CHAPTER 1

Contracting by numbers: the different characteristics of the main shipbuilding contracts

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Safely corralled behind the heavy electronic glass doors of a large commercial law firm, one of the first things to strike a newbie lawyer is that a good deal of the law of contract that they are called on to practise is nothing like what they were meticulously taught as promising law students a few years earlier. Practical contract law is very often simply about the exegesis of well-tried standard forms: it amounts not so much to an intellectual or academic endeavour as to a prosaic process of keeping checklists of what has and has not been altered from a template kept carefully unchanged on the firm's mainframe computer. Understandably so. Time is money and shipping clients are increasingly tight-fisted. Given the choice between negotiating from scratch and using a tried-and-tested formula that everyone knows, practitioners understand and one's predecessors have successfully employed on countless occasions, the answer is a no-brainer. Shipbuilding contracts, the subject of this chapter, are a classic example. Almost all vessels these days are built on the basis of one of five[1] standard forms. On principle, each of these provide a complete workable formula, just leaving such mundane details as the specification, the price, when payable and so on to be filled in. However, as always, there remains the important possibility of more or less extensive mutations to the boilerplate according to the parties' respective desires, bargaining strengths and legal nous. In order of age, the longest-standing, still used extensively in the Far East, is the SAJ[2] Standard Shipbuilding Contract[3] dating from 1974. This is followed by the AWES[4] Standard Shipbuilding Contract from 1978, the Standard Form Norwegian Shipbuilding Contract 2000 (NSC),[5] the BIMCO-sponsored Newbuildcon which appeared in 2007, and the CMAC[6] Standard Newbuilding Contract[7] launched in 2012 for the Chinese shipbuilding industry. Of these, the SAJ form is probably the most frequently used, though subject to fairly extensive alterations (as might be expected

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1 There is a sixth, the 1980 MARAD (US Maritime Administration) form. But its use is effectively limited to buildings commissioned by the US government, and it will not be extensively discussed here.

2 Shipbuilders' Association of Japan.

3 Sometimes called the JCon Form.

4 Association of European Shipbuilders and Ship-Repairers.

5 Agreed between, among others, the Norwegian Shipowners' Association and the Norwegian Shipbuilders' Association. Sometimes known as SHIP 2000.

6 China Maritime Arbitration Commission.

7 Alias the Shanghai Form.

from a template currently celebrating its fortieth anniversary, quaintly assuming the fastest mode of communication between go-ahead businesses to be by 'cable' and referring to such mid-twentieth-century curiosities as the convertible Japanese yen). It is followed by the Norwegian form; the use of the AWES form, while still significant, has declined, partly in line with the reduction in European export buildings. Newbuildcon is fast gaining adherents; as regards the CMAC form, the most recent addition, it is fair to say that this has yet to establish itself. Within these templates, the governing law chosen of course varies, but whatever form is used, a healthy proportion of contracts signed are governed by English law, with provision for LMAA or other London arbitration if anything goes wrong. Hence the relevance of this chapter, which will discuss these forms largely in light of the rules of English law.

The background against which one has to look at shipbuilding contracts is that, for all their advantages, standard forms are not an unmixed blessing. True, using substantial quantities of boilerplate saves vital time and trouble, as mentioned above. But since in shipbuilding there is as regards English law virtually absolute freedom of contract,[8] representing 'commerce, red in tooth and claw',[9] those using standard forms need to know when a boilerplate is satisfactory for the client and when it needs amending: which bits, in other words, to leave and which to negotiate on a bespoke basis. This is a serious concern with standard shipbuilding contracts. Two points in particular stand out. First, however detailed the forms may look, there are a significant number of matters left unresolved, which as any commercial lawyer will confirm is less than satisfactory for a client engaging on a major project that may well carry a price-tag of comfortably over $100 million. Second, while the essential structure of most shipbuilding contracts is the same (the greatest resemblance being to large-scale construction contracts),[10] there remain a substantial number of variations between these forms which can be of major significance. Those acting for buyers, yards and financiers ignore such matters at their peril.

1.1 Uncertainties

1.1.1 The problem of design quality

Given the amount that may well be at stake in a newbuild project, one omission from many of the standard forms is surprising. While they all stipulate, with

8 The Unfair Contract Terms Act 1977 is almost invariably irrelevant. This is because of two provisions. One is s 27(1), disapplying it where English law governs only by party choice: given the virtual disappearance of serious shipbuilding by British yards and indeed in the UK as a whole, this will nearly always be the case. As if this was not enough, s 26 disapplies the Act in any case where the contract is for the sale of goods which are, at the time of the conclusion of the contract, in the course of carriage, or will be carried, from the territory of one State to the territory of another. The fact that in the nature of things the buyer of a cargo ship almost invariably wants to sail her to a country other than where she was built is, it seems, sufficient to trigger s 27 in this context (compare the aircraft sale case of *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd* [2009] EWCA Civ 290; [2010] QB 86).

9 A lapidary and memorable phrase of Jonathan Hirst QC, sitting as a deputy High Court judge: see *Western Bulk Carriers K/S v Li Hai Maritime Inc* [2005] EWHC 735 (Comm); [2005] 1 CLC 704 at [1].

10 On which, see generally the excellent S Curtis, *The Law of Shipbuilding Contracts* 4th edn (Informa Law, 2012) at pp 1–2.

impressive precision, the dimensions, weight, speed, fuel consumption and other readily calculable details of the vessel to be built (or at least provide boxes where that information can be filled in), they are curiously vague and variable on the actual *quality* of design and construction that the customer is entitled to expect. Thus the buyer under the AWES form gets a reassuring but somewhat fuzzy promise that his ship will be built 'in accordance with normal shipbuilding practices [in the place of building] for new vessels of the type and general characteristics of the vessel'.[11] Under the Norwegian form, by contrast, the vessel must be constructed 'in accordance with first class shipbuilding practice in Western Europe'.[12] Newbuildcon similarly uninformatively mandates work 'in accordance with good international shipbuilding and marine engineering practice'. As for the SAJ and CMAC forms, these coyly (and rather curiously) say nothing whatsoever about quality. This creates, to say the least, potential for uncertainty and disagreement: even if there is such a thing as 'normal shipbuilding practice', it may well take two or more experts hired at huge expense to decide what it is. The matter may be especially relevant in the relatively short time after sea-trials and before the contractual delivery date, where there is most scope for argument (and consequent arbitral expense and delay) over what amounts to a shortcoming which the yard is legally bound to put right before handing over the vessel.[13] Is there, for example, room for a contention that there is a difference in standard between first class (Norwegian form) and normal (AWES) shipbuilding practice (with the intriguing implication that all ordinary shipbuilding is by definition somehow second-rate)? More to the point, diffuse provisions of this type, and *a fortiori* the complete non-existence of any standard laid down in some contracts, may leave the argument open that the default standards of s 14 of the Sale of Goods Act 1979[14] have a part to play, especially in the light of Flaux J's recent decision in the related context of ship sale in *Dalmare SpA v Union Maritime Ltd* [15] that only pretty clear words can oust them.[16] It is true that the problem can be, and often is, overcome by the use of more certain and arbitrable standards such

11 AWES, cl. 1(c). Throughout this chapter, when referring to standard forms capitalisation and other common editorial practices will be ignored.

12 Norwegian form, cl. II.1.

13 After delivery has taken place, it seems clear that all the forms are generally sufficient to exclude the Sale of Goods Act duties and indeed almost any implicit duty on the builder: see in particular *China Shipbuilding Corp v Nippon Yusen Kabukishi Kaisha* [2000] 1 Lloyd's Rep 367.

14 On which there is some authority in the shipbuilding context, but much of it elderly and of limited help in the case of modern cargo vessel construction. Representative examples are *McDougall v Aeromarine of Emsworth Ltd* [1958] 1 WLR 1126; *Dixon Kerly Ltd v Robinson* [1965] 2 Lloyd's Rep 404; and *Britain SS Co Ltd v Lithgows Ltd*, 1975 SC 110. See, too, the ship sale case of *Dalmare SpA v Union Maritime Ltd* [2012] EWHC 3537 (Comm); [2013] 1 Lloyd's Rep 509, referred to below.

15 [2012] EWHC 3537 (Comm); [2013] 1 Lloyd's Rep 509. The case concerned a ship sale under Saleform 1993, but the reasoning is wider. Its result was disconcerting; significantly, those drafting cl. 18 of the present Saleform 2012 hastily took the opportunity to put the exclusion of statutory implied terms beyond question for the future. For a comprehensive analysis of this judgment see Chapter 8 by Simon Rainey QC.

16 Such words appear, it is suggested, only in Newbuildcon, cl. 37(d), and possibly in CMAC, cl. XIX.4. In the Newbuildcon version, the wording of the guarantee explicitly 'replaces and excludes any other liability, guarantee, warranty and/or condition and/or innominate term imposed or implied by the law, customary, statutory or otherwise, by reason of the construction and sale of the Vessel by the Builder for and to the Buyer'. Presumably this extends to pre-delivery defects.

as those promoted by the International Standards Organisation;[17] but the point remains that the forms as given are inadequate and can amount to a trap for unwary practitioners.

1.1.2 The issue of insurance

In any shipbuilding contract there is invariably a provision for property and risk to remain in the yard until delivery at which point they are transferred to the buyer.[18] Back-to-back with this is a duty in the yard pending delivery to insure at its own charge the vessel and any buyer's supplies, a provision aimed partly at protecting the buyer's right to get his money back in the event of total destruction,[19] and (no doubt) partly at making sure that the yard is in a position to continue with the work in the event of lesser damage.[20] Nevertheless, there are nagging uncertainties here as to two matters: first, precisely what has to be insured against, and second, what happens if the term is broken? As regards the former, the forms vary from the specific (Newbuildcon, as might be expected, cuts straight to the chase and mandates the 1988 Institute Clauses for Builder's Risk terms including war and strikes),[21] through to the not-entirely-precise, which clearly leaves worrying scope for argument ('customary "all-risk" terms' in the Norwegian form)[22] to the maddeningly vague (the CMAC requirement that any policy 'shall cover the damages or losses of the vessel's materials, hull and equipments which incurred [sic] by various marine perils, inland perils or the builder's errors and omissions').[23] The difficulty here is simply that, except for the Newbuildcon form, it is often going to be difficult or impossible to say whether or not the yard is in breach of its obligation. Such indeterminacy ought to worry negotiators: might the yard be able to satisfy its obligation to the letter and yet leave the buyer unprotected against some significant risk? But that leads on to another point: assuming we can get over any uncertainty as to the *content* of the obligation to insure, what happens where the yard is in breach of it? Any immediate harm to the buyer from non-insurance is likely to be nil as long as the risk has not eventuated; if so, any damages from such failure are apt to be nominal. Hence the only live issue is whether failure by the yard might give rise to some other remedy. Specific performance is one possibility, though perhaps not a very practical

17 Which has a large number of specific shipbuilding standards for those who care to use them: for those interested, they can be found in Part 47 of the ISO catalogue.

18 See e.g. Newbuildcon, cl. 31. But note a curiously insidious provision in the SAJ form, which any well-advised buyer must insist on rewriting in a sensible way. 'Title and risk of loss of the vessel and her equipment', it is said, 'shall be in the builder, excepting risks of earthquake, war and tidal waves' (SAJ form, VII.5). If this Delphic provision means that the buyer has to insure his building vessel right from the outset against these risks alone, or take the risk of having to pay for the ship in the event (a not insignificant chance in Japan) of damage to it caused by tidal waves or similar occurrences, it is not attractive.

19 Hence its universal limitation to the total amount paid by the buyer from time to time, this being the amount at stake as regards that party. Although refunds are largely taken care of today by the custom of requiring the buyer to furnish a third-party refund guarantee, it has to be remembered that some of the older forms, such as the SAJ, contain no such provision.

20 For a comprehensive analysis on standard contracts used in insuring new built ships see Chapter 6 below.

21 Newbuildcon, cl. 38.

22 Norwegian form, cl. XI.2.

23 CMAC, cl. XXVIII.1.

one.[24] More importantly, does failure to insure allow suspension or cancellation by the buyer? Even here, the prospects for those seeking certainty do not look good. None of the forms gives any such right expressly and the prospects of demonstrating that a failure to insure, especially against the background of the requirement of a refund guarantee to protect many of the buyer's interests, do not seem good. Indeed, in *Wuhan Ocean Economic Cooperation Co Ltd v Schiffahrts-Gesellschaft Hansa Murcia mbH*,[25] Cooke J held that where there was no immediate threat to the buyer's security even failure to maintain a refund guarantee, a rather more important obligation, was not repudiatory. In the light of this decision anyone arguing that a different rule should apply to failure to insure faces a somewhat uphill task. This is a matter that must be addressed in any properly drafted contract.

1.1.3 Payment and refund guarantees

Payment and refund guarantees issued by a bank or financier are a universal feature of shipbuilding contracts.[26] Payment guarantees cover the buyer's obligation to pay instalments as and when due at various stages of construction; refund guarantees cover the converse case of the yard's obligation in the event of rightful cancellation to reimburse sums paid by the buyer. Both effectively provide the parties with a vital element of credit insurance. However, with the possible exception of the Newbuildcon form, none of the standard forms deals clearly or satisfactorily with the vital point of precisely what must be done in this respect.[27]

To begin with, what happens if a required guarantee is not forthcoming, or ceases to be effective (for example, because of governmental action, the insolvency of the guarantor, or for that matter, simple expiry)? It is not hard to see why this matters. As regards the buyer, without an effective refund guarantee in place there is a big risk that his very large investment (in which, it will be remembered, he has no ownership rights before delivery) will vanish into thin air if the yard becomes insolvent. Conversely, when it comes to the payment guarantee, the yard's cash-flow and the security available to its financier (who will doubtless have lent against the yard's claim to future instalments) are seriously imperilled without assurance of the ability not only to sue for, but actually to collect, instalments as and when due. The position at common law is, unfortunately, not entirely clear here. In the one case where the issue arose as to whether the failure to preserve a guarantee (there a refund guarantee) was repudiatory so as to allow cancellation,[28] it was held that it was not; but this was partly on the special ground that there was no prejudice to the buyer

24 There seems no reason why there should not under English law be specific performance of a contract to insure, in the same way as there can be specific performance of an obligation to repair (e.g. *Rainbow Estates Ltd v Tokenhold Ltd* [1999] Ch 64) or to service property (*Posner v Scott-Lewis* [1987] Ch 25).

25 [2012] EWHC 3104 (Comm); [2013] 1 Lloyd's Rep 273.

26 See Newbuildcon, cl. 14(b),(c) and CMAC, cl. V.7, where the term appears in the boilerplate. The SAJ and AWES forms require a buyer's payment, but not a seller's refund, guarantee: see SAJ, Appendix, and AWES, cl. 7(b).

27 For a legal analysis of refund guarantees in shipbuilding context see Chapter 5 below.

28 See *Wuhan Ocean Economic & Technical Cooperation Co Ltd v Schiffahrts-Gesellschaft Hansa Murcia mbH & Co KG* [2012] EWHC 3104 (Comm); [2013] 1 Lloyd's Rep 273.

on the facts,[29] hence the decision is not necessarily the last word on the point. Yet, in such a case, any properly advised party will want a clear option to escape: the seller to avoid having to continue construction without assurance of payment,[30] and the buyer in order (a) to have an option to cancel and get back his money from the yard while the going is good, and (b) to avoid having to pay further instalments which may well turn out to be irrecoverable from a bankrupt builder. Nevertheless, the majority of the standard forms give no such indication. Even where they contain a provision for a guarantee,[31] only Newbuildcon and CMAC state clearly what is to happen if it is not there: namely, by making provision for withdrawal if no guarantee is provided at the beginning, and cancellation if the guarantor becomes insolvent and the guarantee is not replaced by another within 30 days.[32] With the others the issue has to be settled by way of agreed amendment or fought out, unsatisfactorily, at common law.

