themselves.)

1. The above-mentioned or named vendor builds the apartment in the item-list mentioned below; sold, the said vendor and lessor builds it in person; in case it is finished building, it was declared that the said vendor and lessor has been entitled to be benfited in full and to transfer or hand over legally and sell it; it is not transferred or handed over and sold beforehand to the others; not mortgaged; not contributed; not exchanged; not leased; being clear of complex problems and ownership and the offer to sell it by means of the preliminary payment system at 450,00,000 Kyats of the present apartment value had been accepted and agreed by the above-mentioned vendee; to purchase it at that price or rate only.

P.T.O

2. The above-mentioned vendor and the vendee had accepted and agreed to conduct the payment and the acceptance of payment by means of the plan mentioned below.

The plan of Pyament & Acceptance of payment

(A) _____ Kyats have to be paid on (- -).

(B) _____ Kyats must be paid on the day on which the ground is started digging or excavating or pegging out; of the building.

(C) _____ Kyats must be paid on the day on which the third floor-pouring or moulding is accomplished; upon the building built.

(D) The last remaining amount of _____ Kyats must be paid; handing over the apartment and entrusting on the day on which (BCC) is issued that the building is accomplished from the Building Section (the Engineering Section) of Y.C.D.C; upon the accomplishment of the said building.

3. The above-mentioned vendor has followed the terms and conditions in the bilateral promissory agreement dated on (- -); made with the lessor and in ( ) months specified, it has been built in accordance with the standards, criteria and appearances of the apartment and accepted and agreed to hand over and entrust.

4. The above-mentioned vendee must pay for the apartment without fail, in accordance with the terms and conditions in the Paras-2 (A) (B) (C) (D) of this agreement; in case it is failed to pay, it has been known, understood, accepted and agreed that the deposit of the apartment paid in advance is to be forfeited.

5. Apart from the natural disasters and the force majeure; in case the said vendor fails to hand over and entrust, having finished building the sold apartment, the double payment of the apartment value obtained in advance must be compensated.

6. Regarding the apartment in the item-list mentioned below; sold by the vendor, it has been undertaken that it is clear of complex problems and ownership. In case any complex ownership or problem occurs, it must be solved or resolved with one's own expense until the said affair is OK. or in case any problem that cannot be solved or resolved occurs, it has been known, understood, accepted and agreed to compensate completely or as the lump sum again, together with the fair damages upon the payment of the apartment value paid by the vendee.

P.T.O

7. The above-named vendee is entitled to resell the apartment purchased by oneself; with the consent of both sides.

8. Both the vendor and the vendee have accepted and agreed to negotiate and conduct bilaterally, concerning the sold apartment, during the period ( ) built the building.

The sold item-list

No. ( ), _____ Street, _____ Ward, _____ Township, _____City / Town, Survey Ward No. ( ), Plot No. ( ), Area ( )acres, ( )sq-ft; 4-storeyed building of Hall Type (RC); 3rd floor (Slab RC-moulded roof); (' x ') as of the length and the widh, the apartment that is in conformity with the qualities of an apartment and all the interest and entitlements, including the water and the electricity.

Both sides read the above information, knew, uderstood, accepted and agreed, so it was signed in the presence of the witnesses and superiors included in the agreement; of one's won free will, and the aforesaid agreement was made.

_____ _____

(VENDOR) **(VENDEE)**

Witnesses

Name _____ Name _____

N.R.C No. _____ N.R.C No. _____

Address _____ Address _____

_____ _____

Annex - 2

THE BILATERAL PROMISSORY AGREEMENT ON THE 5-STOREYED "R.C.C" SOLE BUILDING CONSTRUCTING

Date: _____

The person who entrusts the business

Name _____

N.R.C No. _____

Address _____

The business-accepter

Name _____

N.R.C No. _____

Address _____

1. Both the person who entrusts the business and the business-accepter agreed and made the aforesaid agreement; to conduct the business of the 5-storeyed "R.C.C" building to be built newly at No. ( ), _____ Street, _____ _____ Ward, _____ City/Town, _____ District, _____ Region, on (- -).

2. **Category of Building**

R.C (5-storeys)

3. **Location of Building**

No. (617), Padauk Yeikthar Lane, Peinnegone Ward, Insein Town, Northern District, Yangon Region.

