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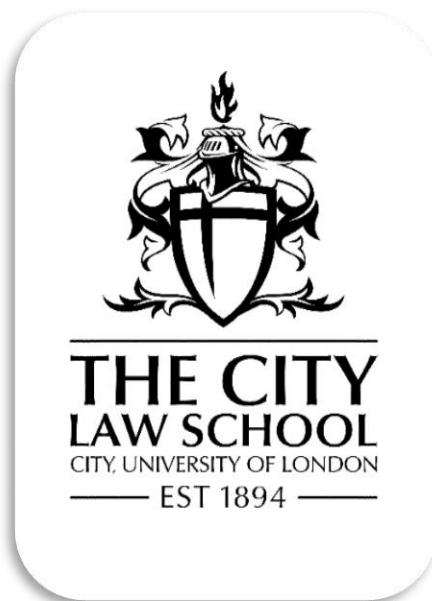
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SHIPBUILDING DISPUTES: INFLUENCE OF INDUSTRY NORMS ON LAW AND CONTRACTS



Amar Vasani

**Doctor of Philosophy (PhD) Thesis
City, University of London
The City Law School**

August 2018

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Acknowledgements

This thesis could not have been written without support from the following people. My academic supervisors, Jason and Anthony, who guided and nurtured my research, as well as going beyond the call of duty to support me pastorally. The staff at The City Law School including Mauro, Kate and Hilary, who led me through the doctoral process. My grandparents, aunties, uncles, cousins and nephews, who were always on hand to provide me with encouragement when I needed it. My mentor and former manager Mike, who inspired me to follow my dreams and apply for postgraduate study. My friends and colleagues, who were always willing to lend both an ear and a helping hand. And last but certainly not least my mother, father and brother. For always being there to give me a pat on the back or a shoulder to cry on. For championing my education above all else, supporting me both financially and emotionally. And for never asking for, or expecting, anything in return.

Abstract

Disputes continue to beset English law governed shipbuilding contracts to this day, despite the fact that English law's characterisation of the shipbuilding contract and relationship have been established since the late 19th Century. For English law to develop such that shipbuilding disputes do not occur in future, this thesis argues that lawmakers and judges must give due regard to shipbuilding industry norms.

In order to do so, this thesis will firstly demonstrate that there is a disparity between how English law characterises all shipbuilding contracts and relationships, and the variety of shipbuilding contracts, relationships and projects found in the industry. It is thus argued that reconciliation of this void between law and industry is contingent upon the law having regard for industry norms.

This thesis will then examine the causes of shipbuilding disputes, before exploring the judicial remedies available to parties following dispute – both if shipbuilding contracts continue to be characterised as sale of goods provisions under English law, and if legislators decide otherwise. The context of remedies will in turn be used to demonstrate how industry norms can influence both the judicial remedies issued by judges and arbitrators, and the contractual remedy clauses which parties insert into their contracts to resolve or mitigate shipbuilding disputes.

Chapter 1

PREMISE AND APPROACH

1.1 – Introduction

Counsel in the sale of goods case of *Balmoral Group Ltd v Borealis (UK) Ltd*¹ asserted that within the English law² of contract lies two worlds. Firstly that of industry parties, a world which includes their contracts, contracting relationships and norms.³ Secondly that of the law,⁴ and how it characterises the contracts and contracting relationships of industry parties. It is possible for there to be a mismatch between these two worlds, which may hold true for the context of shipbuilding. Here, there appears to be a mismatch between the law's *homogenous* characterisation of all shipbuilding contracts⁵ (and the contracting relationships⁶ between buyer and shipbuilder under them), and the *heterogeneous* shipbuilding contracts and contracting relationships (between buyer and shipbuilder) actually found in the shipbuilding industry. It is therefore arguable that when characterising shipbuilding contracts, when characterising the shipbuilding relationship between buyer and shipbuilder, and also when providing remedies in the wake of shipbuilding disputes, 'contract law should proceed on the basis of a more enriched understanding and appreciation of actual [industry] practices'.⁷ This argument

¹ [2006] 2 CLC 220 (Com Ct)

² The term 'English law' in this thesis refers to the legal system governing England and Wales.

³ Catherine Mitchell, *Contract Law and Contract Practice; Bridging the Gap Between Legal Reasoning and Commercial Expectation* (1st edn, Hart Publishing 2013) 1

⁴ [2006] 2 CLC 220 (Com Ct) 322 (Clarke J)

⁵ In this thesis, the law's 'characterisation' of a contract means what the law considers the contract's legal 'nature' to be. [Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 1; William Cecil and Fiona Cain, 'England & Wales' in Arnold J van Steenderen (ed), *Getting The Deal Through Shipbuilding 2017* (6th edn, Law Business Research 2017) 26; Aleka Mandaraka-Sheppard, *Modern Maritime Law and Risk Management* (2nd edn, Informa 2009) ch 10 s 2; Aleka Mandaraka-Sheppard, *Modern Maritime Law Volume 2: Managing Risks and Liabilities* (3rd edn, Informa 2013) ch 7 s 2.]

⁶ The law's 'characterisation' of a contracting relationship in this thesis refers to whether the law shapes the relationship as an 'arm's length' or a 'cooperative' one (these terms being defined in Section 1.2).

⁷ Catherine Mitchell, *Contract Law and Contract Practice; Bridging the Gap Between Legal Reasoning and Commercial Expectation* (1st edn, Hart Publishing 2013) 3

forms the paradigm surrounding this thesis, hereinafter referred to as its ‘overarching theoretical paradigm’. Out of this emerges the ‘overarching theoretical question’ of this thesis, namely:

To what extent should shipbuilding industry norms influence the characterisation of shipbuilding contracts and relationships, and the remedies available or offered in the wake of dispute?

The answer to this overarching theoretical question will be argued to lie on a scale consisting of three markers. The first marker is the regulated stance, under which ‘legislative and administrative activity...directly controls contract behavior’.⁸ Here, the law (through judicial practice, legislation or both) is required to offset the deficiencies of contracts in regulating shipbuilding relationships.⁹ The law is thus ‘a method of channelling contractor behaviour, setting standards and providing incentives for maintaining stable, long-term relations’.¹⁰ Consequently, under this stance industry norms have very little influence on characterisation of contracts and contracting relationships, nor on the remedies offered in the wake of dispute.

The second marker is the liberal¹¹ stance. This stance allows shipbuilding law to be shaped to some extent by the industry, since the shipbuilding remedies administered by the *law*, and also the *legal* characterisation of shipbuilding contracts and relationships, are influenced by *industry* norms. The law on shipbuilding, and the shipbuilding industry, would thus coexist with one another. This stance was taken by Lord Mansfield when he argued that ‘England’s commercial law had to develop as business practice developed, and had to recognize business custom and usage’.¹²

⁸ Richard E Speidel, ‘Contract Law: Some Reflections Upon commercial Context And The Judicial Process’ [1967] Wisconsin Law Review 822, 823

⁹ Catherine Mitchell, *Contract Law and Contract Practice; Bridging the Gap Between Legal Reasoning and Commercial Expectation* (1st edn, Hart Publishing 2013) 8

¹⁰ Catherine Mitchell, ‘Contracts and Contract Law: Challenging the Distinction Between the ‘Real’ and ‘Paper’ Deal’ (2009) 29(4) Oxford Journal of Legal Studies 675, 688

¹¹ The term ‘liberal’ here merely refers to the freedom which shipbuilding contract parties have to shape their contracting relationships, rather than referring to liberalism in a political sense. Thus, use of the term is confined to the shipbuilding relationship context, rather than being used to define the parties’ political views and ideals.

¹² Bruce L Benson, ‘The Spontaneous Evolution of Contract Law’ (1989) 55(3) Southern Economic Journal 644, 654

‘[S]ince contract is concerned essentially with the facilitation of market operations’,¹³ there remained a need for ‘laws which reinforced rather than superseded business practice’.¹⁴

The third marker is the neo-liberal¹⁵ stance, an offshoot of the liberal stance. Predicated upon the assumption that ‘[industry] parties...can fend for themselves’,¹⁶ the neo-liberal stance views the role of law as simply to enforce contractual terms ‘as written’¹⁷ and set ‘the outer limits of permissible behaviour’.¹⁸ ‘[Industry] parties may design their relationships as they wish-subject to a few important exceptions, such as the prohibition on illegal contracts’.¹⁹ Under this stance therefore, industry norms will have a great deal of influence on the characterisation of contracting relationships and contracts, as well as on the remedies awarded following dispute.

Accordingly, this thesis will explore the extent to which shipbuilding industry norms should influence shipbuilding law – both in terms of the characterisation of shipbuilding contracts and relationships, and also in terms of the remedies awarded after a shipbuilding contract has entered into dispute.

¹³ John N Adams and Roger Brownsword, ‘The Ideologies of Contract Law’ (1987) 7(2) Legal Studies 205, 207

¹⁴ Bruce L Benson, ‘The Spontaneous Evolution of Contract Law’ (1989) 55(3) Southern Economic Journal 644, 648

¹⁵ The term ‘neo-liberal’ here merely refers to the freedom that shipbuilding contract parties have to shape their contracting relationships, rather than referring to neo-liberalism in a political sense. Thus, use of the term is confined to the shipbuilding relationship context, rather than being used to define the parties’ political views and ideals.

¹⁶ Frankel Tamar, ‘The Legal Infrastructure of Markets: The Role of Contract and Property Law’ (1993) 73 Boston University Law Review 389, 393

¹⁷ Robert E Scott, ‘The Death of Contract Law’ (2004) 54(4) University of Toronto Law Journal 369, 381

¹⁸ Catherine Mitchell, ‘Obligations in Commercial Contracts: A Matter of Law or Interpretation?’ (2012) 65(1) Current Legal Problems 455, 472

¹⁹ Frankel Tamar, ‘The Legal Infrastructure of Markets: The Role of Contract and Property Law’ (1993) 73 Boston University Law Review 389, 398

1.1.1 Chapter Synopsis

This chapter will introduce the shipbuilding industry and shipbuilding contracts, before explaining the approach taken in writing this thesis and also the purpose of the thesis. Each subsequent chapter will contribute to answering the overarching theoretical question at its heart.

Chapter 2 will assess how the shipbuilding contract and relationship are characterised by English law. Sections 2.2 and 2.3 will look at the entrenched characterisation of the shipbuilding contract, both legislatively and in case law. Since the late 19th Century, English law has characterised the shipbuilding contract as a sale of goods contract – governed by the Sale of Goods Act 1893,²⁰ and latterly the Sale of Goods Act 1979.²¹ These pieces of legislation characterise the relationship between buyer (ship-owner) and seller (shipbuilder) as one operating at arm's length, because any deviation from the original agreement by one party entitles the other to exercise his rights under the statute without any prior discussion. More recently however, the English courts have very occasionally decided shipbuilding dispute cases with alternative characterisations in mind. As explored in Section 2.4, this has been done through declaring that a shipbuilder's obligations under a shipbuilding contract predominantly lies in the newbuild's construction (as per a work and materials or building contract). Additionally, the English courts have sometimes indicated that the shipbuilding relationship is underpinned by cooperation, rather than operating at arm's length. Section 2.5 will then argue that, because the Supreme Court in *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd*²² characterised bunker shipping contracts as *sui generis* contracts (in light of their peculiarities and also those of the bunker industry), the same treatment might be appropriate for shipbuilding contracts in light of their own peculiarities and those of the shipbuilding industry.

²⁰ Sale of Goods Act 1893.

²¹ Sale of Goods Act 1979.

²² [2016] UKSC 23

Chapter 3 will assess shipbuilding industry perception and norms, by recourse to clauses in standard-form shipbuilding contracts, clauses in specially drafted shipbuilding contracts and also to the information on shipyard websites. This assessment will be made in two ways. Firstly, Section 3.2 will set about proving that, whilst English law characterises all contracting relationships (such as shipbuilding relationships) as those operating at arm's length, some industry shipbuilding relationships deviate from this – with the parties instead choosing to cooperate with one another. Accordingly, whilst the law considers shipbuilding relationships to be homogeneous, in reality the norms underpinning shipbuilding industry relationships vary. On one hand, parties to shipbuilding contracts to build standardised vessels often choose to base their agreement on an industry issued standard-form (such as those listed in Section 1.1.6).²³ Because the vessel's design is mature,²⁴ the buyer can simply sign the standard-form as printed and leave the shipbuilder to his own devices²⁵ – an arm's length relationship which matches that prescribed at law. On the other hand, parties to shipbuilding contracts to build bespoke vessels²⁶ (often governed under specially drafted contracts) are likely to be in regular discussion to ensure that the buyer's requirements for his vessel are correctly met. The relationship is therefore underpinned by cooperation, which deviates from the arm's length characterisation of the shipbuilding relationship at law.

Then, Section 3.3 will set about proving that, whilst English law characterises shipbuilding contracts as sale of goods contracts²⁷ under which the shipbuilder's

²³ 'It is very common...in the context of shipbuilding...for there to be standard form contracts which the parties [use]' for standardised projects. [Filippo Lorenzon and Ainhoa Campas Velasco, 'Shipbuilding, Sale, Finance And Registration' in Yvonne Baatz (ed), *Maritime Law* (3rd edn, Informa 2014) 67.]

²⁴ Klaas Van Dokkum, *Ship Knowledge A Modern Encyclopedia* (3rd edn, Dokmar 2001) 80

²⁵ The buyer will leave the shipbuilder to his own devices, apart from attending any inspections or trials which he (or his representative) is *obliged* to attend under the terms of the contract. [*Zhoushan Jinhaiwan Shipyard v Golden Exquisite Inc* [2014] EWHC 4050 (Com Ct).]

²⁶ '[T]he bespoke nature of [such]...projects make the use of standard printed forms of contract very rare' with specially drafted contracts favoured instead. '[I]ndividual yards or their lawyers will usually produce their own draft forms of contract' or '[s]ome yards may even be willing to negotiate a contract based on a draft submitted by a buyer's lawyer'. [Richard Coles and Filippo Lorenzon, *Law of Yachts and Yachting* (Informa 2012) para 1-001.]

²⁷ The only reported exceptions to this characterisation are the cases of *Hyundai Heavy Industries v Papadopoulos*, *Stocznia Gdanska SA v Latvian Shipping Co* and also *Adyard Abu Dhabi v SD Marine Services*, all assessed in Section 2.4.1.

legal obligation lies in delivering the completed vessel,²⁸ this characterisation of the shipbuilder's obligations does not reflect how all shipbuilders perceive their role under shipbuilding projects. Shipbuilders who specialise in standardised vessel building (under industry standard-forms for instance) will tend to perceive their primary role under a shipbuilding contract as being delivery of the built vessel. This is because the mature nature of the vessel's standardised design means that the shipbuilder must simply follow a set procedure to build it²⁹ – mildly resembling how manufactured goods roll off a production line before being delivered to consumers. However, shipbuilders who specialise in bespoke vessel building (under specially drafted contracts for example³⁰) instead often perceive their role under a shipbuilding contract to lie in a service – namely providing the specialist, artisan labour required to reproduce the bespoke vessel's customised design.³¹ Whilst *at law* bespoke vessel building contracts will nonetheless operate the same way that standardised vessel building contracts do (namely as sale of goods contracts, under which the shipbuilder's legal obligation is to deliver the completed vessel), Section 3.3 argues that shipbuilders may perceive their role under bespoke shipbuilding contracts as lying more in the provision of services.

Out of Chapters 2 and 3 will thus emerge proof of a mismatch between the law and the shipbuilding industry. The law characterises shipbuilding relationships *homogeneously*, and characterises shipbuilder obligations under shipbuilding contracts *homogeneously* also. However, industry shipbuilding relationships are in fact *heterogeneous*, and shipbuilder perceptions of their role under shipbuilding contracts are *heterogeneous* also. The heterogeneity is based upon factors such as whether the vessel is of standardised or bespoke specification, and whether the contract is standard-form or specially drafted.

²⁸ Sale of Goods Act 1979, s 27.

²⁹ Klaas Van Dokkum, *Ship Knowledge A Modern Encyclopedia* (3rd edn, Dokmar 2001) 80

³⁰ '[T]he bespoke nature of [such]...projects make the use of standard printed forms of contract very rare' with specially drafted contracts favoured instead. '[I]ndividual yards or their lawyers will usually produce their own draft forms of contract' or '[s]ome yards may even be willing to negotiate a contract based on a draft submitted by a buyer's lawyer'. [Richard Coles and Filippo Lorenzon, *Law of Yachts and Yachting* (Informa 2012) para 1-001.]

³¹ Marco Semini and others, 'Strategies for customized shipbuilding with different customer order decoupling points' (2014) 228(4) *Journal of Engineering for the Maritime Environment* 362, 363

Chapter 4 will then postulate that shipbuilding law has challenges to overcome, by exploring the different causes of dispute that can affect shipbuilding projects. In doing so, the chapter is in place to demonstrate that development of the law (to prevent such disputes from reoccurring in future) not only requires due regard to be given to the industry norms and perceptions explored in Chapter 3, but also requires an understanding of how such disputes are caused. Also included will be the theoretical underpinnings of dispute causes and doctrines such as frustration, Force Majeure and opportunism, before Section 4.4 gives an insight into potential future shipbuilding disputes and how they may arise.

Chapter 5 will use the context of remedies to prove the influence of the industry in shipbuilding. Firstly however, Section 5.2 will demonstrate that differing legal characterisation of the shipbuilding contract determines which judicial remedies³² will be available to the wronged party in the event of dispute. The statutory remedies under the Sale of Goods Act will be explained first (in Section 5.2.1), as they apply to shipbuilding contracts under their entrenched sale of goods characterisation. Next, in Section 5.2.2, focus will turn to the statutory remedies under the Housing Grants, Construction and Regeneration Act 1996,³³ which may apply if a shipbuilding contract is characterised as a general construction or building contract. Finally, Section 5.2.3 will explore common law and equitable remedies, in the event that the characterisation of a shipbuilding contract means that such remedies are available in lieu of (or in addition to) any applicable statutory remedies. Commentary will also be given throughout Section 5.2 on the judicial approach to such remedies – such as whether a judge must exercise his discretion when making a particular remedial award, or whether he can passively make an award based upon a pre-determined rule.

³² The term ‘judicial remedies’ in this thesis will be taken to include remedies awarded by a judge in court *and* also remedies awarded by an arbitrator in an arbitral tribunal.

³³ Housing Grants, Construction and Regeneration Act 1996.

Section 5.3 will then suggest that, rather than begin with statutory rules, common law rules or equitable rules when making remedy awards, judges should begin with one of two alternative starting points – both of which would allow the remedy to take into account shipbuilding industry norms. The first of these alternative starting points (explored in Section 5.3.1) is the agreement between the parties, which likely incorporates any tacit industry understandings which the parties hold. The second alternative starting point for judges when awarding judicial remedies in shipbuilding cases would be a set of dedicated *sui generis* shipping remedies – if judges and lawmakers deemed the nuances of the shipping industry and its various sub-industries (listed in Section 1.1.2) worthy of dedicated rules. Explored in Section 5.3.2, this idea will lead on from the idea of *sui generis* characterisation of the shipbuilding contract introduced in Section 2.5.

As the law on shipbuilding contracts still has challenges to overcome to prevent shipbuilding disputes from occurring (as explored in Chapter 4), parties often insert clauses into their contracts to mitigate or resolve a dispute if one occurs. Discussed in Section 5.4, these contractual remedy clauses supersede the operation of the judicial remedies talked of in Sections 5.2 and 5.3. In approaching this topic, Section 5.4 will identify factors which make for an ‘effective’³⁴ contractual remedy clause.

Finally, Chapter 6 will provide conclusions to the overarching theoretical question introduced in Section 1.1, and also to the sub-question explored in Chapter 2 and Section 3.3 regarding how the shipbuilding contract should be characterised under English law. Then, Section 6.3 will suggest that future research could be undertaken on certain issues and areas falling outside the remit of this thesis.

1.1.2 The Shipbuilding Industry

Widely regarded as ‘one of the oldest, most open and highly competitive markets

³⁴ The definition of ‘effective’ is provided in Section 1.2

in the world',³⁵ the shipbuilding industry has long established itself as a lucrative strand of global commerce. This section will explain why the industry is so significant, as well as explaining its market drivers, the main shipbuilding nations, the stages of a shipbuild, the types of ship which can be built and the standard-forms upon which shipbuilding transactions can be based.

Markets

Shipbuilding is one of four sub-markets which together constitute the shipping industry, alongside the charter or freight market, the scrappage market and the ship sale and purchase market. '[S]hipping is a market-driven industry'³⁶ on the basis that prices directly influence party decision-making. The industry can thus be considered as a Free-Market,³⁷ driven by competitive forces of supply and demand. Shipping demand is determined by factors which include the state of the global economy, commodity prices and sudden economic change (such as recessions).³⁸ Shipping market supply is largely driven by the number of ships in operation (known as the world fleet) as well as 'fleet productivity, shipbuilding deliveries, scrapping and freight revenues'³⁹ – factors which notably correspond with the four aforementioned sub-markets that make up the shipping industry. It is important to understand the mechanics which intertwine the four shipping sub-markets, as the shipbuilding sub-market is affected by (and affects) each of the others. For instance, as displayed in **Fig. 1**, when demand for trade by sea increases, freight rates rise. To capitalise on the increased income generating potential from chartering, ship-owners will order newbuilds and second-hand ships⁴⁰ – thus lifting the newbuild and sale and purchase sub-markets. As shipbuilders expand their yards to cater for this glut of orders, supply will eventually exceed demand. At this point freight rates

³⁵ Rima Mickeviciene, 'Global Shipbuilding Competition: Trends and Challenges for Europe, The Economic Geography of Globalization' (Klaipeda University, Lithuania 2011) <www.intechopen.com/books/theeconomic-geography-of-globalization/global-shipbuilding-competition-trends-and-challenges-for-europe> accessed 3 October 2015, 201

³⁶ Yuen Ha (Venus) Lun and others, *Shipping and Logistics Management* (Springer Science & Business Media 2010) 86

³⁷ Whilst the shipping markets will be assessed from a Free-Market perspective in this thesis, other equally valid standpoints do exist such as that of Marxism and of Developmental Economics.

³⁸ Martin Stopford, *Maritime Economics* (3rd edn, Routledge 2009) 137

³⁹ *ibid* 136

⁴⁰ Yuen Ha (Venus) Lun and others, *Oil Transport Management* (Springer 2013) 16

will fall, meaning that some ship-owners may be forced to sell their fleet in order to stay in business.⁴¹ Newer, commercially utile vessels will be sold to other ship-owners (thus bringing the sale and purchase market into play), and older, unusable vessels will be sold as scrap (thus stimulating the scrappage sub-market).⁴² This increase in scrappage will eventually lead to a contraction in the number of vessels (and ship trade) around the world,⁴³ which in turn will lead ship-owners to attempt to rebalance this contraction by placing orders for newbuilds⁴⁴ – whereupon the aforementioned chain of events restarts. Moreover, as per **Fig. 1**, the inverse chain of events will occur if demand for trade by sea decreases.

Now to assess market drivers of the shipbuilding sub-market specifically. As well as being affected by the state of the other three shipping sub-markets discussed above, shipbuilding is also influenced by global factors such as economic change, political change,⁴⁵ oil demand,⁴⁶ and prices for metals such as steel and copper.⁴⁷ Moreover, at the individual party level, shipbuild *demand* is driven by factors including freight rates, the buyer's access to loans or subsidies to fund the project,⁴⁸ and also second-hand vessel prices.⁴⁹ *Supply* of newbuilds at the individual party level is determined by the number of berths unoccupied at the yard, the cost of production per vessel, and the shipyard's existing orderbook.⁵⁰ These factors will all impact upon the contract price agreed for a newbuild.⁵¹ In this regard,

⁴¹ Martin Stopford, *Maritime Economics* (3rd edn, Routledge 2009) 178-179

⁴² *ibid* 179

⁴³ Yuen Ha (Venus) Lun and others, *Oil Transport Management* (Springer 2013) 19

⁴⁴ *ibid* 16

⁴⁵ Rima Mickeviciene, 'Global Shipbuilding Competition: Trends and Challenges for Europe, The Economic Geography of Globalization' (Klaipeda University, Lithuania 2011) <www.intechopen.com/books/theeconomic-geography-of-globalization/global-shipbuilding-competition-trends-and-challenges-for-europe> accessed 3 October 2015, 202

⁴⁶ Economy Watch, 'Shipbuilding Industry, Shipbuilding Sector' (29 June 2010) <www.economywatch.com/world-industries/shipbuilding-industry.html> accessed 23 November 2017

⁴⁷ Peter Murray and Lin Jiang, 'PRC Shipbuilding Disputes in London Arbitration: The Threat of Parallel Proceedings in China and the Consequences and Possible Alternatives' (2014) 39(1) *Tulane Maritime Law Journal* 183, 185

⁴⁸ George Bruce and Ian Garrard, *The Business of Shipbuilding* (CRC Press 2013) ch 1 (short term demand)

⁴⁹ Martin Stopford, *Maritime Economics* (3rd edn, Routledge 2009) 209

⁵⁰ *ibid*

⁵¹ *ibid*

shipbuilding can be said to be cost-driven,⁵² hence why assessment of the shipbuilding industry will be made from a Free-Market perspective in this thesis.⁵³

Structurally, the shipbuilding sub-market has significant entry barriers including the requirement of infrastructure (namely a shipyard from which to carry out constructions), machinery and equipment, raw materials (such as steel), expertise (namely a workforce who can undertake newbuild projects), and potentially also government support (by means of subsidies for instance).⁵⁴

Taken together, the sub-market for shipbuilding is influenced by global geo-political and economic change, and also by microeconomic factors which affect supply and demand at the individual party level. Moreover, shipbuilding is also affected by the state of the other three shipping sub-markets which together make up the shipping industry.

Nations

As regards the dominant shipbuilding nation, this has fluctuated since the beginnings of the commercial shipbuilding industry⁵⁵ as demonstrated by **Fig. 2**. In the 19th and early 20th Centuries, European countries such as Great Britain held supremacy. Great Britain's shipbuilding dominance at that time was cemented by its expertise in the engineering field and its notoriety for producing high-quality outputs.⁵⁶ Quickly however, Britain's position as a shipbuilding heavyweight dissipated, due to its reluctance to modernise its existing shipbuilding practices and infrastructure and also due to it developing a reputation for volatile employment

⁵² Kevin Cullinane, *Shipping Economics* (Elsevier 2005) 103

⁵³ Whilst the shipping markets will be assessed from a Free-Market perspective in this thesis, other equally valid standpoints do exist such as that of Marxism and of Developmental Economics.