Secondly, it is all very well for a shipbuilding contract to require a guarantee of a given liability: but there are guarantees and guarantees. For instance, their wording, especially in the case of refund guarantees, may give rise to important doubts as to just what obligations are being secured.[33] Again, both a payment and a refund guarantee may take the form either of an old-fashioned 'see-to-it' guarantee, conditioned on the guaranteed sum actually being presently due, or a purely documentary obligation in the nature of a performance bond or demand guarantee. Differentiating between the two can be difficult, depending as it does on whether the bank's promise to pay sums unpaid by the contractual counterparty can plausibly be construed as dependent on those sums actually being outstanding or only on presentation of particular documents by the beneficiary.[34] The difference matters as

29 This was a case where the guarantee expired by effluxion of time. The reason for the lack of prejudice to the buyer was that under the guarantee's own terms it had only to seek arbitration, in which case it would have stood automatically reinstated.

30 An option to suspend, rather than cancel, may suffice here in the event of short-term problems: but for any long-term difficulties it is vital for the yard to avoid having a half-built ship on its hands subject to possible commitments to a bankrupt buyer.

31 Which all save the Norwegian form do, though the details vary (as will appear below). The provision is patchy. The SAJ form appends a suggested buyer's guarantee in a somewhat outdated form, but does not demand it. It says nothing about a refund guarantee. AWES brusquely demands a buyer's guarantee (see – with the exception of the Newbuildcon form – cl. 14) but not satisfactorily.

32 Newbuildcon, cl. 14(b), (c). See too cl. 39(a)(i) (while no effective refund guarantee in place, buyer is protected from having to pay any instalments even if he cannot cancel). CMAC does something similar, though without the suspension right. Clause XXVII provides for a right of cancellation if the guarantee is rendered ineffective, while cl. XXXII makes the entire effectiveness of the contract depend on the provision of the guarantees in the first place. The difference between this and Newbuildcon is that apparently under CMAC there is no actual duty to provide the guarantee: hence a person who signs a shipbuilding contract but fails to do so is not liable in damages, the only 'remedy' being his right to plead the lack of any effective contract at all.

33 An obvious example is *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900, a case which has passed into the canon of authorities on contractual construction. The issue there was whether a refund guarantee drafted with more haste than accuracy covered the case where the yard failed to repay instalments, not because of cancellation by the buyer, but because of its own insolvency and what were in essence Chapter 11 proceedings against it in its home state of Korea. An earlier instance, also ensconced in the contractual canon – this time on the nature of the right of cancellation for breach – was the payment guarantee case of *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 1 WLR 1129.

34 The difference will not be gone into here, save to say that where a document is issued by a bank in a solidly commercial context, and especially where it contains wording such as 'on first demand', the courts lean fairly strongly in favour of a demand guarantee: see *Caja de Ahorros del Mediterraneo v Gold Coast Ltd* [2001] EWCA Civ 1806; [2002] CLC 397 at [15]–[27] (Tuckey, LJ), itself a shipbuilding case concerning a refund guarantee. Other shipbuilding instances include *WS Tankship II BV v Kwangju Bank Ltd, Seoul Guarantee Insurance Co* [2011] EWHC 3103 (Comm); *Wuhan Guoyu Logistics Group Co Ltd v Emporiki Bank of Greece SA* [2012] EWCA Civ 1629; [2014] 1 Lloyd's Rep 266; and *Sea-Cargo Skips A/S v State Bank of India* [2013] EWHC 177 (Comm). See generally on the point G Andrews & R Millett, *Law of Guarantees* 6th edn, (Sweet & Maxwell, 2012) Ch 16.

a demand bond proper (a) gives the beneficiary an enormous cash-flow and inertial advantage, forcing the other party to take out separate proceedings to dispute any liability and recover his money once the bank has disbursed payment; and (b) more importantly, may bypass the co-contractor's ability to delay payment by seeking arbitration.[35] When it comes to the requirements of the various forms, however, there is (save possibly in the case of Newbuildcon, referred to below) no consistent answer as to what kind of guarantee is required. This is obviously so in the case of the Norwegian form, which says nothing at all about the subject and thus leaves it entirely up to the parties to stipulate what they want: but the same problem appears elsewhere. The SAJ form appends a suggested primitive form of 'see-to-it' payment guarantee (though, oddly enough, the text of the agreement itself does not explicitly require the buyer to provide it): refund guarantees are left unmentioned. The AWES form, another builder-drafted document, says laconically that, as regards payment, '[b]ank guarantees for the different instalments have to be provided by the purchaser before the effective date of the contract . . . to the satisfaction of the contractor',[36] leaving plenty of room, in the absence of a properly drafted provision, for lawyers to earn handsome remuneration by arguing about what kind of guarantee a reasonable builder should be satisfied with.[37] Once again, there is nothing at all on refunds. CMAC appends a form of both payment and refund guarantee, which the respective parties are bound to provide.[38] But neither makes it explicit whether it is a demand guarantee: the former would probably be so construed,[39] while the proper interpretation of the latter is anyone's guess.[40] The least unsatisfactory in

35 This was the point at issue in *Caja de Ahorros del Mediterraneo v Gold Coast Ltd* [2001] EWCA Civ 1806; [2002] CLC 397 and *Wuhan Guoyu Logistics Group Co Ltd v Emporiki Bank of Greece SA* [2012] EWCA Civ 1629; [2014] 1 Lloyd's Rep 266, above. The same point arose in *Rainy Sky SA v Kookmin Bank* [2009] EWHC 2624 (Comm); [2010] 1 All ER (Comm) 823, where a similar result was reached. This part of Simon J's judgment was not appealed when the case went to the Supreme Court at [2011] UKSC 50; [2011] 1 WLR 2900 on another point.

36 See cl. 7(b).

37 There is little doubt that some term in the nature of reasonableness falls to be implied here.

38 See cls V.6 (payment) and V.7 (refund). The forms are in Appendix A (refund) and B (payment). Certainty is not helped by the fact that cl. V.7 in its wording provides for a refund guarantee to be payable in the event of cancellation by the *builder*. No doubt this is a typo and should read 'buyer'.

39 The relevant phrase is in Paragraph 4: 'Should the buyer fails [sic] to punctually pay any installment or interest and such failure is last for fifteen (15) days, we will, upon receipt by us from you of the first written demand for the same, pay to you or to your order the amount of the second, third and fourth installments and relevant interest.' Despite the conditionality of the first part, the reference to a first written demand is probably sufficient here.

40 The phrase runs 'Should the seller fails [sic] to repay to you such any or all [sic] installments due as provided by the articles under the contract, and you suspend to terminate the contract [sic] due to the extension of the delivery date, we will make such payment to you without interest. In the event that the delivery date is delayed for [ ] days and you terminate the contract in accordance with the clause 3 of Article 8 or clause 1 (3), 2 (3), 3 (3), or 4 (3) of Article 3 of the contract, we shall pay to you the aforesaid amount of installments together with interest at the rate of [ ] percent (%) per annum, or [ ] percent (%) per annum in other circumstances. Within thirty (30) running days upon receipt by us from you of a repayment demand, we shall pay to you the sun [sic] as follows.' Whether the reference to a 30-day period

this respect is Newbuildcon, which again appends forms and requires them to be provided: but at least in this case it seems fairly clear the respective forms are indeed demand guarantees.[41] Nevertheless, this is a matter which could do with careful scrutiny from anyone negotiating a contract and, *faute de mieux*, insistence on a bond which in terms states whether it is a demand bond, and precisely what obligations it covers, together with back-to-back terms in the contract itself.

1.2 Variations between standard forms

As mentioned above, most contracts to build substantial cargo vessels follow essentially the same structure. (True, there may be a need for substantial alterations to them as regards particular specialist vessels, such as those working on offshore installations,[42] but this is by-the-by.) There is almost invariably provision for payment in instalments at various stated stages of construction: for at least some form of guarantee or performance bonds to secure payment or repayment, or both, against an insolvent counterparty: for assignment: for standards of build: for supervision by the buyer during the build: for later changes to specifications: for subcontracting: for ultimate performance of the vessel and class compliance: for sea-trials and acceptance: for the builder's guarantee of quality once the vessel has been completed and handed over: and to a greater or lesser extent for the exclusion of other liabilities. However, the fine details of many of these provisions vary considerably between the different forms, either owing to a greater or lesser degree of care taken in drafting them,[43] or alternatively because some of these forms are naturally more pro-builder than others (the SAJ template, for example, was drafted largely by builders' interests, whereas Newbuildcon and the NSC were explicitly aimed at holding the ring between builders and buyers). It is some of these small differences that provide a lesson in the dangers and difficulties of standard forms.

1.2.1 Subcontracting and its effects

Whenever work is subcontracted, the yard invariably remains liable for the work of the subcontractor, independently of whether it is itself at fault.[44] Nevertheless, subcontracting remains a point of major importance for both parties. The yard obviously wants to retain as free a hand as possible.[45] The buyer, by contrast, unless

for payment, or a subsequent provision in Paragraph 2 for delay of payment in the event of a dispute going to arbitration, is sufficient to turn this into a documentary demand guarantee is an open question.

41 See Appendices A(i) to (iii). By referring to the precise documentation to be provided (notably a demand and a copy of any demand served on the other party), it seems clear that the obligation here must be a purely documentary one.

42 Where, oddly enough, there seem to be few, if any, specialised forms; as a rule the ordinary forms are simply adapted in a belt-and-braces operation.

43 Without wishing to offend, it is obvious from a brief reading that (for instance) a great deal more meticulous effort went into drafting the Newbuildcon than the SAJ form.

44 This is true of contractual liability at common law (e.g. *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, at 848 (per Lord Diplock)). In fact, however, this is explicitly stated under every form (e.g. SAJ, cl. IX.1).

45 To some extent this may also be supported by the buyer: a wide discretion as to choice of subcontractors may reduce costs and accelerate delivery.

he is simply using a well-known yard as a front-end for cheapskate construction elsewhere,[46] is likely to be concerned that the yard he has appointed will actually do the work: he has, after all, presumably chosen this yard for its reputation and personal competence as well as other things.[47] What is significant is that the standard forms vary spectacularly here. Under the SAJ contract, as might be expected with a builder-produced document, a laconic provision simply licenses the builder to subcontract 'any portion' of the construction work,[48] which with the possible exception of laying off the work completely to someone else (since one can plausibly argue that the whole of a project is not a 'portion' of it), gives virtual *carte blanche* to the yard. All the other forms, by contrast, have some limits, all based to a greater or lesser extent on the concept of an approved 'maker's list' of approved subcontractors appended to the agreement. But even here buyers need to be aware of the differences. Under the Newbuildcon form, there remains a general right to subcontract, albeit limited to firms on the 'makers' list', plus a provision that while the buyer's consent is required to go outside the list, in the case of minor work this consent is not to be unreasonably refused.[49] In the Norwegian form, the right to subcontract at all is excluded in the case of the 'hull and major sections', with everything else being subject to the maker's list principle.[50] Under CMAC, there is a somewhat obscure provision which starts out by allowing anything to be delegated, but then provides that 'delivery and final assembly into the vessel' has to be at the builder's own yard.[51] The result of leaving this clause in place, which should be borne in mind by buyers' representatives, is that large sections even of the hull, provided they are capable of being transported, may still turn out to have been fabricated in the back of beyond, and somewhere completely different from the yard originally signed up.

All this may cause problems for a buyer, for a number of reasons. For one thing, it is all very well to say that the original yard guarantees the quality of the work; but the sensible buyer wants a good ship, not a lawsuit, a right to refuse acceptance until defects are corrected, or a promise of free repairs during a guarantee period.[52] For another, while it is true that the builder invariably assumes an obligation to produce a finished product satisfactory to class,[53] the potential for difficulty and delay is much reduced in so far as all subcontractors have been pre-approved by the classification society involved, which will not necessarily be the case where the

46 Which happens. Giveaway bespoke clauses on the following lines are not unknown: 'The construction of the hull and major sections are accepted by the buyer to be subcontracted in a low-cost country. The builder shall remain fully liable for the due performance of such work as if done by the builder at the builder's yard.'

47 Hence at common law a contractor cannot normally subcontract skilled work without the customer's agreement: see J Beatson, *Anson's Law of Contract* 29th edn, (OUP, 2010) at 448.

48 See cl. I.4 SAJ.

49 Newbuildcon, para. 19: 'The Builder shall employ the sub-contractors as set out in the Specification or Maker's List. Except for minor work, the Builder shall not employ other sub-contractors without the Buyer's approval, which shall not be unreasonably withheld.'

50 Norwegian form, cl. II.4.

51 See cl. X CMAC.

52 Especially as the terms of the guarantee, when coupled with the invariable exclusion of other liabilities, may leave substantial defects uncovered, as shown by *China Shipbuilding Corp v Nippon Yusen Kabukishi Kaisha* [2000] 1 Lloyd's Rep 367. They also often exclude other expenses such as downtime while defects are being put right. The effect of builders' guarantees is discussed below.

53 E.g. Newbuildcon, cl. 3; Norwegian form, cl. II.3.

builder has an entirely free hand in deciding whom to give work to. And yet again, assume that, as soon as the ink on the contract is dry, the buyer has – as is extremely common – agreed to time-charter the vessel when complete. Although it is often assumed that would-be charterers of newbuilds are not concerned with the details of building,[54] this cannot be guaranteed to be the case,[55] and under some forms in the case of substantial subcontracting there could be considerable difficulties.[56] As a result, it is not surprising that the variety of different provisions on subcontracting is matched by the tendency to replace or supplement them with bespoke provisions of the parties' own making: for example, requiring subcontractors to be on a classification society's approved list,[57] or demanding consultation before appointing subcontractors for certain purposes.[58]

1.2.2 Supervision and modifications

Having a ship constructed is not like ordering a new Ford Focus. Shipbuilding contracts are invariably a highly cooperative long-term exercise between the buyer, the yard and others involved in the transaction. Since there is invariably a central guarantee that the finished vessel will be acceptable to the buyer's nominated classification society,[59] class is closely involved throughout the process (so much so, indeed, that none of the standard forms even bothers to provide specifically for its inclusion).[60] Similarly, all construction contracts take place under the watchful eye of a buyer's representative, whose right to be present on the spot is stipulated in some little detail.[61] Apart from pointing out possible defects (of which more below), one of his functions is to negotiate over post-contract alterations in the specifications, which are an inevitable feature of any large-scale construction project taking place over an extended period. Such alterations may arise from a number of causes.

54 The facts in the well-known tanker case of *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 are an obvious illustration. Faced with the certainty of ruinous losses due to the 1974 oil crisis, the Shelltime charterer of a new build tanker tried to throw up the deal merely because actual construction had been (as was entirely usual) subcontracted to another Japanese yard; hence the builder was not the one mentioned in the charter. He lost. A virtual carbon copy, also arising under a Shelltime form, was *Sanko Steamship Co Ltd v Kano Trading Ltd* [1978] 1 Lloyd's Rep 156.

55 In *Reardon Smith v Yngvar Hansen-Tangen*, above, the charterers were opportunistic and entirely undeserving. They were invoking a technical arrangement between yard and subcontractor, both equally reputable, which was completely standard (since the yard itself could not produce ships of the requisite size). It is not difficult to imagine situations where this would not be the case, and where a build discrepancy might allow cancellation: see below.

56 For instance, under SUPPLYTIME 2005, unlike the Shelltime charter in *Reardon Smith v Yngvar Hansen-Tangen*, many of the details of the vessel are expressly warranted by the owner to be correct: see para. 3(a) ('The Owners undertake that at the date of delivery under this Charter Party the Vessel shall be of the description and Class as specified in ANNEX "A", attached hereto . . .'). This clearly creates a potential liability in damages in the owner: and it seems not unlikely that, at least in some instances, it would justify rejection by the charterer as well.

57 See, e.g., a provision on the lines of 'the Builder may subcontract the fabrication of [components] to European Subcontractors who are certified by the Classification Society as meeting DNV MPQA standards'.

58 Indeed, this is explicitly required by one of the standard forms, namely the Norwegian: see cl. II.4.

59 See, e.g., Newbuildcon, cl. 3; Norwegian form, cl. II.3.

60 The Norwegian and Newbuildcon forms, however, provide directly for their presence at sea trials: see respectively cl. VII.3 and cl. 27(c).