4. **The amount of enterprise to be conducted**

(1)	Ground Floor	1100. sq.ft
(2)	First Floor	1100. sq.ft
(3)	Second Floor	1100. sq.ft
(4)	Third Floor	1100. sq.ft
(5)	Fourth Floor	1100. sq.ft

5. **The information to be conducted by the person who entrusts the business and the business-accepter**

All included in the attached book

P.T.O

6. **The value of business**

According to the bilateral agreement, the value of business is (,00,000) Kyats; (Lakh Kyats).

7. **Payment System**

(1) The deposit on the day on which the said agreement is started making. (20.Lakh Kyats)

(2) (25%) of the value (UNFINISHED) on the day on which the ground is started digging or excavating. ( )

3. (20%) on the day on which the second floor is poured or moulded. ( )

4. (20%) on the day on which the fourth floor is poured or moulded. ( )

5. (15%) on the day on which the roof enterprise is conducted. ( )

6. (15%) on the day on which the painting enterprise is started.( )

7. (5%) on the day on which the building is accomplished and entrusted. ( )

Remark: On the day on which the deposit of (25%) is started paying, it is to be deducted. As of the business-levels, it is to be paid, in (7)days, commencing from the day on which the payment is requested or asked for.

Both sides agreed with the above terms and conditions, and were satisfied with it and accepted, so it was signed; of one's own free will, in the presence of the following witnesses.

The business accepter	**The person who entrusts the business**
_____	_____
_____	_____
_____	_____

WITNESSES

1. Signature _____	2. Signature _____
Name _____	Name _____
1. Signature _____	2. Signature _____
Name _____	Name _____

Annex - 3

THE BILATERAL PROMISSORY AGREEMENT ON THE ENTRUSTMENT OF BUSINESS

Date: _____

1. Making the promissory agreement on the entrustment and the acceptance of business; for the building enterprise of (tugboat; push-boat type; attached), measuring (97' x 22' x 7') as of the length, width and depth; to be built at the Dagon Port Dockyard of South Dagon Internal Waterway Transportation.

2. **Category of Enterprise**

The painting and the iron-body-building enterprise, the iron-welding-enterprise and the attached vessel-launching enterprise must be conducted.

3. **The Business-entrusted Value**

700,00,000 Kyats (700-Lakh Kyats)

The Payment System

(A) **First Installment Deposit**

50% (350-Lakh Kyats)

(B) **Second Installment**

(Body flat iron-installing enterprise)

(200 Lakh Kyats)

(C) **Third Installment**

(Merlain-stand/shelf-installing enterprise)

(100-Lakh Kyats)

(D) **Fourth Installment**

(After having launched the vessel.)

(50-Lakh Kyats)

4. **The responsibility of the person who entrusts the business**

(A) To pay out the specified payment according to the specified form or type.

5. **The responsibility of the business-accepter**

(A) To build it according to the sepcified design agreed and specified bilaterally and to scrutinize and supervise for the better quality.

P.T.O

(B) The business-accepter must undertake the welding-rod, gasholder, gasifier, the launching-path-building and the ship-launching enterprises.

(C) The person who entrusts the business must be entrusted by (- -), according to the information in the Serial No. (1). In case the due date passes, the business-accepter must compensate at the rate of 300,000 Kyats per day as the damages.

Both the person who entrusts the business and the business-accepter agreed with the above information and signed in the presence of the following witnesses.

The person who entrusts the business	**The business-accepter**
Name _____	Name _____
N.R.C No. _____	N.R.C No. _____
Address _____	Address _____

Witnesses

Name _____	Name _____
N.R.C No. _____	N.R.C No. _____
Address _____	Address _____

Annex - 4

THE BILATERAL PROMISSORY AGREEMENT ON THE ENTRUSTMENT OF BUSINESS

Date: May , 2015.

1. Making the promissory agreement for the entrustment and the acceptance of business as of the bilateral agreement; for the building enterprise of ("OB" vessel attached), measuring (216' x 54' x 9') as of the length, width and depth; to be built at the South Dagon Dockyard owned by the Department of South Dagon Seaway Transportation.

2. **Category of Enterprise**

Apart from painting enterprise, the iron-body-building enterprise, the welding enterprise and the attached vessel launching enterprise must be conducted.

