Shipbuilding
2021

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LEXOLOGY
Getting The Deal Through

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

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

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

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

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

LEXOLOGY
Getting The Deal Through

London
March 2021

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England & Wales

William Cecil, Fiona Cain and Chrysa Kitsou

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PARTICIPATION AND OWNERSHIP

Restrictions on foreign participation and investment

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

Yes, the shipbuilding industry is open to foreign participation and investment. In the context of commercial shipbuilding, there are no obvious restrictions.

Government ownership of shipbuilding facilities

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

As a result of the Public Bodies (Abolition of British Shipbuilders) Order 2013, British Shipbuilders Corporation (British Shipbuilders), a former public corporation which owned and managed the British shipbuilding industry, was abolished and its residual liabilities transferred to the UK Secretary of State for Business, Energy and Industrial Strategy.

KEY CONTRACTUAL CONSIDERATIONS

Statutory formalities

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

As long as the contractual formalities of offer and acceptance, intention to create legal relations and consideration are observed, a contract will be legally enforceable even if concluded orally and not committed to writing, although in light of the complexities and risks inherent in shipbuilding, this is extremely unlikely to be the case. It is usual for a shipbuilding contract to provide that any modification or variation to the contract must also be in writing, rather than made orally, and where it does so, the Supreme Court confirmed in *Rock Advertising v MWB Business Exchange* (2018) that it will give effect to the no oral modification clause, although the effectiveness of such clauses may still be prevented if the doctrine of estoppel applies. Where the contract is executed in writing, electronic signatures can be used.

Where a party to a shipbuilding contract is a company incorporated outside the United Kingdom (whether or not they have registered an establishment in the United Kingdom) their entry into the shipbuilding contract is governed by the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009 (as amended). Part 2 of the Regulations adapts the formalities set out for doing business under the law of England and Wales in sections 43 (company contracts), 44 (execution of documents) and 46 (execution of deeds) of the Companies Act 2006 for overseas companies.

Choice of law

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

The parties to a shipbuilding contract are generally free to select the governing law of their contract. For contracts concluded on or after 17 December 2009, the applicable law of a contract is determined, for most purposes, in line with Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (Rome I Regulations), notwithstanding the United Kingdom's departure from the European Union. This is a result of the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations 2019 (as amended by the Jurisdiction, Judgments and Applicable Law (Amendment) (EU Exit) Regulations 2020) which introduced an equivalent regulation, UK Rome I, into English law from 1 January 2021. Where there is a conflict of laws as to contractual obligations in civil and commercial matters, the Regulation provides that a contract shall be governed by the law chosen by the parties (whether the law of a member state of the European Union, the United Kingdom or not) but that the choice must be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. Where no such choice is made, the Rome I and UK Rome I provide that the relevant law is the law of the country with which the contract is most closely connected.

Nature of shipbuilding contracts

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

English law of the sale of goods comprises common law principles as codified, amended and supplemented by a statutory scheme, the current principal legislation being the Sale of Goods Act 1979 and the Sale and Supply of Goods Act 1994. Shipbuilding contracts have historically been regarded as contracts for the sale of goods by the English courts (see *McDougall v Aeromarine of Emsworth Ltd* (1958)). This was refined by the House of Lords in *Hyundai Heavy Industries Co v Papadopoulos and Others* (1980) and *Stocznia Gdanska SA v Latvian Shipping Co, Latreefer Inc and Others*(1998) where it was recognised that the shipbuilding contract is not just one of sale alone but also resembles a construction contract. Accordingly, the current preferred view is that a shipbuilding contract in English law should be categorised as a contract of sale of goods (more precisely categorised under the Sale of Goods Act 1979 as an agreement to sell future goods by description) containing certain characteristics of a construction contract. While the decision of the High Court in *Adyard Abu Dhabi v SD Marine Services* (2011) did involve consideration of general (ie, non-marine) English construction law principles in the context of a shipbuilding contract dispute, such principles have to date had limited practical influence on English shipbuilding contract law.

Hull number

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

The hull number has been held not to be an essential part of the description of the vessel but only a means of labelling or identifying her (see *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (The Diana Prosperity)* (1976)). So long as the reference fits the vessel in question and no other vessel could be referred to, the buyer cannot refuse to accept delivery simply because the hull number is different from that stated in the contract.

However, the builder cannot unilaterally switch hull numbers between projects in an attempt to demonstrate performance of its obligations under a different shipbuilding contract as was made clear by the House of Lords in *Stocznia Gdanska SA v Latvian Shipping Co, Latreefer Inc and Others* (1998).

Deviation from description

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

The use of 'approximate' dimensions and descriptions is likely to imply that the builder has a small margin of leeway, but how much will be a question of fact to be decided by the relevant court or tribunal in light of the circumstances in which it is used and appropriate expert evidence. There is no absolute legal test: for example, in the context of a dispute concerning a vessel's warranted speed under a charter party, the Court of Appeal held that the margin provided by the word 'about' cannot be fixed as a matter of law (*Arab Maritime Petroleum Transport Co v Luxor Trading Corporation and Geogas Enterprise SA (The Al Bida)* (1986)). This is the kind of question that is often referred to as a mixed question of fact and law, as concluded at first instance in the same case. In the context of a shipbuilding contract, a cautious approach would be to proceed on the basis that the use of such a term simply allows the builder a margin up to the limits of normal construction tolerances for a vessel of the relevant type.

Guaranteed standards of performance

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

Yes. Shipbuilding contracts commonly set out performance standards for the speed, fuel consumption and deadweight of the vessel and sometime vibration and noise depending on the type of vessel. If any of these agreed performance standards are not met when tested during sea trials, the contract will typically allow a small percentage of agreed deficiency but thereafter the buyer will be entitled to liquidated damages, often tiered depending on the extent of the deficiency. While the builder's liability for liquidated damages is generally capped, the buyer will have the option of rejecting the vessel and terminating the contract where the discrepancy is greater than an agreed percentage of the guaranteed figure. It would be unusual for a shipbuilder to agree to deviate from this approach.

It is usually the case that vessels that are to be constructed under a shipbuilding contract that is governed by English law will not be built in the jurisdiction. As a result, any trade standards in relation to shipbuilding and marine technology that have been developed by British Standards Institution will not apply to a vessel built in another jurisdiction unless they are expressly referred to in the shipbuilding contract. Instead, the local trade standards in the place of construction may apply and, in such circumstances, appropriate legal advice should be sought from local counsel to clarify the position.

Quality standards

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

Unless contractually excluded, three specific conditions relating to quality are implied in any sale contract governed by the Sale of Goods Act 1979 where a seller sells in the course of a business. These are compliance with description (section 13), satisfactory quality (section 14(2)) and reasonable fitness for purpose (section 14(3)). In *Neon Shipping Inc v Foreign Economic 7 Technical Corporation Co of China* (2016), the High Court found that section 14(3) was applicable to a shipbuilding project where the goods had been ordered for their normal purpose.

A breach by a seller of any of these implied conditions entitles the buyer to reject the goods, unless the breach is 'so slight' that it would be unreasonable for the buyer to do so (and so long as the buyer is not dealing as a consumer) (section 15(A)(1)). Most newbuilding contracts expressly exclude these statutory implied terms. This is in line with usual practice by which the builder agrees to build a vessel in conformity with the requirements of the contract and specifications and provides a limited post-delivery warranty in respect of materials and workmanship, but otherwise makes no general guarantee of quality and almost certainly excludes liability for any losses arising from defects in the vessel.

Where the contract does provide for a quality standard, a phrase such as 'highest North European shipbuilding standards' or 'first-class shipbuilding practice in Western Europe' is often used. According to an unreported arbitration award issued in 2011, 'first-class shipbuilding practice in Europe for new vessels of similar type and characteristics as the vessel' imported into the contract an obligation to meet the agreed class standard, while the phrase 'of first-class quality' was considered in *Rolls-Royce Power Engineering plc v Ricardo Consulting Engineers Ltd* (2003) and found to indicate that a higher standard is required than ordinary reasonable skill and care.

Accordingly, a requirement to construct a vessel to such a standard or in accordance with such practice does add something significant to other requirements of the contract. The interaction between express standards of care and other specific contractual requirements has been considered in *MT Hojgaard A/S v E.ON Climate and Renewables UK Robin Rigg East Ltd* (2017).

The Supreme Court found that it was unnecessary to determine whether there was a warranty that the foundations of offshore wind turbines would have a lifetime of 20 years or a contractual term that the foundations would be designed fit to have such a lifetime as neither had been achieved. Although the international design standard contained an error that meant that it would not be possible to comply with the prescribed criteria, this did not make it mutually inconsistent with the other terms of the contract.

Courts are generally inclined to give full effect to the requirement that the item as produced complies with the prescribed criteria, on the basis that, even if the customer has specified or approved the design, it is the contractor who can be expected to take the risk if it agreed to work to a design that would render the item incapable of meeting the criteria to which it had agreed. While this and other recent cases have shown that there can be tension between express standards of care and other specific contractual requirements, such as fitness for purpose obligations, much depends on the specific drafting.

Of the standard forms of shipbuilding contract typically encountered, only BIMCO's Newbuildcon expressly provides for a quality standard. However, given that shipbuilding conditions and standards vary significantly from country to country and, sometimes, even among shipyards in the same country, the phrase 'in accordance with good international shipbuilding and marine engineering practice' set out in its clause 1 can give rise to disputes as to the precise standard imposed.