61 One such representative is allowed under SAJ (SAJ, cl. IV.2): a reasonable number elsewhere.

They include requests by the buyer to make changes; the builder's desire to take advantage of new developments or construction techniques, or his need to provide a substitute for particular components or methods of construction now impracticable; and (vitally) regulatory changes and the updating of detailed class requirements, which are matters that can happen quite suddenly in the course of any new building. Obviously the ideal position here is swift and amicable agreement on such matters; indeed this is often forthcoming, since neither party wishes any delay or deadlock during construction while things are sorted out. But this can only take place against a clear background position on how far such alterations can be insisted on, by whom, what their effect is on the timetable of construction and, most importantly, who pays. Here there are significant variations.

We can begin with alterations requested by the buyer. It is, of course, always possible for buyer and builder to agree *ad hoc* on such changes, with any consequent price and delivery adjustments. But this point is trivial: the important question is how far the contract goes further and actually gives any kind of right to the buyer to demand them. On this the SAJ and CMAC forms are spectacularly unimpressive, merely reiterating what we all know – that is, that the parties can agree, provided the buyer is happy to pay the extra.[62] The AWES form is little better, giving the buyer the right to ask for modifications and obliging the seller to carry them out, but then emptying these provisions of all content by saying that any obligation lapses unless the parties within ten days 'fully agree expressly and in writing' on the modifications, any extra payment, and so on.[63] As regards the Norwegian form and Newbuildcon, the former makes any duty dependent on agreement,[64] but an accompanying provision for an objective means of assessing any price increase suggests that there must be at least some element of obligation,[65] thus creating the possibility of liability in a builder who refused even to negotiate. The latter, drawing doubtless on dissatisfaction with the other forms, makes things largely clear, by not only giving the buyer the right to ask for reasonable alterations which do not in the builder's reasonable judgment interfere with the latter's planning or programmes in respect of other commitments, but also saying that in the absence of agreement the builder is to do as requested, with matters of extra payment referred to arbitration.[66] In practice, of

62 SAJ, cl. V: 'The Specifications may be modified and/or changed by written agreement of the parties hereto, provided that such modifications and/or changes or an accumulation thereof will not, in the Builder's judgment, adversely affect the Builder's other commitments, and provided, further, that the Buyer shall first agree, before such modifications and/or changes are carried out, to alteration in the Contract Price, the Delivery Date and other terms and conditions of this Contract and Specification occasioned by or resulting from such modification and/or changes . . .'. (See too CMAC, cl. XII.1, which is much the same, only longer). Even then one is left wondering why or how the parties' ability to vary a contract by mutual agreement could be excluded where inconvenient to one of them. To be fair, however, it might just be arguable that if (as is entirely possible) the governing law was that of a civil law jurisdiction there might be some sort of good faith obligation on the builder to consider the buyer's request.

63 AWES, cl. 3. The statement that any requirement lapses in the absence of quick express agreement in writing would seem to exclude any possibility of a reference of the matter to arbitration under the dispute resolution clause in cl. 15.

64 See cl. VI (' . . . provided further that the parties shall first agree to possible adjustment in contract price, . . . ').

65 Since otherwise the words would be idle. Compare *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444 (obligation to pay reasonable price where means of ascertainment of price fail).

66 See cl. 24(a), (b) and (e).

CHAPTER 8

'As is' . . . as you were? *The Union Power* and 'as is' provisions in ship sale and purchase contracts

*Simon Rainey QC**

8.1 Introduction: standard form contracts and English law

The business of the sale and purchase of second-hand trading ships is routinely conducted on or by reference to a standard form contract. Various forms are in common currency. Perhaps the most commonly encountered in English legal practice is the Saleform (commonly referred to as the Norwegian Saleform or 'NSF'[1]), first adopted by the Baltic and International Maritime Council (BIMCO) in 1956 and then the subject of periodic revisions[2] culminating in the latest version of the form, Saleform 2012. Others in common use include Nipponsale 93, produced by the Japan Shipping Exchange Documentary Committee. A recent addition to the corpus is the Singapore Ship Sale Form 2011 or 'SSF' launched by the Singapore Maritime Foundation.

Standard form contracts have their advantages: 'if used intelligently, the form will save the parties from going to the trouble and expense of reinventing what may be a relatively complex commercial and legal relationship. For, in addition to setting out the essential commercial elements of a straightforward deal, a good standard form will also contain essential legal components which might be overlooked where the contract is not prepared by an experienced draughtsman.'[3] However, the proviso of intelligent use is important. The use of a standard form needs to take account of the system of law which the parties choose to govern their transaction, entered into on the basis of that form. The BIMCO Saleform 2012, as is typical and as with its predecessors, provides for an optional choice of governing law between English law, alternatively New York law, alternatively such other law as the parties may select and insert.[4] The form is, therefore, drafted as an 'omnibus' form for application under whatever system of law the parties may choose to adopt. While the form shows English common law lineaments, given that it is commonly governed by English law

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1 The full title of the form explains its origins: 'Norwegian Shipbrokers' Association Memorandum of Agreement for Sale and Purchase of Ships. Adopted by BIMCO in 1956. Codename: SALEFORM'

2 In 1966, 1983, 1987 and 1993.

3 I. Goldrein, M. Hannaford and P. Turner, *Ship Sale and Purchase* 6th edn, (Informa Law, 2012) (hereinafter referred to as Hannaford & Turner). Unfortunately, the new edition was published on 19 December 2012 and, therefore, went to print before judgment in *The Union Power* was delivered on 13 December 2012.

4 See cl. 16.

and has therefore been much litigated in England, leading to particular revisions,[5] it is not itself drafted as an English law form.

Therein lurks a very real danger. It is necessary to test the operation of the standard omnibus provisions against the rules which may be applied to those provisions under the applicable system of law. Where the system of law has mandatory statutory provisions which apply to all sales of goods, then attention must be given to the effect of those provisions and, where it is intended to exclude their operation, the wording must be such as will do the job in accordance with the terms of the statute and any relevant case law as to the requirements for exclusion. If it is not, then a typed rider to or amendment of the standard form will be necessary.

Nowhere is that danger more real than in the context of the exclusion of the statutory conditions applicable to all sales of goods under the Sale of Goods Act 1979.

The decision of Flaux J in *Dalmare SpA v Union Maritime Limited (The Union Power)*[6] caused some apparent surprise to those engaged in the sale and purchase of second-hand ships and to some of the commentators on the standard Saleform 1993.[7] However, the decision represented the application of ordinary and basic general principles applicable to the Sale of Goods Act and the sale of any item of goods, whether new or second-hand, and including the sale of ships.

It is suggested that the argument that, in some sense, the statutory conditions under the 1979 Act should not be allowed to supplement a 'comprehensive' form and that the Court should be reluctant 'to supplement its terms by implying provisions from their national laws' because 'where international forms such as the NSF 1987 and 1993, promulgated by a widely respected trade association and almost universally adopted by a global industry, define a detailed contractual regime', is inappropriate, misplaced and starts from the wrong end of the argument.[8] The starting point, as considered below, is that the parties have chosen English law to apply to their standard form, for good or ill. English law provides for the statutory regulation of sales of goods (and has done so since 1893) as is well known. The standard form is being used as the basis of the contract; the parties can therefore accommodate the statute and cater for English law principles by a suitable rider or amendment. If they do not, then the result may not be what they might have expected from simply looking at the form. Drafting deficiencies in standard forms (and BIMCO standard forms in particular) are well known; compare the fate, over many revisions, of the ineffective 'consequential loss' exclusion in the BIMCO Towcon and Supplytime forms and the failure to address the case law.[9]

While criticism has been levelled at Flaux J's decision on the basis that it is

5 For example the revisions of cl. 11 in the 1983 and 1987 versions of Saleform in consequence of the decision in *The Buena Trader* [1978] 2 Lloyd's Rep 325 as to the non-implication of terms as to notification of Class of matters affecting classification status.

6 [2012] EWHC 3537 (Comm); [2013] 1 Lloyd's Rep 509.

7 See, e.g., M. Strong and P. Herring, *Sale of Ships* 2nd edn (Sweet & Maxwell, 2009) (hereinafter referred to as Strong & Herring).

8 See S. Curtis, 'The Union Power Decision', at p. 6 (Paper produced for the London Shipping Law Centre Seminar on Saleform Issues, 8 May 2013) which contains a robust criticism of the decision (hereinafter referred to as Curtis).

9 Discussed by the present author in S. Rainey, *The Law of Tug and Tow and Offshore Contracts* 3rd edn, (Informa Law, 2013) at, e.g., pp.180–187 (Towcon) and by C. Kidd and R. Gay in *Offshore Contracts and Liabilities* edited by B. Soyer and A. Tettenborn (Informa Law, 2014) at chaps 6 and 7 respectively.

retrograde because the Court should be 'very reluctant to assume that [parties] have also agreed to overlay that contract with an additional statutory regime which may be entirely unknown to them; this particularly so given that an accurate analysis of their respective rights and obligations will require a detailed knowledge of and the ability to interpret correctly our national case law',[10] which is not the approach adopted in English law. Nor, it is suggested, can it sensibly be, whether in relation to the BIMCO Saleform or any other standard form contract or trade association template. As the Court of Appeal stated in *Bominflot Bunkergesellschaft für Mineraloele mbH & Co v Petroplus Marketing AG (The Mercini Lady)*,[11] in the context of an attempted exclusion of the Sale of Goods Act 1979 under a contract for the sale of gasoil, the parties must (and can only be) taken to be contracting by reference to principles and settled meanings in English law:

> The jurisprudence extends beyond individual decisions and has become expressive of a principle . . . I must consider that the parties to this English law contract, foreign as both of them are and quite possibly ignorant of the consequences of their choice of language, intended to contract by reference to what English law had to say about the language which they have adopted.[12]

As the Court further explained, at the heart of the matter is the need for commercial and legal certainty of result:

> [. . .] there has also been a judicial consensus that such obligations can only be excluded by language which expressly (or perhaps one may add which must necessarily be taken to) refer to conditions: and that such language as has been used in our case falls within that consensus and principle. Lord Diplock was speaking[13] of a judicial consensus which creates implied obligations: but there may also be a judicial consensus which preserves such implied obligations in the face of inadequate exclusions. In such circumstances, there is an importance in the certainty of our commercial law which goes beyond the answer that may be given in a particular case.[14]

Commentaries have treated *The Union Power* as a decision which relegates 'as is' sales effectively to irrelevance or meaninglessness. But it is important to focus on what the true issue in the case was.

The principal issue was whether the contract in fact contained an 'as is' provision at all. It was held that it did not, therefore, the meaning of 'as is' did not arise directly for decision. The Court went on to determine that separate question *obiter* and on the basis of the specific (and limited) arguments as to how the term should be construed and why it should be so construed. Accordingly, the Court did not, in fact, address the case where a particular contract uses 'as is' wording nor did it have to consider any particular form of 'as is' wording; it merely expressed a non-binding and self-avowedly 'provisional', albeit highly persuasive, view on the meaning of 'as is' in general terms.[15]

10 See Curtis, at p. 6.
11 [2010] EWCA Civ 1145; [2011] 1 Lloyd's Rep 442.
12 *Ibid* at [61] per Rix LJ.
13 In *Lambert v Lewis* [1982] AC 225 at 273, 276.
14 [2010] EWCA Civ 1145; [2011] 1 Lloyd's Rep 442, at [62] per Rix LJ.
15 [2012] EWHC 3537 (Comm); [2013] 1 Lloyd's Rep 509 at [84].

8.2 The approach to 'as is' clauses under the Sale of Goods Act

As said above, the decision of Flaux J represented the application of ordinary and basic general principles applicable under the Sale of Goods Act 1979 to the sale of a second-hand ship, just as with any other item of goods, new or second-hand, complex or simple. It is necessary to consider those general principles since, irrespective of the decision in *The Union Power*, any argument which seeks to exclude the operation of the Act by reference to an 'as is' provision will necessarily invoke those general principles.

It is convenient to take those principles in logical stages.

8.2.1 Application of the Act to ship sale and purchase

Stage one of the analysis is that, as a matter of English law, the 1979 Act applies to a contract for the second-hand sale and purchase of ships just as it does to any other contract for the sale and purchase of a highly complex engineered chattel (whether bought new or second-hand) or internationally traded high value commodities as well as humbler forms of goods.

The 1979 Act (like its predecessor of 1893) is not a consumer protection statute, nor is section 14 a consumer protection measure: it represents a codification of the law of sale of goods both as it affects commerce and trade and as it involves consumers. The Act codified the general law relating to all sales of goods without distinction and section 14(2) in its previous guise of 'merchantable quality' has a long history. The more recent reformulation of the statutory standard as one of 'satisfactory quality' (with guidelines for evaluating what that may entail)[16] does not alter the general applicability of the Act.

The correct starting point is, therefore, that, as with any contract for the sale of goods, from the most humble to the most complex, the sale of a second-hand ship (like the sale of a second-hand aircraft or any other complex mechanical or other chattel) is subject to the Sale of Goods Act 1979: all who buy and sell goods who contract on the basis of English law are taken in English law to be aware of this and to contract upon this basis. The Court in *The Union Power* was, rightly, dismissive of the argument that the Sale of Goods Act should apply in some diluted way to chattels as complex as second-hand ships.[17]

8.2.2 Application of section 14 to such sales

Stage two is that the 1979 Act imports, as a matter of law, an implied term of satisfactory quality into the parties' contract on the Saleform or any other standard form sale contract by section 14(2) ('where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality'). In the case of the sale and purchase of any commercial vessel using the Saleform and in the case of *The Union Power*, the seller will sell the vessel to the buyer in the course of a business, usually that of a trading shipowner or operator.

16 By the amendment of the 1979 Act by the Sale and Supply of Goods Act 1994.
17 [2012] EWHC 3537 (Comm); [2013] 1 Lloyd's Rep 509 at [24]; see also [72].

'Satisfactory quality' is an objective test which applies to goods irrespective of their age and price. It has, for example, been applied to the sale of other second-hand goods, the most frequently cited example being second-hand cars.[18] Not only, therefore, does the Act, on its true construction, apply to a contract for the sale of a second-hand ship, but there is also no reason (theoretical or practical) why the section 14(2) term in particular should not apply to the sale of a second-hand ship (although what constitutes 'satisfactory quality' will, of course, very much vary depending on the precise factual context). There are no 'policy reasons' to restrict the implication of the statutory implied terms into contracts for the sale of second-hand ships, any more than for any other complex second-hand (or new) chattel.

Accordingly, the *prima facie* and indeed the default, position under any contract for the sale of a second-hand ship is that the contract contains an implied term that the vessel sold is of a satisfactory quality.

8.2.3 Section 14 applies unless excluded under section 55

Stage three is that the statutory implied term will only be excluded where the conditions for that exclusion which are contained in section 55 of the 1979 Act are met. Insofar as is material, section 55 provides as follows:

> (1) Where a right, duty or liability would arise under a contract of sale of goods by implication of law, it may (subject to the Unfair Contract Terms Act 1977) be negatived or varied by express agreement, or by the course of dealing between the parties, or by such usage as binds both parties to the contract.
> (2) *An express term does not negative a term implied by this Act unless inconsistent with it.*' [emphasis added].

There are, therefore, three routes by which the implication of the statutory conditions into the contract may be excluded: either (i) by an express agreement; (ii) by the parties' course of dealing (unlikely to arise with any frequency in the context of the sale of second-hand ships); or (iii) by 'usage' or some trade custom or practice.

It is important to note that in *The Union Power*, no case of custom or usage or specially understood binding trade meaning in relation to the contract (an amended version of Saleform 93) was run by the seller before the arbitrators (as was noted by Flaux J).[19] Reliance was placed solely upon the alleged meaning of the express terms on their ordinary language and by reference to ordinary principles of construction. Accordingly, the relevant question in that case, and in any case in which some binding special customary meaning is established, was and is whether there is an express term in the contract that is inconsistent with a term that the vessel should be of satisfactory quality.