⁵⁴ Aditya Kakatkar, 'Global Shipbuilding Industries' (Griffith University, Scribd, 9 October 2009) <www.scribd.com/doc/21286720/Global-Shipbuilding-Industries> accessed 22 November 2017, 14

⁵⁵ 'Commercial shipbuilding' is defined in Section 1.1.4

⁵⁶ S Pollard, 'The Decline of Shipbuilding on the Thames' (1950) 3(1) *The Economic History Review* 72, 72

relations. Its decline coincided with the growth of European shipbuilding, including France's shipyard in Saint Nazaire, Gdansk in Poland, as well as Germany and the Scandinavian region as a whole.

In the 1950s however, Japan took over as the dominant world shipbuilding power. This was down to the fact that it had developed a 'block' assembly method, which streamlined the production process in a way never seen before.⁵⁷ Japan's dominance continued until the 1990s, at which point its high labour costs and its unwillingness to respond to global demand for larger vessels caused its supremacy to wane slightly.⁵⁸ South Korea sought to capitalise on this by offering lower wages than any other shipbuilding nation.⁵⁹ This in turn led South Korea to become *the* dominant force in world shipbuilding by the turn of the millennium.⁶⁰ For a time, its position as the sole global shipbuilding power came under fire, owing to high labour costs, steel shortages and the consequential rise in prices of materials and equipment.⁶¹ Whilst South Korea and Japan continue to be dominant shipbuilding nations, China has since joined them – primarily due to the fact that it has embraced new technologies and also sought to merge existing shipyards to create 'giant' shipbuilding companies.⁶² Accordingly, nowadays dominance in shipbuilding lies with Japan, China and South Korea – as shown in **Fig. 2**.

⁵⁷ Tuvia Blumenthal, 'The Japanese Shipbuilding Industry' in Hugh Patrick and Larry Meissner (eds), *Japanese Industrialization and its Social Consequences* (University of California Press 1976) 156

⁵⁸ Rima Mickeviciene, 'Global Shipbuilding Competition: Trends and Challenges for Europe, The Economic Geography of Globalization' (Klaipeda University, Lithuania 2011) <www.intechopen.com/books/theeconomic-geography-of-globalization/global-shipbuilding-competition-trends-and-challenges-for-europe> accessed 3 October 2015, 203

⁵⁹ ECORYS Research and Consulting, 'Study of Competitiveness of the European Shipbuilding Industry; Within the Framework Contract of Sectoral Competitiveness Studies - ENTR/06/054' (Final Report, Rotterdam, 8 October 2009) 7

⁶⁰ Organisation for Economic Co-operation and Development (OECD), 'Peer Review of the Korean Shipbuilding Industry and Related Government Policies' (2014) Council Working Paper 6(2014)10/FINAL <www.oecd.org/sti/ind/peerreviewofthekoreanshipbuildingindustryandrelatedgovernmentpolicies.htm> accessed 17 October 2015, 64

⁶¹ Rima Mickeviciene, 'Global Shipbuilding Competition: Trends and Challenges for Europe, The Economic Geography of Globalization' (Klaipeda University, Lithuania 2011) <www.intechopen.com/books/theeconomic-geography-of-globalization/global-shipbuilding-competition-trends-and-challenges-for-europe> accessed 3 October 2015, 203

⁶² *ibid* 204

Evidence for Japan, China and South Korea's dominance in shipbuilding can be gleaned from the fact that today their aggregate market share is 90%,⁶³ and was as much as 92% in 2016.⁶⁴ In 2017, over 61% of the world orderbook and 65% of world completions were from these nations alone – as illustrated in **Fig. 3**. Furthermore, Asian dominance in the industry is substantiated by **Fig. 4**, which shows that all five of the world's largest shipbuilders are based in Asia, three of these being South Korean. Much of the shipbuilding which takes place in these countries is the mass production of standardised commercial industry vessels.⁶⁵ As per **Fig. 5**, Japan predominantly builds bulk carriers and oil tankers,⁶⁶ China tends to build bulk carriers, oil tankers and containerships, while South Korea specialises in gas carriers, containerships and oil tankers. Moreover, these nations build offshore vessels,⁶⁷ and state owned Chinese shipbuilders have also recently begun to target the high-end vessel market (for yachts and pleasure boats) which is currently serviced by European shipyards (as will be explored below).⁶⁸

Note however that, whilst Asia is where most ships are nowadays built, these vessels are often ordered by ship-owners in Western countries. For instance, **Fig. 6**, **Fig. 7** and **Fig. 8** illustrate that Greece, the United Kingdom, the United States of America, Canada and Norway were prevalent demanders of newbuilds constructed in South Korea, Japan and China in 2015. Another example occurred in November 2017, where one European ship-owner ordered a large number of chemical tankers,

⁶³ Cichen Shen, 'Shipbuilding issues raised at Japan-China-South Korea summit' (Lloyd's List, 14 May 2018) <<https://lloydslist.maritimeintelligence.informa.com/LL1122576/Shipbuilding-issues-raised-at-JapanChinaSouth-Korea-summit>> accessed 25 May 2018

⁶⁴ UNCTAD, 'Review of Maritime Transport 2017' (United Nations Conference on Trade and Development, 2017) <http://unctad.org/en/PublicationsLibrary/rmt2017_en.pdf> accessed 22 November 2017, 34

⁶⁵ 'Commercial industry' shipbuilding is defined in Section 1.1.4

⁶⁶ UNCTAD, 'Review of Maritime Transport 2017' (United Nations Conference on Trade and Development, 2017) <http://unctad.org/en/PublicationsLibrary/rmt2017_en.pdf> accessed 22 November 2017, 34

⁶⁷ Citigroup, 'Asian Shipbuilding: A Dynamic Market' (Citigroup Sponsored Statement, GTR Export Finance Supplement 2014) <www.citigroup.com/transactionservices/home/.../asian_shipbuilding.pdf> accessed 17 October 2015, 30

⁶⁸ Wei Zhe Tan, 'European shipbuilders need concerted approach to fend off competition' (Lloyd's List, 22 November 2017) <<https://lloydslist.maritimeintelligence.informa.com/LL1120135/European-shipbuilders-need-concerted-approach-to-fend-off-competition>> accessed 24 November 2017

specifically requesting that they be constructed by South Korean shipbuilder Hyundai Mipo.⁶⁹

Now to look at the European shipbuilding industry. Whilst Asia dominates today's industry in terms of numbers, Europe does have a competitive advantage. The European shipbuilding industry specialises in the building of sophisticated, bespoke vessels such as yachts and cruise ships,⁷⁰ where it can exploit its 'tailored and knowledge-based production processes, considerable technical expertise and...high number of specialised subcontractors'.⁷¹ For instance, Italian shipyard Fincantieri Cantieri Navali Italiani specialises purely in commercial passenger shipbuilding,⁷² boasting annual revenues of \$3.1 billion in 2010 for their efforts,⁷³ with German shipyard Meyer Werft engaging mainly in cruise ship and special purpose shipbuilding.⁷⁴

The United Kingdom (UK) also has a competitive advantage in shipbuilding today. Apart from the occasional one-off project,⁷⁵ there is no real commercial shipbuilding⁷⁶ going on in the UK anymore.⁷⁷ Nonetheless, sources indicate that

⁶⁹ Tae-Jun Kang, 'Hyundai Mipo Dockyard wins tankers orders worth \$107.9m' (Lloyd's List, 30 November 2017) <<https://lloydslist.maritimeintelligence.informa.com/LL1120279/Hyundai-Mipo-Dockyard-wins-tankers-orders-worth-1079m>> accessed 1 December 2017

⁷⁰ ECORYS Research and Consulting, 'Study of Competitiveness of the European Shipbuilding Industry; Within the Framework Contract of Sectoral Competitiveness Studies - ENTR/06/054' (Final Report, Rotterdam, 8 October 2009) 8

⁷¹ *ibid* 28

⁷² 'Commercial passenger' shipbuilding is defined in Section 1.1.4

⁷³ Chavdar Chaney, 'Shipbuilding Companies' (CruiseMapper, 26 November 2015)

<www.cruisemapper.com/wiki/769-shipbuilding-companies> accessed 10 January 2016

⁷⁴ ECORYS Research and Consulting, 'Study of Competitiveness of the European Shipbuilding Industry; Within the Framework Contract of Sectoral Competitiveness Studies - ENTR/06/054' (Final Report, Rotterdam, 8 October 2009) 56

⁷⁵ Matthew Ord, 'Cammell Laird Secures £10m Ferry Contract' (Insider Media Limited)

<www.insidermedia.com/insider/northwest/cammell-laird-secures-10m-ferry-contract> accessed 21 February 2018

⁷⁶ 'Commercial shipbuilding' is defined in Section 1.1.4

⁷⁷ Francis X Nolan, 'Shipbuilding Disputes: Selecting And Tailoring Arbitration To Suit' (VedderPrice, 15 May 2012) <www.vedderprice.com/files/Publication/46a1676d-14b0-4f0c-a187-f736deda8034/Presentation/PublicationAttachment/16d91d9e-fc8d-4b0d-b1dc-bc188f07891f/Shipbuilding%20Disputes%20-%20Selecting%20and%20Tailoring%20Arbitration%20to%20Suit.pdf> accessed 5 November 2015

today ‘a healthy proportion of contracts signed are governed by English Law’⁷⁸ and ‘a large number of shipyard contract disputes are...decided by LMAA (London Maritime Arbitrators Association) arbitration under English Law’.⁷⁹ What this reveals is that the UK’s dominance in shipbuilding today lies in its judicial and arbitral infrastructure.

English law and arbitration are attractive for various reasons. Firstly, the English language is used throughout the world, meaning that English legal proceedings are less likely to be disrupted by language barriers. Secondly, common law systems like English law give parties a degree of foreseeability, ‘because basing decisions on precedent means that...[they will] have a good idea as to how their cases will be decided’.⁸⁰ Thirdly, English law is attractive due to its global reputation for being a pioneer – a reputation earned having influenced legal principles in numerous other common law jurisdictions, and also having influenced how judges in these jurisdictions construe contractual clauses.⁸¹ Fourthly, the fact that English law upholds the principle of ‘freedom of contract’ means that parties can make agreements⁸² and conduct arbitral proceedings⁸³ as they wish – subject only to mandatory rules.⁸⁴ Finally, their expertise at dealing with international disputes makes English law judges and arbitrators especially coveted in shipping disputes. A combination of the above reasons has led the Baltic and International Maritime

⁷⁸ Andrew Tettenborn, ‘Contracting By Numbers: The Different Characteristics of the Main Shipbuilding Contracts’ in Barış Soyer and Andrew Tettenborn (eds), *Ship building, sale and finance* (Routledge 2016) 40

⁷⁹ Francis X Nolan, ‘Shipbuilding Disputes: Selecting And Tailoring Arbitration To Suit’ (VedderPrice, 15 May 2012) <www.vedderprice.com/files/Publication/46a1676d-14b0-4f0c-a187-f736deda8034/Presentation/PublicationAttachment/16d91d9e-fc8d-4b0d-b1dc-bc188f07891f/Shipbuilding%20Disputes%20-%20Selecting%20and%20Tailoring%20Arbitration%20to%20Suit.pdf> accessed 5 November 2015

⁸⁰ TransLegal, ‘Common law systems’ (2015) <www.translegal.com/lesson/common-law-systems> accessed 1 February 2016

⁸¹ This idea is revisited in Section 1.2.1

⁸² The Law Society of England and Wales, ‘England and Wales: The Jurisdiction of choice’ (The Law Society PDF sponsored by Herbert Smith, Norton Rose and Eversheds) <www.eversheds.com/documents/LawSocietyEnglandAndWalesJurisdictionOfChoice.pdf> accessed 11 January 2016, 8

⁸³ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 3 art XIII

⁸⁴ See Section 2.6

Council (BIMCO) to specify English law as the default jurisdiction,⁸⁵ and London arbitration as the default arbitral system, for those using its ‘NewBuildCon’ standard-form shipbuilding contract.⁸⁶ Furthermore, the Institute Clauses for Builders’ Risks 1988, ‘the most widely used international form of insurance coverage for vessels under construction’,⁸⁷ are themselves subject to English law.⁸⁸ Accordingly, the popularity of English law in shipbuilding contracts and dispute resolution substantiates the approach taken in Chapters 2-5 of this thesis, which predominantly explore the English law position on shipbuilding contracts, relationships, disputes and remedies.

Significance

The significance of the shipbuilding industry can be classified according to its direct and indirect impacts for society. These criteria were elucidated in a 2013 report by the United States Maritime Administration (MARAD),⁸⁹ an association which pioneered its own standard-form shipbuilding contract.⁹⁰

Firstly direct benefits, or those generated by the shipbuilding industry itself.⁹¹ These include the economic benefits that shipbuilding provides for a national economy. In South Korea for instance, shipbuilding constituted almost 10% of the entire

⁸⁵ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix A citing Baltic and International Maritime Council, ‘BIMCO Standard Newbuilding Contract (NEWBUILDCON Form)1’ (BIMCO, Copenhagen, 2007) s 5 cl 41

⁸⁶ *ibid* s 5 cl 42(c)

⁸⁷ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012), ch pt 3 art XII (Insurance, The London Insurance Clauses)

⁸⁸ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix C citing ‘Institute Clauses for Builders’ Risks’ (1 June 1988)

⁸⁹ United States Maritime Administration (MARAD), ‘The Economic Importance of the U.S. Shipbuilding and Repairing Industry’ (PDF, 30 May 2013) <www.marad.dot.gov/wpcontent/uploads/pdf/MARAD_Econ_Study_Final_Report_2013.pdf> accessed 10 October 2015

⁹⁰ See Section 1.1.6

⁹¹ United States Maritime Administration (MARAD), ‘The Economic Importance of the U.S. Shipbuilding and Repairing Industry’ (PDF, 30 May 2013) <www.marad.dot.gov/wpcontent/uploads/pdf/MARAD_Econ_Study_Final_Report_2013.pdf> accessed 10 October 2015, 1

country's exports in 2011,⁹² and almost 2% of its overall GDP the following year.⁹³ The direct impacts of shipbuilding can also be measured through its economic contribution to the other three sub-markets that make up the shipping industry.⁹⁴ For one, by providing them with new ships, the shipbuilding industry widens the asset base of ship-owning companies – thus strengthening them financially. If these ships are then chartered, this will provide a boost to the freight market. If these ships are then later sold on, this will turn boost the sale and purchase ship-market.⁹⁵

Another direct societal impact of the shipbuilding industry is the jobs that it creates. As mentioned above, Asian shipyards' primary focus is to mass produce standardised vessels. It is for this reason that Asian shipbuilders offer large numbers of jobs at low costs of labour.⁹⁶ For instance, in 2016 the Shipbuilders' Association of Japan reported that – amongst its members alone – the shipbuilding industry constituted over 50,000 employees,⁹⁷ including shipyard workers, subcontractors and general shipbuilding division workers. Also as stated above, European shipyards are focused on building low volumes of complex, bespoke ships. Whilst European shipyards will inevitably therefore employ fewer workers than Asian shipyards, a higher proportion of these jobs are likely to be skilled, knowledge-intensive positions which facilitate the building of *bespoke* vessels.⁹⁸ Accordingly, the shipbuilding industry directly benefits society by providing both 'assembly-line' and skilled jobs.

⁹² Organisation for Economic Co-operation and Development (OECD), 'Peer Review of the Korean Shipbuilding Industry and Related Government Policies' (2014) Council Working Paper 6(2014)10/FINAL

<www.oecd.org/sti/ind/peerreviewofthekoreanshipbuildingindustryandrelatedgovernmentpolicies.htm> accessed 17 October 2015, 10

⁹³ *ibid* 7

⁹⁴ These were listed earlier in this section

⁹⁵ Martin Stopford, *Maritime Economics* (3rd edn, Routledge 2009) 179

⁹⁶ Yin-Chung Tsai, 'The shipbuilding industry in China' [2010] 3 OECD Journal: General Papers <www.keepeek.com/Digital-Asset-Management/oecd/economics/the-shipbuilding-industry-inchina_gen_papers-2010-5kg6z7tg5w5l#page17> accessed 11 October 2015, 50

⁹⁷ The Shipbuilders' Association Of Japan, 'Shipbuilding Statistics' (April 2017) <www.sajn.or.jp/files/view/articles_doc/src/73265e1329b4a8e0ae4fe4bcf31c7e5b.pdf> accessed 20 November 2017, 10

⁹⁸ ECORYS Research and Consulting, 'Study of Competitiveness of the European Shipbuilding Industry; Within the Framework Contract of Sectoral Competitiveness Studies - ENTR/06/054' (Final Report, Rotterdam, 8 October 2009) 113

Secondly, the shipbuilding industry can be said to have indirect benefits for shipbuilding.⁹⁹ This includes providing jobs which – whilst not associated with the physical *construction* of a vessel – are derived from, or generated by, the build’s supply chain.¹⁰⁰ For instance, over 580,000 jobs were created by the United States shipbuilding industry in 2016.¹⁰¹ A significant proportion of these were ‘supply chain’ jobs, such as painters, equipment delivery couriers,¹⁰² upholsterers and steelworkers.¹⁰³ Additionally, one other crucial source of indirect employment in the shipbuilding industry are jobs in ship insurance and ship finance. As will be explored more fervently in Section 1.1.3 below, ship-owners and shipyards often resort to external finance or external guarantors to fund and securitise a build. On this basis, it can be said that the shipbuilding industry generates a demand for specialist newbuild financiers and insurers,¹⁰⁴ to aid shipbuilding parties with these functions.

One final indirect benefit of the shipbuilding industry is its trickle down effects for the development of a nation. For instance, an industry report from 2010 suggested that the Chinese government perceives shipbuilding ‘as a strategic industry, which not only creates economic benefits but also helps deliver public policy

⁹⁹ United States Maritime Administration (MARAD), ‘The Economic Importance of the U.S. Shipbuilding and Repairing Industry’ (PDF, 30 May 2013) <www.marad.dot.gov/wpcontent/uploads/pdf/MARAD_Econ_Study_Final_Report_2013.pdf> accessed 10 October 2015, 1

¹⁰⁰ Richard Tames, *Economy and Society in Nineteenth Century Britain* (Taylor & Francis 2005) 81

¹⁰¹ US Bureau of Labor Statistics, ‘Occupational Employment Statistics; NAICS 336600 – Ship and Boat Building’ (National Industry-Specific Occupational Employment and Wage Estimates, May 2016) <https://data.bls.gov/cgi-bin/print.pl/oes/current/naics4_336600.htm> accessed 23 November 2017

¹⁰² Daniela Matei and Mioara Chirita, ‘Analysis of Operational Risks in Shipbuilding Industry’ (Article provided by “Dunarea de Jos” University of Galati, Faculty of Economics and Business Administration in its journal *Risk in the Contemporary Economy*, Proceedings Conference, 2012) <www.rce.feaa.ugal.ro/images/stories/RCE2012/economics/MateiChirita.pdf> accessed 3 October 2015, 126

¹⁰³ US Bureau of Labor Statistics, ‘Occupational Employment Statistics; NAICS 336600 – Ship and Boat Building’ (National Industry-Specific Occupational Employment and Wage Estimates, May 2016) <https://data.bls.gov/cgi-bin/print.pl/oes/current/naics4_336600.htm> accessed 23 November 2017

¹⁰⁴ United States Maritime Administration (MARAD), ‘The Economic Importance of the U.S. Shipbuilding and Repairing Industry’ (PDF, 30 May 2013) <www.marad.dot.gov/wpcontent/uploads/pdf/MARAD_Econ_Study_Final_Report_2013.pdf> accessed 10 October 2015, 15

outcomes'.¹⁰⁵ Specifically, shipbuilding activity in a certain area aids its 'development[,]. . . technological capability . . . and act[s] as a catalyst to attract direct and indirect foreign investment'.¹⁰⁶ This demonstrates that shipbuilding has benefits beyond the industry itself which, when combined with the direct and indirect benefits mentioned above, proves the significance of shipbuilding today.

1.1.3 Stages of a shipbuild

As per its title, this thesis concerns how industry norms can influence the *law* on shipbuilding *contracts*. For this reason, a 'shipbuild' in this thesis will not just be taken to include the stage of the project where the vessel is constructed, but also the pre-contractual and post-discharge stages which sandwich the build. The rationale for this is because the pre-contractual stage features drafting and agreement of the *contract* itself, and the post-discharge stage potentially features parties turning to *legal* and *contractual* remedies following dispute.

In terms of the stages themselves, the 'pre-contractual' stage involves the agreement of ship specification, before design blueprints are made and appropriate resources are procured for constructing the vessel.¹⁰⁷ This stage usually takes a year, and culminates in the signing of the shipbuilding contract.

Next is the 'contractual' performance stage. Here, the shipyard's role is to build the ship. This stage alone can take anything from a year to three years, depending on the complexity of the vessel being built. If undertaken as an 'assembly' project (as most shipbuilds are), the build will consist of 'steelwork' ('the pre-fabrication,

¹⁰⁵ Yin-Chung Tsai, 'The shipbuilding industry in China' [2010] 3 OECD Journal: General Papers <www.keepeek.com/Digital-Asset-Management/oecd/economics/the-shipbuilding-industry-inchina_gen_papers-2010-5kg6z7tg5w5l#page17> accessed 11 October 2015, 43

¹⁰⁶ *ibid*

¹⁰⁷ In some newbuild projects (such as those for naval shipbuilding, which fall outside the scope of this thesis), a 'tender' stage precedes the 'pre-contractual' stage. [*Exportadora de Sal SA de CV v Corretaje Maritimo Sud-Americano Inc* [2018] EWHC 224 (Com Ct).] In such contracts, a shipyard is chosen by the buyer on the basis of negotiations regarding the ship's specification and design. [Martin Stopford, *Maritime Economics* (3rd edn, Routledge 2009) 208.]

assembly and erection of the steel structure of the ship'¹⁰⁸) followed by 'outfit' ('the installation of the systems, equipment and fittings into the ship'.¹⁰⁹) The shipyard's final task is then to send the vessel for sea trials. On the other hand, the ship-owner's role during the contractual 'performance' stage is to pay for the vessel. Payment is usually made by way of an instalment upon completion of each pre-agreed build 'milestone'. These 'milestones' typically fall upon signing the shipbuilding contract, steel cutting, keel laying, launch of the vessel and delivery.¹¹⁰ Moreover, the instalment payments are usually secured by way of a performance guarantee.¹¹¹

Ship-owners and shipyards often seek external finance or subsidies to assist them in meeting their obligations during the contractual 'performance' stage. Ship-owners will often seek a bank loan to fund the pre-delivery instalments they must pay, or will use the bank as a guarantor in the event that it defaults. Shipyards will tend to use the government or national banks to subsidise or fund their operations. For instance, Chinese shipyards can have their tax rebated by the government on ships built for (and exported to) overseas buyers.¹¹² Also, the Export-Import Bank of Korea (KEXIM) has recently increased its appetite for shipyard finance.¹¹³ In addition, the Developmental Bank of Japan (DBJ) provided subsidies for shipbuilders whose operations had been hampered by the Tohoku earthquake of 2011.¹¹⁴ Furthermore, in the past few years private equity houses have been known to purchase banks' shipbuilding loan books, thus indirectly taking on their loan

¹⁰⁸ Rima Mickeviciene, 'Global Shipbuilding Competition: Trends and Challenges for Europe, The Economic Geography of Globalization' (Klaipeda University, Lithuania 2011) <www.intechopen.com/books/theeconomic-geography-of-globalization/global-shipbuilding-competition-trends-and-challenges-for-europe> accessed 3 October 2015, 213

¹⁰⁹ *ibid*

¹¹⁰ Paul L Francis, *Best Practices: High Levels of Knowledge at Key Points Differentiate Commercial Shipbuilding from Navy Shipbuilding* (Diane Publishing 2009) 22

¹¹¹ Guarantees will be explored in Section 5.4

¹¹² Yin-Chung Tsai, 'The shipbuilding industry in China' [2010] 3 OECD Journal: General Papers <www.keepeek.com/Digital-Asset-Management/oecd/economics/the-shipbuilding-industry-in-china_gen_papers-2010-5kg6z7tg5w5l#page17> accessed 11 October 2015, 45

¹¹³ Tae-Jun Kang, 'Kexim bank eyes more funding for shipbuilders in 2018' (Lloyd's List, 15 December 2017) <<https://lloydslist.maritimeintelligence.informa.com/LL1120517/Kexim-bank-eyes-more-funding-for-shipbuilders-in-2018>> accessed 18 December 2017

¹¹⁴ Organisation for Economic Co-operation and Development (OECD), 'Peer Review of Japanese Government Support Measures to the Shipbuilding Sector' (2013) Council Working Paper 6(2012)26/FINAL <[www.oecd.org/sti/ind/C-WP6\(2012\)26-FINAL-ENG.pdf](http://www.oecd.org/sti/ind/C-WP6(2012)26-FINAL-ENG.pdf)> accessed 17 October 2015, 22

obligations to ship-owners and shipyards.¹¹⁵ In late 2013 for example, private equity houses Oaktree Capital Management and Centerbridge Partners purchased a significant proportion of the shipping loan book held by the Royal Bank of Scotland.¹¹⁶

Returning to the stages of a shipbuild itself, the final one is termed the ‘post-discharge’ stage. Discharge can manifest itself in distinct ways, notably following repudiatory breach, frustration, contract variation or novation. As will be explored in Chapter 4, these can result in disputes – with remedies potentially available to the wronged party.¹¹⁷ Ideally however, shipbuilding contracts will be discharged ‘by performance’, which occurs when the following events all occur: (i) the buyer pays each and every one of his pre-delivery instalments in full, (ii) the seller issues with buyer with a certificate permitting flag registration of the vessel, (iii) the parties both sign a Protocol of Delivery and Acceptance (under which the buyer gains title to the vessel), and (iv) the carrier delivers the vessel to the buyer, who takes delivery without complaint.¹¹⁸

Overall therefore, the entire shipbuilding process can last up to four years from the pre-contractual stage to delivery.¹¹⁹ This duration will likely be exceeded if the contract is not discharged by performance, but instead culminates in dispute litigation or arbitration.