Classification society

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

Where employed solely by the builder, the classification society will not ordinarily be found to owe a contractual duty of care to the buyer to ensure that its surveyors identify defects in the vessel. Whether a classification society can be held liable in tort for negligence is controversial, and although theoretically possible if the claimant can make out the constituent elements of the tort, the English courts have shown a marked reluctance to hold classification societies liable. In *Marc Rich & Co AG v Bishop Rock Marine Co (The Nicholas H)* (1995), the House of Lords refused to impose tortious liability on a classification society, Lord Steyn stressing that classification societies act for the common good in setting maritime safety standards. Where, however, the vessel is being constructed outside England and Wales, the applicable law and jurisdiction that will apply to a claim against a classification society in tort is unlikely to be determined by the English courts under English law, even though the shipbuilding contract may be governed by English law and subject to the jurisdiction of the English courts or London arbitration. It may be possible to bring a claim where the tort has been committed abroad within the jurisdiction of the English court if the parent company of the classification society is domiciled in England and Wales and is found to have, for example, controlled the operations that gave rise to the claim; however, this has only been considered in respect of health and safety and environmental claims (*Lungowe v Vedanta Resources and KCM*(2019)).

With the development of international rules (both by the International Maritime Organization (IMO) and by the European Union authorities) to improve maritime safety and environmental protection, flag states' powers have been delegated to some selected classification societies, each of which has acquired the status of 'recognised organisation' (RO). The degree to which a flag state may choose to delegate authority to an RO is for each flag state to decide, and the corresponding authority of the RO is generally set out in the relevant agreement individually negotiated between the RO and the relevant administration. These agreements are based on the Model Agreement for the Authorization of Recognized Organizations Acting on behalf of the Administration, issued by the IMO's Maritime Safety Committee and its Marine Environment Protection Committee (MSC/Circ.710-MEPC/Circ.307), which imposes a duty of care on the ROs and a liability for breach of such duty to the appointing authority.

The Code for Recognized Organisations (RO Code), a consolidated international instrument, sets out the minimum criteria against which organisations must be assessed towards recognition as an RO with general requirements including the capacity to deliver high standards of service and the need to act independently, impartially and transparently, as well as with integrity, competence and responsibility. Various other IMO resolutions lay down mandatory minimum requirements for ROs with respect to, inter alia, their technical competence, governance and certification. However, following the *Erika* and the *Prestige* disasters at the turn of the century, additional legislation was implemented in the European Union to tighten the regulatory regime applicable to classification societies when performing their duties as ROs and to harmonise their liabilities throughout the European Union (including Directive 2009/15/EC, as amended by Directive 2014/111/EU, and in Regulation (EC) No. 391/2009 included in the Third Maritime Safety (Erika III) Package). Following Brexit, this legislation has been introduced into UK law and amended by virtue of the Merchant Shipping (Recognised Organisations) (Amendment) (EU Exit) Regulations 2019, with separate authorisation agreements now required for ROs to operate in the United Kingdom and in the European Union. Under these rules, an RO may face unlimited liability for damages caused by gross negligence or intentional acts. However, this liability relates only to the indemnity obligations undertaken by the RO in favour of the authorising administration under the relevant agreement granting it RO status. A buyer seeking to sue an RO for damages in respect of loss arising from that RO's negligent acts or omissions could not, therefore, rely on the above rules alone to establish the RO's liability. However, given that the *Nicholas H* pre-dates the RO regime described above, it is unclear whether it would now be followed in any future case where negligence of a classification society acting as RO was alleged.

Flag-state authorities

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

Compliance with flag-state legislation has been outsourced, but only to a limited extent to certain approved classification societies.

The bulk of the survey and certification work required for statutory purposes is delegated to non-governmental organisations that act as certifying authorities on behalf of the UK Maritime and Coastguard Agency (MCA). For surveys required by international conventions, those certifying authorities must be classification societies authorised as ROs in accordance with the European Union regime resulting from the Third Maritime Safety (Erika III) Package, under the relevant UK legislation (see the Merchant Shipping (Recognised Organisations) (Amendment) (EU Exit) Regulations 2019 and the MCA Merchant Shipping Notice MSN 1672 (M+F) Amendment 4 issued in December 2020).

Following the United Kingdom's departure from the European Union, all agreements previously concluded between the MCA and the relevant classification societies have been terminated by mutual consent and replaced by new agreements with amended domestic provisions. The six classification societies that are ROs authorised by the United Kingdom are: Lloyd's Register Marine, ABS Europe Limited, Bureau Veritas, DNV AS, RINA UK Limited and ClassNK.

To avoid unnecessary duplication of survey items between the relevant classification society and the MCA, classification society surveyors are authorised to conduct hull and machinery, electrical and control installation surveys on UK ships on the MCA's behalf, but the scope of such delegation is narrower with respect to roll-on, roll-off passenger ships. Furthermore, ROs' survey and certification powers may also be less comprehensive with respect to passenger ships as opposed to cargo ships, as the MCA's focus remains on the more critical aspects of passenger ship safety, such as fire protection and stability.

Since April 2003, the MCA has been operating the Alternative Compliance Scheme, which, in relation to newbuildings (other than passenger ships) to be registered in the United Kingdom, also allows the relevant classification society to perform most statutory surveys and associated plan approvals without the involvement of the MCA, save for the initial inspection of the vessel on delivery and the audits or inspections for International Safety Management Code, International Ship and Port Facility Security Code and Maritime Labour Convention 2006 requirements.

Registration in the name of the builder or the buyer

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

Vessels under construction may not be registered on the UK Ship Register.

Title to the vessel

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

According to section 17(1) of the Sale of Goods Act 1979, title to the vessel will pass when it is intended by the parties to do so; therefore, the parties may agree that the vesting of title to the buyer is continuous as the construction progresses, or that it occurs upon the builder's achievement of specified and ascertainable milestones.

The 'continuous transfer of title' structure tended to be the approach used in shipbuilding contracts with British yards, and it is still commonly encountered in contracts for the construction of superyachts and in ship conversion contracts.

While English law will uphold the parties' agreement as to the timing of the vesting of title to the partly built vessel, nonetheless the effectiveness of those agreements will ultimately depend upon the lex situs, that is, the law of the place of construction. For instance, the insolvency rules of the lex situs may render any transfer of title ineffective against a liquidator of the yard. These considerations obviously do not apply where the vessel is under construction in England and Wales, but where the contract is governed by English law with a place of construction abroad (as very frequently occurs). In such circumstances, appropriate legal advice should be sought from local counsel to clarify the position.

There is no legal restriction with respect to the moment when the vesting of title can start, but the parties usually choose the vessel's keel laying as the relevant trigger. In any event, the parties should bear in mind that the English courts have tended, in the absence of clear drafting, to be slow to uphold contractual provisions providing for the transfer of title in the material and equipment intended for the vessel where these have not actually been physically incorporated into the vessel.

Passing of risk

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

The general rule, which is enshrined in section 20(1) of the Sale of Goods Act 1979, is that goods remain at the seller's risk until property in them is transferred to the buyer, unless the parties provide otherwise.

For the vast majority of shipbuilding contracts, the parties agree that, regardless of the time of transfer of title, the risk of damage to or loss of the vessel remains with the builder until the delivery and acceptance of the vessel.

Subcontracting

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

Subject to the terms of the shipbuilding contract, the builder may subcontract part or all of the contract works to third parties.

However, depending on the parties' respective bargaining positions, the extent of the builder's rights to subcontract will be more or less extensively defined and limited in the contract. For instance, it may be agreed that certain key steps of the construction process (such as the assembly of the hull and other items of works directly affecting the agreed quality standards of the vessel) cannot be delegated without the prior approval of the buyer, or are not delegable at all.

No matter how wide the builder's liberty to subcontract, and subject to the parties' contrary provision, the builder will remain fully liable towards the buyer for any subcontracted work, and it is usual to find express language to that effect in the contract.

Although a maker's list is not provided for in the SAJ form, upon which international shipbuilding contracts governed by English law tend to be based, most international shipbuilding contracts, as well as BIMCO's Newbuildcon form, include a maker's list of potential major suppliers and subcontractors. Such a list, depending on where the vessel is being built, allows the builder to proceed to making the final selection of major suppliers and subcontractors without further approval from the buyer. If the buyer subsequently wishes to amend the maker's list, they will be liable for the builder's costs resulting from any change. The unamended SAJ form instead grants the builder sole discretion and responsibility to subcontract any portion of the construction. However, this is commonly amended to allow the buyer the right to approve major suppliers and subcontractors and such amendments can include a maker's list.

Extraterritorial construction

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

Subject to any express term of the contract to the contrary, and provided that the contract does not otherwise restrict the ability of the builder to subcontract the construction of the relevant items without the buyer's prior approval, an English or Welsh shipbuilder has no obligation to inform the buyer of its intention to use subcontractors located in countries other than England and Wales. However, it is usually the case that vessels that are to be constructed under a shipbuilding contract that is governed by English law will not be built in the jurisdiction. In those circumstances, appropriate legal advice should be sought from local counsel to clarify if there are any local content rules in that jurisdiction.

In addition to a provision detailing the builder's rights and obligations in respect of subcontracting, the builder's right to perform the contract works (or to have them performed) in a place other than the builder's shipyard may also be curtailed by a term expressly providing that the vessel shall be constructed at that shipyard, as is provided for in the CMAC form.

PRICING, PAYMENT AND FINANCING

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

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

The price can be fixed by the contract either by reference to a specified sum for specific work or, where the work scope is uncertain at the time of contract signing, by measuring the work performed against a given schedule of quantities or rates. In the case of a fixed price, a claim by the builder for the relevant lump sum or an agreed instalment is a liquidated sum in respect of which the builder can apply for summary judgment. In the case of a cost-plus arrangement, the builder can recover the price when the relevant measurement can be ascertained and duly certified.

Shipbuilding contracts are generally fixed-price contracts, whereby the price agreed by the parties incorporates the cost of all materials and labour for the construction of the vessel (with a certain uplift to remunerate the builder), and of all activities and charges ancillary thereto (such as inspections, trials and tests, and supervision and certification by the classification society and the regulatory authorities). Where a contract or part of the work scope is placed on a cost-plus basis, the relevant price is often expressed to cover materials and related services at cost (on an open-book basis) with an agreed markup to cover the shipbuilder's overhead and an agreed profit element.