The concept of an express term inconsistent with the implied term requires little

18 M. Bridge *et al.*, *Benjamin on Sale of Goods* 8th edn (Sweet & Maxwell, 2008), para. 11-048 (hereinafter referred to as Benjamin).

19 [2012] EWHC 3537 (Comm); [2013] 1 Lloyd's Rep 509 at [16]; see also [71], the judge referring to the absence of 'any cogent evidence of market custom' to the effect that 'second hand vessels sold pursuant to MOAs on Saleform were simply sold to a class standard, not to a standard of satisfactory quality under the SOGA'. Cf. the suggestion by Curtis that 'evidence of custom and other practice was submitted to the arbitration tribunal [but] this was not referred to in the award' which is incorrect.

elaboration. Inconsistency means what it says: the seller must be able to point to some other express term of the contract which cannot be reconciled with a warranty of satisfactory quality, written out side by side with it in the contract in question. The term must necessarily negate or 'negative' the implied term because it cannot stand in the same contract with it.

In this context 'express conditions or warranties will normally be construed as additional to the implied terms'.[20] This is entirely appropriate and orthodox: a clause that warrants that, for instance, stores will 'pass survey of the East India Company's officer' (i.e. that those stores will pass an inspection) does not contradict a *parallel* term that those stores are also to be of satisfactory quality (facts taken from the old case of *Bigge v Parkinson* (1862)[21] where the question was whether the express term excluded the implied term of fitness for purpose).

The emphasis in the case law on the exclusion of section 14 statutorily implied terms is on the need for clear language producing a clear result. This is understandable: the Court is being asked by a seller to conclude that the buyer gave up his statutory rights under s 14. If the language relied upon by the seller is ambiguous or can be read sensibly in some way consistently with the statutory rights, then the seller loses. It is well known that the implied terms apply unless excluded; it is a matter for the seller to exclude them expressly or to structure the bargain such that the terms can be shown necessarily to have been excluded by other terms.

By way of example, in *Air Transworld Ltd v Bombardier Inc*,[22] Cooke J summarised the familiar starting point in this context:

> The court was unlikely to be satisfied that a party to a contract had abandoned valuable rights arising by operation of law, unless the terms of the contract made it sufficiently clear that this was intended. The more valuable the right the clearer the language would need to be. Similarly, the more significant the departure from obligations implied by the law or ordinarily assumed under contracts of the kind in question, the more difficult it would be to persuade the court that the parties intended that result.

The Court, therefore, proceeds upon the basic presumption that basic statutory rights in English law will not lightly be assumed to have been abandoned.

8.2.4 The onus is on the seller to satisfy section 55

Stage 4, which flows from the preceding stage, is that the effect of section 55(2) is to place the onus on the seller to demonstrate the exclusion of the Sale of Goods Act terms.

Given that the statutory implied terms provided for by the Sale of Goods Act 1979 will apply to any contract of sale of goods unless and until excluded, then the onus is upon a seller of a second-hand ship who seeks to contend that the implied term as to satisfactory quality under section 14(2) was excluded to point either (i) to an 'express term' within the contract in question which is 'inconsistent' with the particular implied term: see ss 55(1) and 55(2) or (ii) to the term having been

20 Benjamin, op. cit. at para. 11-068.

21 7 H & N 955. Cited in Benjamin as an example of the general principle.

22 [2012] EWHC 243 (Comm); [2012] 1 Lloyd's Rep 349 at [25] per Cooke J.

negatived 'by such usage as binds both parties to the contract'. In the case of (ii), such usage can either be one which applies generally to the type of contract in question or to the meaning of a particular term or expression used in the contract. Accordingly, it will be for the seller to identify either the express term which as a matter of language is said to be inconsistent with the statutory implied term of satisfactory quality or any relevant customary understanding in the relevant trade which excludes the term.

Where a seller relies upon the express terms of the sale contract, this will be a matter of the construction of the particular terms of the contract relied upon, in the context of the contract as a whole and giving the term or terms their sensible and ordinary objective meaning.

8.2.5 'Custom' and customary or settled trade meaning

Much of the controversy which has attended the decision in *The Union Power* springs from commentators who believe that it ran counter to what everyone considered to be the position and upset what had hitherto been a clear and universally settled meaning.[23] The factual premise for that belief is, or has been for a considerable period of years, highly questionable.

Where the seller seeks to rely on any customary meaning, the position as to custom (or 'usage') of the trade (the two terms are usually treated as synonymous) relied upon by a contracting party as giving to a term which is used by the parties a special or customary meaning has been conveniently summarised as follows. 'Evidence of custom is therefore admissible to explain ambiguous mercantile expressions in a charter or to add incidents, or to annex usual terms and conditions which are not inconsistent with the written contract between the parties, but not for any further purpose.'[24]

Reliance by a seller on a customary meaning, however, sets a high threshold and will require compelling evidence. The requirements of a custom or usage of the trade used for this purpose may be taken for present purposes as follows: 'Customs to be enforced by the Courts must be – (i) reasonable; (ii) certain; (iii) consistent with the contract; (iv) universally acquiesced in; (v) not contrary to law.'[25] The position has been described by Professor Guest as follows: 'To be binding however, the usage must be notorious, certain and reasonable, and not contrary to law and it must be proved to be something more than a mere trade practice.'[26]

In the particular context of a custom or usage said to be sufficient to negative the implication of a term as to satisfactory quality under section 14(2) of the Sale of Goods Act, requirements (i) to (iii) and (v) are unlikely to present any difficulty. There is nothing unreasonable or contrary to law about the exclusion of the Sale of Goods Act term: the Act itself provides expressly for the possibility. In a case where

23 See Curtis at p.3, although he recognised that it would not be a view totally acquiesced in but at least 'the overwhelming majority'.

24 This formulation is set out in S. B. Eder *et al*, *Scrutton on Charterparties and Bills of Lading* 22nd edn, (Sweet & Maxwell, 2011) at art. 10; see also H. Beale *et al*, *Chitty on Contracts* 31st edn, vol I, (Sweet & Maxwell, 2012) at para. 12-058.

25 See *Scrutton on Charterparties*, op. cit.

26 See *Chitty on Contracts* 31st edn at para. 12-018; see also para. 12-129.

the contract does not expressly include or contract upon the basis of section 14(2) and where section 14(2) only arises as a matter of statutory implication, then consistency with the contract will not prevent the operation of the custom: the custom is being relied upon as conferring a special meaning on words used. Further, a custom which is said to exclude the Sale of Goods Act term as to satisfactory quality on the basis, for example, that the seller gives no undertaking as to the condition of the thing being sold is sufficiently precise and 'certain'.

The usually problematic area in proving a binding trade or customary usage lies in establishing that the alleged custom or usage is sufficiently universal and total in its application, viz. requirement (iv).

If there are two views on the point or if, while most in a particular trade adhere to one view or adopt the practice in question, others adhere to another view, or either do not follow or do not always follow the practice, then it is not possible to ascribe to the particular word any particular customary meaning: some may use it in one way, others another and the question will fall to be resolved by what it means as a matter of ordinary language.

As already noted, in *The Union Power*, the seller led no evidence as to the meaning of the relevant words relied upon ('as she was') in the parties' contract and in the version of Saleform 1993 under consideration in that case or as to the existence of a settled custom of the trade that the sellers gave no contractual undertakings as to the condition of the vessel sold such as to oust the implication under section 14(2). However, they nevertheless asserted in argument 'it was well settled that such phrases meant that the buyer takes the goods as he finds them, "warts and all" with no warranty or condition as to quality or fitness for purpose'.[27]

Heavy reliance was placed by the seller in *The Union Power* on passages in a leading textbook (Strong and Herring)[28] that the better or the more accepted view was that the Sale of Goods Act implied terms as to quality were not incorporated and that the sale of second-hand ships was or should be viewed as 'as is' in the sense that the seller under the Saleform 1993 gave no undertakings as to the quality or condition of the ship he was selling, other than the various express obligations as to class assumed under various clauses of Saleform. That argument necessarily failed since the seller in that case had not advanced any case of custom or usage as such or led any evidence to make good the existence of any relevant custom or usage: see, for example, per Flaux J rejecting:[29]

> [. . .] the generalised submissions [the seller] made about how application of an implied term as to satisfactory quality would be contrary to the expectations and intentions of parties to MOAs on Saleform and of 'the market'. In the absence of some market custom or usage to exclude the implied terms, as Rix LJ says [in *The 'Mercini Lady'* [2011] 1 Lloyd's Rep 442], the parties to this English law contract are to be taken to have intended to contract by reference to what English law has to say about the language used. Even if [the seller] were right that the expectation of 'the market' was that no term as to satisfactory quality was to be implied into a Saleform MOA, no market custom or usage was pleaded, let alone established.

27 [2012] EWHC 3537 (Comm); [2013] 1 Lloyd's Rep 509 at [11].

28 Malcom Strong and Paul Herring (see footnote 7) are two leading practitioners of Ince & Co, and doyens in the subject, with many years of experience in the field.

29 [2012] EWHC 3537 (Comm); [2013] 1 Lloyd's Rep 509 at [30].

However, the likely, or at least a possible, reason for the seller in that case not leading expert evidence that there was a custom or usage in the second-hand ship sale and purchase trade was that, as the textbooks themselves demonstrated, there was considerable uncertainty about the position in the trade and a number of opposing views prior to the decision in *The Union Power*. In these circumstances, requirement (iv) or Chitty's requirement of notoriety would necessarily be difficult to establish.

The question whether or not the standard Sale of Goods Act section 14(2) implied term applies to Saleform 93 was and is one which has been around for a considerable period, has provoked considerable debate and is widely known in the market as a result. Prior to the decision in *The Union Power*, it has attracted two strongly opposed schools of thought. One school (which Strong and Herring advocated) is that it did not or, perhaps more accurately, should not.[30] The other school (of which a leading exponent was one of the arbitrators in *The Union Power*, Simon Crookenden QC) is that it did.[31] As it was accurately and fairly put by Strong and Herring: 'All of that said, the matter cannot be regarded as settled and there are clearly many arguments which can be advanced on both sides.'[32]

Disputes under Saleform 93 are subject to arbitration (the standard form provides for a choice between London, New York and ad hoc).[33] The question raised in *The Union Power* had divided experienced London commercial and legal arbitrators during the life of the 93 form. The position was summarised by Hannaford and Turner (co-authors of the other leading text in this area) before the decision: 'Whatever the decision, the market will benefit from judicial guidance on an issue which has been the subject of legal debate for many years.'[34]

Each party in *The Union Power* was therefore able, on the application for permission to appeal, to pray in aid reference to the existence of a volume of arbitral awards in favour of the school of thought for which it contended. As a paper by Simon Crookenden QC recorded:[35] 'In London arbitrations some tribunals have held the statutory terms to be implied into Norwegian Saleforms contracts [sic] and some have not. The majority of the awards of which the author is aware, however, have held the statutory terms to be implied.' The leading exponents of the contrary view, Strong and Herring, themselves recognised that the question divides arbitrators: 'It is, however, understood that some arbitrators favour the approach that the implied terms in the Act should apply and that that the standard Saleform wording is not sufficient to prevent them from doing so.'[36]

This was not, therefore, a question where it can be said that either party's

30 See Strong & Herring at p. 39: the authors 'unrepentantly continue to prefer the view that the implied terms in the Act should not apply'.

31 See his paper, *Norwegian Saleform Contracts: Implied Terms of Satisfactory Quality*, unpublished but referred to in the judgment of Flaux J; [2012] 3537 (Comm) [2013] 1 Lloyd's Rep 509 at [66].

32 Strong & Herring at p. 39.

33 See cl. 16.

34 Matt Hannaford of Curtis Davis Garrard and Paul Turner of Clyde & Co are equally doyens in this field with Strong and Herring. As noted above, the new edition was published on 19 December 2012 and therefore went to print before judgment in *The Union Power* was delivered on 13 December 2012 and only after permission had been granted to appeal the underlying award under s. 69 of the Arbitration Act 1996.

35 At para. 21.

36 Strong & Herring at p. 39.

construction leads to an obviously uncommercial result or receives one certain, notorious or universally acquiesced-in answer. Experienced London arbitrators selected by buyers and sellers in Saleform 93 arbitrations felt able to endorse either view as arriving at a sensible and workable commercial bargain between the buyer and the seller of a second-hand ship on Saleform 93 terms. The very real uncertainty over the correct result led BIMCO, in its 2012 revision of the Norwegian Saleform, to include an express exclusion of statutory implied terms as to quality and condition.

Another allied problem with a custom or usage argument is the need to identify the particular 'trade' within which the alleged custom or usage is said to operate or exist.

The wider the trade, the more difficult it may be to establish a settled usage applicable to all transactions in it. In *The Union Power*, while no case on custom or usage was in fact advanced, the submission, as seen above, was that it was the market expectation in *any* sale of *any* second-hand ship or at least of any second-hand ship sold on the Saleform terms that there would be no undertaking by the seller as to the quality and condition of the vessel which was sold on terms as to class and after inspection. That might be said to be an ambitious proposition. The position may be very different where the class of sale is much narrower, for example, where the sale occurs in the specific context of sales of vessels for scrap at scrap prices and destined for scrapping or demolition or where the vessel sold is sold as a wreck for wreck removal or scrap or recycling purposes. In such a case, the particular market and those on that market may very well use a specific term, such as 'As Is, Where Is', to connote a special meaning (whatever it means in ordinary English).

8.3 The decision in *The Union Power*

Against this background of the application of the Sale of Goods Act 1979 to a contract for the sale of a second-hand ship and to 'as is' provisions, the decision in *The Union Power* can be considered.

Under a memorandum of agreement (the MOA) on Saleform 1993, the sellers agreed to sell and the buyers agreed to buy a 15-year-old 1994-built tanker for US$7 million. As she has been described, she was 'a lady in her late middle age, who had almost certainly worked hard all her life and could be expected at this stage to be exhibiting a number of aches and pains'.[37] The MOA provided:

> Clause 11. Condition on delivery. *The Vessel shall be delivered and taken over as she was at the time of inspection*, fair wear and tear excepted. However, the Vessel shall be delivered with her class maintained extended to 30 September 2009 without condition/recommendation, free of average damage affecting the Vessels class. (Emphasis added.)

The buyers inspected the vessel at Piraeus on 18 August 2009 and found the vessel to be 'a quite good vessel' at the time. The vessel was then delivered to the buyers at Tuzla, Turkey on 1 October 2009 for dry-docking there. On 6 November 2009, only some 30 hours after the vessel had departed from Tuzla, the main engine broke down, which, as found by the tribunal, was caused by the ovality of the no. 1

37 See Curtis at p. 3.

crankpin. Further, it was found by the tribunal that the ovality had developed to such a state at the time of delivery that the crankpin bearing was likely to fail within a short period of normal operation of the main engine after delivery of the vessel.

The buyers contended in those circumstances that the sellers were in breach of the MOA either because the ovality was 'average damage affecting class' within clause 11 or because there was a breach of the implied term as to satisfactory quality implied into the MOA by virtue of section 14(2) of the Sale of Goods Act 1979. The sellers denied that any SOGA terms were to be implied into the MOA and argued that the terms of clause 11 were inconsistent with the SOGA implied terms in that the vessel was sold 'as she was'. The tribunal, which was composed of three well-known London maritime arbitrators,[38] rejected the sellers' argument, holding that the implied terms as to satisfactory quality were to be implied into the MOA, the sellers were in breach of that term and the buyers' claim succeeded in full.

It is important to bear in mind the considerable limitations upon the decision of Flaux J in *The Union Power*. As seen, no argument as to market or trade custom or usage was run by the seller in that case (save in the very oblique way referred to above by reference to various statements taken from textbooks). It was a case decided solely upon its particular contract terms and therefore cannot be applied directly to any ship-sale contract which uses materially different terms.

In the case, the only argument advanced was based on clause 11 of the contract as set out above and the particular words 'The Vessel shall be delivered and taken over as she was at the time of inspection, fair wear and tear excepted'. This was relied on as an express term inconsistent with section 14(2) for the purposes of section 55. Reliance was also placed on the words 'the Vessel shall be delivered with her class maintained extended to 30 September 2009 without condition/recommendation, free of average damage affecting the Vessels class'.