¹¹⁵ UNCTAD, ‘Review of Maritime Transport 2014’ (United Nations Conference on Trade and Development, 2014) <unctad.org/en/PublicationsLibrary/rmt2014_en.pdf> accessed 15 October 2015, 59-60

¹¹⁶ Reuters Staff, ‘Funds buy shipping loans from capital-conscious banks’ (18 December 2013) <www.reuters.com/article/shipping-banks/funds-buy-shipping-loans-from-capital-conscious-banks-idUSL6N0JV2JF20131218> accessed 20 November 2017

¹¹⁷ See Chapter 5

¹¹⁸ Simon Curtis, ‘Remedies for Breach of Shipbuilding Contracts – Is English Law ‘Fit for Purpose’?’ in Barış Soyer and Andrew Tettenborn (eds), *Ship building, sale and finance* (Routledge 2016) 89

¹¹⁹ *ibid* 86

1.1.4 Types of ship built

The physical output of the shipbuilding process varies because ships come in a multitude of types. Shipbuilding therefore tends to be classified as commercial industry, commercial passenger, consumer or naval. While some of these types of shipbuilding will not fall within the scope of this thesis,¹²⁰ it would nonetheless be fruitful to explain each type.

Firstly commercial industry shipbuilding, which includes the building of wet and dry cargo vessels (known as onshore shipbuilding) and also the building of offshore vessels – as illustrated in **Fig. 9**. Wet cargo ships include tankers and carriers built to carry oil, chemicals or gas, and are of a lower build sophistication and higher standardisation than ships in other classifications. For instance, oil tankers are in wide circulation given their low build complexity (see **Fig. 10**). Dry cargo vessels include bulk carriers and containerships, and are built to hold non-liquid and non-gas substances such as ores, grains and containerised freight. These have a tendency to be highly priced, despite their relatively unsophisticated nature. The offshore strand of commercial industry shipbuilding¹²¹ includes the construction of offshore: (i) rigs (such as mobile rigs and drilling rigs¹²²), (ii) platforms (such as flotels¹²³) and (iii) vessels (such as Floating Storage and Offloading Units (FSOs)¹²⁴), including topsides construction undertaken on the items listed in the ‘platform’ and

¹²⁰ The scope of the term ‘shipbuilding’ will be defined in Section 1.1.5

¹²¹ IADC, ‘Offshore Installation’ <www.iadclexicon.org/offshore-installation/> accessed 13 July 2017

¹²² Carnwath J found in *Clark v Perks* that, despite mobility being ancillary to the main function of mobile oil-drilling rigs, the fact that it forms a part of their function means that they fall under Merchant Shipping Act 1995’s definition of a ‘ship’. [[2001] EWCA Civ 1228 [42] (Carnwath J).] Longmore LJ later stated in the same case that fixed oil-drilling rigs also fall under this definition of a ‘ship’. [[2001] EWCA Civ 1228 [59] (Longmore LJ); Merchant Shipping Act 1995, s 313(1).]

¹²³ *Addison v Denholm* found that ‘flotels’ (or mobile platforms providing facilities to oil and gas rigs) fall under the Merchant Shipping Act 1995’s definition of a ‘ship’ because, despite being stationary for long periods of time, they are fundamentally capable of movement. [[1997] ICR 770 (Employment Appeal Tribunal) 783 (Lord Johnston); Merchant Shipping Act 1995, s 313(1).]

¹²⁴ A 2011 report by the International Oil Pollution Compensation Funds found that Floating Storage and Offloading Units (FSOs) which can undertake voyages under their own power system and carry oil fall under the International Convention on Civil Liability for Oil Pollution Damage 1992’s definition of a ‘ship’. [International Convention on Civil Liability for Oil Pollution Damage 1992 art 1.1; International Oil Pollution Compensation Funds (IOPC Funds), ‘Consideration of the Definition of ‘Ship’’ (IOPC/OCT11/4/4, 14 September 2011) annex III 2.]

‘vessel’ categories.¹²⁵ These are not to be confused with offshore marine engineering services, which will not fall within the remit of this thesis – as explained in Section 1.1.5.

The second overarching category of shipbuilding is that of commercial passenger vessels. As per **Fig. 9**, this category comprises the building of ferries and cruise ships, whose sophistication and bespoke nature is incredibly high given the different customer perks and safety features that are installed on them.

The third type of shipbuilding is of consumer vessels such as yachts, superyachts and pleasure-boats. Demand for these is restricted only to those who can afford the luxury. The consumer shipbuilding category also includes ‘Waverunners’,¹²⁶ a type of recreational multi-person jet-ski.¹²⁷

The final category of shipbuilding is that of navy ships. As **Fig. 10** quite clearly displays, navy ships are perhaps the most sophisticated ship type in circulation because they must be kitted out with state of the art weaponry and communication systems.¹²⁸ Whilst this brings with it a hefty price tag,¹²⁹ demand remains high as the governments who purchase them are often backed by large defence budgets and will stop at nothing to secure vessels capable of defending their nations. This price inelasticity of demand means that ‘the market of naval ships cannot be seen as a

¹²⁵ 2B1st consulting, ‘Topsides’ (Definition, October 2012) <www.2b1stconsulting.com/topsides/> accessed 13 July 2017

¹²⁶ Yamaha UK, ‘Waverunners’ <www.yamaha-motor.eu/uk/products/waverunners/index.aspx#> accessed 12 February 2018

¹²⁷ *Steedman v Scofield* found that ordinary jet-skis do not fall under the Merchant Shipping Act 1894’s definition of a ‘ship’ as, unlike boats, they do not have a concave shape such that a person can sit on them whilst stationary in water. [Merchant Shipping Act 1894, s 742; [1992] 2 Lloyd’s Rep 163 (Admlty) 163 (Sheen J).] However, *R v Goodwin* later found that ‘Waverunner’ jet-skis fall under the Merchant Shipping Act 1995’s definition of a ‘ship’, as their ‘concave hull that gives the craft sufficient buoyancy to enable three riders to sit astride the saddle...[meaning] The craft bears a much closer resemblance to a boat’. [Merchant Shipping Act 1995, s 313(1); [2005] EWCA Crim 3184 [17] (Phillips CJ); Yamaha UK, ‘Waverunners; Recreation’ <www.yamaha-motor.eu/uk/products/waverunners/recreation/index.aspx> accessed 12 February 2018.]

¹²⁸ John L Birkler, *Differences Between Military and Commercial Shipbuilding* (RAND Corporation 2005) 30

¹²⁹ *ibid* 31

fully open competitive market and is influenced strongly by non-economic factors'.¹³⁰

Finally note that, as illustrated in **Fig. 5**, the shipbuilding industry produces more commercial industry vessels (tankers, carriers, containerships and offshore vessels) and commercial passenger vessels (including ferries) than it does naval and consumer vessels (which fall under **Fig. 5**'s 'Other' category). In this regard, the thrust of shipbuilding outputs nowadays are *commercial* ships.

In addition to the types of shipbuilding already undertaken, plans are afoot for two further variants – the building of eco-ships and the building of autonomous commercial vessels. Eco-ships allow ship-owners to carry the same volume of freight while consuming far less fuel than non-eco vessels.¹³¹ They do so through various methods including the use of aerodynamic bow and propeller designs and systems which re-use exhaust heat.¹³² Demand for eco-ships is increasing, in light of the fact that new environmental shipping regulations are due to be enacted in the coming years.¹³³ Despite orders coming from all four corners of the globe, their construction predominates in Asian shipyards. For example, in late 2017 the Grimaldi Group announced plans to have over a dozen eco-friendly ro-ro vessels built by a shipyard in either South Korea or China.¹³⁴ Subsequently, in August 2018 shipping company Yang Ming revealed plans to have ten environmentally friendly, energy saving newbuilds constructed by Taiwanese shipyard CSBC Corporation (previously known as China Shipbuilding Corporation).¹³⁵ Moreover, since 2009,

¹³⁰ ECORYS Research and Consulting, 'Study of Competitiveness of the European Shipbuilding Industry; Within the Framework Contract of Sectoral Competitiveness Studies - ENTR/06/054' (Final Report, Rotterdam, 8 October 2009) 22

¹³¹ BIMCO, 'What is an "eco" ship?' (BIMCO Education; Questions of Shipping, 19 September 2013) <www.bimco.org/en/Education/Seascapes/Questions_of_shipping/2013_09_19_What_is_an_ECO_ship.aspx> accessed 11 January 2016

¹³² *ibid*

¹³³ See Section 4.4

¹³⁴ Janet Porter, 'Grimaldi brothers raise the bar in clean ship technologies' (Lloyd's List, 2 October 2017) <<https://lloydslist.maritimeintelligence.informa.com/LL111706/Grimaldi-brothers-raise-the-bar-in-clean-ship-technologies>> accessed 19 November 2017

¹³⁵ Cichen Shen, 'Yang Ming unveils feedership orders' (Lloyd's List, 15 August 2018) <<https://lloydslist.maritimeintelligence.informa.com/LL1123868/Yang-Ming-unveils-feedership-orders>> accessed 15 August 2018

the Japanese government has been offering shipyards grants to go towards investment in environmentally friendly vessel equipment.¹³⁶

As for automated commercial vessels, these can be either remotely controlled or fully autonomous.¹³⁷ A White Paper from June 2016 revealed that autonomous technologies could be used on commercial passenger vessels, such as ‘an inland ferry making tens of identical crossings every day’,¹³⁸ and also on commercial industry vessels such as containerships and cargo ships.¹³⁹ This was bolstered by a claim emerging from Japanese shipping firms Mitsui OSK Lines and Nippon Yusen,¹⁴⁰ in which they pledged to have autonomous cargo ships in operation by 2025.¹⁴¹ Albeit in its infancy at the present time, the autonomous commercial shipbuilding sub-market will be predicated upon market drivers. As per a competitive market, ‘[e]ach actor must consider their position in the market relative to the other players’.¹⁴² Subsequently, the market will streamline itself, with only sufficiently strong players able to remain.

1.1.5 Scope of term ‘shipbuilding’

It would be fruitful to define what is to be considered a ‘ship’ and what is to be considered a ‘build’ in this thesis, as this will determine which ‘ship-building’

¹³⁶ Organisation for Economic Co-operation and Development (OECD), ‘Peer Review of Japanese Government Support Measures to the Shipbuilding Sector’ (2013) Council Working Paper 6(2012)26/FINAL <[www.oecd.org/sti/ind/C-WP6\(2012\)26-FINAL-ENG.pdf](http://www.oecd.org/sti/ind/C-WP6(2012)26-FINAL-ENG.pdf)> accessed 17 October 2015, 19

¹³⁷ Munin, ‘The Autonomous Ship’ (Maritime Unmanned Navigation through Intelligence in Networks) <www.unmanned-ship.org/munin/about/the-autonomus-ship/> accessed 10 September 2016

¹³⁸ AAWA, ‘Remote and Autonomous Ships; The next steps’ (Rolls Royce, White Paper, 2016) <www.rolls-royce.com/~media/Files/R/Rolls-Royce/documents/customers/marine/ship-intel/aawa-whitepaper-210616.pdf> accessed 10 September 2016, 12

¹³⁹ *ibid* 13

¹⁴⁰ Tim Collins, ‘Japan plans to launch a fleet of 250 self-driving cargo ships by 2025 that could cut the risk of accidents at sea in HALF’ (9 June 2017, MailOnline) <www.dailymail.co.uk/sciencetech/article-4588626/Japan-launch-fleet-self-navigating-cargo-ships.html> accessed 10 June 2017

¹⁴¹ BBC News, ‘Japan to launch self-navigating cargo ships ‘by 2025’’ (9 June 2017) <www.bbc.co.uk/news/technology-40219682> accessed 10 June 2017

¹⁴² AAWA, ‘Remote and Autonomous Ships; The next steps’ (Rolls Royce, White Paper, 2016) <www.rolls-royce.com/~media/Files/R/Rolls-Royce/documents/customers/marine/ship-intel/aawa-whitepaper-210616.pdf> accessed 10 September 2016, 79

contracts, statutes, case law and industry sources can be assessed in the chapters which follow. In doing so however, the purpose of this section is not to provide a response to the question ‘what does the law consider to be a ship’. Rather, the question asked here is ‘what is to be considered a ship, and what is to be considered a build, for the purposes of the shipbuilding analyses in this thesis’.

The types of ‘ship’ that will be subject of ‘shipbuilding’ in this thesis will be limited to *commercial* industry vessels (namely wet cargo, dry cargo and offshore) and *commercial* passenger vessels. Non-commercial shipbuilding (namely consumer and naval shipbuilding) will be excluded. There are three reasons for this. Firstly, since commercial ships are the most widely built ships in today’s market,¹⁴³ tailoring this thesis toward their construction will give it maximal utility. Stated differently, say for instance that nine out of ten ships produced are commercial vessels. Writing this thesis about commercial shipbuilding would give it 90% industry relevance, in contrast to a thesis written about non-commercial shipbuilding (which would only have a relevance of 10%). Secondly, the two non-commercial shipbuilding industry strands (consumer shipbuilding and naval shipbuilding) do not dovetail with the Free-Market lens¹⁴⁴ through which shipping markets are considered in this thesis – namely as competitive markets driven by supply and demand.¹⁴⁵ The market for consumer vessels such as yachts and pleasure-boats is often non-competitive, given their high price and also due to there often being more shipyards available to build them than there is demand.¹⁴⁶ Naval shipbuilding is often non-market driven, because supply is met by public tender rather than by demand on the open-market. Contract prices for naval vessels do not reflect the market equilibrium, given the propensity for governments to pay whatever it takes to obtain one¹⁴⁷ – especially in times of combat or compromised national security. The third reason why solely commercial shipbuilding will be

¹⁴³ See Section 1.1.4

¹⁴⁴ Whilst the shipping markets will be assessed from a Free-Market perspective in this thesis, other equally valid standpoints do exist such as that of Marxism and of Developmental Economics.

¹⁴⁵ This was explained in Section 1.1.2

¹⁴⁶ William Mathieson, ‘The monopoly effect’ (SuperyachtNews.com, 1 Feb 2016)

<www.superyachtnews.com/products/24204/the-monopoly-effect.html> accessed 26 July 2016

¹⁴⁷ John L Birkler, *Differences Between Military and Commercial Shipbuilding* (RAND Corporation 2005) 36

assessed in this thesis is because the future of shipping (namely autonomous vessel technology¹⁴⁸) will likely only apply to commercial passenger vessels such as ferries, and to commercial industry vessels such as cargo ships and containerships.

Therefore, this thesis will primarily assess the construction of *commercial* vessels. Exception will only be made for non-commercial shipbuilding case law whose contribution to the questions being answered in this thesis outweighs the fact that the case concerns the construction of a non-commercial vessel. A shipbuilding case will not therefore be excised from this thesis solely because it features the construction of a non-commercial ship – provided that the type of ship was incidental to the facts of the case, and thus incidental to the legal principle arising out of it.

Now to define the ‘builds’ which will be considered ‘shipbuilds’ in this thesis. Firstly, as mentioned in Section 1.1.4, ‘commercial industry shipbuilding’ will be taken to include the construction of certain offshore rigs, platforms and vessels. However, offshore marine engineering services such as well engineering¹⁴⁹ will not be considered. As established in Section 1.1.3, central to a shipbuild is the construction stage which features the assembly and initial outfit of the vessel. Since well engineering is an activity undertaken on an offshore platform that has already been built, they fall outside the remit of this thesis as they would not have been part of the platform’s assembly stage nor its initial outfit stage.

A second limit on the definition of ‘shipbuilding’ in this thesis is that it will not include ship refit. One feature of a shipbuild is the construction stage consisting of the initial assembly and outfit of the vessel. Considering that ‘refit’ is defined as the

¹⁴⁸ See Section 1.1.4

¹⁴⁹ LOGIC, ‘General Conditions of Contract (including Guidance Notes) for Well Services’ (Contracts for the Offshore Oil and Gas Industry, Edition 2, March 2001)

replacement of equipment¹⁵⁰ or the installation of new equipment¹⁵¹ on an *existing* vessel, these activities will fall outside the remit of this thesis as they occur neither during the vessel's initial assembly or its initial outfit.

A third limit on the definition of 'shipbuilding' in this thesis is that it will only include certain instances of ship conversion. While a newbuild is under construction, buyers have occasionally asked that the shipbuilder proceed to make the vessel into a ship type other than that which was originally contracted for.¹⁵² To be termed 'intra-transactional', this type of ship conversion will be considered in this thesis as it is undertaken during the initial construction of the newbuild – thus forming part of the construction stage. In contrast, conventional ship conversions (defined as the conversion of 'an existing ship'¹⁵³) fall outside the scope of this thesis. This is because they are a service undertaken on a ship which has already been built to completion,¹⁵⁴ and are essentially therefore 'a specialised area of ship repair, rather than a...newbuilding'.¹⁵⁵ Accordingly, while 'intra-transactional' conversions constitute a mere variation to an ongoing newbuild, a conventional ship conversion is a separate project from that in which the ship was originally built. For this reason, conventional ship conversions are not considered 'shipbuilds' for the purposes of this thesis.

Therefore, assessment will only be made of shipbuilds in which – sandwiched by the pre-contractual stage and the post-discharge stage¹⁵⁶ – a newbuild is assembled and outfitted for the first time. Ship refits and ship conversions will not be assessed in this thesis as they are essentially 'ship-re-builds'. Marine engineering services will also not be assessed in this thesis as they are essentially post-build services.

¹⁵⁰ English Oxford Living Dictionaries, 'Refit' <<https://en.oxforddictionaries.com/definition/refit>> accessed 5 November 2017

¹⁵¹ Collins English Dictionary, 'Refit' <www.collinsdictionary.com/dictionary/english/refit> accessed 5 November 2017

¹⁵² See Section 4.2.5

¹⁵³ International Convention for the Prevention of Pollution from Ships (MARPOL) Annex I Regulation 1(8)(a)

¹⁵⁴ Özgür Umut Senturk, 'The interaction between the ship repair, ship conversion and shipbuilding industries' (2010) 3 OECD Journal General Papers 7, 8

¹⁵⁵ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 5

¹⁵⁶ See Section 1.1.3

1.1.6 Shipbuilding standard-forms

A large number shipbuilding contracts nowadays are based upon standard-forms.¹⁵⁷ These include the Shipowner's Association of Japan 'SAJ' form, the Association of West Europe Shipbuilders contract (AWES), the China Maritime Arbitration Commission form known as 'CMAC', Norway's Standard Form 2000, the Baltic and International Maritime Council (BIMCO) contract known as 'NewBuildCon', and finally the United States' Maritime Administration's 'MARAD' form.¹⁵⁸ Albeit each standard-form can be used as printed, parties may instead use the standard-form clauses as a starting point to develop their own specific agreement – which may ultimately 'depart significantly from the standard form'.¹⁵⁹ Should they choose to do so, the exact terms of the specially drafted contract 'will be dependent on the yard, the type of ship involved, the financing arrangements, and the buyer's requirements for compliance with specifications and design, quality of workmanship and delivery timing'.¹⁶⁰

1.2 – Methodology & Resources

This section will explain the methodological approach used to answer the overarching theoretical question at the heart of this thesis, as well as defining key terms used in the thesis and also the resources used in writing it.

¹⁵⁷ Andrew Tettenborn, 'Contracting By Numbers: The Different Characteristics of the Main Shipbuilding Contracts' in Barış Soyer and Andrew Tettenborn (eds), *Ship building, sale and finance* (Routledge 2016) 40

¹⁵⁸ 'The US Maritime Administration – MARAD contract is the primary US shipbuilding contract...but following the decline of new building activity in that part of the world, it is seldom used except by the US Navy and the coastguard'. [Chris Kidd, 'The BIMCO NewBuildCon Standard Form Shipbuilding Contract: Salient Features and Pitfalls' in Barış Soyer and Andrew Tettenborn (eds), *Ship building, sale and finance* (Routledge 2016) 64-65.]

¹⁵⁹ Filippo Lorenzon and Ainhua Campas Velasco, 'Shipbuilding, Sale, Finance And Registration' in Yvonne Baatz (ed), *Maritime Law* (3rd edn, Informa 2014) 67

¹⁶⁰ The UK Defence Club, 'Shipbuilding Contracts – the Value of Defence Club Cover' (Online PDF, c/o Thomas Miller Defence Ltd, 2010) <www.ukpandi.com/fileadmin/uploads/uk-pi/Latest_Publications/UK_Defence/UKDC_2010_NewBuildingDisputes-web.pdf> accessed 23 July 2017, 3

Methodology

In asking the extent to which the shipbuilding industry *should* influence shipbuilding contracts, relationships and remedies, the overarching theoretical question of this thesis (introduced in Section 1.1) is normative. Normative conclusions arise on the basis that '[i]f the law provides rules for a society and the [societal] views on how to regulate this society differ...there must also be different views of what ought to be'.¹⁶¹ In the context of this thesis, the legal characterisation of the shipbuilding contract and relationship may differ from how the industry (or 'society') thinks that the shipbuilding contract and relationship ought to be characterised, for instance.

Accordingly, since Chapters 2-5 concern the development of shipbuilding contract law, and because the overall question being answered in this thesis is a normative one, the overarching methodological approach taken in this thesis is doctrinal. For Duncan and Hutchinson, the doctrinal method consists of two stages. The first involves 'locating the sources of the law and then interpreting and analysing the text'.¹⁶² This stage – to be undertaken primarily in Chapter 2 – entails exploring 'the law [as] encapsulated in legislation or...entrenched common law principle'.¹⁶³ The Sale of Goods Act 1979 and English case law will predominantly be used to do this, since they entrench the current characterisation of the shipbuilding contract and relationship. The second stage of the doctrinal method is 'where the law...is interpreted and analysed within a specific context'.¹⁶⁴ For one, this will entail analysing whether the law's entrenched characterisation of the shipbuilding contract and relationship reflects the norms and perceptions underpinning different projects in the shipbuilding industry context (Chapter 3). It will then entail analysing the law on shipbuilding contracts and how its deficiencies mean that specific types of dispute still occur (Chapter 4). Finally, it will entail analysing the

¹⁶¹ Jan M Smits, *The Mind and Method of the Legal Academic* (Edward Elgar Publishing 2013) 58

¹⁶² Nigel J Duncan and Terry Hutchinson, 'Defining and describing what we do: Doctrinal legal research' (2012) 17(1) *Deakin Law Review* 83, 110

¹⁶³ *ibid*

¹⁶⁴ *ibid*

law on shipbuilding contracts in terms of the judicial remedies it makes available following dispute (Chapter 5).

While this thesis will predominantly employ the doctrinal legal methodology, select chapters and sections will either employ a specific *aspect* of the doctrinal approach, or even employ a different methodological approach altogether. For one, Section 2.3's chronological account of English shipbuilding case law will give regard to relevant socio-economic circumstances at the time of each case, and Chapter 4's narrative on historical shipbuilding contract disputes will make reference to the context relevant to each. These are known as doctrinal historical inquiries,¹⁶⁵ and will be used to emphasise the reasons behind why certain shipbuilding contracts have been entered into down the years – contracts which shipbuilding law was thus in place to regulate.

Section 2.3 and Section 2.4 will then refer to how the law in certain foreign jurisdictions deal with shipbuilding contracts. These references will not however be used as a means of comparative analysis with English law, but rather will be used to illustrate the following: (i) that foreign jurisdictions also face the challenge of characterising the shipbuilding contract, (ii) how foreign jurisdictions have learnt from English law, or (iii) how foreign jurisdictions do things differently to how they are done under English law (from which English lawmakers can learn).

Subsequently, Chapter 3 will use the empirical positivist method to understand the social realities of shipbuilding relationships – through use of clauses from industry contracts and literature from the websites of shipyards.¹⁶⁶ When analysing an industry contract, inferences about the contracting relationship will only be drawn from the language, label or form of a particular clause where this inference holds

¹⁶⁵ Mark van Hoecke, *Methodologies of legal research: which kind of method for what kind of discipline?*, vol 9 (European Academy of Legal Theory Series, Hart Publishing Ltd 2013) 92

¹⁶⁶ Jill Collis and Roger Hussey, *Business Research: a practical guide for undergraduate & postgraduate students* (4th edn, Palgrave Macmillan 2014) 44

true for the *substance* of the contract.¹⁶⁷ This reflects Lord Templeman's approach in *Street v Mountford*,¹⁶⁸ in which he stated that the nature of contracting documents and party relationships are determined 'not by the label which they choose to put on it'¹⁶⁹ but by '[t]he whole of the document'.¹⁷⁰ Accordingly, '[t]he label attached by the parties...will not be applied if it is inconsistent with the other terms of the agreement'.¹⁷¹ Taking a similar approach in this thesis eliminates the prospect that an inference is drawn from a clause which does not represent the contract as a whole¹⁷² – as acknowledged by the court in the *Leung Wan Kee Shipyard v Dragon Pearl Night Club Restaurant*¹⁷³ case (to be explored in Section 2.3.1.)

For instance, say a shipbuilding contract clause obliges the parties to resolve their disputes between themselves in what it labels a 'cooperative' contracting setup. From this, one would infer that the clause shapes the contracting relationship as one of 'cooperation'. However, this inference will only be deemed conclusive if it chimes with other factors in the contract which are indicative of a cooperative relationship too. A cooperative relationship might be customary of a bespoke vessel build governed by a specially drafted contract for instance.¹⁷⁴ Here, the contracting parties will likely draft the contract from scratch, so that it is particular to their vessel and thus their contracting relationship.¹⁷⁵ If a dispute subsequently arises, the parties often will cooperate and resolve the dispute internally because – given the bespoke nature of the vessel, contract and contracting relationship – it would be inappropriate for a judge or arbitrator to simply 'pigeon-hole' the contract into a set characterisation, and make an award on this basis. Thus, a clause in a contract

¹⁶⁷ Kim Lewison, *The Interpretation of Contracts* (6th edn, Sweet & Maxwell 2017) para 4.03

¹⁶⁸ [1985] AC 809 (HL)

¹⁶⁹ *ibid* 822 (Lord Templeman)

¹⁷⁰ *ibid*

¹⁷¹ *ibid* 812

¹⁷² Avery Katz, 'The Economics of Form and Substance in Contract Interpretation' (2004) 104(2) *Columbia Law Review* 496, 497-498

¹⁷³ [2015] HKCFI 1546

¹⁷⁴ '[T]he bespoke nature of [such]...projects make the use of standard printed forms of contract very rare' with specially drafted contracts favoured instead. '[I]ndividual yards or their lawyers will usually produce their own draft forms of contract' or '[s]ome yards may even be willing to negotiate a contract based on a draft submitted by a buyer's lawyer'. [Richard Coles and Filippo Lorenzon, *Law of Yachts and Yachting* (Informa 2012) para 1-001.]

¹⁷⁵ For instance, the newbuild tanker contract at the helm of *Reardon Smith Line v Yngvar Hansen-Tangen and Sanko SS (The Diana Prosperity)* was so bespoke that the buyer even specified the exact yard in which he wanted his vessel constructed. [[1976] 1 WLR 989 (HL) 993 (Lord Wilberforce).]

stating that the contracting relationship is to operate ‘cooperatively’ will only be deemed conclusive if the substance of the contract corroborates this – namely, if the contract is: (i) to build a bespoke vessel, and/or (ii) specially drafted.