Price increases

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

No, any such increases will be at the builder's risk. Currently, it is unusual for international shipbuilding contracts to incorporate price escalation provisions, but in times of increased demand, steel price adjustment clauses have been agreed. However, shipbuilding contracts typically provide that the fixed price may be adjusted upward or downward in the event of modifications to the specifications or to reflect any liquidated damages payable by the builder as a result of delays in delivery or technical deficiencies in the vessel. However, the builder must ensure it does not carry out any extra work until the parties have agreed and recorded any adjustment to the price or delivery date; failure to do so may prevent the builder from claiming these subsequently.

Retracting consent to a price increase

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

Under English law, it is accepted that economic pressure can amount to duress, provided that such economic pressure could be characterised as 'illegitimate pressure' and constituted a significant inducement to the claimant to enter into the contract that it is seeking to avoid (see *Progress Bulk Carriers Limited v Tube City IMS LLC (The Cenk Kaptanoglu)*(2012)).

The authorities indicate that each case involving economic duress is heavily dependent on its particular facts, including the conduct of the parties and circumstances of the victim. The remedy for economic duress is generally an action for restitution of money (or property) extracted under such duress rather than an action for damages, together with the avoidance of any contract found to have been induced by it. In some cases, however, the duress may also actually amount to an actionable tort, in which case the restitutionary remedy for money had and received is an alternative (not additional) remedy to an action for damages in tort.

Where conduct is found to amount to economic duress, the agreement (including a contract variation) is voidable (not void) but the right to rescind may be lost if a party is found to have affirmed the contract (or otherwise waived its rights) (see *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd (The Atlantic Baron)* (1979)).

Exclusions of buyers' rights

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

Yes, the parties can include provisions in the shipbuilding contract that exclude or limit the buyer's rights to set off, suspend payment or deduct certain amounts.

Refund guarantees

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

Section 4 of the Statute of Frauds 1677 (the Statute) provides that in order to be enforceable in England and Wales, a contract of guarantee must be evidenced by some form of written memorandum or note of the contract signed by the party against whom the claim is to be made. The note or memorandum evidencing the guarantee obligation does not need to be in any special form but must set out all the material terms of the guarantee and, crucially, must be signed by the guarantor or by its agent. 'Guarantee' in this context means a 'true' guarantee where the guarantor acts as secondary obligor as the primary liability remains with the principal debtor, as opposed to 'on demand' guarantees or indemnities (where primary liability is imposed on the party undertaking the obligation).

The above statutory requirements can be fulfilled by guarantees being issued via electronic communication as the courts will uphold accepted contemporary business practice (such as issue of guarantees by the Society for Worldwide Interbank Financial Telecommunication (SWIFT)) and the use of electronic signatures to satisfy the requirements of the Statute for a guarantee to be 'in writing' and 'signed' (see *Mehta v J Pereira Fernandes SA* (2006), *WS Tankship BV v Kwangju Bank*(2011) and *Golden Ocean Group Limited v Salgaocar Mining Industries Pvt Ltd and another*(2012)).

The Newbuildcon form contains a draft refund guarantee, but this is not widely used, so BIMCO has announced that it will issue a standalone standard form refund guarantee this year that it hopes will be acceptable to banks, builders and buyers. This is said to be a primary security instrument where the guarantor will pay on demand, but with appropriate provisions in place for disputes to be resolved by arbitration before payment is made.

No permission is required from any UK authority for a shipbuilder in England or Wales to have refund guarantees issued.

Advance payment and parent company guarantees

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

Section 4 of the Statute of Frauds 1677 provides that to be enforceable in England and Wales, a contract of guarantee must be evidenced by some form of written memorandum or note of the contract signed by the party against whom the claim is to be made. The note or memorandum evidencing the guarantee obligation does not need to be in any special form but must set out all the material terms of the guarantee and, crucially, must be signed by the guarantor or by its agent. 'Guarantee' in this context means a 'true' guarantee where the guarantor acts as secondary obligor as the primary liability remains with the principal debtor, as opposed to 'on demand' guarantees or indemnities (where primary liability is imposed on the party undertaking the obligation).

The above statutory requirements can be fulfilled by guarantees being issued via electronic communication as the courts will uphold accepted contemporary business practice (such as issue of guarantees by SWIFT) and the use of electronic signatures to satisfy the requirements of the Statute of Frauds for a guarantee to be 'in writing' and 'signed' (see *Mehta v J Pereira Fernandes SA* (2006), *WS Tankship BV v Kwangju Bank* (2011) and *Golden Ocean Group Limited v Salgaocar Mining Industries Pvt Ltd and another* (2012)).

Financing of construction with a mortgage

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

English law does not permit the registration of the vessel under construction in the UK Ship Register. Accordingly, neither the builder nor the buyer can create and register a mortgage over the vessel under construction to secure construction financing.

DEFAULT, LIABILITY AND REMEDIES

Liability for defective design (after delivery)

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

In the case of *Aktiebolaget Gotaverken v Westminster Corporation of Monrovia and another* (1971), the High Court held that a clause that imposed upon a repair shipyard warranty obligations in respect of 'material used and work performed' (and that was linked to another clause referring to 'defects or deficiencies of material or workmanship') was also apt to encompass the shipyard's design errors. If there were design errors, there was no reason why these should not be characterised, and attract liability, as bad workmanship and, accordingly, be covered by the warranty provisions.

However, notwithstanding the above judgment, the parties often provide expressly that the builder's warranty covers defects resulting from inadequate or erroneous design discovered in the warranty period so to avoid any uncertainty on this issue.

The extent to which a buyer can recover its losses for defective design or poor workmanship, or both, under a warranty clause was considered in *Star Polaris LLC v HHIC-Phil Inc* (2016), which concerned the serious engine failure on a bulk carrier. The shipbuilding contract had excluded the builder's liability for 'any consequential or special losses' and the court, upholding the decision of the arbitrators, considered that 'consequential' should be considered in its 'cause-and-effect' sense, rather than the traditional *Hadley v Baxendale* distinction of direct and indirect losses. As a result, the buyer's recovery was limited to the cost of repair and did not include its claims for loss of hire and diminution in value that were considered consequential to the repairs works provided for in the warranty provision. However, this non-traditional approach to the categorisation of losses has not been accepted by the courts in a non-marine context in relation to a differently worded clause (*2 Entertain Video Ltd v Sony DADC Europe Ltd*(2020)).

Remedies for defectiveness (after delivery)

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

Under English law, it is not straightforward for third parties to seek redress for damage suffered as a result of the defectiveness of the vessel.

In the absence of a contractual relationship, a third party's ability to enforce the warranty rights under the shipbuilding contract is severely restricted. A third party may be entitled to enforce its terms, including the warranty clause, pursuant to the Contracts (Rights of Third Parties) Act 1999 (the 1999 Act), although contracts usually contain provisions expressly excluding its application. Taking an assignment of the buyer's rights under the shipbuilding contract could be an alternative contractual route that third-party claimants may wish to explore, but this may in fact be impracticable as the shipbuilding contract, as is often the case, may prohibit any assignment or subject the same to the shipbuilder's consent.

It may be open to a third party to establish the shipbuilder's liability in tort, but this is not without its difficulties. First, unless there is no foreign element involved in the case, a claimant has to address the preliminary questions of jurisdiction and proper law (ie, respectively whether English courts have jurisdiction to hear the claim and which system of law should apply to determine the builder's liability). Leaving aside the question of jurisdiction (which, depending on the circumstances, may be governed by the applicable English statutory provisions or by common law), the applicable law for determining whether an actionable tort has been committed will generally be governed by either the Private International Law (Miscellaneous Provisions) Act 1995 (the 1995 Act) or the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) Regulations 2019, as amended by the Jurisdiction, Judgments and Applicable Law (Amendment) (EU Exit) Regulations 2020, on the law applicable to non-contractual obligations (incorporating Regulation (EC) No 864/2007 (Rome II) into English law following Brexit) where the damage occurred after 11 January 2009.

To the extent that English law becomes relevant and the claimants wish to sue the shipbuilder under the tort of negligence, a host of difficult issues will arise as to the nature of the relationship between the claimants and the builder, as well as the nature of the loss suffered. Essentially, any claimant must demonstrate that its relationship with the shipbuilder attracted a legal duty of care and that the shipbuilder's conduct breached that duty, and also that such conduct caused the claimant's loss and the type of loss suffered was foreseeable as a result of the shipbuilder's conduct. In *Howmet Ltd v Economy Devices Ltd* (2016), it was held that where a third party becomes aware of the defect before the damage occurs but continues to use the product, the defendant would be able to escape liability.

The hurdles that a claimant has to overcome are significant, and even where a claimant can establish that the shipbuilder owed it a duty of care that the shipbuilder had then breached by building a defective vessel, the claimant might be unable to bring the type of loss suffered (for instance, pure economic loss as opposed to physical injury or property damage) within the types of losses to which the shipbuilder's duty of care extends. Notably, English courts are reluctant to allow third-party claimants to recover pure economic losses by suing in negligence unless they can demonstrate the existence of a special relationship with the defendant or otherwise establish the defendant's assumption of responsibility. A third party is, therefore, likely to face a considerable challenge to succeed in recovering losses by pursuing the shipbuilder in tort for negligence.