The contract in *The Union Power*, therefore, did not use the words 'as is' or 'as is where is' as are used in certain contracts by way of stand-alone provisions.

The seller in that case sought to isolate the words 'as she was' which were used as part of the wider sentence dealing with the vessel's condition on delivery and her condition on inspection and to treat them as having the meaning of an 'as is' clause. The seller then argued that an 'as is' clause ousted section 14(2). The seller's argument accordingly raised two separate questions for the Court: (i) the narrower first question was whether clause 11 in the contract was equivalent to an 'as is, where is' basis of contract, *assuming* that phrase had the effect of excluding the SOGA implied terms; (ii) the wider second question was, if clause 11 was equivalent to an 'as is' provision, does an 'as is, where is' clause exclude section 14(2) in the light of section 55?

The judge rejected the seller's case based on question (i) and held that the wording in clause 11 was not equivalent to an 'as is' clause but was simply part of a sentence dealing with a different matter. As he put it:[39]

> [. . .] the words 'as she was' in the first sentence of clause 11 are a necessary part of a sentence which is recording the obligation to deliver the vessel in the same condition as

38 Simon Crookenden QC; Michael Baker-Harber and Simon Gault.
39 [2012] 3537 (Comm); [2013] 1 Lloyd's Rep 509 at [64].

> she was when inspected. In other words, they are part of a temporal obligation which arises because, usually, there will be a period of time of weeks or even months between inspection and delivery. However, those words tell one nothing about what the sellers' obligations are, either on inspection or delivery, as regards the quality of the vessel. Hence they do not and cannot exclude the implied term as to satisfactory quality under section 14(2) of SOGA.

In reaching his decision on that first question, the judge referred to the fact that other ship sale and purchase contracts did specifically use separate 'as is' or 'as is where is' provisions; this made it difficult to see the use of the words 'as she was' not on their own but as part of another clause as having the same effect. He stated:[40]

> [. . .] the cases on 'as is' provisions, such as The Morning Watch or The Brave Challenger, do pose a real difficulty for the sellers' case, since they demonstrate that sellers who wish to put themselves into an 'as is' regime, with the intention of excluding the statutory implied terms, use those specific words either on their own (as in The Morning Watch) or by way of addition to the contract terms, for example by adding 'as is, where is' after the reference to the sale being 'outright and definite' in clause 4 of Saleform 93.

He also referred as an example of this approach to another arbitration award which had been put in evidence by the seller in which the arbitrators had said:[41]

> We also mention that the sellers' 'as is' argument has no appeal to us. Many sale and purchase contracts are on this basis but this is made clear by use of the well-known words 'as is' used by those involved in the ship sale and purchase market. No such words were in our contract.

Importantly and, it is suggested, correctly, the judge held that, at its highest for the seller, the argument could only be that the wording 'shall be delivered and taken over as she was at the time of inspection' had two possible meanings and this being the case, was fatal to the exclusion of the Sale of Goods Act since the term could be read in the sense which permitted the Act to apply:[42]

> the sellers cannot establish that that was the only meaning the words were intended to have, since plainly the context indicates the temporal purpose of the words, to make it clear that the vessel is to be delivered in the same condition as when inspected. [. . .] even on the sellers' best case the words must have more than one meaning is fatal to the sellers' case that these words exclude the statutory implied terms. Furthermore, given that an obvious sensible meaning of the words is as part of the temporal obligation to which I have referred, section 55(2) defeats the sellers' argument, since it cannot be said that the first sentence of clause 11 is inconsistent with the implied term in section 14(2).

This is the only aspect of his decision which forms the *ratio decidendi*. The judge then went on, *obiter*, to deal with what would have been the position if clause 11 had been capable of being read as an 'as is' clause. Although *obiter*, the view is plainly entitled to careful consideration, being a decision of a highly experienced and reputed Commercial Court judge.

He decided only as a 'provisional view' that 'that the correct approach is to read down "as is" provisions as excluding the right to reject the vessel, whilst leaving the

40 *Ibid* at [65].
41 *Ibid* at [66]. This award was cited in detail in the paper by Simon Crookenden QC 'Norwegian Saleform Contracts: Implied Terms of Satisfactory Quality', unpublished but referred to in the judgment of Flaux J; [2012] 3537 (Comm); [2013] 1 Lloyd's Rep 509 at [66].
42 *Ibid* at [68].

right to claim damages for breach of the implied terms as to description, satisfactory quality and fitness for purpose unaffected'.[43] In other words, such provisions did not exclude the implication of the section 14(2) implied term into the contract and were effective only to exclude the right of the buyer to reject the vessel for breach of that term, while leaving it entitled to claim damages for that breach.

Being only a judgment at first instance, Flaux J's decision is not binding upon any other judge at first instance. He refused permission to appeal but this confers no additional authority upon his decision.

In arbitration, it could be argued that arbitrators are bound to follow his decision, being a decision of the Court.[44] Leaving the question of principle as to the binding effect of a first instance judgment upon arbitrators to one side, even if this proposition were correct, the judgment would only bind as to its *ratio decidendi*. Accordingly, only if the question in the case were precisely the same question of construction which Flaux J had to decide, namely whether the phrase 'The Vessel shall be delivered and taken over as she was at the time of inspection, fair wear and tear excepted' was an 'as is' provision, would his decision have binding effect. The decision has no binding effect on the meaning of an 'as is' provision as the judge himself made clear.

Flaux J's decision, therefore, leaves open for further argument and decision: (i) the effect of differently worded provisions, either in the context of Saleform or otherwise; (ii) the effect of any specific and express 'as is' provision; and (iii) if desired, any argument by a seller as to allegedly relevant binding market or trade custom as to the meaning of the terms in a particular contract or of a standard form contract, such as Saleform.

Given the dichotomy of views applicable to general second-hand sales at least, in the case of a routine sale of a commercial trading vessel (iii) is perhaps now an even more difficult argument than it was before.

8.4 The meaning of 'as is'

The position can be tested at its simplest by taking any contract for the sale of goods which does not involve a second-hand ship. If the parties contract on terms such as 'sold as is' or 'sold as is, where is' or 'basis of sale: as is', what does their language mean? What did they intend to say? How, if one were writing out their bargain in longhand, would one set out what is comprised within these two (or four) terse syllables?

8.4.1 The ordinary English meaning

As a matter of ordinary language, the term 'as is' in the context of a chattel being sold and delivered or provided means, effectively, to take one dictionary meaning, 'in the state that something is in at the present time.[45] Other dictionaries treat the

43 *Ibid* at [84].

44 However, see the thought-provoking contrary analysis by Andrew Baker QC in 'Arbitrators under English law: Inferior Tribunals or A Law Unto Themselves?', a paper delivered at ICMA XVIII (Vancouver).

45 *Cambridge Dictionary Online* (last accessed 31 December 2014).

words 'as is' as shorthand for 'as it is' which perhaps make the position clearer still when used with the term 'sold'[46] It is a term which in its ordinary sense when used in the context of a sale is used to describe goods which the seller offers in their present, existing condition to a prospective buyer. Read ordinarily, it means that the buyer takes the goods as he finds them because they are sold as they are and in the condition in which they then are.

A brief *tour d'horizon* of dictionaries[47] show firstly that the term is one which has a settled dictionary or ordinary language meaning and that meaning is consistent and settled in both English and American English to the same effect: '*as is*: as it stands; unaltered';[48] '*as is, as it is:* in the existing state, things being what they are';[49] '*as is*: in its present condition; without any repairs, improvements or alterations being made, 'the car was priced at $1000 as is';[50] '*as is*: in the existing state of affairs';[51] '*as is*: in the presently existing condition without modification'.[52]

The decision in *The Union Power* does not address directly what the phrase means, simply as a matter of English. The seller in that case cited no dictionary meaning and did not seek to explain the language of an 'as is' provision simply by reference to plain English, stripped of any shipping or ship sale and purchase case law or textbook commentary.

The judge correctly rejected the argument that the phrase was meaningless.[53] This argument was based on a suggestion (by Simon Crookenden QC)[54] that the term 'as is, where is' is a 'mere truism'. If a contract for the sale of the goods is expressed to be 'Basis: sold as is, where is', it is highly unlikely that the parties intended merely to say nothing. Further, as a matter of ordinary English, 'as is' has a meaning as the extract from the dictionary cited above demonstrates. Therefore, as a matter of construction, absent some special trade meaning, the necessary starting point is thus to ask what the words mean simply as a matter of ordinary English. Once that has been established, that is the meaning of the term in the contract; the next question is then whether that term with that meaning can be read consistently with a section 14(2) term. If it cannot, then the Sale of Goods Act term is negatived under section 55(2).

It might be said that the seller's argument in *The Union Power*, in seeking to confer upon it some special 'second-hand ship sale and purchase received meaning' missed, with respect, a more obvious and far simpler argument as to the ordinary meaning of the words as a matter of ordinary language.

If the term properly construed means that the buyer takes the goods as they are in their present and existing condition, whatever it is, and they are sold to him as they are and in that condition, then it is at least highly arguable that that is flatly

46 *Shorter Oxford Dictionary* 6th edn, (OUP, 2007).

47 I am grateful to Andrew Carruth, barrister of Quadrant Chambers who greatly assisted me in this exercise.

48 *The Chambers Dictionary* 12th edn, (Chambers, 2011).

49 *Shorter Oxford English Dictionary* 6th edn, (OUP, 2007).

50 *Webster's Third New International Dictionary*, (G Bell & Sons, 1961).

51 *Collins English Dictionary* 6th edn, (Collins, 2011).

52 *The Merriam Webster Dictionary*, (online, last accessed 30 July 2014).

53 [2012] 3537 (Comm); [2013] 1 Lloyd's Rep 509, at [82].

54 In the paper referred to above.

CHAPTER 13

Financing newbuilding vessels and Barecon 2001: a fair deal?

*Dr Theodora Nikaki**

13.1 Introduction: setting the scene

Building and purchasing a vessel is a multi-million-dollar investment on the part of shipowners. As such, it requires careful planning in terms of negotiation and drafting of both the shipbuilding contract and the related financing arrangements, to be effected through either ship mortgages[1] or capital leases, such as finance-based bareboat charterparties.[2] In particular, financing bareboat charterparties of newbuilds, on which this chapter focuses, constitute rather complex commercial transactions, involving the negotiation of at least three types of contract between different players in the shipping and financing industry, namely the shipbuilding contract,[3] the bareboat charterparty and the conditional sale agreement.[4] There may also be other contractual agreements involved, such as a contract between the shipbuilders and their bank for the shipbuilders' financing of the project or the shipbuilders' risk insurance contract[5] but their discussion falls outside the scope of this chapter, which centres on the buyers' financing deal of the vessel.

The cornerstone of financing bareboat charterparties of newbuilds is the shipbuilding contract between the shipyard and the buyers. It governs the respective rights and duties not only of the shipbuilders and the buyers under the shipbuilding contract but also, to a great extent, of the parties to the bareboat charterparty.[6] Once the financial arrangements are settled, the shipbuilding contract will then be novated to the buyers' financiers.[7] This novation is a tripartite agreement between the shipbuilders, the buyers and the new buyers (the financing institution), under which, in consideration of the discharge of the original shipbuilding contract, the

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1 Ship mortgages are discussed in Chapter 10 of this book.

2 Other terms used include 'full pay-out' lease or charterparty and 'bareboat lease'. See *Bridge Oil Ltd v Owners and/or Demise Charterers of the Ship Guiseppe di Vittorio (No. 1) (The Guiseppe di Vittorio)* [1998] 1 Lloyd's Rep 136 (CA), 156 (Evans LJ).

3 There are a number of different standard forms in regular use, such as the BIMCO-sponsored NEWBUILDCON and the much older Shipbuilders' Association of Japan (SAJ) Shipbuilding Contract form. See Chapter 1 of this book.

4 See generally the BIMCO BARECON 2001 form, Parts I–IV.

5 See further discussion on such contracts in Chapter 6 of this book.

6 See BARECON 2001, Part III.

7 For an example of a novation clause included in a shipbuilding contract, see *CMA CGM SA v Hyundai Mipo Dockyard Co Ltd* [2008] EWHC 2791; [2009] 1 Lloyd's Rep 213 at [5].

shipbuilders and the original buyers agree to replace it with a new building contract between the shipyard and the financing institution.[8] The novation of the shipbuilding contract will thus divest the original buyers from any responsibility for the performance of their obligations, while the financing institution, as new buyers, will undertake all rights and the duties arising out of the shipbuilding contract,[9] including their right to obtain title to the vessel upon its delivery and acceptance.[10] The financing transaction will not, however, be complete until a financing bareboat charterparty is concluded between the financing institution as owners of the vessel and the original buyers as charterers, which includes either a conditional sale agreement under which property to the vessel will pass to the charterers upon expiration of the charterparty provided certain conditions are met,[11] or an option to purchase in favour of the charterers.[12] Under such a financing charterparty, the charterers (that is, the buyers) bear the obligation to pay hire throughout the stipulated charterparty period, which covers either all of the financiers' capital paid to the shipyard under the terms of the shipbuilding contract plus their profit, or part of it if also combined with a lump sum deposit.[13] Moreover, unlike time charterparties, the risk of the vessel being out of service falls entirely on the charterers who have an operational interest in the vessel, meaning that their obligation to pay hire throughout the agreed duration of the charter will not cease in case of any contingency which may deprive them of the use of the vessel (in other words, 'hell or high water' payment terms).[14]

It comes as no surprise that financing bareboat charters are used in the shipping industry as means of financing the purchase of newbuilds or secondhand vessels, as they are designed to promote the interests of all parties involved in the transaction. From the financing lessors' perspective, the main advantage of such agreements is that they retain the ownership of the vessel as a matter of security, which means that they will be able to retake possession if the bareboat charterers become insolvent.[15] In addition, if all goes well, the lessors will make a profit out of the transaction without getting involved with the operation or the maintenance of the vessel, since

8 *Scarf v Jardine* [1882] All ER Rep 651 (HL), 655 (Selborne LC); *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833 (CA), 841 (Pickford LJ), 849 (Scrutton LJ). The original parties to the shipbuilding contract may simplify the novation process by inserting clauses such as 'and/or for a company or companies to be nominated by them in due course', which have been construed by the courts as evincing an intention to novate the contract upon the nomination of the new purchasers (i.e. the financing institution, provided that the nominated party also agrees). See *Damon Compania Naviera SA v Hapag-Lloyd International SA (The Blankenstein, Bartenstein and Birkenstein)* [1985] 1 WLR 435 (CA), 446–447 (Fox LJ), 454–455 (Goff LJ).

9 *Bradford Old Bank Ltd v Sutcliffe*, ibid.

10 See, e.g., NEWBUILDCON, art. 31 and SAJ, art. VII.5.

11 See, to that effect, BARECON 2001, Part IV, lines 1–7 and the pertinent discussion under 13.4.

12 E.g. a hire-purchase agreement. See, for instance, the financing agreement in *Petroleo Brasileiro SA v Petromec Inc* [2013] EWCA 150 at [3].

13 On the calculation of hire in bareboat charters, see further M. Davis, *Bareboat Charters* 2nd edn, (LLP, 2005), §§35.5, 35.9 and 35.10. The parties may also agree that the financiers' capital and profit will be paid through lump sum deposit(s) at agreed times and monthly hire. See, e.g., the financing agreement in *More OG Romsdal Fylkesbatar AS v The Demised Charterers of the Ship 'Jotunheim' (The Jotunheim)* [2004] EWHC 671; [2005] 1 Lloyd's Rep 181 at [8].

14 BARECON 2001, Part II, cl. 13 (a) or 14(f), Part III, cll.3. With the exception, for instance, of the vessel being lost or missing. See BARECON 2001, Part II, cll. 11(e), and 28(c). See also Davis, ibid., at §§35.5 and 35.9.