Similarly, say a shipbuilding contract clause obliges parties to go straight to court or arbitration in the event of dispute, in what it labels a ‘litigious’ contracting setup. From this, one might infer that the clause shapes the contracting relationship as one operating at arm’s length. However, this inference will only be deemed conclusive if it chimes with other factors in the contract which are indicative of an arm’s length relationship too. An arm’s length relationship might be customary of a standardised vessel build under a standard-form contract, since disputes over such projects in the English legal jurisdiction tend to be administrated in court or arbitral tribunal, rather than being settled internally between the parties. The judge or arbitrator begins on the premise that the contract is a commercial one, characterises it accordingly, and makes an award based upon the parties’ original agreement. Thus, a clause in a contract stating that the contracting relationship is to operate ‘litigiously’ or at ‘arm’s length’ will only be deemed conclusive if the substance of the contract corroborates this – namely, if the contract is: (i) to build a standardised vessel, and/or (ii) a standard-form.

Chapter 4 will then employ the doctrinal method to prove the causes and effects of different types of disputes affecting shipbuilding contracts to this day. For one, in order to prove that the law recognises the party performance themes in Section 4.2 and the extenuating themes in Section 4.3 as dispute *causes*, the chapter will reference the provisions and doctrines which the law has in place to deal with these causes. For instance, the law is aware that disputes can be caused by buyer default,¹⁷⁶ by virtue of the fact that the Sale of Goods Act 1979 provides a seller numerous remedies which become available if he is unpaid.¹⁷⁷ Similarly, the law is aware that disputes can be caused by changes in circumstance which make performance impossible, on the basis that it makes the doctrine of frustration

¹⁷⁶ See Section 4.2.1

¹⁷⁷ Sale of Goods Act 1979, s 39(1).

available in such scenarios.¹⁷⁸ Moreover, Chapter 4 will prove that disputes have legal and industry *effects*. For one, it will prove that certain disputes are significant enough to end up in court (by referring to shipbuilding dispute case law judgments), and it will also prove that certain disputes are significant enough to warrant industry press (by referring to shipbuilding disputes reported in industry sources). Finally, this chapter will use contract theory¹⁷⁹ to comment on the rationale for doctrines such as frustration,¹⁸⁰ and also to establish where opportunistic conduct sits under English contract theory.

Next, Section 5.3.1 will employ a particular aspect of the doctrinal method where researchers ‘tak[e] as a starting-point a certain new legal development...[and] set out to describe how this new development fits in with the area of law [being researched]’.¹⁸¹ Specifically, by using a case law example, Section 5.3.1 will aim to demonstrate how a judicial approach to remedies in which the court begins with the parties’ agreement fits in with the existing approach to how judicial remedies are determined in English courts (namely through recourse to legal doctrine and rules). Then, Section 5.3.2 will use a particular aspect of the doctrinal method regarding ‘how the existing system should be rearranged in order to accommodate for...[a] novelty’.¹⁸² It will do so by suggesting that – if judges and lawmakers see fit – contract law might wish to accommodate dedicated *sui generis* remedies for shipping contracts, to run alongside the existing general remedial regime.¹⁸³

Finally, Section 5.4 will employ the normative aspect of the doctrinal method as it seeks to establish factors which shipbuilding contract remedies *should* embody in

¹⁷⁸ See Section 4.3.2

¹⁷⁹ Contract theory is defined as ‘interpretations of contract law [with an] aim to enhance an understanding of the law by highlighting its significance or meaning’. [Stephen A Smith, *Contract Theory* (Clarendon Law Series, Oxford University Press 2004) 5.]

¹⁸⁰ Jan M Smits, *The Mind and Method of the Legal Academic* (Edward Elgar Publishing 2013) 32

¹⁸¹ Nigel J Duncan and Terry Hutchinson, ‘Defining and describing what we do: Doctrinal legal research’ (2012) 17(1) *Deakin Law Review* 83, 108

¹⁸² *ibid*

¹⁸³ Robert E Scott, ‘A Relational Theory of Default Rules for Commercial Contracts’ (1990) 19(2) *The Law and Economics of Risk* 597, 598

order to be effective.¹⁸⁴ Each factor which makes for an effective contractual remedy will be illustrated by reference to case law and to remedy clauses from industry shipbuilding contracts. Reference will also be made to contract theory,¹⁸⁵ in order to indicate *why* remedy clauses uphold these factors.¹⁸⁶ The contractual remedies to be assessed in Section 5.4 are liquidated damages clauses, Force Majeure clauses, performance guarantees (in favour of the shipyard),¹⁸⁷ refund guarantees (in favour of the buyer),¹⁸⁸ contractual lien clauses, retention of title (Romalpa) clauses and insurance clauses.¹⁸⁹ Contract management clauses, (such as price escalation clauses and future options agreements) are excluded from consideration for two reasons: (i) by definition they are not contractual *remedy* clauses, as they aim to prevent disputes from occurring (thus rendering otiose the need for remedy), and even so (ii) they operate during the contractual stage of a shipbuilding contract, rather than the post-discharge dispute stage being assessed in Chapter 5.¹⁹⁰

¹⁸⁴ Mark van Hoecke, *Methodologies of legal research: which kind of method for what kind of discipline?*, vol 9 (European Academy of Legal Theory Series, Hart Publishing Ltd 2013) 20

¹⁸⁵ Contract theory is defined as ‘interpretations of contract law [with an] aim to enhance an understanding of the law by highlighting its significance or meaning’. [Stephen A Smith, *Contract Theory* (Clarendon Law Series, Oxford University Press 2004) 5.]

¹⁸⁶ Jan M Smits, *The Mind and Method of the Legal Academic* (Edward Elgar Publishing 2013) 32

¹⁸⁷ The reason why performance guarantees in favour of the *shipyard* are assessed in this thesis, rather than performance guarantees in favour of the buyer, is because the former are far more commonplace in shipbuilding contracts than the latter. [Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix A citing Baltic and International Maritime Council, ‘BIMCO Standard Newbuilding Contract (NEWBUILDCON Form)1’ (BIMCO, Copenhagen, 2007) annex A(ii); Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix B citing China Maritime Arbitration Commission (CMAC), ‘CMAC Standard Newbuilding contract (Shanghai Form)1’ (CMAC, China) annex B.]

¹⁸⁸ The reason why refund guarantees in favour of the *buyer* are assessed in this thesis, rather than refund guarantees in favour of the shipyard, is because the former are far more commonplace in shipbuilding contracts than the latter. [Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix A citing Baltic and International Maritime Council, ‘BIMCO Standard Newbuilding Contract (NEWBUILDCON Form)1’ (BIMCO, Copenhagen, 2007) annex A(iii); Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix B citing China Maritime Arbitration Commission (CMAC), ‘CMAC Standard Newbuilding contract (Shanghai Form)1’ (CMAC, China) annex A.]

¹⁸⁹ The insurance clauses contained within shipbuilding contracts will be assessed in this thesis, rather than the *institute* insurance clauses which shipbuilding contract insurance clauses recommend a builder’s policy be based upon. Institute insurance clauses of this sort include the American Institute Clauses 1973, MarCAR 2007, and the Institute Clauses 1988 amongst others. [American Institute of Marine Underwriters, ‘American Institute Builder’s Risk Clauses (1 July 1973)’ (Form 13-K) <www.aimu.org/forms/13-K.pdf> accessed 5 December 2017; Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix D citing ‘London Marine Construction All Risks Wording’ (MarCar, 1 September 2007); Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix C citing ‘Institute Clauses for Builders’ Risks’ (1 June 1988).]

¹⁹⁰ The stages of a shipbuild were listed in Section 1.1.3

Definitions

Certain terms are used in a specific way in this thesis, such as the term ‘shipbuilding’ – whose scope and meaning was defined in Section 1.1.5. Various other technical terms will also be used, and will be defined herein. Firstly the term industry ‘norms’, used in both the title of this thesis, and its overarching theoretical question. This will be taken to mean industry practices and customs (known as social norms¹⁹¹) as well as industry expectations and understandings (known as cognitive norms.¹⁹²) Also note that, whilst the word ‘perception’ is used along with the word ‘norm’ in Chapter 3, perception refers to how parties view the industry, industry norms and their role under industry contracts. Perception is not therefore simply a synonym of the word ‘norm’.

Secondly, the term shipbuilding ‘industry’. For the purposes of this thesis, the ‘industry’ will be taken to comprise in-house shipbuilding lawyers (whose norms and perceptions are reflected in the shipbuilding contracts which they draft on behalf of contracting parties), shipbuilding association draftsmen (whose norms and perceptions are reflected in the standard-form contracts which they draft),¹⁹³ and shipyards themselves (whose norms and perceptions are communicated through the literature on their websites). The term ‘industry’ will also be taken to encompass the ‘market’ operating at its helm – whether it be the shipbuilding sub-market, or the shipping market and its links to the global economy. This means that, in Section

¹⁹¹ RB Cialdini and MR Trost, ‘Social Influence: Social Norms: Conformity, and Compliance’ in Daniel Gilbert and others (eds), *The Handbook of Social Psychology* (4th edn, McGraw-Hill 1998) 151

¹⁹² Janet Stephenson and others, ‘Energy cultures: A framework for understanding energy behaviours’ (2010) 38(10) *Energy Policy* 6120, 6124

¹⁹³ In contrast to existing literature upholding a ‘law versus contract’ dichotomy, this thesis will uphold a ‘law versus industry’ dichotomy – with contracts being one of a few aspects constituting the ‘industry’. [Catherine Mitchell, ‘Contracts and Contract Law: Challenging the Distinction Between the ‘Real’ and ‘Paper’ Deal’ (2009) 29(4) *Oxford Journal of Legal Studies* 675, 675-704; John Armour and others, ‘The Essential Elements of Corporate Law; What is Corporate Law’ (John M Olin Center for Law, Economics, and Business, Discussion Paper No. 643 7/2009) <www.law.harvard.edu/programs/olin_center/papers/pdf/Kraakman_643.pdf> accessed 6 December 2017, 21-23.]

5.4.2 for instance, contractual remedy pay-outs based on shipping market (freight) rates will constitute remedies based on the ‘industry’ for the purposes of this thesis.

Next, the term the ‘shipbuilding relationship’ in this thesis will be taken to mean the relationship between ship-owner and shipbuilder. It is common parlance for a ship-owner to be referred to as simply the ‘owner’, and for a shipbuilder to be referred to as the ‘shipyard’ or ‘builder’. Hence, the labels for each respective party will be used interchangeably in this thesis. Moreover, the ship-owner will occasionally be referred to as the ‘buyer’, and the shipbuilder as the ‘seller’, when the context warrants this terminology. For example, when shipbuilding remedies under the Sale of Goods Act 1979 are explored in Chapter 5, the ship-owner and shipyard are referred to as ‘buyer’ and ‘seller’ – since the 1979 Act talks of contracting parties as either being ‘buyers’ or ‘sellers’ of a good.

Reference is also made in this thesis to ‘arm’s length’ and ‘cooperative’ contracting relationships. An ‘arm’s length’ shipbuilding relationship will be taken to mean one under which the ship-owner leaves the shipbuilder to his own devices after having signed the contract. In the event of dispute, the wronged party will directly seek litigious or arbitral action. A ‘cooperative’ shipbuilding relationship will be taken to mean one under which both parties seek to do all they can to reach their common goal¹⁹⁴ – namely, to discharge the contract by performance.¹⁹⁵ This might include frequent communication and discussion between the parties during the project, and non-litigious dispute resolution and forbearance¹⁹⁶ if the contract is discharged following breach by one of the parties.

Section 5.2 then refers to a number of different judicial approaches to remedies which are defined as follows. The first is the discretionary approach, which pertains

¹⁹⁴ Suresh Murugan, *Sociology For Social Workers* (PSG College of Arts and Science 2013) 11

¹⁹⁵ ‘Discharge by performance’ was defined in Section 1.1.3

¹⁹⁶ Yadong Luo, ‘Contract, cooperation, and performance in international joint ventures’ (2002) 23(10) *Strategic Management Journal* 903, 905

to an ‘individual judge’s assessment’¹⁹⁷ as to whether or how a particular remedy should be implemented in a case. Secondly, a judge could take a substantive approach to applying a certain remedy. This would involve, for instance, making a damage award based upon verifiable quantities¹⁹⁸ such as market prices, contract prices or reliance losses. Thirdly is the active judicial approach, or a ‘judicial willingness to look into the facts’¹⁹⁹ of the particular case brought before the court. For instance, if a shipbuilding contract contained no liquidated damages clause for delay, then an actively applied damage award would take into account the length of the delay, and the proportion of the pre-agreed build period represented by delay. Fourthly, a passive judicial approach to remedies ‘favours the routine application of...clear general rules’.²⁰⁰ This approach might apply to claims for the price, where only ‘mechanical’²⁰¹ or passive application of Sale of Goods Act s 49 is required²⁰² – since the principles of remoteness and mitigation (which judges must otherwise interact with actively) do not apply to such claims. The penultimate approach is the promissory approach, and concerns judges obliging contracting parties to undertake the contractual obligations which they initially agreed upon.²⁰³ An example might be a judge who makes an order of specific performance, rather than awarding damages.²⁰⁴ Finally, the societal approach to remedies. Under this approach, the making of judicial orders centres upon considerations of ‘cost-effectiveness’.²⁰⁵ An example would be where a judge makes equitable orders only where they are practical and cost-effective to supervise.²⁰⁶

¹⁹⁷ The Right Honourable Lord Justice Bingham, ‘The Discretion of the Judge’ (1990) 5(1) *The Denning Law Journal* 27, 28

¹⁹⁸ Alan Schwartz, ‘Relational Contracts In The Courts: An Analysis Of Incomplete Agreements And Judicial Strategies’ (1992) 21(2) *Journal of Legal Studies* 271, 281

¹⁹⁹ Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press 1985) 736

²⁰⁰ John N Adams and Roger Brownsword, ‘The Ideologies of Contract Law’ (1987) 7(2) *Legal Studies* 205, 215

²⁰¹ *ibid*

²⁰² Sale of Goods Act 1979, s 49.

²⁰³ Alan Schwartz and Robert E Scott, ‘Contract Theory and the Limits of Contract Law’ (2003) 113(3) *The Yale Law Journal* 541, 569

²⁰⁴ See Section 5.2.3

²⁰⁵ Gregory Bruce English, ‘The Impact of Cost-Effectiveness Considerations upon the Exercise of Prosecutorial Discretion’ [1977] *Army Law* 21, 21

²⁰⁶ Michael Knobler, ‘A Dual Approach to Contract Remedies’ (2011) 30(2) *Yale Law & Policy Review* 416, 455

Finally, Section 5.4 will look to establish the factors which make for an ‘effective’ contractual remedy. An ‘effective’ contractual remedy is defined as one which is enforceable²⁰⁷ (as against any mandatory rules which would otherwise strike it down), and one which – when activated in the event of dispute – gives the party(s) the outcome which they intended when including the clause in the contract.²⁰⁸ For a contractual remedy to be effective, it need not incorporate all of the factors listed in Section 5.4, since some factors apply only to certain contractual remedies and not others. Rather, the effectiveness of a contractual remedy clause is contingent upon it upholding *at least one* of the factors listed.

Resources

This thesis has been written following extensive analysis of English case law and legislation governing shipbuilding contracts (available as of 19th August 2018), as well as the law governing certain general construction and supply of services contracts. In addition, the following specific resources are used in particular chapters or sections of the thesis.

For one, Chapter 3 will explore shipbuilding industry norms and perceptions, and Section 5.4 will examine contractual remedies. To do so, both will make reference to clauses within specially drafted shipbuilding contracts (derived from the website of the United States’ Securities and Exchange Commission (SEC)), and within standard-form shipbuilding contracts²⁰⁹ (obtained from the ‘Encyclopaedia of Forms and Precedents’,²¹⁰ from the appendices in Simon Curtis’ book ‘The Law of Shipbuilding Contracts’,²¹¹ or from internet webpages). In addition, Chapter 3 will glean the perceptions of shipyards by using information from their websites.

²⁰⁷ Robert Feldman and Raymond Nimmer, *Drafting Effective Contracts: A Practitioner’s Guide* (2nd edn, Wolters Kluwer 1999) ch 1 §1.01[B] 1-6

²⁰⁸ Mark Anderson and Victor Warner, *Drafting and Negotiating Commercial Contracts* (4th edn, Bloomsbury 2016) 68

²⁰⁹ These were listed in Section 1.1.6

²¹⁰ Stuart Beare, Graeme Bowtle and Jane Martineau, ‘Shipbuilding contract of the Shipowners Association of Japan (SAJ)1’ in Lord Millett (ed), *Encyclopaedia of Forms and Precedents* (vol 39(1) pt 1(B)(A) LexisNexis 2016)

²¹¹ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012)

Furthermore, the chapter will draw comparisons with general construction contracts such as the New Engineering Contract (NEC) and the Joint Contracts Tribunal's 'JCT' form (whose clauses are reproduced in 'Keating on Construction Contracts'²¹²), and also with offshore construction contracts (such as those issued by LOGIC²¹³ and the International Marine Contractors Association.²¹⁴)

Chapter 4 explores the causes and effects of shipbuilding disputes, and is based on data and resources available as of 19th August 2018. Information about shipbuilding disputes which have proceeded to court or arbitration will be established from the approved judgment given by the judge, or from articles reporting the outcome of the arbitration (such as those contained in the Journal of the Chartered Institute of Arbitrators.²¹⁵) Information about shipbuilding disputes which have not proceeded to court or arbitration will be derived from online information distributed by Lloyd's List and also The UK Defence Club. Moreover, the theoretical underpinnings of legal doctrines such as frustration will be gleaned by reference to texts by academics and theorists including David Campbell²¹⁶ and Guenter Treitel.²¹⁷

In regards to Chapter 5, Section 5.2 will comment upon the judicial approaches to remedies and Section 5.4 will determine the factors which make for an 'effective' contractual remedy. Analyses in both sections will be substantiated by reference to academic journal articles. Section 5.2 will draw upon journal articles written by

²¹² Vivian Ramsey and Stephen Furst, *Keating on Construction Contracts* (10th edn, Sweet & Maxwell 2017)

²¹³ LOGIC, 'General Conditions of Contract (including Guidance Notes) for Construction' (Standard Contracts for the UK Offshore Oil & Gas Industry, Edition 2, October 2003) <www.logic-oil.com/sites/default/files/documents/Construction%20Edition%202.pdf> accessed 11 June 2017; LOGIC, 'General Conditions of Contract (including Guidance Notes) for Marine Construction' (Standard Contracts for the UK Offshore Oil & Gas Industry, Edition 2, October 2004).

²¹⁴ International Marine Contractors Association, 'IMCA Marine Construction Contract' (Rev. 3, February 2017) <www.imca-int.com/publications/402/imca-marine-construction-contract/> accessed 14 September 2017

²¹⁵ Oliver Weiss, 'Significant Developments In Shipbuilding Disputes Within London Arbitration' (2010) 76(3) Journal of the Chartered Institute of Arbitrators 440, 440-447

²¹⁶ David Campbell, 'Arcos v Ronaasen as a Relational Contract' in David Campbell, Linda Mulcahy and Sally Wheeler (eds), *Changing Concepts Of Contract: Essays In Honour of Ian MacNeil* (Palgrave Macmillan 2013)

²¹⁷ Guenter Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014)

academics including Atiyah²¹⁸ and also co-authors John Adams and Roger Brownsword,²¹⁹ while assertions made in Section 5.4 will be bolstered by reference to the works of contract theorists such as Eric Posner²²⁰ and also co-authors Alan Schwartz and Robert Scott.²²¹

Finally, it is worthy of note that – whilst an extensive literature search was conducted when writing this thesis – some resource bases could not be considered. Firstly, a decision was made to consider the shipping industry as a competitive Free-Market driven by demand and supply. Whilst this choice was explained in Section 1.1.2, doing so also meant that other equally valid standpoints (such as that of Marxism and Developmental Economics) were not considered, nor the resource bases informing these standpoints.

Secondly, Chapter 2 will make reference to how the law in certain foreign jurisdictions deal with shipbuilding contracts. Each foreign jurisdiction was chosen based upon the fact that it is a dominant shipbuilding country,²²² its legal system is often chosen to govern shipbuilding contracts, or its approach to characterising the shipbuilding contract differs from the approach under English law. This however means that other foreign jurisdictions were not considered, nor the law and resources associated with them.

Thirdly, Chapter 3 and Section 5.4 consulted a sample of specially drafted shipbuilding contracts from the website of the United States' Securities and Exchange Commission (SEC). This sample was defined, and the contracts subsequently chosen, by a twofold process. Firstly, the SEC only makes 'material

²¹⁸ Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press 1985)

²¹⁹ John N Adams and Roger Brownsword, 'The Ideologies of Contract Law' (1987) 7(2) *Legal Studies* 205, 205-223

²²⁰ Eric Posner, 'Contract Remedies: Precaution, Causation and Mitigation' in Boudewijn Bouckaert and Gerrit De Geest (eds), *Encyclopedia of Law and Economics* (Edward Elgar Publishing 2000)

²²¹ Alan Schwartz and Robert E Scott, 'Contract Theory and the Limits of Contract Law' (2003) 113(3) *The Yale Law Journal* 541, 541-619

²²² These were listed in Section 1.1.2

contracts'²²³ available on its website.²²⁴ Thus, the sample of SEC contracts assessed when writing this thesis was initially narrowed by the SEC's own materiality criterion, which excludes contracts that the SEC deemed 'immaterial'. Secondly, given the sheer volume of shipbuilding contracts which are 'material' and thus appear on the SEC website, only those whose terms were deemed relevant to the overarching theoretical question of this thesis were considered and referred to. Specifically, a shipbuilding contract listed on the SEC website was only considered and referred to in this thesis if: (i) its terms embodied cooperative norms, (ii) the shipbuilder was required to provide a service (or services) under the contract, or (iii) the contract governed the building of a bespoke vessel. Any SEC contracts falling outside these criteria were thus not considered.

Fourthly, many of the shipyard websites consulted in Chapter 3 are those of Japanese, Chinese and South Korean shipyards. This is because the majority of shipbuilding projects, and thus shipbuilding disputes, take place in these countries.²²⁵ This however means that the websites of many non-Asian shipyards were not considered – although certain European shipyards were assessed where appropriate, such as when discussing the construction of sophisticated or bespoke vessels (which select European shipyards specialise in.²²⁶)

Fifthly, many of the reported disputes referred to in Chapter 4 are English law governed. This is because English courts and London arbitrators are the most

²²³ 'Material Contracts' are defined by the SEC as those which are not made in the ordinary course of business. [Anne Margaret Thompson, 'SEC Confidential Treatment Orders: Balancing Competing Regulatory Objectives' (PhD Dissertation, Texas A&M University 2011) 8.] Materiality of a contract can also be secured by the contract's value or price. [Defined Term, 'Material Contract' <https://definedterm.com/material_contract> accessed 30 April 2018.]

²²⁴ Ken Adams, 'An Update on Retrieving Contracts from the SEC's EDGAR System' (Adams on Contract Drafting, 28 July 2014) <www.adamsdrafting.com/an-update-on-retrieving-contracts-from-the-secs-edgar-system/> accessed 30 April 2018; John Newell and Ettore Santucci, 'Operating Under the New Form 8-K Accelerated and Expanded Reporting Requirements' [2005] *The Real Estate Finance Journal* <www.goodwinlaw.com/~media/Files/Publications/Attorney%20Articles/2004/Operating_Under_the_New_Form_8_K_Accelerated_and_Expanded_Reporting_Requirements.pdf> accessed 30 April 2018, 35

²²⁵ See Section 1.1.2

²²⁶ See Section 1.1.2

commonly used dispute jurisdiction for these types of cases,²²⁷ and also because the scope of this thesis lies in English law's characterisation of shipbuilding. Whilst international disputes have also been referred to in that chapter (by recourse to articles from international maritime news providers such as Lloyd's List), reported judgments from foreign jurisdictions have not been considered.

1.2.1 Purpose

This thesis serves various purposes, both academic and practical. Firstly, in a practical sense, by proving there to be a mismatch between the legal characterisation of the shipbuilding contract and relationship, and the industry norms and perceptions underpinning certain shipbuilding contracts and relationships, this thesis might serve as a catalyst to reform shipbuilding law (and judicial practice) so that it begins to take into account industry norms and perceptions. Moreover, exploring the various causes of dispute which affect present day shipbuilding contracts may assist lawmakers whose job it is to create legal solutions to prevent such disputes from occurring in future.

Secondly, again in a practical sense, this thesis may benefit industry parties who are seeking assurances as to the shipbuilding contract they are entered into, or may soon enter. For one, sections of this thesis which examine the shipbuilding relationship will inform parties of norms which they might wish to uphold during performance. Additionally, sections of this thesis which outline the legislation that shipbuilding contracts fall under will benefit parties by informing them of: (i) any implied duties which the statute requires them to uphold during performance, (ii) any statutory remedies available to them, and (iii) their statutory rights in the event of dispute (such as who is entitled to the vessel corpus, and who can claim any materials that were unattached to the vessel corpus at the point of dispute.²²⁸) Furthermore, sections of this thesis which explore the various types of shipbuilding contract

²²⁷ See Section 1.1.2

²²⁸ Aleka Mandaraka-Sheppard, *Modern Maritime Law Volume 2: Managing Risks and Liabilities* (3rd edn, Informa 2013) ch 7 s 2

dispute, and sections exploring the factors which make for an effective contractual remedy clause, may assist contracting parties in crafting their shipbuilding contract so that its clauses are capable of resolving or mitigating disputes.

Also note that, despite being based primarily upon English law, this thesis may benefit those seeking to enter into shipbuilding contracts governed by other common law systems, and also lawmakers in other common law jurisdictions. This is because English law influences legal principles in jurisdictions such as India,²²⁹ Malaysia²³⁰ and the Caribbean islands²³¹ amongst others, and also because English judicial practice influences how judges in these jurisdictions construe contract clauses.

Thirdly, in an academic sense, by proving that differing characterisation of the shipbuilding contract will determine the judicial remedies available to a plaintiff following dispute, the implied terms regulating performance under the contract, and whether any mandatory rules apply to the contract, this thesis contributes toward the argument *for* characterisation of contracts. It thus joins existing academic literature which argues that characterisation of contracts to paint portraits²³² and to order food in a restaurant²³³ is necessary to then determine from where a plaintiff's legal rights derive following breach. This is in sharp contrast to those who view characterisation of contracts as unnecessary on the basis that, in the shipbuilding context for instance, the transaction will result in delivery of a completed vessel – irrespective of the contract's characterisation.