Brief mention should also be made of the statutory regime provided by the Consumer Protection Act 1987 (the 1987 Act). Under the 1987 Act, a 'producer' of a defective product is made liable without proof of fault for any damage arising from the defect. Ships are expressly included in the definition of products so there is accordingly scope for a claimant to bring a claim under the 1987 Act where it has suffered loss or injury because of the defective condition of a ship. A shipbuilder could, therefore, as a producer, face a claim where an accident can be proven to have resulted from a defect in construction. A defect under the 1987 Act was defined in *Colin Gee and others v DePuy International Ltd* (2018) as the abnormal potential for harm, namely, whatever it is about the condition or character of the product that elevates the underlying risk beyond the level of safety that the public is entitled to expect.

However, while personal injury claims are largely unqualified by the 1987 Act, liability for property damage is significantly limited. First, the 1987 Act does not provide a remedy in respect of any damage to the product itself, even if caused by the defect. Second, it only applies to damage to property that is of a description ordinarily intended for private use, occupation or consumption and that is intended by the person suffering the loss to be mainly for its own use, occupation and consumption. As a result, most cases of damage to commercial ships and their cargo and any cargo damaged on the defective vessel fall outside the scope of the 1987 Act although, prima facie, damage caused by a defective vessel to private yachts and private property ashore would not be excluded.

Liquidated damages clauses

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

In the past, the effectiveness of liquidated damages provisions was subject to the requirement that the agreed level of damages must represent a genuine pre-estimate of the losses arising from the relevant breach. In light of this test, where the level of compensation was found to be extravagant or unconscionable, the clause would be treated as a penalty and would therefore be legally unenforceable.

The test was definitively clarified by the Supreme Court in 2015 in the conjoined appeals of *Cavendish Square Holdings BV v Talal El Makdessi and ParkingEye Limited v Beavis* (2015). In essence, whether a contractual provision is a penalty is a question of interpretation, with the real question being whether the clause is penal or punitive in nature. A penalty clause can only exist where a secondary obligation (eg, to pay liquidated damages) is imposed following a breach of a primary obligation owed by one party to the other (eg, a failure to meet performance guarantees) and is to be distinguished from a conditional primary obligation, which depends on events that are not breaches of contract. It is, therefore, potentially possible to circumvent the penalty rule with careful drafting, as was the case in *Holyoake and another v Candy and others* (2017). Where a provision in substance, rather than in form, imposes a secondary liability for breach of a primary obligation that is out of all proportion to any legitimate interest of the innocent party in the performance of the primary obligation or is exorbitant, extravagant or unconscionable in comparison with the value of that legitimate interest it will be considered penal. The onus lies on the party alleging that a clause is a penalty to show this. As the penalty rule is an interference with freedom of contract, the courts will not lightly conclude that a term in a contract negotiated by properly advised parties of comparable bargaining power is a penalty (see *GPP Big Field LLP v Solar EPC Solutions SL (formerly Prosolia Siglio XXI)* (2018)). While a number of cases have now been heard by the court since *Makdessi*, earlier case law considering whether specific clauses are penal will still be relevant, as the Supreme Court considered it impossible to lay down abstract rules as to what may or may not constitute 'extravagant' or 'unconscionable' (see High Court case of *Azimut-Benetti SpA v Healey* (2011) concerning a yacht builder's claim for an amount equal to 20 per cent of the contract price by way of liquidated damages on its termination of the yacht construction contract for the buyer's late payment of an instalment).

There is also authority to indicate that the courts will interpret liquidated damages clauses to prevent their application where the relevant underlying breach of contract is relatively minor. This de minimis approach was adopted by the Court of Appeal in *Cenargo Ltd v Izar Construcciones Navales SA*(2002), which concerned a provision for payment of liquidated damages for reductions in the vehicle-carrying capacity of ferry newbuildings. The cost of the modifications, at around US$11,000, was substantially less than the liquidated damages claim under the contract of around US$750,000. This judgment is considered to be controversial as it has been felt to run counter to the whole premise of a liquidated damages clause being to reflect the contractual bargain between the parties for a specific breach of contract, notwithstanding a party's loss. For example, more recently, in the first instance decision in *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* (2015) and approved obiter by the Court of Appeal (2016), demurrage, which was payable by a charterer to a shipowner for failure to load or unload goods on time and recognised as a payment of liquidated damages, did not require the innocent party to prove its actual loss or mitigate that loss when it fell due.

Even if the contract has been rescinded, liquidated damages may be payable by the builder in respect of delay, even if the work is completed elsewhere. In *Triple Point Technology v PTT Public Co Ltd* (2019), the court identified three possible scenarios, namely that liquidated damages may (i) not apply; (ii) only be payable up to the date of rescission; or (iii) be payable until the replacement builder completes the work. While in this case the Court of Appeal determined that the liquidated damages clause did not apply when the contract had been rescinded, the appeal judgment from the Supreme Court is currently awaited.

Preclusion from claiming higher actual damages

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

If the loss arising from the breach exceeds the level of the liquidated damages, it is clear that the liquidated damages provision limits the liability of the party in breach to the agreed amount under the clause. The claimant will need to establish an alternative or additional breach of contract to sue for its actual loss in such a case. Where a builder fails to deliver a vessel by the contractual delivery date, the buyer's remedy is usually (subject to the terms of the particular contract) limited to the liquidated damages provisions of the contract dealing with delay in delivery. However, where the liquidated damages clause is successfully challenged as constituting an unlawful penalty and therefore unenforceable, both parties are disabled from invoking it. In such a case, the innocent party is entitled to sue for its actual losses, subject to the usual rules of remoteness of damage and causation.

Force majeure

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

Parties are free to design the force majeure clause and it is important that due consideration is given to doing so because English law, unlike some civil law jurisdictions, does not recognise any general doctrine of force majeure. Accordingly, the parties must specify the events, unforeseen at the point of contracting, that will constitute force majeure. These typically include events such as: acts of God; war or other hostilities; blockade; civil war; strikes, lockouts or other labour disturbances; labour shortage; flood, typhoons, hurricanes, storms or other weather conditions not included in normal planning; pandemics; earthquakes; tidal waves; landslides; fires; and explosions. The parties must also specify the effect of the occurrence of such an event. The contract usually sets strict time limits within which the commencement and ending of the event must be notified, and failure to do so can be fatal to successfully claiming force majeure (see, by way of recent example, *GPP Big Field LLP v Solar EPC Solutions SL (formerly Prosolia Siglio XXI)* (2018)). The scope of the force majeure clause will affect the extent to which the builder is entitled to an extension of time for completion of the vessel and the remedies available to the buyer where the builder fails to meet the delivery date. Where a party seeks to rely on a force majeure event, it must show causation and establish that it would have performed the contract but for the force majeure event (see *Seadrill Ghana Operations Ltd v Tullow Ghana Limited* (2018) and *Classic Maritime Inc v Limbungan SDN BHD & Anor*(2018)).

As all of the standard forms include epidemics as a force majeure event (and it is also common to find pandemics, quarantine, entry and exit restrictions, restraint of princes, rulers and people, and requirements of government authorities in such clauses), a builder may have been able to claim force majeure as a result of the coronavirus pandemic, provided that the builder: (i) could show that construction or delivery was delayed; and (ii) complied with the relevant notice provisions in the force majeure clause.

Umbrella insurance

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

The Institute of London Underwriters' Builders' Risks Clauses dating from 1988 (the 1988 Clauses) are recommended as the minimum insurance in BIMCO's Newbuildcon and widely used to cover the risks of physical loss of and damage to the vessel and her components during the period of construction. Generally, the cover incepts at the stage of keel laying (although the parties may agree a different stage of construction) and lapses upon delivery of the vessel to the buyer. Insurance is on an all-risks basis (subject to certain limitations) in respect of loss or damage to the vessel or her components, including repair or replacement costs of parts condemned owing to latent defects discovered within the period of the insurance. It is usual for builders' risks policies to identify the insured parties in broad terms to include, in addition to the builder as the principal assured, other parties involved with the project, such as the builder's subcontractors and suppliers.

The more recent London Marine Construction All Risks (MarCAR) 2007 clauses were released in 2007 (the MarCAR 2007 Clauses) to suit a wider range of projects (including conversion, repair, lengthening or other similar work, as well as the construction of liquefied natural gas carriers and high-value cruise vessels) than the 1988 Clauses and to address certain shortcomings perceived in those clauses. However, insurance written on the terms of the 1988 Clauses remains the norm.

An alternative wording for builders' risk insurances is that contained in the Nordic Marine Insurance Plan 2013 (the Plan), as updated in 2019, providing coverage against vessel's physical damage and its components caused prior to delivery by marine perils, strikes and lockouts. War perils coverage can be purchased as an add-on from the date of launching. Regarding machinery and components, coverage can be purchased but only from the date they have been placed on board the launched vessel. Insurance coverage is for the 'builder's yard or other premises in the port where the builder's yard is situated and while in transit between these areas' and the designated area for the vessel's sea trials.

Coverage for the construction and modification of vessels and installations employed in the offshore oil and gas sector is usually provided on the Offshore Construction Project Policy (WELCAR 2001) terms. WELCAR 2001 provides general all risks coverage throughout the construction process, from initial procurement to start-up. The Lloyds' Joint Rig Committee revised the WELCAR wording and circulated it for consultation in 2011. The amended wording however was criticised as too restrictive and pending further consultation it has not re-emerged.

Aside from WELCAR, it is not uncommon for parties to opt for CAR (contractors all risks) or EAR (erection all risks) coverage. The former is designed to cover all loss or damage to insured property (such as permanent property resulting from the works, construction equipment, worksite property and removal of debris) and liability towards third parties for death, bodily injury and damage to property, while the latter predominantly provides cover for risks associated with the erection, installation and commissioning of equipment, machinery, plant and structures. Although both of these policies are generally used for onshore construction and infrastructure projects, subject to the insurance arrangements of the parties, they may also be suitable for some shipbuilding and offshore construction projects.