15 On the procedures applicable to the different types of insolvency, see Davis, ibid., at §§35.28–35.36.

such obligations fall into the sphere of the charterers' responsibility (subject to the repairs falling into the scope of guarantee works).[16] Moreover, the lessors' financial interests are further protected because they are entitled to terminate the charterparty if the charterers fail to fulfil any of their core obligations under it, such as their duty to pay hire punctually, to comply with the agreed trading restrictions, and to maintain and repair the vessel.[17]

In a similar vein, the charterers (buyers) also benefit from such an arrangement as the bareboat charterparty constitutes a *contract of hire of the ship*, not for the provision of services.[18] Thus, they are entitled to possession of the ship and also have full control over the master and the crew, the master being the servant of the charterer, not of the owner.[19] In other words, the charterers/buyers can use the vessel as they deem appropriate to maximise their earnings,[20] which will, in turn, be used towards the payment of her purchase price via the payment of monthly instalments in the form of hire.[21]

Nevertheless, attention needs to be paid to any restrictions applying to lease financing agreements under the law of the flag of the vessel. For example, until 1996, it was unlawful for foreign banks to use this means to finance the purchase of a vessel employed in the US coastwise trade as they did not satisfy the rigid citizenship precondition imposed on this type of vessel, namely the qualification that at least 75 per cent of the owners of such vessels had to be a US citizen.[22] To boost the coastwise market, in 1996, the US Government relaxed the financing requirements for such vessels in order to allow foreign lessors to finance their acquisition, introducing the 'foreign lessor exemption', which eliminated the strict citizenship prerequisite.[23] To ensure, however, that foreign investors did not actually operate vessels in the coastwise trade, the foreign lessor exemption was made subject to other strict conditions, such as the requirements that the owner must only have a financial interest in the vessel (a 'passive investment') and also that the vessel be demise chartered for a period of at least three years to a US citizen who was qualified to engage in the coasting trade.[24]

This chapter focuses on a number of legal issues arising out of the financing arrangements related to the acquisition of newbuilding vessels under the BIMCO

16 See BARECON 2001, Part II, cl. 10(a) and Part III, cl. 1(d), lines 29–51.
17 Ibid., at Part II, cl. 28(a).
18 *Sea & Land Securities v Dickinson* [1942] 2 KB 65 (CA), 69–70 (Mackinnon LJ); *Bridge Oil Ltd v Owners and/or Demise Charterers of the Ship Guiseppe di Vittorio (No. 1) (The Guiseppe di Vittorio)* [1998] 1 Lloyd's Rep 136 (CA), 156 (Evans LJ).
19 See BARECON 2001, Part II, cl. 10(a)(i) and (b). See also *Baumwoll Manufactur von Carl Schleibler v Furness* [1892] 1 QB 253 (CA), 259 (Esher LJ), affirmed at [1893] AC 8 (HL), 16 (Herschell LC); *The I Congreso del Partido* [1978] QB 500 (QB), 537–538 (Goff J).
20 The owners' consent is only required if the charterers want to enter into a sub-charter on bareboat basis. See BARECON 2001, Part II, cl. 22(a).
21 BARECON 2001, Part IV, lines 1–7. Also, for a brief discussion on the tax benefits conferred on bareboat charterers under capital lease, see Chapter 12.
22 46 USCA §50501 (2006).
23 46 USCA §12106 (1996) as amended by the Coast Guard and Marine Transportation Act of 2004, PubLNo 108–293, §608, 118 Stat 1028, 1054 (2004).
24 Ibid. See further discussion in A. Hugunine, 'The Emergence of Lease Financing for Vessels Engaged in Coastwise Trade' (2006) 30 *Tul Mar LJ* 411; C. Papavizas, 'US-Flag Vessel Financing and Citizenship Requirements' (2007) 32 *Tul Mar LJ* 35; and D. Michaeli, 'Foreign Investment Restrictions in Coastwise Shipping: A Maritime Mess' (2014) 89 *NY ULRev* 1047.

BARECON 2001 Standard Bareboat Charter, a form which is widely used in the shipping industry. In particular, it analyses the owners' and charterers' respective rights and obligations as regards delivery and repairs. It also investigates the position under a conditional sale agreement (called 'Hire/Purchase' in BARECON 2001, Part IV). Considering the role each party plays in such a financing transaction – owners as financiers and charterers as ultimate buyers of the vessel – it critically evaluates their rights and duties with a view to ascertaining whether the distribution of the parties' rights and obligations under the BARECON 2001 charterparty is fairly balanced. Where appropriate, solutions will be also proposed to restore the balance between the parties' rights. As a final note, this chapter will evaluate the parties' position in the context of English law, being one of the applicable systems of law (and indeed the default) in BARECON 2001.[25]

13.2 Delivery

13.2.1 Overview

The delivery of a vessel to the charterers and her acceptance mark the commencement of the charterparty period and the time from which the duty to pay hire arises.[26] Generally, the vessel tendered for delivery must correspond with the description recorded in the charter form, as negotiated between the owners and the charterers.[27] The position is somewhat different when it comes to financing bareboat charters of newbuilding vessels, as the owners bear the obligation to deliver a ship already fully described in the shipbuilding contract. To that end, it is expressly provided in BARECON 2001 that the owners will discharge their delivery obligation as long as the vessel tendered for delivery is constructed and completed in accordance with the description set out in the shipbuilding contract, and the specifications and plans annexed to it[28] (including subsequent amendments), as approved by the charterers.[29] Thus, as the financing bareboat charterparty is drafted back-to-back with the shipbuilding contract, good delivery of the vessel under the shipbuilding contract amounts to good delivery at one and the same time under the bareboat charterparty,[30] relieving, in turn, the owners from any liability with respect to the vessel's unseaworthiness, specifications, performance and defects, except from those covered by guarantee works.[31]

Furthermore, taking into account the fact that that shipbuilding contracts normally allow for a grace period,[32] it is expressly provided in BARECON 2001 that the owners' duty to deliver the vessel arises only at the date of her actual delivery by the shipbuilders, which may not always coincide with the estimated delivery time.[33] In

25 See BARECON 2001, Part II, cl. 30(a) and (e).
26 See, e.g., BIMCO NYPE 93, cl. 1 and 10, BARECON 2001, Part II, cl. 11(a)–(b).
27 See, e.g., BIMCO NYPE 93, lines 10–20.
28 See, e.g., NEWBUILDCON, art. 2, SAJ, art. I.1–2,
29 BARECON 2001, Part III, cl. 1(a)–(b), 1(d), lines 19–25 and 2(a), lines 53–61.
30 *BW Gas AS v JAS Shipping Ltd* [2010] EWCA 68; [2010] 2 Lloyd's Rep 626 [39] (Rix LJ).
31 BARECON 2001, Part III, cl. 1(d), lines 25–51 and cl. 2(a).
32 See, e.g., NEWBUILDCON, arts 13 and 39(a)(iii) and 39 and SAJ, art. VIII.
33 BARECON 2001, Part III, cl. 1(d), lines 21–25 and cl. 2(a), lines 61–67.

addition, the bareboat charterparty imposes a corresponding duty on the charterers to accept a vessel built in accordance with the terms of the shipbuilding contract at the time she is in fact tendered for delivery.[34] Bearing this leeway in mind, charterers who plan to sub-charter the newbuilding vessel should include flexible cancelling clauses in their sub-charterparties, giving them the right to provide an alternative delivery date – also to be accepted by the sub-charterers – if they cannot meet the cancelling date because the vessel will be delivered later than the originally estimated date.[35] When entering into a sub-charter, the charterers should also provide a realistic 'estimated time of arrival' at the delivery port or 'expected ready to load date'. Otherwise, they will be held liable for damages as, given their involvement in the building process, it would be difficult to prove that they honestly expected that the vessel would be ready to load on the estimated date and that their expectation was based on reasonable grounds.[36]

Such delivery arrangements reflect the nature of the bareboat charterparty of newbuilding vessels as merely a financing tool. On the one hand, the owners are only there to facilitate the purchase of the newbuilding vessel and have practically no involvement in either the construction or the operation of the vessel. It would therefore be unfair to impose on them any liability with respect to the description of the vessel, her seaworthiness or any delay in her delivery. On the other hand, it is the charterers who have the operational interest in the vessel, being her operators and ultimate buyers. In that capacity, they are afforded the opportunity to negotiate and approve the specifications of the new vessel at the time of the conclusion of the shipbuilding contract, which is then novated to the owners, and also at any time during the construction process, as their consent is a prerequisite to any amendments to the terms of the shipbuilding contract and the vessel specifications/plans.[37] In a similar vein, the charterers are entitled to check the vessel's conformity with the agreed specifications throughout the construction process as the bareboat charterparty confers on them the right to send their representative in the shipyard.[38] It should be noted, though, that the bareboat charterparty terms do not automatically grant them such rights, as after the novation of the shipbuilding contract, the charterers have ceased to be a party to it. It is therefore necessary that a special provision to that effect is included in the shipbuilding contract to ensure that they will be allowed to exercise any of these rights. Moreover, it is the charterers who have the final say in deciding whether or not to reject the vessel tendered under the shipbuilding agreement if there is a valid reason to do so. BARECON 2001 imposes an obligation on the owners/lessors to consult with them before deciding on whether or not to accept delivery of such a vessel.[39] More importantly, it confers on the charterers the right to sue their contractual counterparty for damages if the shipbuilders terminate the shipbuilding contract for breach of contract on the part of the owners. All in all, it is

34 Ibid.

35 See, e.g., the cancelling clause in BIMCO NYPE 93, cl. 16, lines 209–218 (Extension of Cancelling).

36 *Maredelanto Compañía Naviera SA v Bergbau-Handel GmbH (The Mihalis Angelos)* [1971] 1 QB 164 (CA), 194 (Denning MR).

37 BARECON 2001, Part III, cl. 1(b).

38 Ibid., at cl. 1(c).

39 Ibid., at cl. 2(c)(i)–(ii).

safe to conclude that, subject to the exceptions discussed below, the bareboat charterparty confers on the charterers essentially the same delivery rights they would have had had they been parties to the shipbuilding contract.

Based on the above discussion, one might say that overall, the delivery rights and obligations of the parties under the financing bareboat charterparty are balanced, reflecting the role each one of them plays. The next subchapter will discuss issues related to the scope of the 'description' of the vessel as agreed in the shipbuilding contract to demonstrate how the different wording employed in standard shipbuilding contracts may impact the protection of the charterers' interests. It will then focus on the assessment of damages for non-delivery arising out of the owners' default with a view to analysing the complexities in calculating damages for breach of the delivery obligation under the financing bareboat charterparty.

13.2.2 The scope of the vessel description

We have so far established that delivery of a newbuilding vessel which conforms to the description provided in the shipbuilding contract simultaneously discharges the owners' delivery obligation under the bareboat charterparty.[40] It is, therefore, important to explore the scope of the vessel description as the charterers' core right to reject the vessel is dependent upon her compliance with it.[41]

It is trite law that full compliance with the terms of the vessel's description set out in the shipbuilding contract does not amount to a strict condition precedent of the charterers' obligation to accept the vessel.[42] The applicable test to the compliance with the contractual description is one of 'mercantile character', assessing whether, according to 'tests men in the market would apply', the vessel tendered for delivery is of a different kind from that which the owners have agreed to buy under the terms of the novated shipbuilding contract.[43] To that end, the description of the vessel encompasses only items amounting to a substantial ingredient of her *'identity'* and does not extend to articles which simply aim to *label* or *identify* the vessel so that the parties can locate her and, should they wish, sub-dispose of her.[44] For example, the description of the vessel entails articles such as her speed, fuel consumption and cubic and deadweight capacity but not the vessel number indicated in the shipbuilding contract (i.e. 'to be built by Osaka Shipbuilding and known as Hull number no. 354'), which is deemed to only form part of her identification under the shipbuilding contract.[45]

Nevertheless, it is at least arguable that the owners will not fulfil their delivery

40 Ibid., at cl. 1(d), lines 19–24 and at cl. 2(a), lines 53–61. See also *BW Gas AS v JAS Shipping Ltd* [2010] EWCA 68; [2010] 2 Lloyd's Rep 626 [39] (Rix LJ).

41 BARECON 2001, Part III, cl. 1(d), lines 19–25 and cl. 2(a).

42 *Reardon Smith Line Ltd v Yngvar Hansen Tangen (The Diana Prosperity)* [1976] 2 Lloyd's Rep 60 (CA), 72 (Denning MR), approved by Lord Wilberforce in the House of Lords at [1976] 1 WLR 989, 998–999.

43 *Christopher Hill Ltd v Ashington Piggeries Ltd* [1972] AC 441 (HL), 489 (Wilberforce LJ), 503 (Diplock LJ).

44 *Couchman v Hill* [1947] KB 554 (CA), 559 (Scott LJ); *The Diana Prosperity* [1976] 1 WLR 989 (HL), 999 (Wilberforce LJ); *Sanko Steamship Co Ltd v Kano Trading Ltd* [1978] 1 Lloyd's Rep 156 (CA), 158–159 (Roskill LJ), 160–161 (Bridge LJ), 161 (Stephenson LJ).

45 *The Diana Prosperity*, ibid. *Sanko Steamship Co Ltd v Kano Trading Ltd*, ibid.

obligation under the charterparty if the tendered vessel is built in a different shipyard from the one(s) expressly stipulated in the shipbuilding contract. This issue may well arise if the vessel is built under the NEWBUILDCON terms. NEWBUILDCON, clause 2, titled 'Description', explicitly provides in paragraph (a) that the vessel shall be built 'at the shipyard and shall have the Builder's Hull Number stated in Box 6'. The shipyard is further defined in NEWBUILDCON as 'the place or places stated in Box 5 where the vessel will be assembled and/or constructed'.[46] In fact, there was a comparable provision in *Sanko*,[47] where clause 41 of the charterparty made reference to a 'vessel to be built *at* Osaka Shipbuilding Co. Ltd. Hull Number 352', whilst the preamble referred to a vessel 'known *as* Osaka Shipbuilding Co. Ltd., Hull No. 352 until named' (emphasis added).[48] The Court of Appeal read the two provisions together to conclude that, in the light of the principles enunciated in *The Diana Prosperity*,[49] the words in the charterparty were not apt to create a contractual obligation requiring the owners to tender a vessel built at the Osaka Shipbuilding Co Ltd's yard at Osaka, therefore the owners were entitled to tender the ship built at Oshima and bearing the yard number 352.[50]

One might argue, however, that *Sanko* is distinguishable for a number of reasons and therefore is not applicable to the wording employed in NEWBUILDCON. NEWBUILDCON, article 2(a), clearly provides for the assembly and construction of the vessel at the agreed place(s), as opposed to the clause at issue in *Sanko*, which merely made reference to a vessel 'to be built *at Osaka Shipbuilding Co., Ltd.*' (emphasis added), wording which Roskill LJ found to be incomplete and unclear.[51] Moreover, as Roskill LJ found himself bound to construe that clause together with the preamble, he left open the issue of the interpretation of the clause had it stood alone, when it might well have meant that the vessel was to be built at the Osaka Shipbuilding Co's own yard.[52] More importantly, it transpires from the text of NEWBUILDCON that it is the intent of the parties to the shipbuilding contract, and in turn, to the bareboat charterparty, to qualify the shipyard where the vessel is built as a substantial ingredient of her identity, as the undertaking to construct the vessel at the agreed shipyard in NEWBUILDCON falls within the scope of the vessel description clause (clause 2). This is also reinforced by the argument that, on the true construction of the shipbuilding contract, and in turn of the bareboat charterparty which makes express reference to the vessel description under it, the express enumeration of such places in the shipbuilding contract demonstrates the parties' reliance on the stipulated contracting and subcontracting arrangements made in the course of the shipbuilding. It is thus the parties' understanding that the vessel they have bargained for may only be assembled and constructed at the place(s) mentioned at the shipbuilding contract.[53] Thus, it is submitted that, unlike

46 NEWBUILDCON, lines 48–49.
47 *Sanko Steamship Co Ltd v Kano Trading Ltd* [1978] 1 Lloyd's Rep 156 (CA).
48 Ibid., at 158.
49 [1976] 1 WLR 989 (HL), 999 (Wilberforce LJ).
50 *Sanko Steamship Co Ltd v Kano Trading Ltd, at* 160 (Roskill LJ), 160–161 (Bridge LJ) and 161 (Stephenson LJ).
51 Ibid., at 159 (Roskill LJ).
52 Ibid., at 159 (Roskill LJ) and 161 (Bridge LJ)
53 Such an argument was rejected in both *The Diana Prosperity* and *Sanko* on the basis that the true

the loose language of the clauses at issue in both *The Diana Prosperity* and *Sanko*,[54] the wording employed in NEWBUILDCON, article 2(a), is to be treated as creating a contractual obligation to deliver a vessel constructed in the agreed shipyard(s) and not as introducing merely 'labelling words'.