3. **Business-entrusted Value** 63,000,000 Kyats
(630-Lakh Kyats)

Payment System

(A) First Installment Deposit (150-Lakh Kyats)

(B) Second Installment (196-Lakh Kyats)
(For the frames-installing.)

(C) Third Installment (221-Lakh Kyats)
(For installing the flat side and the flat deck; in case the out fitting enterprises are accomplished.)

(D) Fourth Installment (63-Lakh Kyats)
(After having launched the vessel.)

4. **The responsibility of the person who entrusts the business**

(A) To send the implements to the launching field in time.

(B) To pay out the specified payment according to the specified form or type.

The responsibility of the business-accepter

(A) To build according to the design agreed and specified bilaterally and to scrutinize and supervise for the better quality.

P.T.O

(B) The person who entrusts the business must undertake; for welding-road, gasholder, gasifier, launching-path-building and ship or vessel-launching enterprises.

The person who entrusts the business and the business-acceptor signed the above information in the presence of the witnesses.

The person who entrusts the business	**The business-acceptor**
Name _____	Name _____
N.R.C No. _____	N.R.C No. _____
Address _____	Address _____

Witnesses

Name _____	Name _____
N.R.C No. _____	N.R.C No. _____
Address _____	Address _____

Annex - 5

Explanatory Notes for NEWBUILDCON are available from BIMCO at www.bimco.org

BIMCO

NEWBUILDCON

STANDARD NEWBUILDING CONTRACT

PART I

1. **Place and date of Contract** (Cl. 3, Cl. 44(b), Cl. 47)

2. **Builder's name, full style address and contact details** (Definitions)

Name:
Address:

Country:
Phone/Fax:
E-mail:

Company registration No.

Additional names, addresses and contact numbers:

Name:
Address:

Country:
Phone/Fax:
E-mail:

Company registration No.

3. **Buyer's name, full style address and contact details** (Definitions)

Name:
Address:

Country:
Phone/Fax:
E-mail:

Company registration No.

Additional names, addresses and contact numbers:

Name:
Address:

Country:
Phone/Fax:
E-mail:

Company registration No.

4. **Vessel description/type** (Definitions, Cl. 28(i))

State vessel type:
(i) Dry bulk carrier:
(ii) Tanker:
(iii) Container vessel:
(iv) Other (state type):

Main **dimensions** (Cl. 28(i)):

(i) LOA (m):
(ii) Length between perpendiculars (m):
(iii) Deadweight capacity DWT (mts):
(iv) Mean draft in salt water (m):

B1. **Cargo capacity** (Cl. 28(i)(v) and Cl. 11):

(i) Cubic capacity:
(ii) Bale capacity:
(iii) Grain capacity:

B2. **TEU carrying capacity (only if applicable)** (state number of containers):
(i) Total on deck
a. 20'/40'/45" TEU:
b. No. of reefers:
(ii) Total under deck
a. 20'/40'/45"TEU:
b. No. of reefers:
(iii) No. of TEU homogenous loaded at 14 mts.

Main **engine(s)**: (Cl. 28(ii), Cl. 28(ii)(v) and Cl. 9)

(i) Maker/Type:
(ii) Max. Continuous Rating (MCR) (kilowatts at MCR):
(iii) RPM at MCR:
(iv) Specific Fuel Oil Consumption at MCR:
(v) Normal Continuous Rating (NCR):
(vi) RPM at NCR:
(vii) Type of fuel and specification (including Calorific Value (kcal/kg)):

Average **speed** (Cl. 28(iii) and Cl. 8)

(i) Service speed at design draft (m):
(ii) Min. number of knots:
(iii) Engine output (kilowatts at MCR):
(iv) Percentage of engine's max. continuous power/loss margin:
(v) RPM:

E. **Other matters** (optional)(state any other technical requirements for the particular vessel type)(Cl. 28(iv)(vi) and Cl. 17)

Source : http://www.globalcimaks.com/files

5. Shipyard(s) (if different from Box 7) (Full style address and contact details) (Definitions)

Name:
Address:

Country:
Phone/Fax:
E-mail:

Additional names, addresses and contact numbers:

Name:
Address:

Country:
Phone/Fax:
E-mail:

Name:
Address:

Country:
Phone/Fax:
E-mail:

Additional names, addresses and contact numbers:

Name:
Address:

Country:
Phone/Fax:
E-mail:

6. Builder's Hull Number (Definitions, Cl. 2(a))

7. Flag State (Definitions)

8. Classification Society/Class Notation (Definitions, Cl. 3)

9. Contract Price and Currency (Definitions, Cl. 7)

(a) Price
(b) Currency:

10. Contractual Date of Delivery (Definitions, Cl. 14(c)(iii)(1))

11. Payment Amounts and Time Due (Definitions, Cl.7, Cl.15, Cl.39(c))

1st instalment (see Cl. 15(a)(i))

2nd instalment and time due

3rd instalment and time due

4th instalment and time due

Final instalment (see Cl. 15(a)(iv))

12. Builder's Bank Account Details (Cl. 15(d))

Name:
Address:

Country:
Phone/Fax:
E-mail:
Sort code:
Account number:
Account name:

13. Speed Deficiency (Cl. 8, Cl. 39(a)(iv))

(i) Contract Price reduction amount:
(ii) Maximum amount: (state monetary limit):

14. Excessive Fuel Consumption (Cl. 9, Cl. 39(a)(v))

(i) Contract Price reduction amount:
(ii) Maximum amount: (state monetary limit):

15. Deadweight Deficiency (Cl. 10, Cl. 39(a)(vi))

(i) Deadweight tolerance:
(ii) Contract Price reduction amount:
(iii) Maximum amount: (state monetary limit):

16. Cubic Deficiency (Cl. 11, Cl. 39(a)(vii))

(i) Cubic capacity tolerance:
(ii) Contract Price reduction amount:
(iii) Maximum amount: (state monetary limit):

17. Other Deficiencies (Optional)(Cl. 12, Cl. 39(a)(viii))

18. Late Delivery Compensation (Cl. 13) (i) Amount per day: (ii) Maximum amount: (state monetary limit):	19. Guarantees (Cl. 14(a) and (b)) (a) Buyer's guarantees (i) Number of days after signing Contract: (ii) Buyer's Instalment/Performance Guarantee: (b) Builder's guarantees (i) Number of days after signing Contract:

20. Guarantee Period (state number of months. If left blank 12 months shall apply) (Cl. 35(a)(i))	21. Additional Guarantee Period (state number of months) (Cl. 35(a))	22. Suspension and Termination (Cl. 39) (i) Running period (state number of days): (ii) Notice period (state number of days):

23. Governing law and Dispute Resolution (Cl. 41 and Cl. 42) (a) Governing law (b) Place of dispute resolution	24. Guarantee Engineer (state monthly lump sum) (Cl. 36(b))
25. Effective Date of Contract (state conditions to be fulfilled) (Cl. 44(a))	26. State number of days within which conditions have to be satisfied (Cl. 44(b))
27. Optional additional vessels (state number) (Cl. 46)	28. Optional additional vessels contract price and delivery dates (Cl. 46)
29. Declaration of Options (state number of months after Effective date) (Cl. 46)	30. Interest (state rate of interest) (Cl. 18, Cl. 36(b)(ii)(2)(f), Cl. 39(c) and 39(f)(iv))
31. Buyer's Guarantor (state name of bank or party as appropriate, full style address and contact details((Cl. 14(a)) Name: Address: Country: Phone/Fax: E-mail:	32. Builder's Guarantor (state name of bank or party as appropriate, full style address and contact details((Cl. 14(b), Cl. 27(d)(ii)(C))) Name: Address: Country: Phone/Fax: E-mail:
33. Additional Annexes	34. Numbers of Additional Clauses