Disagreement on modifications

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

Where the contract provides for any dispute to be submitted to the High Court, the court will not normally be prepared to set terms for the parties if they cannot agree them themselves, although it may be willing to determine what would be a reasonable adjustment to the contract price or a reasonable delivery date. If, however, arbitration is the chosen means for dispute resolution, the position may be different.

Marine construction contracts governed by English law often include a term that, when making its award, the tribunal may include a finding as to any extension of the delivery date (which, for instance, allows the builder to seek extra time where the arbitration itself has caused delay to completion of the vessel). However, that is usually as far as the term goes – there is typically no provision for what criteria are to be applied by the tribunal in exercising this discretion. Further, if the parties wish the tribunal to determine any reasonable adjustments to other terms of the contract, such as the contract price, the contract should expressly confer that power on the tribunal.

Under the Arbitration Act 1996, the parties are free to agree on the powers exercisable by a tribunal as regards remedies. Unless otherwise agreed by the parties (or by reference to the rules of the applicable arbitral institution), the tribunal has wide powers, including ordering payment of a sum of money in any currency, making a declaration as to any matter to be determined in the proceedings, ordering a party to do or to refrain from doing anything, ordering specific performance of the contract and ordering rectification, setting aside or cancellation of a deed or other document. However, neither the arbitral tribunal nor the court can otherwise amend the terms of the contract. It is also important to consider where such a non-damages remedy is sought and the other party subsequently does not act in accordance with the arbitral award, whether such a remedy can actually be enforced in the jurisdiction where the award would need to be enforced.

It is not unusual to encounter provisions in shipbuilding contracts requiring further negotiation or agreement between the parties. The general position under English law is that true agreements to negotiate or agreements to agree are unenforceable (see, for example, *Walford v Miles* (1992)). In many cases where, therefore, parties fail to reach agreement on the contract price, delivery date or other key terms, neither the court nor an arbitration tribunal will usually be prepared to set such terms for them. However, that is not always the case, and often the court or arbitration tribunal will strive to uphold the contract that the parties have entered into by implying a term into the contract to make it enforceable. In *Teekay Tankers Limited v STX Offshore and Shipping Company* (2017) the court would not imply terms into the option agreement in circumstances where the parties were unable to reach agreement as to the delivery date for two options for the construction of up to four vessels each, because it took the view that such terms were at odds with the parties' scheme as set out in the option agreement. However, whether this approach is applicable in all cases will depend upon the construction of the contract.

The conclusion of a letter of intent is a typical first stage in most newbuilding projects, the main purpose of which is usually to secure the slot in the shipyard's building schedule for a period during which the parties will negotiate the contract and specification of the vessel, and also to set out certain key terms, such as delivery date, payment terms and perhaps options on further vessels. As a matter of English law, unless (unusually) the letter of intent expressly states that it creates a legally binding agreement, its enforceability will be a matter of construction, although that wording alone may not be sufficient to result in an enforceable letter of intent. Where the terms included contain provisions as to consideration and governing law and jurisdiction, the requisite intention to create a contractual relationship is likely to be found. However, even if such an intention is present, the letter of intent will still not be enforceable if, on its true construction, it provides no more than an agreement to agree or an agreement to negotiate. Recent case law has shown that, depending on the construction of the terms of the particular contract, it is possible for an agreement to agree or to negotiate to be enforceable, although recent reported cases demonstrate how nuanced the position can be. In *Arcadis Consulting (UK) Ltd v AMEC (BSC) Ltd* (2018), the Court of Appeal found that where a party started work on a project following receipt of a letter of instruction that was sufficient to amount to acceptance, even though negotiations were ongoing and never finalised. The letter of instruction stood as the contract between the parties and incorporated the terms and conditions that the parties were already working under on another contract, even though the parties continued to negotiate the terms and conditions as part of the failed negotiations. However, in *Joanne Properties Ltd v Moneything Capital Ltd* (2020), the use of the term 'subject to contract' prevented there from being a binding contract until a formal contract was made.

Acceptance of the vessel

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

The principal purpose of the protocol of delivery and acceptance is to record the time and date that title and risk pass to the buyer. It is also typically required to enable the builder to obtain the delivery instalment of the contract price.

The effect of the protocol of delivery and acceptance was reviewed by the High Court in the case of *Riva Bella SA v Tamsen Yachts GmbH* (2011), which concerned the resale of a newbuild yacht. It was held that in certain circumstances (for instance, where the contract itself expressly provides), by accepting the vessel and by signing a protocol of delivery and acceptance, the buyer may be precluded from rejecting the vessel (at least with regard to patent defects) and prevented from claiming damages against the seller, and may instead be confined to the remedies arising under the contractual warranties. The court held, however, that, in the ordinary course, acceptance will not prevent a claim for damages (this was confirmed in *Saga Cruises BDF Ltd and another v Fincantieri SPA* (2016), which concerned a contract for dry docking, repair and refurbishment of a cruise ship). This is also clear from the judgment of the Court of Appeal in *Cenargo Ltd v Izar Construcciones Navales SA* (2002) where acceptance of a vessel from the builder was held not to preclude the buyer from asserting at delivery or thereafter any claim for liquidated damages for breach of any performance warranty.

It is relatively unusual to find a protocol of acceptance stating that 'buyer's acceptance of the vessel is final and binding so far as conformity of the vessel to the contract and specifications are concerned'. Most protocols confine the statement to delivery 'in accordance with' or 'pursuant to' the contract. However, such a term is frequently encountered as part of the provisions regarding sea trials in the shipbuilding contract itself.

In *China Shipbuilding Corporation v Nippon Yusen Kabukishi Kaisha and another* (2000), it was held that, in the context of the buyer's express or deemed acceptance of the vessel following trials (ie, in the sense of confirmation of approval of the vessel as distinct from taking possession following formal tender of delivery), a provision that acceptance 'shall be final and binding so far as conformity of the vessel to this contract and the specifications is concerned' was limited. Such a term was found merely to prevent the buyer from refusing the later delivery of the vessel when she was tendered; it did not preclude the buyer from asserting after delivery the existence of specific defects whether previously notified to the builder or latent at the time of delivery.

However, the terms of a certificate of acceptance may be such as to constitute clear and unequivocal agreement by the buyer that the goods conform on delivery with the required contractual condition, thereby preventing the buyer from later claiming otherwise. The construction of such a certificate was central to the Court of Appeal's decision in *Olympic Airlines SA (in special liquidation) v ACG Acquisition XX LLC*(2013) in the context of delivery of an aircraft under an aircraft lease and to the High Court's decision in *ABN Amro Commercial Finance plc v McGinn* (2014) in the context of a conclusive evidence certificate given by the lender in relation to a claim under an indemnity.

Repair location and associated costs

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

It is normally provided that any replacements or repairs will take place in the builder's shipyard, but that is rarely the case as any warranty works will have to be scheduled depending on vessel's trading commitments and operations.

Where it is 'impractical to bring the vessel to the shipyard' (as under the SAJ and Newbuildcon forms) or when the builder 'cannot supply necessary replacement parts and materials without impairing or delaying the operation or working of the Vessel' (see Newbuildcon Form), the buyer is entitled to have the warranty works undertaken at 'any other shipyard or works' provided that the builder has the right of pre-inspection of the alleged defects. In this case, under the SAJ Form, the buyer is entitled to recover the sum 'equal to the reasonable cost of making the same repairs or replacements at the Shipyard'. Alternatively, it is also common for the contracting parties to agree to limit the builder's recovery to the lowest or the average price for the repairs quoted by two or three shipyards in the vicinity in which the vessel is located. Under the Newbuildcon, the builder shall pay the 'reasonable cost and expenses' of the warranty works. Unlike the Newbuildcon, the SAJ Form explicitly provides that the vessel shall be taken at the buyer's cost and responsibility to the repair yard and be ready for the repairs or replacements.

Ultimately, it is for the parties to agree whether ancillary expenses such as towage, dockage, wharfage, port charges and anything else incurred by the buyer getting and keeping the vessel ready for repairs shall be borne by the builder or the buyer.

Liens and encumbrances

33 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?

Under English law, a lien is a right over the property of another arising by operation of law, independently of any agreement. There are various categories of lien but the most relevant here would be a legal lien (also known as a possessory or common law lien), which gives the lienor a right to retain the property until the owner has settled some debt owed to the lienor. There are various subcategories of common law liens. However, if the equipment is already in the possession of the builder, ready to be incorporated into the vessel, the essential element of the lien (ie, possession by the lienor) will be missing.

In any event, it is usual practice for the builder to issue a written declaration at delivery of the vessel's freedom from encumbrances and the bill of sale typically provided at delivery will usually contain a similar express covenant. Such a warranty will (unless expressly excluded) also be implied by section 12(2)(a) of the Sale of Goods Act 1979.

Reservation of title in materials and equipment

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

It is common for suppliers to incorporate into their contracts retention or reservation of title clauses. These usually stipulate that the supplier retains the property in the goods until such time as full payment has been made. The validity of these clauses was established in the case of *Aluminium Industrie Vaasen BV v Romalpa Aluminium Ltd* (1976), but while the practical effects of these clauses seem well understood, the legal issues arising are often less so.

It is important to distinguish the simple retention of title clause from a security agreement. The latter (where the transaction involves companies) may well require registration as a registrable charge under section 859A of the Companies Act 2006. A simple retention of title clause will not have this effect and is not a charge because property in the goods is retained by the original supplier and never passes to the buyer. As the buyer was never the owner, it would never be able to grant any interest in the goods to the seller by way of security. However, retention of title clauses vary considerably and a sophisticated clause may well be found to constitute a charge, especially where it grants back to the seller any beneficial or equitable interest. In company law, there is a regime for the registration of charges that serves as notice to any subsequent buyer or subsequent chargee of the existence of the charge. The failure of a supplier to register a registrable charge means that any such subsequent chargeholder or buyer can ignore the claims of the original supplier who will be left with its claims against the buyer under the contract. This would clearly be disastrous for the original supplier if the buyer became insolvent. It is, therefore, important to ensure that any such clause is carefully reviewed.