²²⁹ WH Rattigan, 'The Influence of English Law and Legislation upon the Native Laws of India' (1901) 3(1) *Journal of the Society of Comparative Legislation* 46, 65

²³⁰ Jasni bin Sulong and others, 'The Influence of English Law for the local: A study on the administration of Islamic Law of Inheritance in Malaysia' (WEI International Academic Conference Proceedings, 14-16 January 2013) <www.westeastinstitute.com/wp-content/uploads/2013/02/ANT13-222-Jasni-Sulong-Full-Paper.pdf> accessed 2 May 2018, 26

²³¹ Desiree P Bernard, 'The Impact of the English Common Law on Caribbean Society' (SAS-Space, 2014) <http://sas-space.sas.ac.uk/5176/1/Desiree_Bernard_The_Impact_of_the_English_Common_Law.pdf> accessed 2 December 2016, 1

²³² *Robinson v Graves* [1935] 1 KB 579 (CA)

²³³ *Lockett v A&M Charles Ltd* [1938] 4 All ER 170 (KB); *Wood v TUI Travel Plc* [2017] EWCA Civ 11

Fourthly, again in an academic sense, using shipbuilding contracts as a basis upon which to draw inferences about shipbuilding relationships reinforces the academic argument regarding the importance of contracts. As well as giving an idea of the norms which underpin that particular contracting relationship, a contract serves various other purposes. For one, the contract establishes the responsibilities that parties must uphold during the shipbuild.²³⁴ Also, contracts can be used to allocate risks²³⁵ through use of terms such contractual remedies clauses,²³⁶ which aim to minimise the need for litigation or arbitration.²³⁷ Additionally, the contract is in place to define the parties' rights in the event that dispute goes to court or arbitration. Finally, contracts hold particular value to shipbuilding projects in which a *bespoke* vessel is being built, as the written agreement will contain the build's technical information (such as design and specification).

Accordingly, the issues raised in this thesis will mean that it is useful in both academic and industry circles. Moreover, the usefulness of this thesis (concerning shipbuilding contracts which have fallen into dispute) is sustainable in future, because there is always a possibility that future shipbuilding contracts will fall into disputes such as those to be explored in Section 4.4. While this will prove to be an unwelcome prospect for shipyards and ship-owners, the prospect of such disputes reoccurring confirms the utility of this particular thesis.

²³⁴ Akxoffice, 'The nature and functions of contract' (Slide Share, 21 March 2015) <www.slideshare.net/bravoram/the-nature-and-functions-of-contract> accessed 6 December 2017, slide 3

²³⁵ Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press 1985) 713

²³⁶ See Section 5.4.3

²³⁷ Nico Apfelbaum, 'The True Importance of Written Contracts in Businesses & Transactions' <www.hg.org/article.asp?id=39639> accessed 6 December 2017

Chapter 2

LEGAL CHARACTERISATION OF SHIPBUILDING

2.1 – Introduction

The legal characterisation²³⁸ of a contract determines the legislation that it will be governed by, and therefore the rights, duties and obligations due under the contract. The legal characterisation of a contracting relationship refers to how the law shapes the parties' relationship and interactions with one another.²³⁹ This chapter will establish how English law characterises the shipbuilding contract and relationship. These findings will then be juxtaposed with conclusions yielded in Chapter 3 (regarding *industry* norms and perceptions of the shipbuilding contract and relationship), in order to establish whether shipbuilding law and the shipbuilding industry are mismatched. If the law is found to be mismatched with the industry, then this would increase the extent to which industry norms and perceptions should influence the characterisation of shipbuilding contracts and relationships under English law – as per the overarching theoretical paradigm of this thesis. References will also be made to characterisations of the shipbuilding contract in foreign legal systems. These will illustrate how other jurisdictions have followed the English law approach to characterisation, or will illustrate an approach to characterisation taken by a foreign jurisdiction which English lawmakers may wish to learn from in future.

²³⁸ In this thesis, the legal 'characterisation' of a contract is synonymous with the contract's legal 'nature' (the latter term commonly used in existing literature.) [Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 1; William Cecil and Fiona Cain, 'England & Wales' in Arnold J van Steenderen (ed), *Getting The Deal Through Shipbuilding 2017* (6th edn, Law Business Research 2017) 26; Aleka Mandaraka-Sheppard, *Modern Maritime Law and Risk Management* (2nd edn, Informa 2009) ch 10 s 2; Aleka Mandaraka-Sheppard, *Modern Maritime Law Volume 2: Managing Risks and Liabilities* (3rd edn, Informa 2013) ch 7 s 2.]

²³⁹ For instance, the law could shape the shipbuilding relationship to be at arm's length or to be cooperative – these terms being defined in Section 1.2.

Additionally, the legal characterisation of the shipbuilding contract will determine which implied terms apply to the contract,²⁴⁰ which judicial remedies are open to the parties in the event of dispute,²⁴¹ and also whether the Unfair Contract Terms Act 1977²⁴² applies to the contract's terms.²⁴³ The 1977 Act requires judges to give due regard to the industry context surrounding a contract term when establishing whether it is permissible or not. This requirement to interact with the industry mirrors the idea of industry influence being examined in this thesis.

2.2 – How Legislation deals with shipbuilding contracts

The entrenched characterisation of shipbuilding contracts under English law is that they are contracts for the sale of goods, governed by the Sale of Goods Act 1979.²⁴⁴ As will be explained further in Section 2.3 in regards to the case of *Behnke v Bede Shipping*,²⁴⁵ ships fall within the Act's definition of 'goods'.²⁴⁶ Goods which can form the subject matter of a sale of goods contract can either be an 'existing' good (one which is owned by the seller or in his possession when the contract is made), or a 'future' good (one which will be manufactured by the seller after the contract has been made).²⁴⁷ Since a newbuild comes into existence a number of years after the shipbuilding contract is originally agreed, the contract operates as a present 'agreement to sell'²⁴⁸ future goods.²⁴⁹ Moreover, since the newbuild will be constructed in accordance with a pre-agreed design blueprint and specification, a shipbuilding contract can be considered an agreement to sell according to (or 'by') description.²⁵⁰ As per s 18 r 5(1) of the Act, title under the contract will pass from seller to buyer upon delivery of the good (ship) in a 'deliverable' and description

²⁴⁰ See Section 2.4.2

²⁴¹ See Section 5.2

²⁴² Unfair Contract Terms Act 1977.

²⁴³ See Section 2.6

²⁴⁴ Sale of Goods Act 1979.

²⁴⁵ [1927] 1 KB 649

²⁴⁶ Sale of Goods Act 1979, s 61.

²⁴⁷ *ibid* s 5(1)

²⁴⁸ *ibid* s 2(5)

²⁴⁹ *ibid* s 5(3)

²⁵⁰ Filippo Lorenzon and Ainhwa Campas Velasco, 'Shipbuilding, Sale, Finance And Registration' in Yvonne Baatz (ed), *Maritime Law* (3rd edn, Informa 2014) 68

compliant state.²⁵¹ The primary obligation of the seller (shipbuilder) thus lies in delivery of a newbuild in this state, with acceptance and payment being the primary obligations of the buyer (ship-owner) – as listed under s 27 of the Act.²⁵² In sum therefore, English law characterises shipbuilding contracts as ‘agreements to sell future goods by description subject to the Act and...its implied conditions’²⁵³ – these implied conditions to be revisited in Section 2.4.2 and Section 2.6.

Since shipbuilding contracts fall under the Sale of Goods Act, the Act accordingly characterises the relationship between parties to shipbuilding contracts. Specifically, the Sale of Goods Act characterises the contracting relationship as one in which parties operate at ‘arm’s length’ to each other. This is so because, if one party derogates from his duties under the contract, the other can resort to his rights under the Act and take legal action – without needing to offer the breaching party any goodwill,²⁵⁴ nor try and resolve the dispute internally first.

Take the buyer’s rights upon receipt of a defective good.²⁵⁵ If he deems the good to be in breach of warranty, he has an immediate right to claim damages or an extinction of the price.²⁵⁶ The Act does not oblige the wronged buyer to give the seller a second chance to make good the promise and rectify the defect. The buyer’s rights under the Act are therefore setup as a ‘*get it right, or else face litigation or arbitration*’ warning to the seller, which moulds the parties’ relationship into one operating at arm’s length.²⁵⁷ Similarly, an unpaid seller has various rights of recourse under the Act²⁵⁸ including a lien on the good.²⁵⁹ The Act does not oblige an unpaid seller to give the buyer another chance to pay before seeking to enforce the lien. The seller’s rights under the Act are therefore setup as a ‘*pay or else I will*

²⁵¹ Sale of Goods Act 1979, s 18 r 5(1).

²⁵² *ibid* s 27

²⁵³ Richard Coles and Filippo Lorenzon, *Law of Yachts and Yachting* (2nd edn, Informa 2018) para 1-003

²⁵⁴ The concept of goodwill will be revisited in Section 5.4.6

²⁵⁵ See Section 5.2.1

²⁵⁶ Sale of Goods Act 1979, s 53(1).

²⁵⁷ Alistair Mills and Rebecca Loveridge, ‘The uncertain future of *Walford v Miles*’ (2011) 4 *Lloyds Maritime and Commercial Law Quarterly* 528, 529

²⁵⁸ See Section 5.2.1

²⁵⁹ Sale of Goods Act 1979, s 41.

take action' warning to the buyer, which shapes the relationship with his counterpart as an arm's length one.

The arm's length relationship prescribed of contracting parties under the Sale of Goods Act is exemplar of the classical view of the English law of contract. English law has historically modelled the contracting arena as 'a meeting point between two individuals with separate interests',²⁶⁰ in which 'those who let down their fellows should be made to pay the cost of doing so'.²⁶¹ If a contract enters into dispute, parties are thus at liberty to 'pursue their own self-interest'²⁶² in court or arbitral tribunal without need to try and resolve the dispute another way first. Accordingly, the classical view believes that 'where one party is in breach of contract...the innocent party [can and will]...legitimately take up...legally available options'.²⁶³ For instance, '[i]n a contract of sale of goods...one would expect to find the seller entitled to sue the buyer for the price whenever the buyer repudiates'.²⁶⁴ This was famously described in *Walford v Miles*²⁶⁵ as the 'adversarial position'²⁶⁶ customary of the 'ethic of [English] contract law',²⁶⁷ by Lord Ackner.²⁶⁸

²⁶⁰ Anat Rosenberg, 'Contract's Meaning and The Histories of Classical Contract Law' (2013) 59(1) McGill Law Journal 165, 178

²⁶¹ Patrick Atiyah, 'Contracts, Promises and The Law of Obligations' in Patrick Atiyah (ed), *Essays on Contract* (Oxford University Press, Oxford 1986) 16

²⁶² [2013] 1 CLC 662, 694 (Leggatt J)

²⁶³ Roger Brownsword, 'Suisse Atlantique Societe d'Armement SA v NV Rotterdamsche Kolen Centrale' in Charles Mitchell and Paul Mitchell (eds), *Landmark cases in the law of contract* (Hart Publishing 2008) 306

²⁶⁴ Patrick Atiyah, 'The Liberal Theory of Contract' in Patrick Atiyah (ed), *Essays on Contract* (Oxford University Press 1986) 124

²⁶⁵ [1992] 2 AC 128 (HL)

²⁶⁶ *ibid* at 138 (Lord Ackner)

²⁶⁷ Christian Twigg-Flesner, Rick Canavan and Hector MacQueen, *Atiyah and Adams' Sale of Goods* (13th edn, Pearson 2016) 33

²⁶⁸ *Walford v Miles* concerned a 'lock-out' agreement under which a seller would be obliged to terminate negotiations with third-parties and instead negotiate exclusively one particular buyer, if this buyer satisfied a condition precedent. The buyer duly satisfied this condition, but the seller latterly terminated negotiations with him in breach of contract. Lord Ackner gave two reasons for why the 'lock-out' agreement would nonetheless be unenforceable. Firstly, such agreements require the parties to negotiate in good faith; however, this is repugnant to the adversarial ethic of negotiating, and secondly a court cannot be expected to police party negotiations. However both of these reasons have since been challenged. The first reason misses the point that parties will have mutually agreed to include the lock-out clause (containing the good faith obligation) in the first place, and thus will not have been acting as adversaries. [Alistair Mills and Rebecca Loveridge, 'The uncertain future of *Walford v Miles*' (2011) 4 Lloyds Maritime and Commercial Law Quarterly 528, 530-531.] The second reason can be countervailed by recourse to jurisdictions such as French law, where courts already police pre-contractual negotiations. [Paula Giliker, 'A Role for Tort in Pre-Contractual Negotiations? An Examination of English, French, And Canadian Law' (2003) 52(4)

2.2.1 Foreign Legislation following suit

A number of foreign jurisdictions also characterise shipbuilding contracts as sale of goods contracts. In the United States of America for instance, a shipbuilding contract is considered ‘a contract for the [future] sale of tangible personal property [or goods]’.²⁶⁹ This is the case because, firstly, art 2 § 2-106 of the Uniform Commercial Code (UCC) considers shipbuilding contracts as ‘contract[s] to sell...at a future time’²⁷⁰ – since the contract is for the present sale of a vessel which will only exist and be identifiable²⁷¹ at the future point in time when it is completed. Secondly, since vessels are not contained within the exhaustive definition of ‘intangible personal property’ given in art 9 § 9-102(42),²⁷² they are considered to be ‘tangible personal property’ (which are more simply referred to as ‘goods’ elsewhere in the Act.²⁷³)

International and Comparative Law Quarterly 969, 982-985.] Additionally, further general criticisms of Lord Ackner’s rejection of the good faith doctrine have emerged. A 2017 article by David Campbell indicates that Lord Ackner did not account for the fact that the doctrine of agreement in English contract law has a moral substrate, which sharply contrasts with the adversarial nature of English contracting which Ackner suggests. [David Campbell, ‘Adam Smith and the social foundation of agreement: Walford v Miles as a relational contract’ (2017) 21(3) Edinburgh Law Review 376, 379.] Also, Leggatt J has suggested that refusing to accept good faith in English law, on the basis of its apparent repugnance, would be going against a growing tide of jurisdictions which already recognise the doctrine. This includes not only civil law jurisdictions (such as Germany, France and Italy) but also Canada, a common law jurisdiction. [*Yam Seng PTE v International Trade Corporation* [2013] 1 CLC 662, 695 (Leggatt J).] Furthermore, Lord Hodge held in one case that the defendant agreed a contract price which was amenable to his contracting counterpart (namely in good faith), whilst concurrently keeping his own interests in mind. There was no such ‘repugnancy’ between good faith and self-interest as Lord Ackner had feared. [*R&D Construction Group v Hallam Land Management* [2009] CSOH 128 [47]-[48] (Lord Hodge).]

²⁶⁹ Mark Lowe and Christine Reidy, ‘United States’ in Arnold J van Steenderen (ed), *Getting The Deal Through Shipbuilding 2016* (5th edn, Law Business Research 2016) 83

²⁷⁰ Uniform Commercial Code (UCC), art 2 § 2-106.

²⁷¹ *ibid* art 2 § 2-105

²⁷² “‘General intangible’ means any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. The term includes payment intangibles and software.” [Uniform Commercial Code, art 9 § 9-102(42).]

²⁷³ “‘Goods’ means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities...and things in action.” [Uniform Commercial Code, art 2 § 2-105(1).]

But it is not only common law jurisdictions that have adopted a sale of goods characterisation of shipbuilding contracts. With their roots in Scandinavian-German Civil law, Denmark and Norway also characterise shipbuilding contracts in this way. For one, shipbuilding contracts fall within the Danish Sale of Goods Act 2003.²⁷⁴ Sections 1A(1) and 2(2) respectively state that the Act ‘shall apply to all contracts of sale other than contracts for the sale of immovable property’²⁷⁵ and that it ‘does not apply to contracts for the construction of buildings or other facilities on immovable property’.²⁷⁶ Shipbuilding contracts are accordingly considered contracts for the sale of goods, on the basis that a ship is an example of movable property – thus falling outside the Act’s exemption criterion in s 2(2). Similarly, in Norway, shipbuilding contracts are considered as sale of goods contracts under its Sale of Goods Act 1988,²⁷⁷ for which ‘[t]he risk passes to the buyer when the goods have been delivered’.²⁷⁸ In doing so, Norwegian law considers shipbuilding contracts as separate from general construction or service provisions, which are excluded from the Act under § 2(1)²⁷⁹ and § 2(2)²⁸⁰ respectively. French law also characterises the shipbuilding contract as a sale of goods but, rather than stipulate that title must pass upon delivery as Norwegian law does, allows for title to pass continuously during the project – thus protecting the buyer in the event the shipyard becomes insolvent.²⁸¹ The fact that French law permits such a choice is testament to the ‘contractual freedom’ allowed under arts L5113-1 to L5113-6 of the French Transport Code,²⁸² which govern shipbuilding contracts.

²⁷⁴ Danish Sale of Goods Act 2003.

²⁷⁵ *ibid* s 1A(1)

²⁷⁶ *ibid* s 2(2)

²⁷⁷ Norwegian Sale of Goods Act 1988.

²⁷⁸ *ibid* § 13(1)

²⁷⁹ ‘This Act does not apply to contracts for the construction of buildings or other facilities on real property.’ [Norwegian Sale of Goods Act 1988, § 2(1).]

²⁸⁰ ‘This Act does not apply to contracts which impose on the supplier of the goods an obligation also to perform work or other service, and this constitutes a preponderant part of his obligations.’ [Norwegian Sale of Goods Act 1988, § 2(2).]

²⁸¹ Mona Dejean, ‘France’ in George Eddings and others (eds), *The Shipping Law Review* (4th edn, Law Business Research 2017) 203

²⁸² French Transport Code, arts L5113-1 – L5113-6.

Furthermore, under Spanish law, other than when parties actively elect to have their contract operate as a ‘work or industry’ contract,²⁸³ the default position is for shipbuilding contracts to operate as sale of goods contracts. Article 1,588 of the Spanish Civil Code²⁸⁴ regulates contracts for work, and states that ‘[t]he execution of building works may be hired under the agreement that the executor must...provide his work or industry’.²⁸⁵ The wording of art 1,588 indicates that building projects (such as shipbuilding projects) may therefore fall under the provision as works contracts, in that they both feature a builder providing his work. In practice however, unless the buyer and shipbuilder specifically provide that their shipbuilding contract is a works contract, Spanish law will consider the shipbuilder to possess title during construction, and for title to pass to the buyer upon delivery²⁸⁶ – facets customary of a sale of goods contract.

Thus, a brief venture into foreign law illustrates that English law is not the sole proponent of the sale of goods characterisation of shipbuilding contracts.

2.3 – Case Law characterising the shipbuilding contract

English law’s characterisation of the shipbuilding contract as a sale of goods contract was the result of three ‘waves’ of case law. Firstly, a line of 19th Century and early 20th Century shipbuilding cases posed criteria to distinguish between shipbuilding contracts and ship materials contracts. Secondly, dicta in the cases of *Behnke v Bede Shipping*²⁸⁷ and *McDougall v Aeromarine of Emsworth*²⁸⁸ made the sale of goods characterisation of the shipbuilding contract express. Thirdly, a line of more recent 21st Century case law sought to further entrench this characterisation.

²⁸³ Luis de San Simón, ‘Spain’ in James Gosling and Rebecca Warder (eds), *The Shipping Law Review* (1st edn, Law Business Research 2014) 498

²⁸⁴ Spanish Civil Code 1889, art 1,588.

²⁸⁵ *ibid*

²⁸⁶ Luis de San Simón, ‘Spain’ in James Gosling and Rebecca Warder (eds), *The Shipping Law Review* (1st edn, Law Business Research 2014) 498-499

²⁸⁷ [1927] 1 KB 649

²⁸⁸ [1958] 1 WLR 1126 (QB)

First Wave

The ‘first wave’ of relevant English law shipbuilding cases began in the late 19th Century. As mentioned in Section 1.1.2, Great Britain was *the* global shipbuilding powerhouse at this time – boasting a large workforce of skilled engineers and workers²⁸⁹ operating on the banks of rivers Tyne, Mersey and Clyde.²⁹⁰ The opening case was *Seath & Co v Moore*,²⁹¹ in which engineers A. Campbell & Sons supplied engines and machinery for ships being built by TB Seath. Seath was a shipbuilder based on the River Clyde in Glasgow, an area which possessed tremendous shipbuilding appetite. The parties held their commercial relationship for a number of years but, on 12th May 1883, Campbell went bankrupt. At this point there was a pile of machinery lying on Campbell’s premises, which was intended to be incorporated into vessels that Seath was building at the time. Accordingly, Seath requested the bankruptcy administrator to declare that it had title to the materials lying in Campbell’s premises.²⁹² In rebuttal, citing Jervis CJ in *Wood v Bell*,²⁹³ counsel for Campbell argued that the contract in question was for the sale of a ship, not for the sale of the materials used to make a ship.²⁹⁴ Under a contract for the sale of a future good (ship) to be constructed, the following holds true: (i) only property in component materials affixed to the corpus of the ship will be deemed to have passed from supplier to shipyard, and (ii) upon completion and delivery, only property in component materials affixed to the corpus of the ship will be deemed to have passed from shipyard to buyer.²⁹⁵ As Lord Watson put it, ‘materials provided by the builder and portions of the fabric, whether wholly or

²⁸⁹ S Pollard, ‘The Decline of Shipbuilding on the Thames’ (1950) 3(1) *The Economic History Review* 72, 72

²⁹⁰ Richard Tames, *Economy and Society in Nineteenth Century Britain* (Taylor & Francis 2005) 81

²⁹¹ (1886) 11 App Cas 350 (HL)

²⁹² *ibid* at 356

²⁹³ (1856) 119 ER 897 (QB)

²⁹⁴ (1886) 11 App Cas 350 (HL) 367

²⁹⁵ When there are materials which have been approved for, but are as yet unappropriated to, a newbuild corpus at the point of dispute, this raises a property law issue as to which party (buyer, shipyard or supplier) has title to them. [Aleka Mandaraka-Sheppard, *Modern Maritime Law Volume 2: Managing Risks and Liabilities* (3rd edn, Informa 2013) ch 7 s 2.2.] This issue is re-examined in Section 5.4 in respect of retention of title clauses. On this, it is important to distinguish retention of title clauses from charges which must be registered under the Companies Act 2006. [William Cecil and Fiona Cain, ‘England & Wales’ in Arnold J van Steenderen (ed), *Getting The Deal Through Shipbuilding 2017* (6th edn, Law Business Research 2017) 33.]

partially finished, although intended to be used in the execution of the contract, cannot be regarded as appropriated to the contract, or as “sold,” unless they have been affixed to or in a reasonable sense made part of the corpus²⁹⁶ – as per s 18 r 5(1) of the Sale of Goods Act 1893,²⁹⁷ the latest iteration of the Act at the time of this case.

Accordingly, it was held that shipbuilding materials strewn across Campbell’s estate would only have been reclaimable by Seath under a work and materials contract. Due to the sale of goods characterisation of the Campbell-Seath contract however, Seath could only claim shipbuilding materials which had been affixed to the ship corpus. Moreover, in terms of the characterisation of contracts under English law, the court’s decision was significant in delineating between ship-materials contracts (for the sale of component materials used to make a ship) and shipbuilding contracts (for the sale of a completed ship made using component materials).

In 1904, the courts were faced with the case of *Reid v Macbeth & Gray*,²⁹⁸ involving a shipbuilding contract between shipbuilder Reid and ship-owner Macbeth. Clause 4 of the contract indicated that Macbeth had title to the vessel and its components during construction, stating:

‘The vessel as she is constructed, and all her engines, boilers, and machinery, and all materials from time to time intended for her or them, whether in the building-yard, workshop, river, or elsewhere, shall immediately as the same proceeds become the property of the purchasers, and shall not be within the ownership, control, or disposition of the builders’.²⁹⁹

Reid ordered a quantity of iron and steel plates from a nearby merchant to be used in building the vessel. The merchant was Young & Alexander, who in 1871 had

²⁹⁶ (1886) 11 App Cas 350 (HL) 381 (Lord Watson)

²⁹⁷ Sale of Goods Act 1893, s 18 r 5(1).

²⁹⁸ [1904] AC 223 (HL)

²⁹⁹ *ibid* at 223

taken over the Govan shipyard located on the River Clyde in Glasgow as a base from which to carry out its ship building and ship material supply business.³⁰⁰ Unfortunately shipyard Reid went bankrupt before the ship could be completed, at which point the plates it had ordered were lying at Greenock railway station (just west of Reid's shipyard in Port-Glasgow) ready for delivery. The question in this case was therefore whether ship-owner Macbeth held title in the plates, on the basis of cl 4 of the contract. It was however held that the contract in question was for purchase of the completed newbuild. Macbeth could not claim the materials, as they were neither affixed to the corpus³⁰¹ nor had they been sold as discrete 'contracts of sale' under the Sale of Goods Act.³⁰² As Lord Davey put it '[t]here is only one contract—a contract for the purchase of the ship. There is no contract for the sale or purchase of these materials separatim'.³⁰³

Thus, the decisions in *Seath* and *Reid* delineated ship-materials contracts (for the sale of the individual components used to make a ship), from shipbuilding contracts – for the sale of a ship that will be built (or 'manufactured') to completion using component materials.³⁰⁴

A third case concerning whether unappropriated materials were claimable under a shipbuilding contract was *Re Blyth Shipbuilding and Dry Docks Company*.³⁰⁵ Here, there was a shipbuilding contract to be paid for in instalments, between shipbuilders Blyth and buyer Cosulich Societa Triestina. Blyth began shipbuilding in Northumberland in 1811, and by the mid-1920s had become known for its novel

³⁰⁰ Acumfaegovan, 'The Yards' <www.acumfaegovan.com/shipbuilding/yards/yards.php> (accessed 18 January 2018)

³⁰¹ When there are materials which have been approved for, but are as yet unappropriated to, a newbuild corpus at the point of dispute, this raises a property law issue as to which party (buyer, shipyard or supplier) has title to them. [Aleka Mandaraka-Sheppard, *Modern Maritime Law Volume 2: Managing Risks and Liabilities* (3rd edn, Informa 2013) ch 7 s 2.2.] This issue is re-examined in Section 5.4 in respect of retention of title clauses. On this, it is important to distinguish retention of title clauses from charges which must be registered under the Companies Act 2006. [William Cecil and Fiona Cain, 'England & Wales' in Arnold J van Steenderen (ed), *Getting The Deal Through Shipbuilding 2017* (6th edn, Law Business Research 2017) 33.]