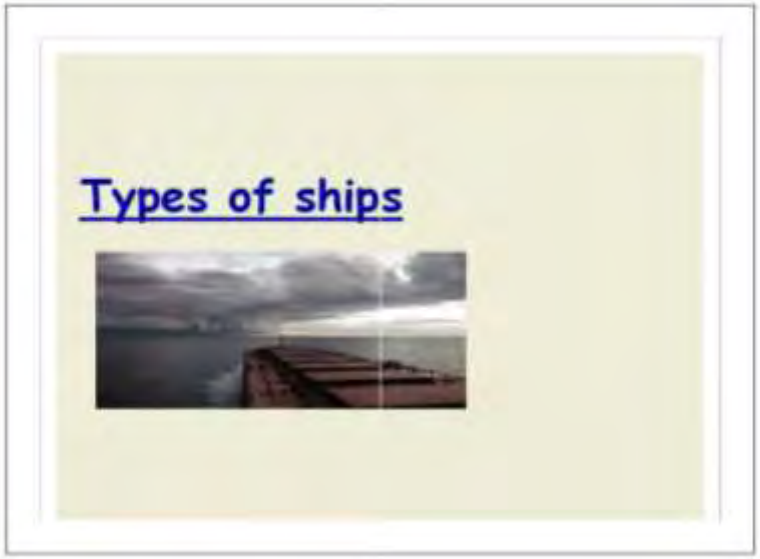
This Contract consists of PART I including additional clauses, if any agreed and stated in Box 34, and PART II as well as any Annexes agreed and attached hereto and shall be performed subject to the conditions contained herein. In the event of a conflict of conditions the provisions of PART I shall prevail over those of PART II to the extent of such conflict, but no further.

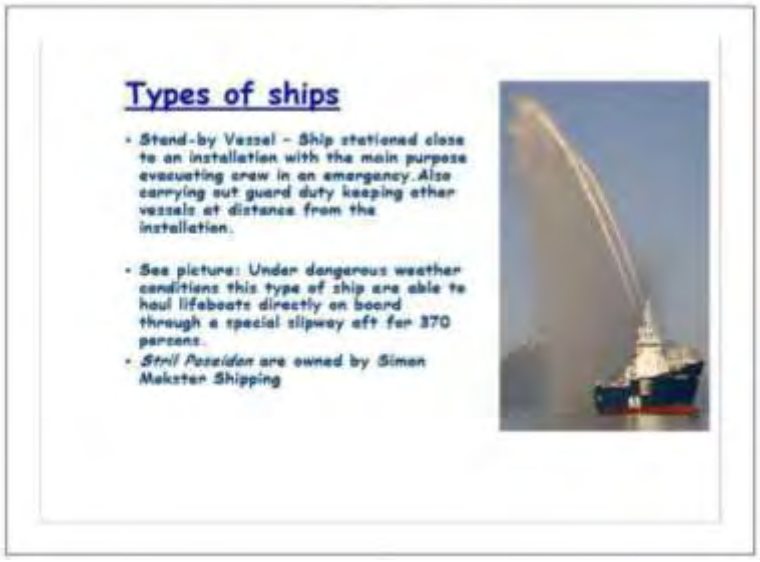
The Specification, Maker's List, Plans and/or Drawings hereafter approved by the Buyer shall form part of this Contract, but in the event of conflict between the provisions of this Contract and the Specification, Maker's List, Plans and/or drawings, the provisions of this Contract shall prevail. In the event of inconsistency between the Specification and Maker's List, on the one hand and the Plans and/or Drawings on the other, the Specifications/Maker's List shall prevail. In the case of inconsistency between any of the Plans and/or Drawings, the later in date shall prevail.

Signature (Builder)	Signature (Buyer)

Annex 6

Types of Ships





Source : http://www.globalcimaks.com/files

Types of ships

- Drill ship (Boreskip) – Vessels carrying out drilling operations, equipped with drilling rig and its own propulsion machinery.
- Kept in position by dynamic positioning equipment. Operates at sea depths with a max. of 2.000 meters.
- Drill ship in the harbour of Sandnessjøen.
- Photo: Johansen

Types of ships

- Bulk carrier (Bulkskip) – Single deck vessel carrying homogenous unpacked cargoes. Some are built only for the transport of coal, ore, grains, paper, timber etc.
- Open Hatch Bulk Carrier:

Types of ships

- Bulk/oil carrier (Bulktankskip) – Multipurpose vessel built to carry cargoes of coal as well as oil.
- Most bulk-oil carriers are reinforced to carry ores and are called OBO-ship (Ore/Bulk/Oil)e than called OBO-ships (ore/bulk/oil).
- Photo © :

Source : http://www.globalcimaks.com/files

Types of ships

- Capesize – These ships are to large to navigate the Panama Canal, 80.000 up to 175.000 dwt, width 42 up to 46 meters (The Panama canal are 32,2 in width) these ships are forced to pass Cape Horn.