Where material has been delivered by the supplier to the shipbuilder pursuant to a contract containing reservation of title provisions, to the extent that the material remains held in stock and available, the clause should be effective to ensure the property remains vested in the supplier. However, where the goods have been incorporated in, or used as material for, other goods, detailed analysis of the resulting product will be required to establish ownership. It cannot be assumed that if a supplier is unable to identify its particular goods, its retention of title clause will be defeated. In the first instance, it will be necessary to establish the extent to which the original goods supplied have retained their original identity. Where the identity of the original goods has been lost, the buyer is likely to have acquired title. If, however, the original goods have been mixed with goods owned by a third party, a supplier's retention of title claim will not necessarily be defeated, particularly if such goods retain their original identity or can be extracted from the manufacturing process.

There is authority for the assumption that the newly manufactured goods are owned by the buyer of the original goods (ie, the shipbuilder) but that the clause itself may then provide evidence of a charge created in favour of the supplier (to which the issues raised above are then relevant). Depending again on the precise terms of the contract between them, notwithstanding any retention of title provision, the shipbuilder, as a party that has agreed to buy goods and, therefore, a buyer in possession after sale, is permitted under section 25 of the Sale of Goods Act 1979 to sell the goods and pass good title. The supplier is left with a claim for damages.

Third-party creditors' security

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

The availability of any such right of a third-party creditor to obtain a security attachment or lien over the vessel (more commonly referred to as arrest) or equipment will depend upon the lex situs, that is, the law of the place of construction.

As the vast majority of shipbuilding contracts governed by English law provide for title to the vessel to pass to the buyer on delivery, at that point in time, the builder is required to issue a written declaration that the vessel is free from, among other things, charges and liens and will want to ensure that it can make the declaration required.

Subcontractor's and manufacturer's warranties

36 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?

Whether such a warranty can be assigned will depend on the terms of the relevant contract. Under English law, in the absence of an express prohibition in the contract, the benefits (but not the burdens) of a contract can generally be assigned by either party to a third party.

Where the assignment is made in writing, is signed by the assignor, is in absolute terms (and not by way of charge only) and a written notice of the same is given to the contractual counterpart, it will satisfy section 136 of the Law of Property Act 1925 and constitute a legal assignment. As a result, the assignee assumes the rights of the assignor under the contract and may enforce such rights itself directly against the other contracting party. The notice of assignment must be given before the assignee can exercise its contractual rights, such as giving notice to terminate the contract (*General Nutrition Investment Company v Holland and Barrett International Ltd* (2017)). Where the statutory formalities have not been met, the assignee may still be able to enforce the assignment in equity by requiring the assignor to sue on its behalf. In *Energy Works (Hull) Ltd v MW High Tech Projects UK Ltd & Others*(2020), it was decided following a preliminary issues hearing that the assignment of a sub-contract from the contractor of a re-gasification plant in England to the employer on termination of the main contract transferred the benefit of all accrued and future rights, leaving the contractor with no contractual claim against the sub-contractor. It was also determined that the contractor was entitled to claim a contribution from the sub-contractor under the Civil Liability (Contribution) Act 1978 in relation to certain types of damage. However, advice should be sought from local counsel to clarify the position in the jurisdiction where the vessel is being constructed, which is not normally England or Wales.

Under the Contracts (Rights of Third Parties) Act 1999, it is now possible in certain circumstances for contractual rights to be enforced directly by a third party provided that the contract expressly provides that the third party may do so or a relevant term 'purports to confer a benefit upon him' and, on the proper construction of the contract, it is clear that the parties intended that such third party should be entitled to enforce it. The third party must 'be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into'. This third party is entitled to the same remedies as would have been available to it in an action for a breach of contract if it had been an original party. However, the contractual defences available to the original parties are preserved in relation to the third party and it is open to the original parties to set conditions on a third party's rights to enforce any term. This Act substantially changed contractual doctrine as to third-party rights and, in light of its significant implications, is routinely excluded in manufacturers' warranties.

Default of the builder

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

Parties usually agree that certain defined events of default will entitle the buyer to terminate the contract by exercising express rights in the contract to this effect. Most shipbuilding contracts define delay in delivery, technical deficiencies in the vessel, insolvency events and total loss as such events entitling termination.

It is important to ensure that the party seeking to terminate the contract complies with any contractual mechanism or procedure for terminating, including the service of notices of default. However, as illustrated in the first instance decision of *Obrascon Huarte Lain SA v Attorney General of Gibraltar* (2014), strict compliance with such a procedure may not be essential, an approach that the judge considered 'accords with commercial common sense', although a party terminating a contract will certainly not want to have to rely on this decision. However, in a recent arbitration award (London Arbitration 2/19), the tribunal said that the builder was obligated to give notice of any delay for which it claimed an extension of time to the delivery date because certainty was of great importance in commercial contracts and it was essential that both parties knew when the right to cancel could be exercised.

When a party wishes to exercise its right to terminate at common law, it will not be necessary for that party to comply with the express contractual termination provisions, including any notice requirements, unless the express wording of the termination provision states that it applies to termination at common law, although such a term cannot be implied into the termination provision of a contract (see *Vinergy International (PVT) Ltd v Richmond Mercantile Ltd FZC* (2016)).

If the buyer exercises a right to terminate, the builder will normally have to refund the instalments paid up to that point, together with interest at an agreed rate. Where title passes on delivery, the builder's obligation to refund the pre-delivery instalments is normally secured by a refund guarantee, the provision of which is usually a condition precedent to payment of instalments.

Even if the buyer is refunded its advance instalments and interest, the buyer may still incur substantial losses as a result of the termination. These losses may be categorised as either loss of bargain (usually expressed as the difference between the contract price and the market price for an equivalent newbuilding) or reliance loss (wasted expenditure as a result of the termination of the contract). These losses are not normally recoverable from the builder, as shipbuilding contracts invariably seek to limit the builder's obligations on termination by the buyer to repayment of the advance instalments with interest.

Where the victim of a breach of contract prefers performance of the contract rather than its termination, in theory it may be possible for it to obtain an order of specific performance from the High Court or arbitration tribunal. This is an order directed to the party in breach to fulfil its contractual obligations. However, it is a discretionary remedy and seldom granted: for example, an order for specific performance will not be made where an award of damages would adequately compensate the victim. Also, in a shipbuilding context, the courts have refused to order specific performance to ensure completion and delivery of a vessel, due to the difficulty of ensuring adequate supervision of a complex construction project (although the position may be otherwise where the vessel is actually complete, as the remedy has been granted in the context of sales of second-hand vessels). The case of *Liberty Mercian v Cuddy Civil Engineering Ltd and another* (2013) indicates that the mere fact that some level of supervision is required does not of itself prevent a court from granting an order for specific performance.

It may, however, be possible to characterise the builder's conduct as being a repudiatory breach of contract, which is essentially where the breach is either in relation to a term that is correctly categorised as a contractual condition or is serious enough to deprive a party of substantially the whole benefit it intended to obtain from the contract. If so, the breach gives that party a common law right to treat the contract as discharged and to recover damages for loss of bargain. This position was reaffirmed in the important case *Stocznia Gdynia SA v Gearbulk Holdings Ltd* (2009). The Court of Appeal in the *Gearbulk* case held that the particular contractual provision (regarding delay in delivery) did not exclude a right to terminate under common law and also did not exclude the claimant's rights to recover losses in the usual way, so the buyer could claim damages for loss of bargain. Furthermore, the exercise of its contractual rights to recover the instalments did not prejudice the claimant's ability to claim damages for the builder's repudiatory breach because it could recover those instalments under the doctrine of total failure of consideration, which was distinct from any right to recover damages for loss of bargain. The *Gearbulk* case provides an example of a failure to exclude the buyer's common law rights. However, where common law rights are not excluded but a party terminates in accordance with an express contractual right only, and that right does not amount to a breach of contract, the innocent party will subsequently be precluded from claiming common law remedies for breach because they had not terminated for a repudiatory breach of contract (actual or anticipatory). In *Phones 4U Limited (in administration) v EE Limited* (2018), the innocent party lost the right to claim loss of bargain damages because the basis for termination set out in the notice of termination was the appointment of administrators only. This case illustrates that it is crucial that a party should carefully considers its legal options, and obtain legal advice before serving notice of termination.

Remedies for protracted non-performance

38 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?

Depending on the circumstances of the case and the terms of the contract, it may be open to the shipowner, in addition to any contractual remedies, to treat a protracted failure to construct or to continue construction as a repudiatory breach of contract by the builder entitling the shipowner to accept the repudiation (so as to bring the shipbuilding contract to an end) and to claim damages in respect of losses caused by the breach. A shipowner may have to wait until it is impossible for the builder to meet the delivery date before it can exercise such a right and cancel the contract. If beforehand the builder evinces an intention not to perform its obligations in some essential respect, the builder's actions may amount to renunciation of the contract, allowing the shipowner to accept the breach and sue for damages before performance is required under the contract. In *Teekay Tankers Limited v STX Offshore and Shipping Company* (2017), the judge considered obiter that it was clear from the statements made by the builder regarding the provision of refund guarantees that the builder did not intend to fulfil its obligations and the shipowner would therefore have been entitled to terminate on that basis.

Where the contract sets out the delivery date but does not already make time of the essence, the shipowner's position in the event of protracted failure to construct or continue construction by the shipbuilder may require, or at least be strengthened by, the serving of a notice making time of the essence, as long as it gives the shipbuilder a reasonable time to complete construction. That notice should be sent as soon as the breach arises, but the shipowner does not need to wait until there has been unreasonable delay before sending it (see *Behzadi v Shaftesbury Hotels* (1992)).