³⁰² [1904] AC 223 (HL) 223

³⁰³ *ibid* at 232 (Lord Davey)

³⁰⁴ Sale of Goods Act 1893, s 5(1).

³⁰⁵ [1926] Ch 494 (CA)

ship propeller technologies.³⁰⁶ It was technological advances like these which helped cement Great Britain's position as dominant world shipbuilder at the time.³⁰⁷ Clause 6 of the contract between Blyth and Cosulich concerned the passage of title, and stipulated:

‘[F]rom and after payment by the purchasers to the builders of the first instalment on account of the purchase price the vessel and all materials and things appropriated for her should thenceforth, subject to the lien of the builders for unpaid purchase money including extras, become and remain the absolute property of the purchasers’.³⁰⁸

However, after two instalments were paid (and the vessel partly complete), Blyth's shareholders decided that they wished to reclaim their investments. A receiver was thus appointed and work on the newbuild ceased.³⁰⁹ At the time when the receiver was appointed, there were unappropriated materials³¹⁰ ready to be incorporated into the vessel. The buyer argued that these were his property, citing cl 6. In response, Blyth's counsel, with whom the court agreed, successfully argued that the unappropriated materials had not passed to the buyer because the nature of the contract was one for the sale of a completed ship – not for the sale of its constituent materials. The case precedent, namely *Seath* and *Reid*, both made reference to the fact that only a unitary ship corpus can pass under a shipbuilding contract characterised as a sale of goods. The test for whether property in shipbuilding components had passed was therefore to ask whether the components had yet been affixed to the ship corpus. While *Re Blyth* offered the same test for the passage of property under a sale of goods characterised shipbuilding contract, it did not merely talk about the affixation (or otherwise) of the components but also referred to the

³⁰⁶ Grace's Guide, 'Blyth Shipbuilding and Dry Docks Co'

<www.gracesguide.co.uk/Blyth_Shipbuilding_and_Dry_Docks_Co> accessed 18 January 2018

³⁰⁷ See Section 1.1.2

³⁰⁸ [1926] Ch 494 (CA) 494 (Romer J)

³⁰⁹ *ibid* at 496 (Romer J)

³¹⁰ When there are materials which have been approved for, but are as yet unappropriated to, a newbuild corpus at the point of dispute, this raises a property law issue as to which party (buyer, shipyard or supplier) has title to them. [Aleka Mandaraka-Sheppard, *Modern Maritime Law Volume 2: Managing Risks and Liabilities* (3rd edn, Informa 2013) ch 7 s 2.2.] This issue is re-examined in Section 5.4 in respect of retention of title clauses. On this, it is important to distinguish retention of title clauses from charges which must be registered under the Companies Act 2006. [William Cecil and Fiona Cain, 'England & Wales' in Arnold J van Steenderen (ed), *Getting The Deal Through Shipbuilding 2017* (6th edn, Law Business Research 2017) 33.]

overall ‘deliverability’ of the good, as per s 18 r 5(1) of the Sale of Goods Act.³¹¹ Specifically, Romer J stated that ‘[w]here there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract...the property in the goods thereupon passes to the buyer’.³¹²

Therefore, *Re Blyth* reached the same conclusion to *Seath* and *Reid* in defining what will pass under a shipbuilding contract, however it did so by reference to the test of deliverability in s 18 r 5(1). The case is thus highly significant in the chronology of English shipbuilding law, because it reconciles shipbuilding contracts with this provision of the Sale of Goods Act – and in doing so, seemingly characterises the contracts as a sale of goods. And the significance of *Re Blyth* has continued, having been cited and followed in the Australian cases of *Altmann v Skippercraft Boat Builders*³¹³ (regarding the test of ‘deliverability’³¹⁴) and *North Western Shipping and Towage v Commonwealth Bank of Australia*³¹⁵ (regarding when property has been sufficiently appropriated for delivery³¹⁶), and more recently in the Canadian cases of *Re Anderson’s Engineering Ltd*³¹⁷ (to be explored in Section 2.3.1) and *FC Yachts v Splash Holdings*³¹⁸ (regarding ownership of a partially complete newbuild.³¹⁹)

Moreover, the case of *Barclay Curle & Company Ltd v Sir James Laing & Sons Ltd*³²⁰ also found that title in a newbuild passes unitarily under a contract for the sale of goods. In contrast to the *Seath*, *Reid* and *Re Blyth* cases however, *Barclay Curle* illustrated this point in the context of ship arrest. Here, shipbuilder Barclay Curle and Italian buyers Lloyd Sabaubo had contracted for the construction of two

³¹¹ Sale of Goods Act 1893, s 18 r 5(1).

³¹² [1926] Ch 494 (CA) 499 (Romer J)

³¹³ [1982] 32 SASR 351 (Supreme Court of South Australia)

³¹⁴ *ibid* (Bollen J)

³¹⁵ [1993] FCA 122

³¹⁶ *ibid* [24] (O’Loughlin J)

³¹⁷ [2002] BCSC 504

³¹⁸ [2007] FC 1257

³¹⁹ *ibid* [10]-[12] (Harrington J)

³²⁰ (1907) 15 SLT 482 (Court of Session, Inner House)

steamers – identifiable as the 468 and the 469. These vessels were reportedly to serve as hospital ships in the Italo-Turkish war and also in earthquakes occurring around Italy in the early 20th Century.³²¹ Clause 7 of the parties' agreement stated that the vessels will not be considered as 'delivered' until they had undergone trials off the coast of Greenock and a trial voyage in Genoa. The purchase price was to be paid in instalments at various intervals during the construction process. During construction, the buyers arrested both steamers. In the arrest agreement, the buyers asserted that they were due the £221,000 worth of pre-delivery instalments which they had paid to the shipbuilders up until the point of arrest. Out of this came a petition by the shipbuilders to have the steamers returned to them, on the basis that number 468 was in a graving dock and number 469 in the shipyard when the arrests were made. The buyer asserted that, since he had agreed to pay the contract price in instalments, property in the ship increasingly passed to him as each instalment was paid. Accordingly, he argued that the pre-delivery arrest was perfectly allowable, given that property in the then partially complete ships had already passed to him. Finding in the opposite, Lord M'Laren reminded the court that, under s 18 of the Sale of Goods Act,³²² determinations regarding when property under a (shipbuilding) contract will pass should be based not on the payment regime, but upon the parties' intentions. For M'Laren, by including a post-trial deliverability clause (cl 7), the parties intended for delivery to be made, and for property to pass, once the trials had been completed. He stated 'when we examine the contract of sale under which this ship was built...as a matter of intention, I see no reason to doubt that it was the wish of both the seller and the purchaser that the ship should remain the property of the seller until...completion of the trials'.³²³ Continuing, Lord Kinnear referenced Sale of Goods Act s 18 r 2, which states that '[u]nless a different intention appears...Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until the thing is done and the buyer has notice that it has been done'.³²⁴ According to this rule, Lord Kinnear held

³²¹ Tony De Bolfo, 'In Search of Kings' (Book extracts)

<<https://bi.hcpdts.com/reflowable/scrollableiframe/9780730491422>> accessed 18 January 2018

³²² Sale of Goods Act 1893, s 18.

³²³ (1907) 15 SLT 482 (Court of Session, Inner House) 488 (Lord M'Laren)

³²⁴ Sale of Goods Act 1893, s 18 r 2.

that there was no intention for title in the newbuilds to pass prior to delivery,³²⁵ and that deliverability would only being achieved once conditions in cl 7 of the parties' contract had been fulfilled. Furthermore the Lord President, reaffirming the earlier decision in *Reid*, stated that 'the only sale that is found in this contract is the sale of a completed ship...the property of the ship was not passed from Barclay Curle & Co...to the purchaser bit by bit as it came into existence'.³²⁶

In sum therefore, the buyer did not have property in the steamers upon their arrest. The steamers were thus ordered to be returned to the shipbuilders, who were relieved of their alleged £221,000 instalment repayment owing. In doing so, the court in *Barclay Curle* enunciated that title passes unitarily under a shipbuilding contract once any conditions precedent have been fulfilled and delivery is made – as is the case for all contracts under the Sale of Goods Act. This is so even where a sale of goods contract stipulates that payment is to be made by instalments, because an instalment based payment regime divides the transfer of *payments*, not the transfer of *property* or *title*.

Accordingly, this 'first wave' of shipbuilding contract cases allude to a sale of goods characterisation of the shipbuilding contract. Their approach to doing so was to distinguish ship-*materials* contracts (for the sale of the individual components used in making a ship) from ship-*building* contracts (concerning the sale of the completed and 'deliverable' ship). The case of *Barclay Curle* then asserted that the passage of title under shipbuilding contracts is determined by the intention of the parties, rather than by the passage of payment – this being the case for all contracts falling under the Sale of Goods Act.

Second Wave

It was not until a 'second wave' of cases that English law's characterisation of the

³²⁵ (1907) 15 SLT 482 (Court of Session, Inner House) 485

³²⁶ *ibid* at 487 (Lord President)

shipbuilding contract, as a sale of goods contract, was *expressly* confirmed. This wave began in the aftermath of the First World War, and ended after the Second World War – periods of history where industries such as shipping sought to find their feet following significant disruption.

Firstly, the case of *Behnke v Bede Shipping*.³²⁷ Here, a ship called ‘The City’ was being sold by its British owner to a German ship-owner. Having had much of its fleet confiscated under the Treaty of Versailles following the First World War, German shipping companies were keen to make up for lost time by purchasing ships.³²⁸ It is likely because of ship purchases such as ‘The City’ in 1926 that the German shipping markets entered a boom from 1927 to 1929.³²⁹ This particular transaction was conducted through an intermediary broker, Mr Sloan, with the sellers being represented by Mr Frew. On November 19th, Mr Sloan drafted a contract and sent it to the sellers. On November 24th, the sellers duly returned the contract to Mr Sloan having inserted a clause requiring it to inspect and repair the ship before delivery to the buyer. Mr Sloan then sent the amended contract to the buyers. On November 25th, the seller told the buyer (via Mr Sloan) that it would need to respond to the amended contract terms by November 27th. The buyer accordingly signed the contract and posted it to the seller. In the meantime however, the seller’s representative Mr Frew had already agreed to sell the ship to another buyer. Counsel for the original buyer (the German ship-owner) in turn argued that the seller had breached a term in the contract which prevented him from selling the ship to a secondary buyer. The German ship-owner subsequently urged the court to order that the original sale contract be specifically performed, such that the seller would have to sell the ship to him.

Giving judgment, Wright J emphasised the fact that s 52 of the Sale of Goods Act³³⁰ allows a court to order the specific performance of contracts for the sale of *goods*.

³²⁷ [1927] 1 KB 649

³²⁸ Hartmut Rübner and Lars Scholl, ‘Major German Shipping Lines during the 1920s and 1930s’ (2009) 21(1) *International Journal of Maritime History* 27, 35

³²⁹ *ibid* 38

³³⁰ Sale of Goods Act 1893, s 52.

The court could therefore only order specific performance of the contract to sell ‘The City’ to the German ship-owner if ships fell under the Sale of Goods Act’s definition of ‘goods’, and thus the *sale of* a ship constituted the ‘*sale of* goods’. Section 62 of the 1893 Act (and the equivalent s 61 provision in the 1979 Act) define ‘goods’ to include ‘all personal chattels other than things in action and money’,³³¹ whereby ‘things in action’ are deemed to include ‘shares and other securities, debts, bills of exchange and other negotiable instruments, bills of lading, insurance policies, patents, copyrights and trade marks, lottery tickets, and other incorporeal property’.³³² Clearly a ‘ship’ is neither money nor any of the items listed under those considered ‘things in action’. Accordingly, it constitutes a ‘personal chattel’ and thus a ‘good’ under the Sale of Goods Act, whose sale would therefore constitute the sale of goods. This meant that contracts for the sale of ships (such as ‘The City’ in *Behnke*) could be specifically performed by an order of the courts under s 52.³³³ Most importantly however, Wright J made clear that a ship being constructed is also subject to the Sale of Goods Act.³³⁴ This well and truly established that, in English law, shipbuilding contracts fall under sale of goods legislation as contracts for the sale of goods.

As a caveat, it is notable that breach of condition following non-delivery (as featured in *Behnke*) can be remedied either by specific performance of the contract or by an award of damages.³³⁵ In this case, counsel for the German ship-owner successfully argued that specific performance was a more appropriate remedy because the ship was bespoke. Damages would have been insufficient recompense for him, as he could not have simply gone out onto the market and used them to buy another ship of the same type, because no identical ship existed – a prospect to be revisited in Section 5.2.3.

³³¹ Sale of Goods Act 1893, s 62; Sale of Goods Act 1979, s 61.

³³² Michael G Bridge, *Benjamin’s Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 1-080

³³³ See Section 5.2.3

³³⁴ [1927] 1 KB 649, 654 (Wright J)

³³⁵ Damages for non-delivery are explored in Section 5.2.1

A second case which confirmed the legal characterisation of shipbuilding contracts as sale of goods contracts, was that of *McDougall v Aeromarine of Emsworth*.³³⁶ Here, shipbuilders Aeromarine of Emsworth agreed to build a yacht³³⁷ for buyer Ronald McDougall. In the years following the Second World War, yacht racing had become an increasingly popular pastime in Britain – potentially why McDougall contracted in 1957 for the construction of a Thames cruiser yacht.³³⁸ Payment was to be made in instalments, and cl 8 of the contract specified when property in the vessel and its materials³³⁹ would pass, as follows:

‘The said craft together with all materials equipment fittings and machinery purchased by the builders specifically for the construction thereof whether in their building yard workshops water or elsewhere shall become the absolute property of the buyer upon the first instalment being paid’.³⁴⁰

When the yacht was launched, the buyer noticed that it was defective. The shipbuilders therefore offered to make repairs under one of two propositions. Firstly, the shipbuilder asked for the contract to be varied to include the repairs, rather than have the repairs undertaken as remedy for a breach – the latter which, if revealed to the rest of the industry, might lead the shipbuilder to gain a reputation as being a contract ‘breacher’. Alternatively, the shipbuilder asked that the buyer not repudiate the contract on the basis of the defects, but to accept a 50 guinea discount on the original contract price.³⁴¹ The buyer rejected both of these, repudiated the contract, and commenced legal proceedings in pursuit of: (i) the pre-delivery instalments which he had already paid, and (ii) damages for his inability

³³⁶ [1958] 1 WLR 1126 (QB)

³³⁷ The scope of this thesis is limited to commercial vessels, as defined in Section 1.1.4. However, *McDougall v Aeromarine of Emsworth* is included on the basis that Lord Diplock expressly characterises the shipbuilding contract in his judgment.

³³⁸ Equinox Sailing, ‘RORC History’ <<http://equinoxsailing.com/rorc-history/>> accessed 18 January 2018

³³⁹ When there are materials which have been approved for, but are as yet unappropriated to, a newbuild corpus at the point of dispute, this raises a property law issue as to which party (buyer, shipyard or supplier) has title to them. [Aleka Mandaraka-Sheppard, *Modern Maritime Law Volume 2: Managing Risks and Liabilities* (3rd edn, Informa 2013) ch 7 s 2.2.] This issue is re-examined in Section 5.4 in respect of retention of title clauses. On this, it is important to distinguish retention of title clauses from charges which must be registered under the Companies Act 2006. [William Cecil and Fiona Cain, ‘England & Wales’ in Arnold J van Steenderen (ed), *Getting The Deal Through Shipbuilding 2017* (6th edn, Law Business Research 2017) 33.]

³⁴⁰ [1958] 1 WLR 1126 (QB) 1127 (Diplock J)

³⁴¹ Accepting this offer would be an example of ‘goodwill’, a concept explained in Section 5.4.6

to use the yacht during the yachting season. The shipbuilders in turn argued that the buyer's rejection of their proposals, and subsequent repudiation of the contract, constituted wrongful repudiation. Normally under a sale of goods contract, a buyer has the right to reject the good and disclaim property in it. Given the presence of cl 8 in this particular contract however (which stated that property in the ship and materials passed to the buyer upon payment of the first instalment), the shipbuilders argued that buyer McDougall's right to reject the ship would be unavailable after this point – because he would then be rejecting his own property. The courts were however unmoved by this reasoning. Whilst cl 8 stipulated that property in the ship would *in theory* pass upon payment of the first instalment, *in practice* the transfer could not be made at this stage, as there was nothing physical to transfer. The ship would have been merely a bunch of unattached parts at this stage. Property could only have passed once the ship was in a deliverable state, at which point the buyer could then decide to reject it. Thus, McDougall was still entitled to reject the ship and disclaim property in it, as the contract was a sale of goods under which property in the subject matter would only pass once deliverable. Crucially however, Lord Diplock concluded by stating 'it seems well settled by authority that, although a shipbuilding contract is in form a contract for the construction of the vessel, it is in law a contract for the sale of goods'.³⁴² Accordingly, *McDougall* is fundamental to the legal history of the shipbuilding contract under English law, as it affirms their characterisation as a sale of goods contract.

Third Wave

Finally, a 'third wave' of cases entrenched the sale of goods characterisation of shipbuilding contracts. They did so by demonstrating that statutory terms imposed on a contract by virtue of its sale of goods characterisation can only be excluded where the provisions of the contract *expressly* allow this (and where these provisions communicate this intention to a sufficient degree). These cases accordingly feature failed attempts by parties to make provisions of the Sale of Goods Act inapplicable to ship purchase and shipbuilding contracts.

³⁴² [1958] 1 WLR 1126 (QB) 1129 (Diplock J)

Firstly, in *Dalmare SpA v Union Maritime Ltd, Valla Shipping Ltd (The Union Power)*,³⁴³ a vessel was being sold to buyers under the Norwegian ship sale contract ‘Saleform 93’. The ship then broke down on its first voyage, prompting the buyer to seek damages for the seller’s alleged breach of s 14(2) of the Sale of Goods Act³⁴⁴ – the statutory implied term of satisfactory quality.³⁴⁵ The contract contained the words ‘as is where is’. The seller took these words to mean that the buyer had agreed to purchase the vessel in the condition it was in upon purchase – ‘warts and all’. Counsel for the seller subsequently argued that the presence of these words excluded the implied term of satisfactory quality under s 14(2) of the Sale of Goods Act from applying to the contract, meaning that the seller was exonerated from any liability for breach of this provision. Counsel for the buyers, with whom the court agreed, counter-argued that exclusion of terms implied under the Sale of Goods Act will only be granted if the contract *expressly* stipulates their exclusion (and if their exclusion satisfies mandatory rules and prohibitions.³⁴⁶) Implied terms will not be excluded on the basis of semantic inference – such as inferring from the words ‘as is where is’ that a buyer is to take a good in the condition that it was in upon agreement. The court’s decision was thus policy driven. In emphasising the need for express stipulation when excluding statutory terms from applying to a commercial contract, Flaux J was careful not to open the floodgates to endless litigants arguing that statutory terms should be excluded from their contracts on the basis of tenuous inferences drawn from the wording of their provisions. To rule otherwise would, in the words of Flaux, ‘drive...a coach and horses through the authorities on the need for clear words to be used to exclude statutory implied conditions’,³⁴⁷ and in turn countervail the notion of certainty in contracting.

³⁴³ [2012] EWHC 3537 (Com Ct)

³⁴⁴ Sale of Goods Act 1979, s 14(2).

³⁴⁵ Until January 1995, s 14(2) of the Sale of Goods Act 1979 was a statutory implied term of ‘*merchantable* quality.’ [WCH Irvine, ‘Satisfactory quality: what does it mean?’ [Nov 2004] *Journal of Business Law* 684, 684.] The prefix ‘merchant’ alludes to the sale of an item in the course of business operations, perhaps suggesting that s 14(2) was predominantly aimed at regulating business transactions (such as commercial shipbuilds). [Collins Dictionary, ‘Merchant’ <www.collinsdictionary.com/dictionary/english/merchant> accessed 11 January 2018.] The term ‘satisfactory’ makes no such allusions however.

³⁴⁶ Contractual terms purporting to exclude or restrict liability for breach of the Sale of Goods Act 1979’s implied terms are only operable if they fulfil the Unfair Contract Terms Act 1977’s ‘reasonableness’ test – explained further in Section 2.6. [Sale of Goods Act 1979 s 55(1).]

³⁴⁷ [2012] EWHC 3537 (Com Ct) [81] (Flaux J)

A second decision which built upon *The Union Power* was *Michael Hirtenstein v Hill Dickinson LLP*.³⁴⁸ Mr Hirtenstein bought a second hand yacht.³⁴⁹ The purchase included a warranty on the yacht's condition, despite the fact that it had undergone neither a survey nor sea trials. Soon after purchase, the yacht's engines failed. Attention was once again drawn to the meaning of the words 'as is where is' in the contract. Building upon what was said in *The Union Power*, Leggatt J emphasised that these words 'when included in a contract for the sale of goods are not by themselves sufficient to exclude the conditions as to satisfactory quality and fitness for purpose implied by the Sale of Goods Act, and only exclude the right to reject the goods for breach of those conditions'.³⁵⁰ Thus, whilst the words could not outright exclude the Sale of Goods Act's implied terms, they could exclude a right to reject the goods following breach of one of these terms.

Taken together, *The Union Power* and *Michael Hirtenstein* highlight that excluding Sale of Goods Act terms from a sale of goods characterised contract will only be permissible if this is expressly stipulated.³⁵¹ In the absence of stipulation to a sufficient degree, the contract will remain firmly within the remit of the Act and its implied terms.

A similar conclusion was drawn in the shipbuilding case of *Neon Shipping Inc v Foreign Economic & Technical Corporation Co of China*,³⁵² where a buyer entered into a contract with a shipbuilder to build a carrier. Three years after delivery, the buyer made a claim on the basis that the carrier's cranes were faulty. This was rebuffed by counsel for the shipbuilder, who argued that the claim would be time-barred under art XI of the contract, which stated:

³⁴⁸ [2014] EWHC 2711 (Com Ct)

³⁴⁹ The scope of this thesis is limited to commercial vessels, as defined in Section 1.1.4. However, *Michael Hirtenstein v Hill Dickinson LLP* is included on the basis of its relationship with the case of *The Union Power* (involving a commercial vessel), which it heavily cites.

³⁵⁰ [2014] EWHC 2711 (Com Ct) [55] (Leggatt J)

³⁵¹ Michael G Bridge, *Benjamin's Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 1-031

³⁵² [2016] 1 CLC 418 (Com Ct)

‘Seller guarantees that Vessel, and all parts thereof that [are] manufactured or supplied by Seller, its sub-contractors and/or vendors under this Contract, will be seaworthy...upon delivery and for a period of twelve (12) months from the Date and Time of Delivery’.³⁵³

Since any *express* claims for breach were time-barred, the buyer then considered whether the contract contained an *implied* term which he could claim had been breached by the shipbuilder. Because the buyer had made it known to the shipbuilder prior to completion that the ship was going to be used for a specific purpose (for which fully functioning cranes were required), the buyer’s counsel argued that the shipbuilder was in breach of the Sale of Goods Act s 14(3) implied term assuring fitness for purpose.³⁵⁴ The shipbuilder’s counsel counter-argued, stating that s 14(3) is unlikely to be applicable to shipbuilding projects such as the present one (where the ship being built has a standardised specification), and is instead only applicable to bespoke newbuilds. The basis of their assertion lay in the work of Simon Curtis, a shipbuilding lawyer and author of ‘The Law of Shipbuilding Contracts’,³⁵⁵ whose book states:

‘Section 14(3) will not, however, normally assist the purchase of a new building in a quality dispute. The subsection is designed to cover the situation in which the goods are required for a specific purpose made known to the seller before the contract is signed; it is as such likely to be inapplicable in the overwhelming majority of shipbuilding projects, in which the vessel is built for use in standardised trades which are well known to, and understood by, both the buyer and the builder’.³⁵⁶

Burton J however ruled that the shipbuilder’s counsel had interpreted Simon Curtis’ words wrongly. What Curtis meant was that ‘reliance upon the implied term was unlikely to be necessary in a shipbuilding contract which made express provisions for a specification which was agreed by both parties to be applicable to the purpose

³⁵³ *ibid* at 421 (Burton J)

³⁵⁴ Sale of Goods Act 1979, s 14(3).

³⁵⁵ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012)

³⁵⁶ [2016] 1 CLC 418 (Com Ct) 433 (Burton J) citing Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 3 art VI

for which the vessel was required'.³⁵⁷ Stated differently, Curtis was not saying that s 14(3) will not *apply to* the majority of shipbuilding projects, but rather that s 14(3) is unlikely to be *necessary for* the majority of shipbuilding projects – as parties will tend to include contractual provisions detailing the specification which will make the vessel fit for purpose. Accordingly, whilst the Sale of Goods Act's implied term of fitness for purpose under s 14(3) did indeed apply to the shipbuilding contract in question, most shipbuilding contracts will likely include terms stipulating the purpose for which the vessel is required – thus superseding the need for s 14(3) in any case. Overall therefore, the case confirmed the applicability of the Sale of Goods Act (and thus its implied terms) to shipbuilding contracts, entrenching their sale of goods characterisation.

2.3.1 Foreign Case Law following suit

The following cases from foreign jurisdictions mirror English law's sale of goods characterisation of the shipbuilding contract, and also draw upon the English courts' *approach* to characterising the shipbuilding contract in this way. Recourse to these cases thus demonstrates how English law informs the legal systems of foreign nations.

Firstly the Canadian case of *Re Anderson's Engineering Ltd*,³⁵⁸ which followed *Re Blyth*³⁵⁹ in asserting that sale of goods contracts are those under which title can only pass when the good is 'deliverable'. Here, builders Anderson Engineers were constructing a fire truck for buyers On-Line. Part-way through the construction process however, Anderson went bankrupt. At this point, a chassis and fire pump had not yet been attached to the partially completed truck. The question was therefore whether property in the pump and chassis had passed to the buyers before Anderson's bankruptcy. The passage of property is first and foremost established from the express intentions of the parties. Although the parties had not explicitly

³⁵⁷ [2016] 1 CLC 418 (Com Ct) 435-436 (Burton J)

³⁵⁸ [2002] BCSC 504

³⁵⁹ This case was introduced in Section 2.3

stipulated an intention as to how property in the item should pass, they elected the Canadian Sale of Goods Act 1996³⁶⁰ as the governing provision, and builders Anderson had been performing on the basis that the contract was for sale of the completed fire truck. Under s 4 of the Act, a party can only claim property in goods which are in a 'deliverable state'.³⁶¹ The goods in question (namely the pump and chassis) were, according to the judge, 'not in a deliverable state as neither On-Line nor the Regional District would under the contract have been bound to take delivery of the Chassis and Pump except as part of a completed fire truck'.³⁶² Accordingly, much akin to dicta by their Lordships in *Seath* and Lord Davey in *Reid*,³⁶³ this sale of goods characterised contract was for the sale of the *completed* corpus, not for the sale of the materials which, when put together, make up the completed corpus. As the pump and chassis had not yet been affixed to the truck at the time of Anderson's bankruptcy, property in them would not have passed. Accordingly, the court held that title to such items remained with seller Anderson – a ruling subsequently relied upon by the Supreme Court of Victoria in *Warehouse Sales Pty v LG Electronics Australia*.³⁶⁴ Moreover, the decision in *Re Anderson's Engineering* drew upon the English law *approach* to characterising shipbuilding contracts as sale of goods contract. The intentions of the parties prevail, and if such intention points toward a sale of goods characterisation, then title to materials can only pass if they are sufficiently appropriated to a deliverable corpus.