Types of ships

- Container vessel – Ship specially designed to carry standard containers.
- Are also called *cellular containerships. A large amount of the capacity contains of containers that are carried on deck. Containers are* lifted onboard and on shore by special cranes(a lo-lo-ship).
- Containerships are generally line vessels and are relatively fast. There are a lot of bulk-containerships (*combulkers*), specially adjusted.

Containerskip fra Odense Staalskibsværft:

Types of ships

- Drilling Tender – Service vessel with Personell and equipment to the drilling rig.

Source : http://www.globalcimaks.com/files

Types of ships

- Drill ship (Borefartøy) – Vessel carrying out drilling operation

Types of ships

- Diving Support Vessel (Dykkerfartøy) – Ship with diving equipment onboard for special assignments involving diving. Some are also fitted with sub-sea robots (Remote Operated Vehicle – ROV).

Types of ships

- Feeder vessel – Short-sea vessel used to fetch and carry goods and containers to and from deep-sea vessels.

Source : http://www.globalcimaks.com/files

Types of ships

- Flo-flo-ship – Special vessels which may be submerged to allow the floating on or off of cargo for jack up-platforms which may be carried "piggy-back" fashion on a flo-flo-ship.(has the ability to "lower it self" i.e. to make it possible for jack up-platforms to float in on deck).




Types of ships

- Supply vessel (Forsyningsskip) – Vessels transporting stores and equipment to platforms or installations during building or the production phase. Are often called Straight Supply, or Platform Supply Vessel (PSV).
- Supply ship from Brevik Construction to S.Ugelstad Shipping:M/S «SKANDI WAVENEY»:

Types of ships

- **Reefers (Frys/Kjøleskip) – Vessels with refrigerated cargo holds**
- A conventional reefer (Nordland Saga) loading frozen fish at Shetland:
- Sidegateship, Framnes owned by Fjord1 Fylkesbaatane i S&F:



Source : http://www.globalcimaks.com/files

Types of ships

- Gas tanker – Special vessel for transport of liquid/condensed gas. The most important cargoes are:
- Ammonia.
- Ethylene.
- LNG – Liquefied Natural Gas, contains mostly of methane).
- LPG – Liquefied Petroleum Gases (propane, butane).

LNG tanker for Snøhvit. Ill: Statoil:

Types of ships

- Handymax – Dry cargo bulk vessel appr. 35.000 – 50.000 dwt.

Types of ships

- Handysize – Dry cargo bulk vessel or product tanker at 15.000 – 50.000 dwt.

Source : http://www.globalcimaks.com/files

Types of ships

- HSLC - High Speed Light Craft (hurtigbåt)

Types of ships

- HSS - High speed Sea Service - Fast ferry conceptwith double or multihull with carying capacity up to 1500 passengers and 400 cars.

Types of ships

- Chemical tankers/Special tankers for transportation of bulk chemicals. Modern vessels has as a rule stainless steel tanks and may carry a lot of different cargoes simultaneouslys because each tank has its own pump and pipeline system for loading and discharging.

- Kleven Flora has delivered the chemical tanker «Jo Sequoia» to the shipping company Jo Tankers.

Source : http://www.globalcimaks.com/files

Types of ships

- Combination carriers (Kombinasjonsskip) – Vessels that may transport both liquid and dry bulk cargoes. There are two main types:
- Ore Carriers and Bulk-tanker ships

Types of ships

- Crane and Construction Vessel/Unit (Kran-og konstruksjons fartøy).- Usually a vessel a barge or a semisubmersible equipped for construction and maintenance of fixed installations. Often built with accommodation. This unit may also be used as storage, water/electricity/ air pressure suppliers, offices, communication centre or landing pod for helicopters etc.

Types of ships

LASH-vessel - Lighter Aboard Ship, i.e vessels which can carry lighters piggy-back fashion.

Source : http://www.globalcimaks.com/files

Types of ships

- Lay Barge or Pipe Laying Barge – Vessels laying pipelines on the seabed.

Types of ships

- Liners –serving a regular defined route or trade following a published sailing schedule.

Tpes of ships

- Lo-lo-skip - Lift on-lift off-skip. Containers and other goods are lifted on board and discharged by cranes.