Although shipbuilding contracts include detailed provisions on items falling into the description of the vessel, such as the guarantees related to the vessel's speed, fuel consumption and cubic and deadweight capacity,[55] there will be cases where, given the complexity of the shipbuilding process, the final product may not fully conform to the agreed specifications. As this may happen quite often, shipbuilding contracts include clauses providing for tolerated breaches in terms of speed, fuel consumption and cubic and deadweight capacity, which entitle the owners to only claim liquidated damages but not to reject the vessel.[56] In turn, the owners will tender such a vessel to the charterers, who are under the obligation to accept her, even though she falls short of the agreed characteristics, as the charterers may reject the vessel only if the owners would have had the same right under the shipbuilding contract.[57] Nevertheless, depending on the charterparty terms, the charterers may be entitled to claim from the owners the stipulated proportion of the liquidated damages the latter will recover from the shipyard.[58]

What may complicate things and also disadvantage the charterers is the provision in shipbuilding contracts for the valid delivery to the owners of a newbuilding vessel with 'minor defects'. Such a clause is found in NEWBUILDCON, which obliges the owners to take delivery of a vessel with 'defects of minor importance, not affecting her class or her operation in its intended trade', which may not be rectified within reasonable time and in any event before the accrual of the owners' rights to terminate the shipbuilding contract.[59] For example, under NEWBUILDCON, the owners/lessors as buyers would be required to take delivery of a container ship even though the shipyard had not completed the decoration of her interior but would not be obliged to accept such a vessel if she had faulty operating cranes. Assuming that the defect is minor, the owners are thus obliged to accept delivery of the vessel on the condition that the shipbuilders agree not only to rectify the defects at their own cost and as soon as possible but also to indemnify them for any consequential loss they incurred, including any loss of time.[60] Then, the charterers in turn have no other option but to accept the tendered vessel, as the owners were not entitled to reject her under the terms of the shipbuilding contract either,[61] and must also

construction of the pertinent clauses did not support such a conclusion. *The Diana Prosperity* [1976] 1 WLR 989 (HL), 1000 (Wilberforce LJ); *Sanko Steamship Co Ltd v Kano Trading Ltd* [1978] 1 Lloyd's Rep 156 (CA), 160 (Roskill LJ).
54 *The Diana Prosperity*, ibid., at 994; *Sanko Steamship Co Ltd v Kano Trading Ltd*, ibid., at 158.
55 NEWBUILDCON, art. 2, SAJ, art. I.2.
56 NEWBUILDCON, cl. 8–13, SAJ, art. III.
57 BARECON 2001, Part III, cl. 2(c)(iii). Similarly, the delivery of a vessel built 'without buyer's supplies' amounts to good delivery if the shipbuilding contract provides that the builder is entitled to construct the vessel without them. See *BW Gas AS v JAS Shipping Ltd* [2010] EWCA 68; [2010] 2 Lloyd's Rep 626.
58 BARECON 2001, Part III, cl. 1(d), lines 45–51.
59 NEWBUILDCON, art. 27(d)(iv).
60 Ibid., at art. 27(d)(iv) (1)–(3).
61 BARECON 2001, Part III, cl. 2(c)(iii).

wait for the shipyard to remedy the defect. It is nevertheless clear that the charterers' interests are not adequately protected as the privity of contract doctrine prevents them from suing the shipbuilders directly if they fail to remedy the minor defect within a reasonable period of time. To make things worse, the charterers have no legal means of forcing the owners to take a legal action against the shipyard that does not comply with its obligation to rectify such faults. The owners' obligation to endeavour to compel the builders to repair the vessel extends only to deficiencies falling into the scope of guarantee works appearing *after the delivery* of the vessel and not to those defects which are in existence *at the time of the delivery*.[62] Even if the necessary repairs are effected by the shipbuilders, it will be the charterers who may incur losses, such as damages for loss of time, if the vessel is taken out of service to effect the repairs, since the hire is agreed on 'hell or high water payment' terms. This is, in fact, an example of how the financing agreement may jeopardise the charterers' interests, as had they been party to the shipbuilding contract, they would have been entitled to sue the shipyard directly and also claim damages for any time lost. Therefore, if the vessel is built under the NEWBUILDCON terms, the parties to the financing bareboat charterparty should consider including additional typed clauses in either the shipbuilding contract or their charterparty agreement to circumvent these hurdles. To that effect, the owners should for example, negotiate with the shipyard the incorporation of a clause in the shipbuilding contract granting the charterers the right to sue the shipyard directly for minor defects or conferring them the benefit of the 'minor defects' clause.[63] Or, if the shipyard is not agreeable, the parties to the bareboat charterparty may agree on the inclusion of two additional clauses in their contract, one imposing on the owners a duty to use best endeavours to compel the builders to repair minor defects, as well as an off-hire clause for the time lost during repairs of the minor defects. Such clauses will certainly advance the charterers' interests without at the same time disadvantaging the owners as any damages for loss of time will be passed on to the shipbuilders who have anyway agreed to pay them for such damages.[64]

13.2.3 Liability for non-delivery

Unlike other types of charterparty, financing bareboat charterparties are often fixed for newbuilding vessels which are then only at the construction stage. Therefore, one should not underestimate the possibility that the vessel may never be delivered at all for a number of reasons, including the termination of the charterparty by either the builders or the buyers for any of the events enumerated in the shipbuilding contract, or because the vessel is lost prior to delivery.[65] Again, bearing in mind the role the owners play in the transaction as financiers, it would be unjust to impose on them any liability if the vessel is not delivered for reasons beyond their control. This is, in fact, reflected in the BARECON 2001, which expressly exonerates them for any such liability if the builders are discharged from their obligation to deliver the vessel

62 Ibid., at cl. 1(d), lines 29–34.
63 Contracts (Rights of Third Parties) Act 1999, s. 1(1).
64 NEWBUILDCON, art. 27(d)(iv)(2)–(3).
65 See, e.g., NEWBUILDCON, art. 39, SAJ, arts X–XI.

for any reason other than the owners' own default,[66] such as the insolvency of the guarantor providing the performance guarantee on behalf of the owners as buyers.[67] They will also be relieved from any liability for non-delivery if the charterers instruct them to reject the vessel for non-compliance with the terms of the shipbuilding contract.[68]

Nevertheless, the owners would not escape liability for non-delivery of the vessel under the financing bareboat charterparty if it was their own default which prevented the delivery. For instance, standard shipbuilding contracts grant the shipyard the right to terminate the building contract if the buyers fail to meet their obligation to pay any of the instalments of the contract price or take delivery of the vessel.[69] If this is the case, the charterers will be entitled to treat the owners' default as anticipatory breach of the combined hire/purchase agreement. In particular, the owners will be guilty of anticipatory breach by renunciation of both the bareboat charterparty and the conditional sale contract in so far as their acts or defaults taking place before the time for delivery would lead a reasonable person to the conclusion that they would not perform their side of either of the contracts.[70] In addition, the charterers may establish anticipatory breach by self-induced impossibility as it is the owners' default which has disabled them from performing their obligation to deliver the vessel to the charterers, depriving them in turn of substantially the whole benefit of the contract (i.e. the use of the newbuilding vessel).[71]

If the charterers opt to act upon the anticipatory renunciation and adopt it as a rescission of the combined hire/purchase agreement,[72] then they will be discharged of all of their obligations, including (most significantly) their duty to pay hire. Moreover, they will be entitled to sue the owners for damages forthwith,[73] without even having to prove that they would have been ready and willing at the time of the renunciation to perform their part of the contract.[74] In assessing their damages, the principle of mitigation will also come into play, meaning that the charterers must take all reasonable steps to reduce their loss naturally flowing from the owners' failure to deliver,[75] for example by going to the market to obtain a substitute vessel,

66 BARECON 2001, cl. 2(b) and (iv).
67 See, e.g., NEWBUILDCON, art. 39(b)(i).
68 BARECON 2001, Part III, cl. 2(c)(i) and (iv).
69 BARECON 2001, ibid., at cl. 2(b), NEWBUILDCON, art. 39(b)(ii)–(iii), SAJ, art. XI. 1.
70 *Freeth v Burr* (1874) LR 9 CP 208 (CCP), 213, (Coleridge CJ), 214–215 (Keating J); *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 WLR 361 (CA), 368 (Salmon LJ), 374 (Sachs LJ), 380 (Buckley LJ); *Universal Cargo Carriers Corporation v Citati* [1957] 2 QB 401, 436–438 (Devlin J); *Geden Operations Ltd v Dry Bulk Handy Holdings Inc (The Bulk Uruguay)* [2014] EWHC 885; [2014] 2 Lloyd's Rep 66 [15]–[21] (Popplewell J).
71 The breach of the financing charterparty is indeed inevitable as the defaulting owners/lessors cannot fulfil their obligation to deliver the vessel to the charterers/buyers. *Universal Cargo Carriers Corporation v Citati*, ibid.; *Geden Operations Ltd v Dry Bulk Handy Holdings Inc (The Bulk Uruguay)*, ibid., at [15]–[18]. For the advantages of establishing anticipatory breach by renunciation, rather than impossibility see *Universal Cargo Carriers Corporation v Citati*, ibid., at 436–437 and 443 (Devlin J).
72 *Johnstone v Milling* (1886) 16 QBD 460 (CA), 467 (Esher MR), 470 (Cotton LJ).
73 Ibid., at 467 (Esher MR).
74 Nevertheless, if they cannot prove that they would have been in a position to complete in any case, then they may be limited to nominal damages: see, e.g., *Cooper Ewing & Co Ltd v Hamel & Horley Ltd* (1922) 13 LIL Rep 590 (KB), 593 (Sankey J) and *Flame SA v Glory Wealth Shipping PTE Ltd (The Glory Wealth)* [2013] EWHC 3153; [2014] QB 1080 [81]–[86] (Teare J).
75 *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London*

if a reasonable opportunity arises,[76] and will be debarred from claiming damages for any such loss which they unreasonably failed to avoid.[77] Hence, the measure of the charterers' damages will depend on whether there is an available market for a 'like-for-like' replacement, as well as on whether they have met their duty to mitigate their loss.

This raises the question of what amounts to an 'available market' for a substitute newbuilding vessel. A number of cases have considered the meaning of 'available market' in the context of sales contracts and concluded that such a market exists if there is either at least one actual buyer that day at a fair price or, if there is no actual offer for sale, if on that day there are in the market a sufficient number of traders potentially in touch with each other to establish a market in which the actual or notional seller could sell the goods should he wished to do so.[78] Although this is a definition of the term elaborated and adopted for the purpose of defining 'available market' in the context of sale of goods, courts have found it to be applicable also to charterparty cases,[79] whether the charterers can replace the broken charter with exactly what they bargained for by entering into a replacement charter for the unexpired term on materially equivalent terms (other than freight/hire but including trading limits, hire period and type of cargo).[80] Other cases have stressed that there may be no available market for goods which are too specialised, including goods which had to be manufactured to the specifications requested by the buyers.[81] This is exactly the difficulty the charterers will encounter in finding a readily available substitute vessel, since the newbuilding vessel is constructed in accordance with the specifications agreed in the shipbuilding contract. Such a difficulty raises, in turn, a number of issues with respect to the actions expected to be taken by the charterers to fulfil their obligation to mitigate their loss. The starting point should be that the mitigation rule requires the charterers to only act reasonably, taking an action which a reasonable and prudent person might in the ordinary conduct of business have taken.[82] To that end, reasonable steps to be taken by the charterers to reduce the loss arising from the non-delivery of the newbuilding vessel would not entail a

Ltd [1912] AC 673 (HL), 689 (Viscount Haldane LC); *Fulton Shipping Inc of Panama v Globalia Business Travel SAU of Spain* [2014] EWHC 1547; [2014] 2 Lloyd's Rep 230 [18] (Popplewell J) referring to the summary of the mitigation rules in *McGregor on Damages* 18th edn (Sweet & Maxwell, 2011) [7.003–7.006]. It should also be noted that such a duty does not arise if the anticipatory repudiation is not accepted by the injured party. *Shindler v Northern Raincoat Co* [1960] 1 WLR 1038 (Ass Manch), 1048 (Diplock J).

76 Sale of Goods Act 1979, s. 51(3), embodying a mitigation principle; *Melachrino v Nickoll & Knight* [1920] 1 KB 693 (KB), 697 (Bailhache J).

77 *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd*, ibid.; *Fulton Shipping Inc of Panama v Globalia Business Travel SAU*, ibid.

78 *Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd (No. 2)* [1990] 3 All ER 723 (KB), 730 (Webster J).

79 *Zodiac Maritime Agencies Ltd v Fortescue Metals Group Ltd (The Kildare)* [2010] EWHC 903; [2011] 2 Lloyd's Rep 360 [56]–[58] (Steel J).

80 Ibid., at [57]–[58], applying *Golden Strait Corporation v Nippon Yusen Kubishka Kaisha (The Golden Victory* [2007] UKHL 12; [2007] 2 AC 353. See also *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd* [2015] EWHC 718 [220] (Popplewell J).

81 *Hinde v Liddell* (1874–75) LR 10 QB 265, 269 (Blackburn J). See also *Hirtenstein v Hill Dickinson LLP* [2014] EWHC 2711 [118]. For a detailed discussion on the definition of 'available market', see M.G. Bridge, *The Sale of Goods* 3rd edn (OUP, 2013), §§12.70–12.73.

82 *Dunkirk Colliery Co v Lever* (1878) 9 ChD 20 (CA), 25 (James LJ); *British Westinghouse Electric*

duty to commission the construction of a new vessel[83] or buy a vessel which does not meet the contracted specifications,[84] such specifications to be interpreted as including any tolerated breaches agreed in the shipbuilding contract.

A more challenging question will arise in cases where the construction of the newbuilding vessel at issue was completed in accordance with the shipbuilding specifications but the vessel was not delivered because the owners failed to pay the last instalment or accept delivery. One might argue here for the availability of a market for a substitute vessel in the form of the original vessel herself, as the shipbuilders would usually exercise their right under the shipbuilding contract to sell her elsewhere.[85] Moreover, the charterers will normally be aware of the opportunity created as, having doubtless exercised their rights to monitor the building of the vessel throughout the construction stage, they will clearly know that the vessel is complete and ready. It is, therefore, submitted that the charterers' duty to mitigate their loss requires them to at least approach the shipyard and negotiate the purchase of that particular vessel and, if they are successful, to also enter into a new financing agreement with another financial institution. It is also submitted that the charterers will be deemed to have acted reasonably for the purposes of the avoidable loss rule even if they settled the financing arrangements of the vessel at a higher interest rate, resulting in a higher purchase price.[86] Therefore, they should be entitled to claim any such additional amounts from the owners, as such an extra cost fell on them entirely through their owners' breach.[87] The charterers would not, however, be expected to pay any extortionate price for the repurchase of the vessel, if the shipyard attempted to take advantage of the situation, as this is not an action a reasonable and prudent person might in the ordinary conduct of business have been expected to take.[88] In any case, even if unsuccessful in reaching an agreement with the shipyard to repurchase, the charterers will still be entitled to claim the expenses incurred in taking reasonable steps to repurchase and refinance the acquisition of the newbuild, including legal and brokers' fees.[89]

Assuming that there is an available market, the charterers will be entitled to damages, which will be subject to the usual rules on quantification, including the

& Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd [1912] AC 673 (HL), 690 (Viscount Haldane LC).