Builder's insolvency

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

Clauses granting the buyer the right to terminate the contract if the builder becomes insolvent (or commits any other type of defined 'financial default') are not uncommon in English law shipbuilding contracts (such a provision appears in the Newbuildcon form, although not in the SAJ form). In *Fibria Celulose S/A v Pan Ocean Co Ltd and another*(2014), Fibria was found to be entitled to cancel a contract of affreightment with the South Korean shipping company in accordance with the terms of the contract on the basis of it being subject to an insolvency process. The company was subject to a rehabilitation process in Korea, which was regarded as being broadly comparable to an English administration coupled with a scheme of arrangement or company voluntary arrangement. The English court had no power under the Cross Border Insolvency Regulations 2006 (SI 2006/1030) to order a stay in relation to Fibria's entitlement to serve such a termination notice under the contract and nor could it make an order restraining it from doing so.

The judge noted that in some jurisdictions, a clause that allows a party to a contract to terminate the contract by reason of the insolvency of the counterparty is called an ipso facto clause. While in some jurisdictions such clauses are automatically invalid or the court has power to stay the exercise of rights under such clauses, there was no dispute in this case as to the efficacy of such a provision under English law. Indeed, the judge remarked that it was accepted that those provisions are valid in English law. In particular, it was accepted that the rule of insolvency law, known as the anti-deprivation rule, does not strike down such provisions. (The anti-deprivation rule can be briefly summarised as that which on insolvency prevents parties from depriving the insolvent company of property that would otherwise be available for creditors.)

Judicial proceedings or arbitration

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

The parties commonly choose which arbitration institution or country's courts will have jurisdiction over any disputes that arise under or in connection with the contract. Such clauses commonly override the basic principle that a defendant should be sued in his or her country of domicile. Arbitration is the preferred mechanism to resolve disputes arising under shipbuilding contracts. References are usually to a sole arbitrator or to a tribunal of three arbitrators in accordance with the rules of an arbitration institution, such as the London Maritime Arbitrators' Association (LMAA) and its Terms (the current version is the LMAA Terms (2017)), and the provisions of the Arbitration Act 1996. Where judicial proceedings are selected, disputes are typically agreed to be submitted to the Commercial Court or the Technology and Construction Court in London, part of the Business and Property Courts of England and Wales.

Arbitrations are often preferred because they are typically confidential and awards are generally more easily enforced around the world than English court judgments, owing to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention. In both instances appropriate legal advice should be sought from local counsel. The procedure for enforcement of UK court judgments in European Union states has changed as a result of the United Kingdom's departure from the European Union.

It is possible to challenge an arbitrator's award for lack of substantive jurisdiction, for serious irregularity or on a question of law (although the parties can agree to exclude the last of these), and as a result the dispute may end up before the courts. Where there are related contracts, for example, the shipbuilding contract and the refund guarantee, it is not uncommon to find that disputes arising under the former will be dealt with by arbitration, while the latter is subject to separate court proceedings.

Buyer's right to complete construction

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

While a buyer's contractual right to take possession of the vessel under construction and continue construction would survive the bankruptcy or moratorium of the creditors of the builder under English law, this is an issue that would be determined by the lex situs, that is, the law of the place of construction, which is not normally England or Wales. In such circumstances, appropriate legal advice should be sought from local counsel to clarify the position.

ADR/mediation

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

Of the standard forms of shipbuilding contract typically encountered, only BIMCO's Newbuildcon contains extensive, formal ADR provisions. In particular, this standard form provides a detailed mediation clause that permits the parties to refer any dispute arising out of the contract to mediation even if they have previously agreed to submit such dispute to arbitration and even if arbitration has already been commenced (in which case the arbitration proceedings are to continue during the conduct of the mediation and the tribunal has the power to adjust the arbitration timetable to take the mediation into account). Aside from BIMCO's Newbuildcon, it still remains relatively unusual to see provision for formal ADR procedures such as mediation, early neutral evaluation or the like provided for in shipbuilding contracts, although it may be agreed that the parties are to convene a meeting between senior management to try to resolve any dispute before arbitration or court proceedings are commenced. Where litigation is the agreed mode of dispute resolution, the English High Court encourages and has the power to order parties to engage in ADR procedures before or after formal proceedings are commenced and may stay the proceedings to allow for this to happen.

It is not uncommon for maritime construction contracts, particularly those in the offshore sector, to provide for an escalation procedure in an attempt to settle disputes through senior management before commencing formal arbitration or litigation. It was generally considered that where such a 'tiered dispute resolution clause' was included in a contract, any requirement for the parties to hold such discussions before the dispute was referred to formal dispute resolution was likely to be held unenforceable as it amounted to an agreement to agree. However, in the case of *Emirates Trading Agency LLC v Prime Mineral Exports Private Limited*(2014) the High Court held that, provided such a term is not incomplete and not uncertain, a requirement to hold 'friendly discussions', such as appears in the CMAC form, may well not be a mere agreement to negotiate and could, depending on the facts, be enforceable. Stipulating that those discussions are conducted in good faith generally does not add to the obligations on the parties and can instead lead to a dispute as to whether a duty of good faith has been imposed and what this amounts to.

Default of the buyer

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

As with default by the builder, it is usual for the parties to agree that certain defined events will entitle the builder to terminate the contract by exercising express rights in the contract to this effect in the event of default by the buyer. Most shipbuilding contracts define the buyer's failure to make timely payment of the instalments of the contract price or to take delivery of the vessel when it is tendered for delivery as events entitling termination, but depending on the financial standing of the buyer, such a clause could also include insolvency events.

Some shipbuilding contracts provide that the builder must give notice of default to the buyer, specifying a period during which the buyer can remedy the default, as a condition precedent to the builder's right to terminate the contract, but it is common for the builder to have the automatic right to terminate the contract upon the buyer's breach without notice of default.

The shipbuilding contract will set out the consequences of the buyer's default. Where the buyer fails to pay any instalments, the shipbuilding contract will commonly provide that the buyer is obliged to pay an agreed rate of interest from the date of the default until payment, including interest, is made in full. It may also require the buyer to pay all charges and expenses incurred by the builder as a consequence of the default. Such provisions also commonly provide that the delivery date will automatically be extended for the period of such default regardless of whether the construction of the vessel has been delayed as a result, although they are often amended to limit the extension to the period of time when the builder's construction programme is delayed. If the default continues for more than a set number of days, the builder will normally have the option to terminate the shipbuilding contract by giving notice to the buyer.

By cancelling the shipbuilding contract, the builder has brought an end to its obligation to construct the vessel and the buyer's obligation to purchase the vessel. On cancellation, the builder is normally entitled to retain the instalments of the contract price already paid by the buyer. The builder must, however, give credit for such sums in the 'final accounting'. As to instalments that are due but unpaid, termination of a contract of sale can prevent the recovery of any unpaid instalments from the buyer on the basis that the price is no longer payable (see *Dies v British and International Mining and Finance Corporation Ltd* (1939)). In the context of shipbuilding contracts, however, unless the builder has done nothing in the performance of the contract such that there has been a total failure of consideration (see *Hyundai Heavy Industries Co v Papadopoulos and Others* (1980) and *Stocznia Gdanska SA v Latvian Shipping Co, Latreefer Inc and Others* (1998)), the buyer cannot contend that the unpaid instalments are no longer due and instalments that have therefore accrued due, but remain unpaid by the buyer at the time of builder's termination, are recoverable by the builder. As to future payments, in the absence of express wording to the contrary, the builder's cancellation of the shipbuilding contract will prevent the builder from seeking to recover any future instalments of the contract price. Shipbuilding contracts also commonly provide that on cancellation by the builder, title in the buyer's supplies will transfer to the builder. However, this is normally limited to those buyer's supplies that have been installed or have been utilised on board the vessel.

Following termination of the shipbuilding contract, the builder will normally be entitled to sell the vessel, either in its existing condition, or to continue with the construction of the vessel and sell it once it has been completed. Shipbuilding contracts usually expressly provide for the application of the proceeds realised upon sale for each such scenario. In *Stocznia Gdanska*, the House of Lords held that the vessel did not need to be completed in accordance with the original specification in order to amount to a sale of the vessel under the relevant default clause. The appropriate course of action will normally be determined by the stage that construction has reached, together with the state of the newbuilding market at the relevant time. While shipbuilding contracts generally allow the sale to take place publicly or privately, the builder is normally subject to either an implied or express duty to act in good faith to prevent the sale of the vessel at an undervalue. Once the vessel has been sold, a final accounting will take place and take into account the original contract price or the builder's costs of construction or any anticipated lost profit of the builder (depending on the contract terms and whether the vessel was sold in a complete or incomplete state), and the instalments paid by the buyer. Any surplus will then usually be shared between the buyer and the builder, although the buyer is not usually entitled to recover more than the aggregate of the instalments paid and the supplies purchased. Where, however, there is a shortfall, the builder can demand the difference from the buyer.

Unless they have been excluded by clear words, the builder will also be entitled to rely on its common law rights, which may entitle it to treat the buyer's conduct as a repudiatory breach of the contract. In such circumstances, the builder can either affirm the contract, or accept the breach as bringing to an end the parties' respective obligations to construct and purchase the vessel, but require the buyer to pay damages for the builder's losses.

CONTRACT FORMS AND ASSIGNMENT

Standard contract forms

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

Most international shipbuilding contracts governed by English law tend to follow the Shipbuilders' Association of Japan's 1974 standard contract SAJ form, which forms the basis for many standard forms used in South Korea, China, Taiwan and Singapore. Other forms include BIMCO's 2007 standard newbuilding contract Newbuildcon, the Community of European Shipyards' Associations' 1999 form (commonly referred to as the AWES form) and the China Maritime Arbitration Commission's 2011 CMAC Standard Ship Building Contract (Shanghai edition). These forms are commonly substantially amended either by the parties when negotiating the specific contract or by the shipyard to create its own standard form, which it presents to potential buyers (who may then negotiate further amendments, depending on the respective bargaining power of the buyer and the builder).