Secondly, a foreign case which drew upon the approach to characterising shipbuilding contracts in *Barclay Curle*³⁶⁵ is *Pacific Islands Shipbuilding v Don The Beachcomber (No. 3)*³⁶⁶ from Hong Kong. Here, shipbuilders Pacific Island contracted with a ship-owner to build a yacht.³⁶⁷ The shipbuilder failed to deliver on time, with the ship-owner consequently rescinding the contract having alleged

³⁶⁰ Canadian Sale of Goods Act 1996.

³⁶¹ *ibid* s 4

³⁶² [2002] BCSC 504 [60] (Wong J)

³⁶³ These cases were introduced in Section 2.3

³⁶⁴ [2014] 291 FLR 407 (Supreme Court of Victoria), 419 (Sifris J)

³⁶⁵ This case was introduced in Section 2.3

³⁶⁶ [1963] HKLR 515

³⁶⁷ The scope of this thesis is limited to commercial vessels, as defined in Section 1.1.4. However, *Pacific Islands Shipbuilding v Don The Beachcomber (No. 3)* is included due to its enunciation of the fact that the passage of title in a ship is indivisible.

that the shipbuilder's delay amounted to a breach of contract. This occurred at a time when the ship-owner had paid all but the final pre-delivery instalment. The ship-owner's non-payment of the final instalment prompted the shipbuilders to claim that they were entitled to a possessory lien on the ship. The crux of their argument was aptly enunciated by Huggins J in the case, who stated that 'although the price is, under the contract, payable by instalments it is nonetheless indivisible'.³⁶⁸ In other words, although an instalment based payment regime divides the transfer of *payments* for a ship, it does not also divide the transfer of *property* in that ship. As is customary for all sale of goods contracts, the transfer of property unitarily occurs upon delivery by the shipbuilder, the ship-owner having made payment in full. Applied to the present facts, because the final instalment payment had not been made by the ship-owner at the time when he sought to rescind the contract, title had not yet passed to him. This meant that the shipbuilder had a right to retain the ship under a possessory lien. Huggins J went on to add that, for a shipbuilding contract to instead be characterised as a contract for services, the contract must refer to a regime other than one for which 'the builder is to do all the work and to be paid at the end',³⁶⁹ as is otherwise the case under sale of goods contracts. Thus, as under English law, a shipbuilding contract under Hong Kong law will be characterised as a sale of goods contract but for express stipulation to the contrary.

Another foreign case which both characterised shipbuilding contracts as sale of goods provisions, and mirrored the English law approach to making this characterisation, is the Hong Kong Court of Appeal decision in *Dragon Pearl Night Club Restaurant v Leung Wan Kee Shipyard*³⁷⁰ and subsequent Court of First Instance ruling in *Leung Wan Kee Shipyard v Dragon Pearl Night Club Restaurant*.³⁷¹ Dragon Pearl had a cruise business, and contracted with shipbuilder Leung Wan Kee to build a cruise ship. Payment was to be made in seven instalments. Whilst the first four were successfully paid, buyer Dragon Pearl was late in paying the fifth and sixth instalments. This led shipbuilder Leung Wan to

³⁶⁸ [1963] HKLR 515, 539

³⁶⁹ *ibid* 540

³⁷⁰ [2011] 5 HKLRD 718

³⁷¹ [2015] HKCFI 1546

terminate the contract whilst the ship was still only partially complete. The buyers however brought a claim before the Court of Appeal and latterly the Court of First Instance, arguing that title to the partially completed vessel was theirs.

Counsel for the buyers cited dicta in the *Seath*³⁷² and *Re Blyth*³⁷³ cases,³⁷⁴ which stated that the intentions of the parties will determine when title to the vessel passed. Reconciling s 20 of the Hong Kong Sale of Goods Ordinance³⁷⁵ with s 18 of the English Sale of Goods Act 1979, counsel reminded the court that property in a shipbuild will pass upon completion and delivery ‘[u]nless a different intention appears’.³⁷⁶ For the buyers, cl 4 of the contract between Dragon Pearl and Leung Wan constituted a ‘different intention’ for the purposes of Ordinance s 20, because it stated that ‘at each stage of the construction of the steel harbour cruiser when an instalment of the price becomes due and payable, property in the steel harbour cruiser, so far as then finished, shall pass to the Plaintiff [buyer]’.³⁷⁷ On the basis of cl 4, which indicated that property was to increasingly pass upon payment of each pre-delivery instalment, property in the partially complete vessel lay with buyer Dragon Pearl as it had paid six of the seven instalments due under the contract at the time of termination (four of them promptly, and a further two late). Moreover, the contract’s heading stated that the shipbuilder was being engaged to ‘design and build’³⁷⁸ a vessel, as opposed to ‘sell and deliver’ one. If the contract was indeed a construction contract for the design and build of a vessel (rather than a sale of goods contract for the sale and delivery of a vessel), then this would corroborate the

³⁷² ‘[W]here it appears to be the intention, or in other words the agreement, of the parties to a contract for building a ship, that at a particular stage of its construction, the vessel, so far as then finished, shall be appropriated to the contract of sale, the property of the vessel as soon as it has reached that stage of completion will pass to the purchaser’. [*Dragon Pearl Night Club Restaurant v Leung Wan Kee Shipyard* [2011] 5 HKLRD 718, 721 citing *Seath & Co v Moore* (1886) 11 App Cas 350 (HL) 380 (Lord Watson).]

³⁷³ ‘[T]he issue remains whether a contract was for the sale of a completed ship or “for the sale from time to time of a ship in its various stages of construction...”. If the latter then notwithstanding the property was not in a deliverable state, the property would pass, notwithstanding Rule 5, if a contrary intention appears, which may be expressed or inferred’. [*Dragon Pearl Night Club Restaurant v Leung Wan Kee Shipyard* [2011] 5 HKLRD 718, 724 citing *Re Blyth Shipbuilding and Dry Docks Company* [1926] Ch 494 (CA) 500 (Romer J).]

³⁷⁴ These cases were introduced in Section 2.3

³⁷⁵ Hong Kong Sale of Goods Ordinance Cap 26.

³⁷⁶ *ibid* s 20

³⁷⁷ [2011] 5 HKLRD 718, 721

³⁷⁸ [2015] HKCFI 1546 [2]

buyer's argument that he was to obtain title progressively during the project upon payment – since the progressive or incremental passage of title is customary of construction contracts (as explored further in Section 2.4.1).

Counsel for shipbuilders Leung Wan on the other hand relied on cl 7.5 of the parties' agreement, which stated that risk during the construction of the vessel lay with the shipbuilders, and that the transaction would only be complete once relevant documentation had been given to Dragon Pearl upon completion of the build. For Leung Wan's counsel, these points substantiated the idea that 'the Agreement was for the sale of the completed ship'.³⁷⁹ On this reasoning, title to the partially completed ship would lay with the shipbuilders, and would only have passed once the ship had been completed and the buyer paid in full – a course of events which of course did not transpire.

In the end, the court held that the overarching spirit of the agreement indicated it to be a sale of goods contract, given that the transfer of documents and title was to occur upon delivery.³⁸⁰ Broadly, the decision goes to show that the overall spirit of a shipbuilding contract, rather than its heading or 'label', will determine its legal characterisation. Moreover, the *Dragon Pearl* case upheld the protocol heralded in English shipbuilding law that the passage of title in a newbuild will be determined by the parties' intentions.

Overall therefore, cases from foreign jurisdictions have been known to characterise the shipbuilding contract as a sale of goods, and have often done so by citing (and using the approach taken in) the English decisions discussed in Section 2.3. This demonstrates the influence of English law in shipbuilding.

³⁷⁹ [2011] 5 HKLRD 718, 725

³⁸⁰ [2015] HKCFI 1546 [17(3)]

Finally, one Canadian case has used a different approach to characterising the shipbuilding contract as a sale of goods, to that taken under both English law and under the foreign cases mentioned so far in this section (*Re Anderson's Engineering, Pacific Islands Shipbuilding* and *Dragon Pearl*.) Assessing this case thus demonstrates that other jurisdictions (such as Canada) have had to deal with the quandary of how to characterise the shipbuilding contract. The case itself was *Royal Bank of Canada v Saskatchewan Telecommunications*,³⁸¹ and featured a general construction contract between builder Tritec and buyer Saskatchewan Telecommunications or 'Sask Tel'. The buildings were to be constructed on Tritec's premises before being delivered to the buyer's sites in Northern Saskatchewan. Prior to completion of the construction project, builder Tritec went bankrupt. This resulted in a dispute between the parties as to who had title to the then partially complete buildings. Resolution of the dispute required firstly establishing the contract's characterisation, and thus when property passed under the contract. The court framed it as a showdown between whether the contract resembled a sale of goods contract (to which the Sale of Goods Act would apply), or a building contract. Judge Wakeling sought to distinguish the ruling given in the Canadian general construction case of *Taypotat et al v Surgeson*.³⁸² The facts of *Taypotat* were similar to those of *Royal Bank of Canada*, and featured homes that were built in a construction yard before being placed onto the buyer's residential lots.³⁸³ The contract was found to be a building contract because, on the basis that the 'lots' were part of the soil or realty, items placed onto them (such as the buildings in question) would also be affixed to the buyer's land once completed. Put simply, the fact that the buildings were intended to be immovable once in place meant that the contract was characterised as a building contract. As a result, the court in *Taypotat* held that 'the owner was to acquire a legal proprietary interest in the home as it progressed through the various stages of construction'.³⁸⁴ Conversely, in *Royal Bank of Canada*, counsel for the appellant builders asserted that the buildings were never going to be affixed to the land, but were merely to be slid onto timbers in Northern Saskatchewan. It was accepted by the court that their

³⁸¹ [1985] 20 DLR (4th) 415

³⁸² [1985] 3 WWR 18

³⁸³ [1985] 20 DLR (4th) 415 [10] (Wakeling J)

³⁸⁴ *ibid*

‘movability’ and un-affixation to the realty meant that the contracts to build them were sale of goods contracts, for which title would not have passed until delivery and completion. As delivery and completion had not occurred by the time Tritec had been made bankrupt, it was held that title to the uncompleted buildings remained with Tritec. Moreover, *Royal Bank of Canada* is relevant because of a passage given by Judge Wakeling in the case, in which he explains why shipbuilding contracts are characterised as sale of goods contracts under Canadian law:

‘If one concludes that what is involved is the sale of a chattel, this is determinative of the fact the transaction does not come within the ambit of a building contract...‘building contracts’, are those which relate to the construction of buildings and of such works as roads, sewers, railways docks, canals and similar constructions. They do not include, for example, contracts for the construction of machines or of ships, or of any article which, when constructed, could properly become the subject matter of a contract for the sale of goods. They are, thus, confined to constructions which either directly affect the land, or are concerned with structures which become part of the realty; and are essentially contracts for the performance of services, although incidentally they may also include the supply of materials’.³⁸⁵

What Judge Wakeling had done is to find an objective factor – namely, the movability (or otherwise) of the item being built – upon which the legal characterisation of a construction contract could hinge. In a similar vein to how the Danish Sale of Goods Act operates,³⁸⁶ if a moveable object is being constructed (such as a ship), then it will be considered a sale of chattels contract falling under the Sale of Goods Act. If an immoveable object is being constructed (such as a building), then the contract will be governed by building legislation. And the utility of Wakeling’s approach to characterising such contracts was confirmed in the later Canadian decision of *Garvey v Garvey Estate*,³⁸⁷ where it was used to determine

³⁸⁵ *ibid* [12] (Wakeling J)

³⁸⁶ See Section 2.2.1

³⁸⁷ [1987] CarswellSask 401

whether a trailer permanently stationed in one place whilst connected to gas and electricity was a chattel or a fixture.³⁸⁸

2.4 – Alternative characterisations of the shipbuilding contract

As explained in Sections 2.2 and 2.3, English law characterises shipbuilding contracts as sale of goods contracts, whose primary obligation lies in the sale and delivery of a completed good (ship). However, this entrenched legal characterisation has been challenged as it fails to acknowledge that most shipbuilding projects predominantly consist of ‘the performance of work or services to which the supply of materials or...goods is incidental’.³⁸⁹ These shipbuilding projects essentially comprise two parts: ‘(1) a contract under which the supplier is to make the ship – which is a contract for services – and (2) a contract under which the supplier agrees to sell the completed ship – in effect, a contract of sale of goods’.³⁹⁰ Since ‘the whole of the work or skill’³⁹¹ often goes into the service of constructing a newbuild before its ultimate delivery, the law has occasionally characterised the shipbuilding contract with the service input in mind.³⁹²

2.4.1 Alternative characterisations under Case Law

Whilst the sale of goods characterisation of shipbuilding contracts has been entrenched in English law for the past few centuries,³⁹³ the English courts have very occasionally been known to characterise a shipbuilding contract as either a building (general construction) contract or a contract for work and materials.

³⁸⁸ *ibid* [45]–[50] (McIntyre J)

³⁸⁹ Michael G Bridge, *Benjamin’s Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 1-041

³⁹⁰ Patrick Atiyah, John Adams, Hector L MacQueen, *Atiyah’s Sale of Goods* (Revised edn, Pearson 2010) 26

³⁹¹ Michael G Bridge, *Benjamin’s Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 1-047

³⁹² Filippo Lorenzon and Ainhoa Campas Velasco, ‘Shipbuilding, Sale, Finance And Registration’ in Yvonne Baatz (ed), *Maritime Law* (3rd edn, Informa 2014) 68

³⁹³ See Section 2.3

As regards the building contract characterisation, one case which took this view was *Hyundai Heavy Industries v Papadopoulos*.³⁹⁴ Here, a Liberian company called Pitra Pride Navigation contracted with respondent shipbuilders Hyundai Heavy Industries to build a ship. The appellants were guarantors of the buyer's instalments, who would pay the instalments if the buyer became unable to do so. Article 11 of the parties' contract gave the shipbuilder a right to rescind the contract if the buyer defaulted.³⁹⁵ It transpires that the buyer did indeed default, failing to pay the second instalment of the contract price. As a result, the shipbuilder exercised his right of rescission under art 11, and the contract was cancelled.³⁹⁶ Subsequently, the shipbuilder sued the appellant guarantors for the unpaid second pre-delivery instalment. The guarantors refused, alleging that the shipbuilder's cancellation of the contract in turn cancelled his right to reclaim the as yet unpaid second instalment. The question in the case was therefore whether cancellation of a contract in turn cancels pre-accrued rights. The answer fell on two lines of reasoning.

The initial point was to establish what the buyer was paying for in exchange for his payment of the contract price. Viscount Dilhorne pointed to a provision in the contract which stated that the shipbuilder was obliged to 'build, launch, equip and complete'³⁹⁷ the vessel, with Lord Fraser referencing another provision stating that the contract price was a 'payment for services in the inspection, tests, survey and classification of the vessel'.³⁹⁸ It swiftly became apparent that the nexus of the contract lay in the services required to build the ship and make it seaworthy, as opposed to merely lying in the delivery of the completed ship. Accordingly, for Dilhorne, the contract 'was not simply one of sale but which so far as the construction of the vessel was concerned, resembled a building contract',³⁹⁹ because it embodied various characteristics of a building contract.⁴⁰⁰ This

³⁹⁴ [1980] 1 WLR 1129 (HL)

³⁹⁵ *ibid* at 1129

³⁹⁶ *ibid* at 1146 (Lord Fraser of Tullybelton)

³⁹⁷ *ibid* at 1131 (Viscount Dilhorne)

³⁹⁸ *ibid* at 1148 (Lord Fraser of Tullybelton)

³⁹⁹ *ibid* at 1134 (Viscount Dilhorne)

⁴⁰⁰ Michael G Bridge, *Benjamin's Sale of Goods* (10th edn, Sweet & Maxwell 2017) para 5-064 fn 344

postulation deviated from the entrenched sale of goods characterisation of shipbuilding contracts in English law up until that point.

On the proviso that the contract was more akin to a building contract, rather than a sale of goods contract,⁴⁰¹ the court referenced pertinent authorities in general construction law in order to answer the question in this case. It firstly cited a passage in ‘Hudson’s Building and Engineering Contracts’⁴⁰² which stated that ‘[w]here the contractor has become entitled to an instalment payment, he will not normally forfeit his right to such payment by a subsequent abandonment or repudiation of the contract, but will be entitled to sue for any unpaid instalment’.⁴⁰³ Accordingly, the fact that Hyundai Heavy Industries cancelled the contract at a time when it was still owed pre-delivery instalment payments, did not in turn cancel its entitlement to these instalments. Its right to these instalments accrued when the contract was still in operation. Cancellation and rescission take effect prospectively,⁴⁰⁴ rather than ‘rewinding’ the contract and abolishing the rights, liabilities and obligations already accrued under it.⁴⁰⁵ This was a principle formalised by Dixon J in the case of *McDonald v Denny Laschelles Ltd*,⁴⁰⁶ who asserted:

‘When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired’.⁴⁰⁷

Accordingly, cancellation only discharged defaulting buyer Pitra Pride Navigation from further obligations under the contract, and not from his already accrued

⁴⁰¹ [1980] 1 WLR 1129 (HL) 1134 (Viscount Dilhorne)

⁴⁰² Alfred Arthur Hudson and Ian Norman Duncan Wallace, *Hudson’s Building and Engineering Contracts* (10th edn, Sweet & Maxwell 1970)

⁴⁰³ [1980] 1 WLR 1129 (HL) 1134 (Viscount Dilhorne) citing Alfred Arthur Hudson and Ian Norman Duncan Wallace, *Hudson’s Building and Engineering Contracts* (10th edn, Sweet & Maxwell 1970) 255

⁴⁰⁴ [1980] 1 WLR 1129 (HL) 1141 (Lord Edmund-Davies) citing Edwin Peel, *Treitel on The Law of Contract* (14th edn, Sweet & Maxwell 2015) 641

⁴⁰⁵ [1980] 1 WLR 1129 (HL) 1135 (Viscount Dilhorne) citing John Salmond and Percy Winfield, *Principles of the Law of Contracts* (Sweet & Maxwell 1927) 286

⁴⁰⁶ (1933) 48 CLR 457 (High Court of Australia)

⁴⁰⁷ *ibid* at 476 (Dixon J)

obligation to pay the second instalment. Pitra Pride Navigation's guarantors were thus held liable to pay the second instalment on Pitra's behalf. For Lord Fraser, this ruling was driven by commercial 'common sense', as he refused to believe that these commercial entities 'intended that the guarantors were to be released from their liability for payments already due and in default just because the builder used his remedy of cancelling the shipbuilding contract for the future'.⁴⁰⁸ Rather, 'the ending of the contracts did not free the buyer from the obligation to pay the instalments liability for the payment of which had already accrued, and did not free the guarantors from liability under the guarantees'.⁴⁰⁹

Overall, *Hyundai Heavy Industries v Papadopoulos* is relevant to this thesis because the court characterised the shipbuilding contract in the case as a building contract whose primary obligation lay in the service of constructing the vessel and making it seaworthy (as opposed to a sale of goods contract whose primary obligation lay in the delivery of a completed vessel).

A few years later, a shipbuilding contract was characterised as a work and materials contract in *Stocznia Gdanska SA v Latvian Shipping Co.*⁴¹⁰ Here, the defendant buyers Latreefers Inc (a subsidiary of Latvian Shipping) entered into six shipbuilding contracts with shipyard Stocznia, for the building of vessels to be numbered from one to six. The price was payable in instalments, with the second instalment due upon keel laying of each vessel. Clause 5.05 of each contract stipulated that '[i]f the purchaser defaults in the payment of any amount due to the seller...the seller shall be entitled to rescind the contract'.⁴¹¹ When keels had been laid for vessels one and two, the buyer defaulted – citing a downturn in business in the reefer market in which it operated. This led the shipyard to rescind the contracts for vessels one and two under cl 5.05, meaning that contracts for vessels three, four, five and six, and keels for (now rescinded) vessels one and two, remained. Since the shipyard was entitled to second pre-delivery instalments on vessels for whom a

⁴⁰⁸ [1980] 1 WLR 1129 (HL) 1151 (Lord Fraser)

⁴⁰⁹ *ibid* at 1133 (Viscount Dilhorne)

⁴¹⁰ [1998] CLC 540 (HL)

⁴¹¹ *ibid* at 542 (Lord Goff)

keel was laid, it renumbered vessels three, four, five and six, as ‘new one’, ‘new two’, ‘new three’ and ‘new four’ and then assigned vessels ‘new one’ and ‘new two’ the keels previously laid for original vessels one and two.⁴¹² It then claimed the second pre-delivery instalments on ‘new one’ and ‘new two’, ‘thereby putting itself in a stronger financial position than it would have been in if it only had a right to claim damages’.⁴¹³ Moreover, the shipyard then served keel laying notices on vessels ‘new three’ and ‘new four’, before rescinding them⁴¹⁴ so that it could claim the second pre-delivery instalments on these vessels also. In rebuttal, counsel for the buyers claimed that because the contracts had been rescinded before property in the vessels could pass (which would have been upon delivery of the completed vessels, as per the entrenched sale of goods characterisation of shipbuilding contracts under English law), a total failure of consideration prevented the shipyard from reclaiming second instalments in respect of vessels ‘new one’, ‘new two’, ‘new three’ and ‘new four’. The question in this case thus emerged as to whether the shipyard was entitled to reclaim these instalments.

As in the case of *Hyundai*, the court first looked to the nature of the obligations owed by the shipyard in exchange for the buyer’s payment of the contract price. Clause 2.01 of each contract stated that the shipyard must ‘design, build, complete and deliver’⁴¹⁵ each vessel. For Lord Goff, the contracts ‘were not therefore contracts of sale simpliciter, but...contracts for work and materials’,⁴¹⁶ meaning that the ‘test is not whether the promisee has received a specific benefit [namely delivery of the completed vessel], but rather whether the promisor has performed any part of the contractual duties in respect of which the payment is due’.⁴¹⁷ Since the shipyard’s obligations included both ‘construction *and* delivery’,⁴¹⁸ its laying of keels could be considered a contractual duty for which it was owed consideration in return (on the basis that keel laying is the first stage of the construction process).

⁴¹² *ibid* at 543 (Lord Goff)

⁴¹³ *ibid*

⁴¹⁴ *ibid* at 540

⁴¹⁵ *ibid* at 542 (Lord Goff)

⁴¹⁶ *ibid* at 551 (Lord Goff)

⁴¹⁷ *ibid* at 552 (Lord Goff)

⁴¹⁸ *ibid*

Accordingly, despite the fact that the contracts were brought to an end before delivery was made and property passed, the shipyard's laying of keels was sufficient to ensure that there had been 'no total failure of consideration'⁴¹⁹ under them. It was thus at liberty to reclaim the second instalments on vessels 'new one', 'new two', 'new three' and 'new four'. Citing Clark J in a previous decision under the same action, Lord Goff concluded by asserting that there had been no 'expression of intention on the part of the seller that he should, by exercising his right of rescission under cl. 5.05(2), abandon his right at common law to recover as a debt unpaid instalments of the price which have already accrued due'.⁴²⁰ This demonstrates that contractual rights can coexist with legal rights, and is thus exemplar of (*industry*) contract clauses coexisting with the *law* – as per the 'liberal' stance to the overarching theoretical question of this thesis.

As a caveat, it is important to the overarching theoretical paradigm of this thesis to cite Rix LJ's dicta in the sister case of *Stocznia Gdanska SA v Latvian Shipping Co (No. 2)*.⁴²¹ Here, he questioned whether the shipbuilder's submission of keel laying notices for vessels 'new one', 'new two', 'new three' and 'new four' amounted to affirmation of the contracts under them, or whether the fact that they then submitted rescission notices for each vessel represented 'an intention to terminate'.⁴²² In doing so, he stated:

'I do not think that the use of a contractual mechanism for terminating the contracts is inconsistent with reliance on repudiatory conduct for effecting a common law acceptance of an anticipatory breach. Where contractual and common law rights overlap, it would be too harsh a doctrine to regard the use of a contractual mechanism of termination as unequivocally ousting the common law mechanism, at any rate against the background of an express reservation of rights'.⁴²³

⁴¹⁹ *ibid*

⁴²⁰ *ibid* at 549 (Lord Goff)

⁴²¹ [2002] EWCA Civ 889

⁴²² *ibid* [85] (Rix LJ)

⁴²³ *ibid* [88] (Rix LJ)

By asserting that contractual rights should not oust legal ones, Rix J alludes to a coexistence between (*industry*) contracts clauses and *legal* doctrine – so far as parties' rights are concerned.

In sum therefore, while the facts of *Hyundai* and *Stocznia* case concerned liability and entitlement to pre-delivery instalments,⁴²⁴ each decision was based upon the obligations owed under the contract – and thus the characterisation of the contract. The shipbuilding contracts in these particular cases were characterised as building contracts and contracts for work and materials respectively. In this way, *Hyundai* and *Stocznia* were the first English law decisions to characterise a shipbuilding contract as something other than a sale of goods contract.

