Shipbuilding

In 17 jurisdictions worldwide

Contributing editor
Arnold J van Steenderen

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GETTING THE DEAL THROUGH

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CONTENTS

Netherlands

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1 Restrictions on foreign participation and investment

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

The Dutch shipbuilding industry is open to foreign participation and investment. Dutch tax law provides a very attractive fiscal climate for foreign investors generally. For innovative shipbuilders, companies in the field of R&D can benefit from the 'innovation box' resulting in an effective corporate tax rate of 5 per cent as well as an allowance for income tax and social security contribution deductions. There are no restrictions on foreign participation.

2 Government ownership of shipbuilding facilities

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

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

3 Statutory formalities

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

The parties are free to negotiate the terms of a shipbuilding contract and design it as they wish. There are no statutory formalities to be met in entering into a shipbuilding contract.

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

4 Choice of law

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

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

5 Nature of shipbuilding contracts

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

Although the wording of a specific shipbuilding contract will be decisive to conclude whether it should be construed as a contract for the sale of goods, or as a contract for the supply of workmanship and materials, generally speaking a shipbuilding contract is qualified as a contract to construct a vessel in accordance with construction law principles. If the vessel does not meet specifications there is a breach of contract on the builder's side.

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

6 Hull number

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

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

7 Deviation from description

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

The use of the word 'approximate' in the dimensions and description will allow the builder to deviate slightly from the figure stated. A court will have to decide case by case the exact latitude the builder has. It is of paramount importance that a certain measurement (eg, the draft of a vessel) is met precisely. It is therefore advisable for the commissioning party not to accept approximate dimensions or descriptions.

8 Guaranteed standards of performance

May parties incorporate guaranteed standards of performance whose breach entitles the buyer to liquidated damages or rescission?

Clauses guaranteeing certain standards of performance are frequently included in shipbuilding contracts. If upon delivery the guaranteed performance standards cannot be met by the builder, the building contract may allow for payment of liquidated damages or a penalty to be paid by the builder, and if a certain benchmark cannot be met then rescission of the contract can be applied for. In article 6:91 of the Dutch Civil Code,

Dutch civil law defines a penalty clause as any clause which provides that an obligor, should he or she fail in the performance of his or her obligation, must pay a sum of money or perform another obligation, irrespective of whether this is to repair damage or only to encourage performance. Penalty clauses as described above are enforceable but the constraining function of reasonableness and fairness principles may prohibit the obligee from claiming the benefit of a full penalty when such a claim may be unreasonable in the circumstances (Dutch Supreme Court 17 December 2004, NJ 2005, 271). The correct phrasing of a liquidated damages clause is of great importance. Dutch courts can mitigate contractual penalties upon request of the builder, whereas a liquidated damages clause reflecting a genuine compensation for the loss of the owner cannot easily be set aside in whole or in part.

9 Quality standards

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

The inclusion of a certain contractual benchmark will make the standard of performance of the builder more transparent. Reference to 'highest North European shipbuilding standards' will eventually have to be demonstrated by an expert opinion to the court, should there be a dispute between the parties as to what the scope or application of the standard is.

10 Classification society

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

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

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

- a general standard which concerns advancing safety within the territorial waters (in this case: the aforementioned Rhine Rules); and
- a code of conduct which concerns the standards of due care to be exercised when inspecting and certifying.

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

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

11 Flag-state authorities

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

The flag-state authorities of the Netherlands have outsourced compliance with flag-state legislation to the classification societies. In the Netherlands the government agency responsible is the Netherlands Shipping Inspectorate of the Ministry of Infrastructure and Environment. The Dutch Shipping Act applies to all seagoing vessels flying the Dutch flag and the Netherlands Shipping Inspectorate monitors vessels flying the Dutch flag, but also foreign vessels, crews, shipping companies and classification societies. The Inspectorate has authorised a number of organisations, including classification societies, to perform certain inspections. These are the 'recognised organisations'. The Netherlands has appointed seven classification societies as Recognised Organisations to act on its behalf and the working method and procedures are laid down in an agreement combined with a mandate. It concerns inspections and certification required by international conventions (eg, the International Convention for the Safety of Life at Sea, the International Convention for the Prevention of Pollution from Ships, tonnage measurement, load lines and ILO 152).