Source : http://www.globalcimaks.com/files

Types of ships

Ore/oil carrier (Crane and Construction Vessel/Unit) – Vessels with separate holds for ore cargoes. When vessel carries oil the ore holds also may be filled with oil to utilize the capacity to thefullest.

Types of ships

- Multipurpose ship (Stykkgodsskip) – General cargo ship which can carry containers.

Types of ships

OBO-carrier – Oil-Bulk-Ore – Vessels used for both dry and liquid bulk, i.e. Ore tanker/Bulk tanker.

Source : http://www.globalcimaks.com/files

Types of ships

- Offshore service vessels – Common term used for specialized vessels used during the exploration, development and production phase of oil and gas at sea.

Types of ships

- Oil-tanker – Vessel carrying crude oil or refined products. If more than one type of goods are possible it is called Parcel tanker.
- Shuttle tanker/Buoy-loader (Bøyelaster)- Vessel carrying oil from oilfield to terminal. With interior coated tanks, called Product carrier

Types of ships

- Panmax or Panamax – largest bulk carrier fully loaded that (less than 32,2 m) are able to pass through the Panama Canal (55.000 – 80.000 dwt.)

Source : http://www.globalcimaks.com/files

Types of ships

- Pipe-Laying Barge or Lay Barge – vessel constructed for the laying of pipes on the seabed.

Types of ships

- Production Ship – specialized vessel pumping oil through flexible pipelines from the seabed. During operation the vessel are usually anchored to the bottom with a "turret"-arrangement.

Vargfeltet are built with a production vessel and a well platform.

Types of ships

Ro-ro-ship (Roll on - Roll off) - Cargo are driven on board and ashore by means of own machinery or by trucks. There are three main usages:

1. *Ro-ro-skip for transport of cars (specialised: Pure Car Carrier – PCC), and other "rolling" machinery.*
2. *Ro-ro-ship liners carries containers, pallets, flats or general cargo that may be driven on board.*
3. *Ro-ro-ferries has a combination of trucks/lorries/cars and passengers.*

Source : http://www.globalcimaks.com/files

Types of ships

- Seismic vessels – maps/charts geological structures at seabed by using firing guns transmitting sound waves into the sea bottom. Echoes are traced by hydrophones towedf behind the vessel. Has an essential role in mapping where to drill for oil.

Types of ships

- Anchor handling Tug – AHT (Separate/ankerhåndteringsfartøy) – performs moving of anchors and tugging drilling installations, barges etc. May be combined supply vessel, and called Anchor handling Tug/Supply (AHTS).

Types of ships

- Suezmax – Largest tanker to pass the Suez canal fully loaded (120.000 – 165.000 dwt.)

Source : http://www.globalcimaks.com/files

Types of ships

- Tanker – Vessel carrying liquid bulk cargoes

Types of ships

- ULCC – Ultra Large Crude Carrier – Oil tanker at more than 300.000 dwt.

ULCC vessel Jahre Viking at 564.763 dwt and with displacement at 647.955 tons built in 1979 at Sumitomo

Types of ships

- VLCC – Very Large Crude Carrier – Oil tanker between 200.000 dwt. and 300.000 dwt

Source : http://www.globalcimaks.com/files

EAST YANGON UNIVERSITY

DEPARTMENT OF LAW

MYANMAR

Date : 31.5.2016

Assessment in the dissertation entitled:

ISSUES ON SHIPBUILDING CONTRACT

Submitted by Ma Pwint Phyu for the degree of PhD in Law of
the University of Yangon

Professor Dr May Htar : External Examiner

Pwint Phyu studied about Issues on Shipbuilding Contract. A shipbuilding contract is a contract executed between buyer and a shipbuilder for the construction of a ship. It is contract for future goods as the property cannot pass at the time the contract is concluded. So, it has many issues. She did the research works on the issues on making of shipbuilding contracts, contractual terms of shipbuilding, ship acquisitions process and rights and obligations under shipbuilding contracts. After that she could comprehensively study on all the aspects and effects of the shipbuilding contracts. She could point out the legal issues and give the possible ways to solve those issues. As an external examiner, I would like to give my concern upon Pwint Phyu that she is entitled to achieve PhD in Law.

Dr May Htar
Professor & Head (Rtd.)
Department of Law
East Yangon University