Assignment of the contract

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

Where the contract assignment is made in writing, is signed by the assignor, is in absolute terms (and not by way of charge only) and a written notice of the same is given to the contractual counterpart, it will satisfy section 136 of the Law of Property Act 1925 and constitute a legal assignment. As a result, the assignee assumes the rights of the assignor under the contract and may enforce such rights itself directly against the other contracting party. The notice of assignment must be given before the assignee can exercise its contractual rights, such as giving notice to terminate the contract (see *General Nutrition Investment Company v Holland and Barrett International Ltd* (2017)). Where the statutory formalities have not been met, the assignee may still be able to enforce the assignment in equity by requiring the assignor to sue on its behalf.

Under the Contracts (Rights of Third Parties) Act 1999, it is possible in certain circumstances for contractual rights to be enforced directly by a third party provided that the contract expressly provides that the third party may do so or a relevant term 'purports to confer a benefit upon him' and, on the proper construction of the contract, it is clear that the parties intended that such third party should be entitled to enforce it. The third party must 'be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into'. This third party is entitled to the same remedies as would have been available to it in an action for a breach of contract if it had been an original party. However, the contractual defences available to the original parties are preserved in relation to the third party and it is open to the original parties to set conditions on a third party's rights to enforce any term. In light of its significant implications, this Act is routinely excluded in manufacturers' warranties.

English law regards an attempted assignment of contractual rights in breach of a contractual prohibition as ineffective to transfer such contractual rights. In *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*(1994) it was held that, were the law otherwise, it would defeat the legitimate commercial reason for inserting such a contractual prohibition, namely to ensure that the original parties are not brought into direct contractual relations with third parties (see also *BG Global Energy Limited (formerly BG International (NSW) Limited) and others v Talisman Sinopec Energy UK Limited (formerly Talisman Energy (UK) Limited) and others*(2015)). However, while any assignment in breach of a contractual prohibition is incapable of transferring any interest to the assignee, it may well create enforceable obligations between the assignor and assignee themselves. Moreover, *Linden Gardens* established that an intended assignee may still have a remedy in spite of such a contractual prohibition on assignment, although any claim must be brought by the assignor who would hold any damages recovered on trust for the assignee.

It is not uncommon to see such a prohibition qualified by requiring a party seeking to assign to obtain prior written approval or consent of the other party, such approval or consent not to be unreasonably withheld. The authorities establish that such approval or consent operates as a condition precedent to the validity of such an assignment (see *BG Global Energy* and the cases cited therein).

Assuming no contractual prohibition, and assuming compliance with the statutory requirements, a lawful assignment by one party of its rights to an assignee will not discharge the original contract. The position is different where one party wishes to transfer both its rights and obligations under an existing contract, whereby the original parties must agree to the substitution of the transferor by the new party, usually by novating the contract (by way of a novation agreement). This creates a new contract between the continuing party and the new party, replacing the rights and obligations of the original parties under the existing contract, which is thereby discharged. Prior to executing any novation, it is essential to consider the effect it would have on any third-party security issued in connection with the original contract, because the novation will be likely to discharge a guarantor from any liability under any guarantee. Accordingly, refund guarantees provided to the buyer should be carefully reviewed in advance of execution of any novation to check whether they need to be reconfirmed by the relevant guarantor or replaced as necessary.

UPDATE AND TRENDS

Recent developments

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

Environmental matters

Regulatory changes aimed at reducing the environmental impact of shipping remain a hot topic for the shipping industry as a whole (not just those entering into shipbuilding contracts), as the industry seeks to reduce its carbon intensity by 40 per cent by 2030, compared to 2008. The global upper limit of sulphur content in fuel oil on board ships is now 0.5 per cent m/m (mass/mass) under the International Maritime Organization (IMO) MARPOL treaty, except in designated emission control areas (ECAs), in the Baltic Sea, North Sea, North America and US Caribbean (with an ECA in the Mediterranean Sea under discussion), where a lower limit of 0.1 per cent applies. To comply with the sulphur content limits, vessels must use either a compliant fuel oil, an exhaust gas cleaning system (otherwise known as a scrubber), an alternative fuel (ie, liquefied natural gas or methanol) or onshore power supply when at berth and only carry non-compliant fuel oil for combustion purposes or operation onboard a ship where the ship is fitted with scrubbers. Nitrogen oxide emission limits for newer vessels were reduced in the Baltic Sea and North Sea ECAs this year to fall in line with the other ECAs. At the Marine Environmental Protection Committee 75 in November 2020, further draft amendments to MARPOL were adopted for new ships, such as gas carriers, general cargo ships and LNG carriers, bringing forward the date for compliance with a reduction in the Energy Efficiency Design Index (EEDI) from 2025 to 2022. Proposals were also made this year to further tackle emissions and pollution by agreeing to prohibit heavy fuel oil on ships in Arctic waters from 1 July 2024 and to enhance the EEDI and Ship Energy Efficiency Management Plan by introducing a technical requirement to reduce carbon intensity, based on a new Energy Efficiency Existing Ship Index, and operational carbon intensity reduction requirements, based on a new operational Carbon Intensity Indicator. There were also changes in the commissioning testing of ballast water systems under the International Convention for the Control of Management of Ships' Ballast Water and Sediments, 2004, which are likely to come into effect next year. Despite this, concerns were raised as to whether these measures will enable the industry to reach its carbon reduction targets by 2030.

Autonomous vessels

The coronavirus pandemic has had a mixed impact on the development of autonomous vessels. The publication of the results of the IMO's scoping exercise to assess the extent to which existing IMO rules need to be amended to provide for autonomous or remote-controlled vessels did not take place as planned and work on the construction and testing of autonomous vessels both in the UK and abroad was impacted. However, the fourth edition of the Maritime Autonomy Ship Systems (MASS) UK Industry Conduct Principles and Code of Practice was published in 2020, together with a report on the UK's Maritime Autonomy Regulation Lab, which looked at reviewing existing UK legislation and identifying potential barriers and blockers to MASS in UK waters. In addition, the construction and testing of various autonomous vessels continued in key locations throughout the world including the UK. As with any innovative technology, the parties to a shipbuilding contract will, no doubt, wish to give full consideration to the impact of this new technology and whether the usual apportionment of risk remains appropriate when entering into a contract for the construction of an autonomous vessel, particularly where third parties are likely to play a key role in the provision of the essential technology to the vessel, such as its navigation or control system. Many of the autonomous vessels that have been built or are currently under construction involve close partnerships with the autonomous technology provider, rather than this work being subcontracted as is typical in standard shipbuilding contracts. The possibilities arising from fuel transition have afforded a number of traditional shipbuilders the opportunity to enter the autonomous vessel sector by contracting to build fully electric vessels (for example ferries) which will, post delivery, undergo commissioning and installation of autonomous systems in the country in which the vessel is intended to finally operate.

Coronavirus

47 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Supply contracts

In response to the covid-19 economic crisis and the uncertain trading conditions, the Corporate Insolvency and Governance Act (CIGA) came into force in the UK in June 2020, with certain provisions having a retrospective effect from 27 April 2020.

CIGA introduced a number of temporary and permanent debtor-friendly procedures and measures to enable UK-registered companies in financial distress to maximise their prospects of survival. These include:

- a new statutory moratorium process;
- a new restructuring plan procedure;
- a new legal framework prohibiting the termination of contracts for the supply of goods and services on insolvency grounds;
- a prohibition on winding-up petitions arising from coronavirus-related debts, giving struggling businesses short-term relief from the threat of being wound up for non-payment due to the coronavirus having a 'financial effect on the company'; and
- retrospective 'suspension' of potential personal liability for directors for wrongful trading for the periods from 1 March 2020 to 30 September 2020 and 26 November 2020 to 30 April 2021 (as subsequently extended), allowing directors to continue to trade through the covid-19 crisis without worrying about their potential personal liability for wrongful trading.

Many of these measures will now be available until 30 March 2021, following the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2020, although it is possible that such measures will be extended further.

There are limited protections available to companies that discover their counterparty is suffering financial distress. It is not open to such companies to accelerate invoicing and payment schedules on an insolvency, given the restrictions imposed by CIGA on doing 'any other thing' to the contract as a result of their counterparty becoming subject to a 'relevant insolvency procedure'. Companies may seek to mitigate their exposure by carrying out detailed financial due diligence, and conducting periodic risk assessments on current supply contracts to check whether customers have already defaulted on any payments and consider bringing such contracts to an end prior to insolvency.

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Where a customer enters into a moratorium, the supplier may contact the relevant customer to mutually agree on terminating the contractual relationship. If the customer opposes termination, and instead requests further supplies, the supplier can either: (i) apply to court for permission to terminate the contract on the basis that the continuation of the supply contract will cause the supplier 'undue hardship'; or (ii) perform the contract and provide the requested supplies. If the customer then does not pay for the supplies, the supplier is allowed to terminate the contract. Suppliers might also seek to reduce their risk by contractually incorporating an obligation on customers to notify them in good time if, for example, they intend to appoint an administrator, or there is withdrawal of credit insurance or downgrading of credit rating.

Seafarers

Following a request from the International Maritime Organization and International Labour Organization, the UK was one of the first jurisdictions to designate seafarers as 'key workers' and issued guidance stating that 'key workers' 'includes those who will keep the air, water, road and rail passenger and freight transport modes operating'. Key worker designation is essential to exempt these professionals from specific covid-related travel restrictions, allowing them to travel between ships and their country of residence, embark and disembark ships and become repatriated when their contracts end. Seafarers may also be granted priority access to vaccination against covid-19.

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