83 *Sealace Shipping Co Ltd v Oceanvoice Ltd (The Alecos M)* [1991] 1 Lloyd's Rep 120 (CA), 125 (*per curiam*).

84 As a buyer generally is not obliged under the mitigation rules to accept from the seller goods that do not conform with the contract specifications as per *Kersterton v Albiac*, it seems to follow that the buyer is not obliged under the mitigation rules to buy goods that do not meet the contract description from third parties in order to fulfil their duty to mitigate their damages. *Heaven & Kesterton v Établissements François Albiac et Cie* [1956] 2 Lloyd's Rep 316 (QB), 321 (Devlin J).

85 NEWBUILDCON, art. 39(f), SAJ, art. XI.4.

86 See the reasoning in *Bacon v Cooper (Metals) Ltd* [1982] 1 All ER 397(QB), 401–402 (Cantley J).

87 Ibid.

88 *Dunkirk Colliery Co v Lever* (1878) 9 ChD 20 (CA), 25 (James LJ); *Melachrino v Nickoll & Knight* [1920] 1 KB 693 (KB), 697 (Bailhache J), referring to the duty to mitigate 'if a reasonable opportunity arises'.

89 *Fulton Shipping Inc of Panama v Globalia Business Travel SAU of Spain* [2014] EWHC 1547; [2014] 2 Lloyd's Rep 230 [18] (Popplewell J), referring to the summary of the mitigation rules in *McGregor on Damages* 18th edn (Sweet & Maxwell, 2011) [7.003–7.006].

compensatory principle[90] and the mitigation rule.[91] When calculating such damages, one should take into account the interrelationship between the bareboat charterparty and the conditional sale agreement. Neither of these two contracts stands alone as they operate together towards financing the purchase of the vessel. In that respect, the hire instalments paid to the owners throughout the charterparty period and any lump sums agreed (if any) cover the consideration for both the use of the vessel during the hire period and the vessel price. Bearing this in mind, the damages which will place the charterers in the same financial position as if the vessel had been delivered to them and her ownership transferred, will be assessed based on the difference between the agreed contract rate of the financing bareboat charter period (including any lump sums agreed) and the market rate for the chartering in and financing of a substitute vessel for the same period.[92]

Moreover, the charterers' damages will be assessed based on the assumption that, after accepting the anticipatory renunciation of the combined hire/purchase agreement, the charterers acted reasonably to minimise their loss by entering as soon as reasonably possible into a new financing bareboat charterparty for a substitute vessel on the best terms available.[93] Thus, the charterers should be afforded a reasonable period of time after their acceptance of the repudiation to decide how to mitigate,[94] taking into consideration the time required to negotiate the purchase of another vessel and her financing. If, nevertheless, they fail to conclude a new combined hire/purchase agreement within such a reasonable time and in the meantime the market price has gone up, they will be debarred from claiming the difference between the lower price on the date they ought to have entered into a new financing agreement and the higher price they actually paid to hire/purchase a substitute vessel.[95] Certainly, their additional loss is to be attributed to their neglect to mitigate the damages within reasonable time, which breaks the chain of causation between their loss and the owners' breach.[96]

90 *Robinson v Harman* (1848) 1 Ex 850 (Exch Ct), 855 (Parke B); *Watts, Watts & Co Ltd v Mitsui & Co Ltd* [1917] AC 227 (HL), 241 (Dunedin LJ); *Golden Strait Corpn v Nippon Kubisha Kaisha (The Golden Victory)* [2007] UKHL 12; [2007] 2 AC 353 [9] (Bingham LJ), [29] (Scott LJ) and [57] (Brown LJ).

91 *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 (HL), 689 (Viscount Haldane LC); *Fulton Shipping Inc of Panama v Globalia Business Travel SAU of Spain* [2014] EWHC 1547; [2014] 2 Lloyd's Rep 230 [18] (Popplewell J).

92 *Koch Marine Inc v d'Amica SaRL (The Elena d'Amico)* [1980] 1 Lloyd's Rep 75 (QB), 87 (Goff J); *Kaines (UK) v Oesterreichische Warenhandelsgesellschaft Austrowaren GmbH* [1993] 2 Lloyd's Rep 1 (CA), 10 (Bingham LJ).

93 *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 (HL), 689 (Viscount Haldane LC); *Fulton Shipping Inc of Panama v Globalia Business Travel SAU of Spain* [2014] EWHC 1547; [2014] 2 Lloyd's Rep 230 [18] (Popplewell J).

94 *C Sharpe & Co Ltd v Nosawa & Co* [1917] 2 KB 814 (KB), 821 (Atkin J); *Golden Strait Corpn v Nippon Kubisha Kaisha (The Golden Victory)* [2007] UKHL 12; [2007] 2 AC 353 [10] (Bingham LJ), [57] (Carswell LJ), [80] (Brown LJ).

95 *Melachrino v Nickoll & Knight* [1920] 1 KB 693 (KB), 699 (Bailhache J); *Jamal v Moolla Dawood Sons & Co* [1916] 1 AC 175 (PC), 179 (Wrenbury LJ); *Koch Marine Inc v d'Amica SaRL (The Elena d'Amico)* [1980] 1 Lloyd's Rep 75 (QB), 88–90 (Goff J). See also *Gebruder Metelmann GmbH & Co KG v NBR (London) Ltd* [1984] 1 Lloyd's Rep 614 (CA), 632 (Donaldson MR), holding that if the reasonably anticipated consequence was that the losses would increase day by day, subject to minor unpredictable and short-lived upward movements in the price, the innocent party is under an obligation to take all reasonable measures to prevent this increase in loss.

96 *Kaines (UK) v Oesterreichische Warenhandelsgesellschaft Austrowaren GmbH* [1993] 2 Lloyd's Rep 1 (CA), 10–11 (Bingham LJ).

It is also worthy to note that, in addition to the damages for the breach of the financing bareboat charterparty, the charterers will be entitled to recover all expenses incurred in their reasonable attempts to avoid loss[97] (i.e. any legal or broker's fees incurred to repurchase the vessel). What they will not be allowed to recover, though, is any loss of profits they would have earned if they had gone to the market to conclude a new financing bareboat charterparty for a substitute vessel.[98] Their decision not to enter the market is independent of the owners' default and therefore breaks the causative link between the owners' default and charterers' loss of the opportunity to earn the profits through the use of the vessel.[99]

On the other hand, it is more likely than not that there will no available market for a 'like-for-like' replacement of the newbuilding vessel at the date of the anticipatory renunciation by the owners, which constitutes the breach date of both contracts.[100] If this is the case, the charterers would be again entitled to claim damages under the compensatory principle.[101] But as there will be no available market to measure their damages against, the only way of putting them, as far as money can do so, in the same position as if the financing bareboat charter agreement had been performed, is to allow them to claim their actual loss – to be calculated under the general contract law rules on assessment of damages.[102] The proper measure of such damages is normally damages that can fairly and reasonably be regarded as having been in the contemplation of the parties at the time when the contract was entered into, provided that such damages are likely to happen in the ordinary course of things.[103] When assessing the damages for the breach of contract, one should also consider the nature and object of the business transaction, including the commercial context in which it had been made.[104] Applying this rule to the breach of the financing bareboat charterparty, one would conclude that it was within the reasonable contemplation of parties at the conclusion of the hire/purchase contract that the charterers would exploit the vessel to generate profits. Therefore, reasonable parties to the financing bareboat charterparty would have understood

97 *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 (HL), 689 (Viscount Haldane LC); *Fulton Shipping Inc of Panama v Globalia Business Travel SAU of Spain* [2014] EWHC 1547; [2014] 2 Lloyd's Rep 230 [18] (Popplewell J).

98 *Jamal v Moolla Dawood Sons & Co* [1916] 1 AC 175 (PC), 179 (Wrenbury LJ); *Koch Marine Inc v d'Amica SaRL (The Elena d'Amico)* [1980] 1 Lloyd's Rep 75 (QB), 88–90 (Goff J).

99 *Koch Marine Inc v d'Amica SaRL (The Elena d'Amico)*, ibid., approved by Bingham LJ in *Kaines (UK) v Oesterreichische Warenhandelsgesellschaft Austrowaren GmbH* [1993] 2 Lloyd's Rep 1 (CA), 10. The issue of causation in cases of mitigation is thoroughly analysed in *Fulton Shipping Inc of Panama v Globalia Business Travel SAU of Spain* [2014] EWHC 1547; [2014] 2 Lloyd's Rep 230.

100 *Frost v Knight* (1871–72) LR7 Ex. 111 (Exch Ct), 114 (Cockburn CJ).

101 *Johnson v Agnew* [1980] AC 367 (HL), 400 (Wilberforce LJ). See also Sale of Goods Act 1979, s. 51(2).

102 *Glory Wealth Shipping Pte Ltd v Korea Line Corp (The Wren)* [2011] EWHC 1819; [2011] 2 Lloyd's Rep 370 [31] (Blair J); *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd* [2015] EWHC 718 [226] (Popplewell J) and Sale of Goods Act 1979, s. 51(2).

103 *Hadley v Baxendale* (1854) 9 Ex 341 (Exch Ct), 355 (Alderson B); *Koufos v C Czarnikow Ltd (The Heron II)*, [1969] 1 AC 350 (HL), 382–383, 385 (Reid LJ), 394–395 (Morris LJ), 410–411 (Hodson LJ), 416–417, 421 (Pearce LJ); *Tharros Shipping Co Ltd v Bias Shipping Ltd (The Griparion) (No. 2)* [1994] 1 Lloyd's Rep 533 (QB), 537 (Rix J); *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48, [2009] 1 AC 61 [15], [26] (Hoffmann LJ), [30], [36] (Hope LJ), [52] (Rodger LJ), [69], [78], [79], (Walker LJ), [91], [93] (Baroness Hale).

104 *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)*, ibid., at [78]–[79] (Walker LJ).

that the owners' default in delivering the vessel could result in the charterers' losing the profits they would have expected to earn not only during the hire period but also throughout the expected life of the vessel.[105] It is thus submitted, that the proper measure of damages for the breach of the financing bareboat charterparty is the charterers' likely profit loss calculated from the date of the breach as accrued throughout the expected life of the vessel.[106] The assessment of such damages is a particularly difficult exercise for the courts since they not only have to calculate the damages without a market, but they also must project such losses for a considerably longer period of time (the expected life of the newbuilding vessel). Against such a challenge, the court is expected to make the best assessment that it can, making use of whatever information is available to it, to construct a market value or otherwise calculate the charterers' loss.[107]

As a final note, should the charterers decide to commission the building of a vessel with the same specifications to replace the one which was not delivered, then their damages for the breach of the financing bareboat charter party will again be assessed by reference to their actual loss, although they will not be as extensive.[108] In particular, the measure for assessing their damages is any additional amount they paid to purchase the substitute vessel, as well as any loss of profits incurred between the time the newbuilding vessel should have been delivered and the date the replacement vessel was in fact delivered to them under the new financing bareboat charterparty.[109]

13.3 Repairs

13.3.1 Overview

Bareboat charterparties constitute a distinct category of charters. They qualify as contracts of hire, effectively meaning that full possession and control of the vessel is passed on to the bareboat charterers.[110] Such a full possession and control of the vessel comes also with additional responsibilities imposed on the bareboat charterers,[111] including the duty to maintain the vessel, which normally falls on the owners of a voyage or time-chartered vessel.[112] Under the BARECON 2001 terms, the charterers thus undertake to maintain the vessel and her machinery in a good state of repair, in efficient operating condition and in accordance with good commercial maintenance practice, as well as to keep her class fully up to date with the

105 See the discussion on the calculation of damages of profit earning chattels in *Cullinane v British Rema Manufacturing Co Ltd* [1954] 1 QB 292, 301–302 (Evershed MR), 308 (Jenkins LJ). See also Bridge, n. 81 above, at §§12.179, 12.123–12.132.

106 Ibid.

107 *Deutsche Bank AG v Total Global Steel Ltd* [2012] EWHC 1201; [2012] EnvLRD7 [167] (Smith J) relying on A. Tettenborn, *The Law of Damages* 2nd edn, § 22.99.

108 *Glory Wealth Shipping Pte Ltd v Korea Line Corp (The Wren)* [2011] EWHC 1819; [2011] 2 Lloyd's Rep 370 [31] (Blair J).

109 Ibid., holding that the revival of the (charterparty) market at a later date does not in itself provide the correct measure of damages but may be a factor to take into account in calculating future loss.

110 *Bridge Oil Ltd v Owners and/or Demise Charterers of the Ship Guiseppe di Vittorio (No. 1) (The Guiseppe di Vittorio)* [1998] 1 Lloyd's Rep 136 (CA), 156 (Evans LJ).

111 BARECON 2001, Part II, cll. 10(a)(i), 13(a) or 14 (d)–(f).

112 See, e.g., NYPE 1993, cl. 1, lines 37–38.

classification society and maintain all other certificates in force at all times.[113] The charterers thus have to carry out the required preventive and remedial maintenance of the vessel throughout the hire period, by performing not only regular inspections and surveys but also, subject to the exception discussed below, by repairing the vessel any time she becomes operationally inefficient during the charter period.[114] In terms of the level of their duty, the maintenance obligation is not absolute as it is qualified by 'good commercial maintenance practice'. The bareboat charterers are thus expected to take reasonable steps within a reasonable time, using reasonable skill and care, to remedy any deficiency they have discovered or which they ought to have discovered.[115] In judging whether the bareboat charterers have exercised such reasonable care and skill, regard should be made to factors such as the nature and the complexity of the required remedial work, taking also into account any flexibility available to the charterers about when, where and how the repairs will be effected.[116] Nonetheless, unless the bareboat charterparty is deemed frustrated, the charterers cannot avoid the performance of repairs which may be too expensive, as the proportionality in terms of financial expenditure does not come into play.[117]

The charterers' obligation to perform remedial maintenance does not however encompass repairs, replacements or defects appearing during the first 12 months from her delivery by the builders, if such matters fall within the scope of the guarantee clause in the shipbuilding contract. Specifically, it is expressly agreed between the parties to the financing bareboat charterparty that in case of such repairs, the owners will 'endeavour to compel the Builders to repair, replace or remedy any defects or to recover from the Builders any expenditure incurred in carrying out such repairs, replacements or remedies'.[118] Such an exception aims at protecting the owners from claims they cannot pass on to the shipyard. It also purports to place the charterers in the same position as if they were parties to the shipbuilding contract since, in such a case, they would not have been required to bear the cost of repairs covered by the guarantee clause. Nonetheless, as it will be shown below, the owners' obligation only to 'endeavour to compel the Builders' may not always adequately protect the charterers' interests.

Although guarantee clauses have been discussed elsewhere in this book,[119] it is necessary to make a few points which are of particular relevance to financing bareboat charterparties. The first observation relates to the interrelationship between the guarantee clause and the charterers' recovery for repairs covered by the clause. It is clearly stated in BARECON 2001 that the owners' liability to the charterers for defects appearing within the first 12 months from the vessel's delivery by

113 BARECON 2001, Part II, cl. 10(a)(i). See also Sale of Goods Act 1979, s. 20(3) imposing on the charterers/buyers the duty to take reasonable care of the vessel as bailees.

114 On the maintenance obligation see generally T. Coghlin *et al.*, *Time Charters* 7th edn, (2014), §§11.5–11.14.

115 *Golden Fleece Maritime Inc v ST Shipping & Transport Inc (The 'Elli' and The 'Frixos')* [2007] EWHC 1890; [2008] 2 Lloyd's Rep 119 [59] (Cooke J) (time charterparty case) relying on *'Snia' Societa di Navigazione Industria e Commercio v Suzuki & Co* (1923) 17 LIL Rep 78 (KB), 88 (Greer J).

116 *Golden Fleece Maritime Inc v ST Shipping & Transport Inc (The 'Elli' and The 'Frixos')*, ibid.

117 Ibid.

118 BARECON 2001, Part III, cl. 1(d), lines 29–34.

119 See the discussion in Chapter 1.