Regarding EU Regulation No 391/2009 on common rules and standards for ship inspection and survey organisations which entered into force on 17 June 2009:

> *The European Union requires the twelve Classification Societies recognised by the EU (hereafter: EU ROs) to mutually recognise the class certificates for materials, equipment and components issued by other EU ROs, in appropriate cases, in article 10 of Regulation (EC) No 391/2009, which entered into force in 17 June 2009 (hereafter described as EU Mutual Recognition). [...] In response to this requirement, the EU ROs have agreed to apply EU Mutual Recognition in a phased manner and developed a common procedure for type approval and technical requirements for eleven items as the first phase, which were deemed to have relatively little effect on the safety of ships. Technical requirements were developed to cover all relevant rules of EU ROs and finalised with the result of external review by the relevant industry. Application of EU Mutual Recognition for the eleven items as the first phase in accordance with the agreed procedure and technical requirements commenced from 1 January 2013.*
>
> *While the EU requires implementation of EU Mutual Recognition In article 10 of Regulation (EC) No 391/2009, it does not oblige the use of mutually recognised products on all vessels. Accordingly, under the requirements of EU Mutual Recognition the use of mutually recognised products onboard the vessel is accepted in cases where manufacturers, shipyards, or shipowners intend to install them onboard, provided that the certificates of the products are valid and there are no special instructions from the flag state. When mutually recognised products are to be used onboard a vessel registered with the Society, an application for survey of the product by manufacturers, shipyards or ship owners is not necessary.*

12 Registration in the name of the builder or the buyer

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

Registration of a seagoing vessel under construction is only possible if it is under construction in the Netherlands (article 8:194 section 1 of the Dutch Civil Code). Registration must be requested by the shipowner and he or she must submit a declaration signed to the effect that, to the best of his or her knowledge, the vessel is registrable as a seagoing vessel. If it concerns a request for registration as a seagoing vessel under construction, this declaration must be accompanied by proof that it is a vessel under construction in the Netherlands. Shipbuilding contracts in this jurisdiction usually

contain a provision allowing the commissioning party to register the vessel in his name as a seagoing vessel under construction upon payment of a certain milestone instalment. The earliest possible moment therefore is the laying of the keel of the vessel. The legal consequences of registration of the vessel are mainly in respect of the possibility to register a mortgage over the vessel under construction. If the vessel under construction has not been registered yet a right of pledge could be created as a security for a financial institution.

13 Title to the vessel

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

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

14 Passing of risk

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

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

15 Subcontracting

May a shipbuilder subcontract part or all of the contract and, if so, will this have a bearing on the builder's liability towards the buyer?

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

16 Extraterritorial construction

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

Subject to any express term of the building contract to the contractee, and also provided that the contract does not otherwise restrict the ability of the builder as main contractor to subcontract the construction of certain items without the commissioning party's prior approval, the builder is under no obligation to inform the buyer of an intention to have certain main items constructed in another country, but to avoid claims for misrepresentation ('highest Dutch build quality') it is advisable that the builder discloses this fact, should he or she have the intention to construct main sections outside the country where the builder is located.

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

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

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

18 Price increases

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

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

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

19 Retracting consent to a price increase

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

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

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

20 Exclusions of buyers' rights

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

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

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

21 Refund guarantees

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

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

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

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

22 Advance payment and parent company guarantees

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

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

23 Financing of construction with a mortgage

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

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

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

24 Liability for defective design (after delivery)

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

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

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

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

25 Remedies for defectiveness (after delivery)

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

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

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

breaching a duty imposed by law or a rule of unwritten law pertaining to proper social conduct.

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

26 Liquidated damages clauses

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

All clauses that provide that a shipyard (obligor), should it fail in the performance of any of the performance criteria of the shipbuilding contract, must pay a sum of money or perform another obligation, is considered to be a penalty clause, irrespective of whether this is to repair damage or an incentive only to encourage performance (article 6:91 of the Dutch Civil Code). The creditor may not demand performance of the penalty clause where the failure in the performance of the obligation cannot be attributed to the shipyard. A notice will be required in order to demand performance of the penalty clause in the same cases as such is required to claim damages due by law. The court may reduce the stipulated penalty upon the demand of the debtor, if it is evident that fairness so requires. The court, however, may not award less than the damages due by law for failure in the performance. The Supreme Court has held in *Ampatil/Weggelaar* (Supreme Court 17 December 2004, NJ 2005, 271) that claiming payment of a penalty under certain circumstances can be unacceptable according to standards of reasonableness and fairness. Dutch courts can mitigate contractual penalties upon request of the builder, whereas a liquidated damages clause reflecting a genuine compensation for the loss of the owner cannot easily be set aside in whole or in part.

27 Preclusion from claiming higher actual damages

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

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

28 Force majeure

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

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

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

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

29 Umbrella insurance

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

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

30 Disagreement on modifications

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

The parties have contractual freedom, but if there is disagreement on the proper construction of a contractual term a court or arbitral tribunal will have to establish the presumed intentions of the parties. In *Vodafone Libertel NV/European Trading Company CV* (Supreme Court 19 October 2007, JOL 2007, 686) the Supreme Court held that in finding the proper interpretation of a contractual clause a mere linguistic approach will not suffice. The test must be to try to establish the meaning parties reasonably have given to the disputed clause, taking into account each other's position. The rights and obligations of parties in relationship with one another are not only determined by the explicit contractual terms prevailing between them, but also by principles of reasonableness and fairness.

31 Acceptance of the vessel

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

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

32 Liens and encumbrances

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

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

The exercise of a lien over the vessel or work or equipment ready to be incorporated in the vessel as a security for payment of invoices can only

Update and trends

Recent developments in the shipbuilding industry have shown a shift towards increasing Dutch innovation possibilities by awarding grants for new and innovative projects by the Dutch government. There are a number of financing products and subsidies available which, if applicable, will lead to attractive deductions. A large number of Dutch shipyards have chosen to build ships entirely on Dutch locations. There is a tendency to specialise in niche markets to reduce labour costs, minimalise risks and optimise the construction process. The budget for innovative shipbuilding in 2014 was €5.2 million.

be successfully obtained if the supplier or subcontractor effectively holds possession of the relevant work or equipment and it can prevent the shipbuilder, buyer or third parties without consent taking possession of this work or equipment. The work or equipment will therefore need to be in the custody of the relevant supplier or subcontractor.

ECLI:NL:RBROT:2013:6587 (*Aeolus/Van de Grijp*): in this case the subcontractor of the defendant claims to have a right of retention towards the defendant. The subcontractor has the factual power over the products and refuses to issue the products to the plaintiff due to its claimed right of retention. The contract between plaintiff and defendant contains a provision which says that the contractor may not suspend its obligations in the contract when the client does not fulfil its payment obligations. The court considers that this provision holds a prohibition for the (sub)contractor not to exercise a right to suspension. Furthermore, the court considers that, regarding the rights of third parties, a contracting party whose performance has become of such importance to the interests of third parties cannot neglect these interests which are largely dependent on the performance of the contracting party. The standards that are considered acceptable in society according to general principles of civil law may entail that the contracting party needs to respect these interests, when these interests are closely related to a proper performance of the agreement. In its judgment, the court will need to consider the position of the parties involved, the contents and meaning of the contract, and the way the interests of third parties are involved (HR 24 September 2004, LJN AO9069).

33 Reservation of title in materials and equipment

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

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

34 Subcontractor's and manufacturer's warranties

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

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

35 Default of the builder

Where a builder defaults in the performance of the contract, what remedies will be open to the buyer?

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

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

36 Remedies for protracted non-performance

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

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

37 Judicial proceedings or arbitration

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

The parties to a shipbuilding contract are free to make a choice in favour of one of the institutional arbitration institutes or ad hoc arbitrators. The institutions most commonly agreed on by the parties are:

Stichting TAMARA (Transport and Maritime Arbitration Rotterdam-Amsterdam)
PO Box 23158
3001 KD Rotterdam
Tel: +31 10 436 3750
www.tamara-arbitration.nl

The Netherlands Arbitration Institute
PO Box 21075
3001 AB Rotterdam
Tel: +31 10 281 6969
www.nai-nl.org

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

38 ADR/mediation

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

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

39 Standard contract forms

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

The association of shipbuilders in the Netherlands (VNSI) has published a standard form of shipbuilding contract. The shipbuilding contracts governed by the law of the Netherlands are still mainly based on either the VNSI form, or alternatively the well known 1999 AWES form of contract, published by the Community of European Shipyards' Associations.

40 Assignment of the contract

What are the requirements for assigning the contract to a third party? What are the consequences of a contractual prohibition of assignment? Is the original contract discharged by the assignment?

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

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

Pursuant to article 6:159 of the Dutch Civil Code a transfer of contract requires: (1) an agreement between the transferor and transferee; and (2) co-operation of the counterparty to the contract. Failure to meet any of these two conditions will cause the transfer of the contract to be void. No legal formalities apply in respect of the cooperation to be provided by the counterparty. Such cooperation could be provided in advance, in the transfer of contract agreement (should the counterparty be a party thereto), or following execution of the transfer of contract agreement.

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

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