Subsequently, in *Adyard Abu Dhabi v SD Marine Services*⁴²⁵ the court characterised a set of shipbuilding contracts as general construction contracts, by importing general construction principles into the shipbuilding context. Buyer SDMS contracted with shipbuilder Adyard for the building of 32 vessels. Article 1.1 of the contract stipulated that each vessel 'shall be designed, constructed, launched, equipped, completed and delivered by the Builder'.⁴²⁶ The contracts also stated that two of the vessels, named Hulls 10 and 11, had to be ready for sea-trials by a date pre-agreed for each. Unfortunately, the vessels were not sea-trial worthy by these dates, which led buyers SDMS to rescind the contracts to build Hulls 10 and 11.⁴²⁷ A dispute however arose as to whether SDMS could rescind these two contracts, because Adyard claimed that it had been prevented from getting the vessels ready on time by actions of the buyer. The preventing act in question was that SDMS did not respond to Adyard's suggestion that it amend Hulls 10 and 11 so that they complied with terms imposed by the Maritime Coastguard Agency during the

⁴²⁴ Simon Curtis, 'Remedies for Breach of Shipbuilding Contracts – Is English Law 'Fit for Purpose'?' in Barış Soyer and Andrew Tettenborn (eds), *Ship building, sale and finance* (Routledge 2016) 91

⁴²⁵ [2011] EWHC 848 (Com Ct)

⁴²⁶ *ibid* [7] (Hamblen J)

⁴²⁷ *ibid* [4] (Hamblen J)

construction period. Adyard accordingly sought to argue that: (i) because SDMS caused the delay, SDMS was unentitled to cite delay as a reason to rescind the contracts, and failing that (ii) it should be entitled to an extension of time.

Counsel for Adyard firstly argued that it could rely the prevention principle.⁴²⁸ This (non-maritime) general construction principle, to be revisited in Section 4.2.2, was described by Jackson J in *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd*⁴²⁹ as when ‘[i]n the field of construction law...the employer cannot hold the contractor to a specified completion date, if the employer has by act or omission prevented the contractor from completing by that date’.⁴³⁰ Applied to the shipbuilding context, a buyer cannot hold a shipbuilder to a pre-agreed completion date if the buyer has acted in a way which prevented the shipbuilder from completing by this date. On this basis, Adyard attempted to rely on the prevention principle⁴³¹ as it was left in ‘contractual limbo’ whilst it waited for the buyer to accept the proposed specification amendment, during which time it was unable to continue with the project.⁴³² Unfortunately, counsel for SDMS was able to rebut this argument on two grounds. Firstly, art 8(1) of the contract (a Force Majeure clause⁴³³), and art 8(3) (which allowed delivery to be postponed upon the occurrence of any of the circumstances listed in art 8(1)) together constituted an extension of time provision – whose presence in the contract nullified use of the prevention principle. Thus, given the presence of an extension of time provision in the contract, Adyard could not seek recourse under the prevention principle.

Counsel for Adyard thus turned to its second ground, as to whether its client was eligible to an extension of time under art 8. Adyard could only be given an extension

⁴²⁸ *ibid* [239] (Hamblen J)

⁴²⁹ [2007] Bus LR D109 (TCC)

⁴³⁰ *ibid* [48] (Jackson J)

⁴³¹ [2011] EWHC 848 (Com Ct) [245] (Hamblen J)

⁴³² The view of the court was however that, rather than simply sit and wait for the buyer to respond, Adyard should have performed in the spirit of the provision by continuing the build having itself made a decision to either include or forego the amendment in question.

⁴³³ Simon Kverndal, ‘The Application of the ‘Prevention Principle’ in the Shipbuilding Context’ in Barış Soyer and Andrew Tettenborn (eds), *Ship building, sale and finance* (Routledge 2016) 105

of time if the delay was such that it extended past the pre-agreed completion date.⁴³⁴ This was not however the case, meaning that Adyard would have had time to make the relevant changes between the point when SDMS affirmed the specification amendment, and the completion deadline. It was thus not in need of an extension of time.

Overall therefore, the court held that SDMS was entitled to rescind the contracts under Hulls 10 and 11 for two reasons. Firstly there was an extension of time provision in the contract, meaning that the prevention principle could not be relied upon. Secondly, SDMS' indecision was not of sufficient duration to activate the extension of time provision in any case. Moreover, importation of the prevention principle (a general construction principle) into this shipbuilding case was indicative of a movement away from how the law had characterised shipbuilding contracts until this point – namely as sale of goods contracts to which sale of goods principles apply. This reconciliation between the shipbuilding and general construction contexts is perhaps justifiable on the basis that both industries feature 'substantial and complex project[s], in which each party undertakes long-term obligations towards the other and accepts the accompanying significant commercial risks'.⁴³⁵

Moreover, the Canadian *Taypotat et al v Surgeon*⁴³⁶ case (first introduced in Section 2.3.1) reaches the same conclusion *Adyard Abu Dhabi*, in characterising a shipbuilding contract as a general construction provision. Crucially however, *Taypotat* arrives at this conclusion in a different way. To recap, the case concerned builder Kenron Homes who were constructing houses on their premises to then be transported to the buyer's desired location. Part way through the project Kenron went bankrupt, leaving open the question as to who possessed title in the partially completed properties. Besides from answering this question, the court suggested an approach to determining whether a contract to build properties was a construction

⁴³⁴ [2011] EWHC 848 (Com Ct) [257] (Hamblen J)

⁴³⁵ Simon Kverndal, 'The Application of the 'Prevention Principle' in the Shipbuilding Context' in Barış Soyer and Andrew Tettenborn (eds), *Ship building, sale and finance* (Routledge 2016) 100

⁴³⁶ [1985] 3 WWR 18

contract or a sale of goods contract, based upon the presence (or otherwise) of security clauses in the contract. Under a construction contract, title passes incrementally upon the buyer's payment of each instalment. Accordingly, using the court's approach, a contract to build properties would be legally characterised as a construction contract if it contained security mechanisms whose function it was to secure the payment of instalments upon which title incrementally passes. Under a sale of goods contract however, title only passes to the buyer once he has paid in full and accepts the good. Therefore, under the court's approach, a contract to build properties would be legally characterised as a sale of goods if the contract contained no security clauses – on the basis that property would remain with the seller (builder) during the build, irrespective of whether the buyer paid or not. Applying this test to the present case, the judge stated:

‘This was not a sale of goods under the Sale of Goods Act...The contract was weighted in favour of insuring the contractor's recovery of the contract price with the emphasis focused on security...If title were to remain in the contractor, such provisions would be meaningless and unnecessary’.⁴³⁷

It was held that the buyer was entitled to claim property in the five partially completed houses upon the builder's bankruptcy. The contract was deemed to be a construction contract under which title in the properties was to pass incrementally to the buyer – meaning that he would not have to wait until completion and delivery of the properties to obtain title in them.

Much as English law has in recent times occasionally characterised a shipbuilding contract as something other than a sale of goods contract (namely a building contract in *Hyundai*, and a work and materials contract in *Stocznia*), the law of China – a leading shipbuilding nation⁴³⁸ – has done the same. The case of *Guangdong New China Shipyard v Guangzhou Su Hang Industrial*⁴³⁹ for instance saw New China Shipyard contract with buyer ‘Guangzhou City, Hong Kong and Macau Shipping Company’ to build two container freighters. A dispute arose when

⁴³⁷ *ibid* [22]

⁴³⁸ See Section 1.1.2

⁴³⁹ (2005) Guanghai Fa Chu Zi No. 362

the buyers defaulted on more than 6 million yuan worth of instalments. Trial Judge Han Haiban characterised the shipyard's right to be paid as 'remuneration [for]... arrears of *works*'⁴⁴⁰ – a right which flowed from the shipbuilding contract's underlying characterisation as a *works* contract. This was further substantiated by the fact that he then went on to cite art 263 of Contract Law of the People's Republic of China 1999⁴⁴¹ as the basis upon which the repayment order was to be made. Article 263 falls within Chapter XV of the Act dedicated to 'Works Contracts', and makes repayment rights contingent upon 'results of the *work*'.⁴⁴² Similarly, in the most recent shipbuilding decision to reach the Chinese Supreme Court, *PICC Shipping Insurance Operations Center v Taizhou Sanfu Shipbuilding Co.*,⁴⁴³ the judge characterised the shipbuilding contract as a 'design, construction and equipment'⁴⁴⁴ provision – essentially, a contract for works.

But shipbuilding contracts are not always treated as works provisions under Chinese law. China has had difficulty finding a consensus as to how to characterise the shipbuilding contract, meaning that in any given case a shipbuilding contract could be characterised as: (i) a works contract, (ii) a general construction contract, or (iii) a hybrid service-sale contract.⁴⁴⁵ Justification for Chinese law's occasional characterisation of shipbuilding contracts as construction contracts derives from the fact that both types of project are large scale, high cost, consist of significant design and construction obligations, and permit the buyer (and/or his agents) to supervise the project.⁴⁴⁶ When characterised this way, the shipbuilding contract is governed by Chapter XVI of Contract Law of the People's Republic of China 1999⁴⁴⁷ which regulates 'Construction Project Contracts' such as those for 'designing and construction'.⁴⁴⁸ Furthermore, as the obligations due under a shipbuilding contract

⁴⁴⁰ *ibid* (Judge Haiban)

⁴⁴¹ Contract Law of the People's Republic of China 1999.

⁴⁴² *ibid* art 263

⁴⁴³ (29 June 2017) Trial Review and Trial Supervision, Supreme People's Court No. 476

⁴⁴⁴ *ibid* (Judge Yu Xiaohan)

⁴⁴⁵ Li Chenbiao, 'China' in Arnold J van Steenderen (ed), *Getting The Deal Through Shipbuilding 2016* (5th edn, Law Business Research 2016) 17

⁴⁴⁶ Maritime Law Lei Rongfei, 'About the nature of the shipbuilding contract' (Blog, English Translation, 25 June 2014) <http://blog.sina.com.cn/s/blog_3f3aa8080101hw65.html> accessed 13 January 2018

⁴⁴⁷ Contract Law of the People's Republic of China 1999, arts 269-287.

⁴⁴⁸ *ibid* art 269

straddle both *service* tasks (such as design and construction) and *sale* of goods tasks (namely delivery of the completed vessel), China has been known to characterise shipbuilding contracts in some cases as hybrid service-sale provisions.⁴⁴⁹

Finally, returning to English law, it would be fruitful to acknowledge cases which – whilst not characterising the shipbuilding *contract* any differently to its entrenched sale of goods position – characterised the shipbuilding *relationship* differently to the arm's length relationship prescribed to it under the Sale of Goods Act.⁴⁵⁰ One example is *Swallowfalls Ltd v Monaco Yachting & Technologies SAM*.⁴⁵¹ Here, a buyer agreed make payments to shipyard MYT during the construction period of his vessel, in order to maximise the chances of its timely completion. In return, shipyard MYT was to repay the buyer by instalments due upon certain construction milestones, with a final instalment (of 10%) owed on delivery.⁴⁵² The shipyard however defaulted on these repayments, claiming that the buyer prevented it from making them. Specifically, by not signing milestone certificates, it alleged that the buyer had not complied with an implied term in the refund guarantee to cooperate in the achievement of milestones. Longmore J agreed, stating that under shipbuilding contracts the buyer has 'an implied obligation to co-operate in the performance of the contract'.⁴⁵³ The judge then insisted that this implied obligation should flow through to any financial documents connected with the contract, such as refund guarantees. Accordingly, by arguing that the buyer had not cooperated in the signing of milestone certificates, the shipyard avoided liability for non-repayment of the buyer's loan. Another case eliciting similar conclusions was *Gyllenhammar & Partners International v Sour Brodogradevna Split*.⁴⁵⁴ While the case primarily concerns the remedy of specific performance,⁴⁵⁵ it is relevant as Hirst J stated in his judgment that shipbuilding contracts require 'co-operation between the parties on...matters

⁴⁴⁹ Lin Yuanmin, 'The nature of the shipbuilding contract' (Blog, English Translation, 16 March 2013) <http://blog.sina.com.cn/s/blog_7da2c510010197tq.html> accessed 13 January 2018

⁴⁵⁰ See Section 2.2

⁴⁵¹ [2014] EWCA Civ 186

⁴⁵² *ibid* [2] (Longmore LJ)

⁴⁵³ *ibid* [32] (Longmore LJ)

⁴⁵⁴ (1989) 2 Lloyd's Rep 403 (Com Ct)

⁴⁵⁵ Specific performance will be explored in Section 5.2.3

[including]...variations, and, perhaps most important of all, matters of detail'.⁴⁵⁶ Taken together, *Gyllenhammar* and *Swallowfalls* expressly acknowledge that cooperation should be integral to the shipbuilding relationship, in direct contrast to the arm's length relationship prescribed to such contracts by English law under the Sale of Goods Act.⁴⁵⁷

2.4.2 Alternative ways for Legislation to deal with shipbuilding contracts

As explained in the introduction to this section, the sale of goods characterisation of the shipbuilding contract has been challenged on the basis that the obligations under some shipbuilding contracts tend to be service heavy. Whilst contracts characterised as sale of goods contracts are dealt with under the Sale of Goods Act, service contracts are dealt with by a number of 'scattered statutes'.⁴⁵⁸ In this regard, two different statutes will be suggested below which a shipbuilding contract could fall under if characterised as such.

For one, in the *Stocznia Gdanska* case, Lord Goff stated that shipbuilding contracts 'were not...contracts of sale simpliciter, but 'contracts for work and materials''.⁴⁵⁹ At present under English law, '[c]ontracts for work which involve the supply of materials are governed by the common law...[and] the Supply of Goods and Services Act 1982'.⁴⁶⁰ Alongside the common law, the 1982 Act⁴⁶¹ might therefore be an appropriate piece of legislation to deal with shipbuilding contracts characterised as work and materials provisions.⁴⁶²

⁴⁵⁶ (1989) 2 Lloyd's Rep 403 (Com Ct) 422 (Hirst J)

⁴⁵⁷ See Section 2.2

⁴⁵⁸ Raymond T Nimmer, 'Services Contracts: The Forgotten Sector Of Commercial Law' (1992) 26 Loyola of Los Angeles Law Review 725, 728

⁴⁵⁹ [1998] CLC 540 (HL) 551 (Lord Goff)

⁴⁶⁰ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 5 II (the nature of the conversion contract)

⁴⁶¹ Supply of Goods and Services Act 1982.

⁴⁶² The Sale of Goods Act 1979's provisions often make reference to 'international sale of goods', thus confirming the lawmakers' intention for the 1979 Act to apply both to transactions being undertaken in England and also those being undertaken overseas. However, the Supply of Goods and Services Act 1982 is silent on whether it applies to work and materials transactions which, whilst governed by English law, are taking place overseas. [Sale of Goods Act 1979, sch 1 s 11; Sale of Goods Act 1979, sch 1 s 13; Sale of Goods Act 1979, sch 2 s 15.] If it was the intention of lawmakers

If a shipbuilding contract was characterised so that it fell under the 1982 Act, it would be subject to similar implied terms as it would under the Sale of Goods Act 1979. This is because the courts often imply terms identical to those owed under the 1979 Act into supply of goods and services contracts.⁴⁶³ For instance, much akin to the Sale of Goods Act's implied terms regarding title, sale by description and quality and fitness (under ss 12-14), a supply of goods contract under the 1982 Act is subject to an implied term as to title under s 2,⁴⁶⁴ an implied term as to transfer by description under s 3,⁴⁶⁵ and an implied term as to quality and fitness under s 4.⁴⁶⁶ Additionally, the supply of services aspect of the shipyard's obligations would be subject to an implied term as to care and skill under s 13,⁴⁶⁷ an implied term as to time for performance under s 14,⁴⁶⁸ and an implied term as to consideration for the service supplied under s 15.⁴⁶⁹ Furthermore, the 1982 Act's implied terms regarding time for performance and consideration only apply where the parties have made no express contractual agreement to exclude them.⁴⁷⁰ This is clearly reconcilable with s 55(1) of the Sale of Goods Act, which states that the 1979 Act's implied terms apply only where their exclusion is not expressly stipulated. However, it is worthy of note that any such attempts to exclude or restrict liability in respect of the 1982 Act's implied terms may be prohibited by s 7 of the Unfair Contract Terms Act 1977⁴⁷¹ – as will be explained in Section 2.6.

Alternatively, in the *Hyundai* case, Viscount Dilhorne stated that a shipbuilding contract 'was not simply one of sale but which so far as the construction of the

for the 1982 Act to apply only to supply of work and materials transactions taking place in England, then the Act's implied terms would not apply to shipbuilds which – whilst characterised as work and materials contracts governed under English law – are being undertaken in an overseas shipyard (such as one in Asia or continental Europe).

⁴⁶³ Michael G Bridge, *Benjamin's Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 1-041

⁴⁶⁴ Supply of Goods and Services Act 1982, s 2.

⁴⁶⁵ *ibid* s 3

⁴⁶⁶ *ibid* s 4

⁴⁶⁷ *ibid* s 13

⁴⁶⁸ *ibid* s 14

⁴⁶⁹ *ibid* s 15

⁴⁷⁰ NE Palmer, 'The Supply of Goods and Services Act 1982' (1983) 46(5) *Modern Law Review* 619, 619

⁴⁷¹ Unfair Contract Terms Act 1977.

vessel was concerned, resembled a building contract'.⁴⁷² This characterisation was entrenched by the fact that the court went on to cite 'Hudson's Building and Engineering Contracts'⁴⁷³ in delivering judgment, and also by the fact that the court in *Adyard* subsequently sought to incorporate a general construction doctrine into a shipbuilding case. Lord Diplock in *Gilbert-Ash (Northern) v Modern Engineering (Bristol)*⁴⁷⁴ defined a building or general construction contract as 'an entire contract for the sale of goods and work and labour for a lump sum price payable by instalments as the goods are delivered and the work is done'.⁴⁷⁵ Moreover, if the item is bespoke, then the builder's obligations will also include design – thus rendering the provision one for 'goods, work, labour *and design*'. Regulating this mix of obligations 'will often require complex and specialist provisions'.⁴⁷⁶ As a result, a shipbuilding contract characterised as a general construction contract (containing bespoke design, work and labour obligations) must fall under a statute able to govern obligations more complex than merely the sale of goods or supply of services. One possibility would be Part II of the Housing Grants, Construction and Regeneration Act 1996⁴⁷⁷ (HGCRA), which covers contracts for 'the carrying out of construction operations...[including] design, or surveying work'.⁴⁷⁸

The only issue with shipbuilding contracts falling under Part II of the 1996 Act is that – at present – it only applies to 'structures forming, or to form part of the land'⁴⁷⁹ as per s 105. Ships would fall outside its scope because they are movable items detached from the realty, as established in cases such as *Royal Bank of Canada v Saskatchewan*.⁴⁸⁰ For example, in *Staveley Industries Plc v Odebrecht Oil & Gas Services Ltd*,⁴⁸¹ a contract for the 'design, engineering, procurement,

⁴⁷² [1980] 1 WLR 1129 (HL) 1134 (Viscount Dilhorne)

⁴⁷³ Alfred Arthur Hudson and Ian Norman Duncan Wallace, *Hudson's Building and Engineering Contracts* (10th edn, Sweet & Maxwell 1970)

⁴⁷⁴ [1974] AC 689 (HL)

⁴⁷⁵ *ibid* at 717 (Lord Diplock)

⁴⁷⁶ Hugh Beale, *Chitty On Contracts*, vol 2 (31st edn, Sweet & Maxwell 2012) ch 37 s 1(a) para 37-004

⁴⁷⁷ Housing Grants, Construction and Regeneration Act 1996.

⁴⁷⁸ *ibid* s 104

⁴⁷⁹ *ibid* s 105

⁴⁸⁰ This case was introduced in Section 2.3.1

⁴⁸¹ TCC, 28 February 2001

supply [and] delivery'⁴⁸² of equipment meant for an oil rig was excluded from the remit of the HGCRA 1996 on this basis. Overall therefore, if a shipbuilding contract was characterised as general construction contract then, for it to fall under the Act, s 105 would have to be broadened to encompass the construction of moveable items.⁴⁸³

Up until now, this section has explored different pieces of English legislation which English law governed shipbuilding contracts could fall under if they were characterised as something other than a sale of goods contract. There do however exist other approaches to characterising shipbuilding contracts as something other than a sale of goods contract, such as those used in the following pieces of foreign legislation.

Firstly, characterisation of a shipbuilding contract in some countries varies depending upon whether the ship's specification is bespoke or standardised. In Germany, shipbuilding contracts are governed by s 651 of the German Civil Code (BGB).⁴⁸⁴ The provision is made up of two constituent parts; its first sentence

⁴⁸² Ian Wright and Franco Mastrandrea, 'Adjudication' in Vivian Ramsey, Ann Minogue, Jenny Baster, Michael O'Reilly and Hamish Lai (eds), *Construction Law Handbook* (2009 edn, Thomas Telford Ltd 2009) 847

⁴⁸³ Even if shipbuilding contracts were characterised as general construction provisions and s 105 of the HGCRA 1996 was broadened to allow shipbuilding contracts to fall under the 1996 Act, the Act may yet disapply to certain shipbuilding contracts. Whilst Part II of the HGCRA 1996 will *in theory* govern all English law governed construction contracts falling under its scope, the drafting of its provisions indicates that it was perhaps not intended to cover contracts where the construction is taking place overseas. This is often the case in shipbuilding, as the ship is commonly constructed in an Asian or continental European shipyard in spite of the contract being governed by English law. The construction projects to which the Act was intended to apply are likely those being carried out on English soil. Potential evidence for this comes from s 117, which states that construction contracts entered into on behalf of the Queen, Duchy of Cornwall and Duchy of Lancaster fall under the scope of Part II of the Act. [Housing Grants, Construction and Regeneration Act 1996, s 117.] By considering that applicable construction contracts might be entered into by members of the dukedom and monarchy who hold and undertake their titles on behalf of English regions (such as Cornwall and Lancaster), the Act is intending to apply to construction projects occurring in England. Moreover, the Act's long title refers to the constructions connected with the 'Commission for the New Towns' – a body which forms part of the 'National Regeneration Agency for England'. [Housing Grants, Construction and Regeneration Act 1996, Long Title.] Therefore, even if shipbuilding contracts are characterised as general construction provisions falling under the HGCRA 1996, perhaps the Act will likely only apply to those English law governed shipbuilds which are being undertaken in England, due to the domestic nexus seemingly intended by lawmakers when drafting the Act.

⁴⁸⁴ German Civil Code (BGB), s 651.

provides the ‘rule’ of characterisation, with the second sentence providing the ‘exception’ to the aforementioned rule. The ‘rule’ is that contracts to supply a moveable good (which has been produced or manufactured) are sale of goods contracts.⁴⁸⁵ The second sentence of s 651 however adds ‘[t]o the extent that the movable things to be produced or manufactured are not fungible things’,⁴⁸⁶ ‘[c]ertain provisions concerning contracts on the supply of workmanship...may apply’.⁴⁸⁷ In this way, legal characterisation of shipbuilding contracts under German law falls upon whether the ship in question has a fungible⁴⁸⁸ specification or a bespoke one. If the ship is fungible, then the contract to build it is a sale of goods contract under the first sentence of s 651. If the ship is bespoke, then the contract to build it is a supply of workmanship contract under the second sentence of s 651, to which additional provisions apply (regarding collaborative⁴⁸⁹ obligations owed by the buyer,⁴⁹⁰ the passage of title⁴⁹¹ and the buyer’s right to terminate.⁴⁹²) A similar observation can be made of the laws of Canada. Here, the default position is that shipbuilding contracts are contracts for the supply of work and materials.⁴⁹³ However, if a newbuild is an ‘assembly-line type of vessel with set particulars’,⁴⁹⁴ then it is treated as a sale of goods contract to which the implied warranties of quality and fitness under the Canadian Sale of Goods Act 1996 s 18⁴⁹⁵ apply. In Canada and Germany therefore, shipbuilding contracts will be characterised as either sale of goods contracts or as work and materials contracts based upon the vessel’s specification.

⁴⁸⁵ *ibid*

⁴⁸⁶ *ibid*

⁴⁸⁷ Jan Dreyer, ‘Germany’ in Arnold J van Steenderen (ed), *Getting The Deal Through Shipbuilding 2014* (3rd edn, Law Business Research 2014) 39

⁴⁸⁸ The code defines fungible things as ‘movable things that in business dealings are customarily specified by number, measure or weight.’ [German Civil Code (BGB), s 91.]

⁴⁸⁹ The term ‘collaboration’ is synonymous with the cooperative norm of certain shipbuilding relationships being explored in this thesis.

⁴⁹⁰ German Civil Code (BGB), ss 642-643.

⁴⁹¹ *ibid* ss 446-447

⁴⁹² *ibid* s 649

⁴⁹³ Rui Fernandes, ‘Canada’ in Arnold J van Steenderen (ed), *Getting The Deal Through Shipbuilding 2014* (3rd edn, Law Business Research 2014) 9

⁴⁹⁴ *ibid*

⁴⁹⁵ Canadian Sale of Goods Act 1996, s 18.

Secondly, characterisation of a shipbuilding contract in certain other countries varies depending upon whether the buyer or the shipyard has supplied the construction materials. Article 241 of the Italian Code of Navigation⁴⁹⁶ characterises shipbuilding contracts as supply of work and materials contracts, under which the buyer is paying for the work put in by the shipbuilder to transform materials into a completed corpus.⁴⁹⁷ Crucially however, if the materials for a shipbuild are supplied by the buyer,⁴⁹⁸ Italian law is inclined to frame the contract as a ‘sale of future goods’.⁴⁹⁹ Moreover, under Korean law, title to a newbuild will lie with the shipyard during construction – as per a sale of goods contract. However, for projects in which the buyer ‘procures and provides the whole or a substantial part of the materials’,⁵⁰⁰ title may be deemed to pass incrementally during construction (as per a general construction contract) or may lie with the buyer indefinitely.

Therefore, certain foreign jurisdictions employ a flexible approach to characterising shipbuilding contracts, permitting the contract to be characterised as either a sale of goods or as something else depending on factors such as the ship’s specification and who provided the build materials. Taking this one step further, the following pieces of foreign legislation *unconditionally* characterise shipbuilding contracts as something other than a sale of goods contract, irrespective of who supplies the materials and the specification of the vessel being built.

⁴⁹⁶ Italian Code of Navigation, art 241.

⁴⁹⁷ M Musi, ‘Guarantees in the Shipbuilding Contract, in Light of the Italian Legislative Framework’ in M Musi (ed), *New Comparative Perspectives in Maritime, Transport and International Trade Law* (Libreria Bonomo Editrice 2014) 1-2

⁴⁹⁸ Various standard-form shipbuilding contracts make provision for the *buyer* supplying the materials for the project. [Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix A citing Baltic and International Maritime Council, ‘BIMCO Standard Newbuilding Contract (NEWBUILDCON Form)1’ (BIMCO, Copenhagen, 2007) s 3 cl 21; Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix B citing China Maritime Arbitration Commission (CMAC), ‘CMAC Standard Newbuilding contract (Shanghai Form)1’ (CMAC, China) s 3 art XI; Stuart Beare, Graeme Bowtle and Jane Martineau, ‘Shipbuilding contract of the Shipowners Association of Japan (SAJ)1’ in Lord Millett (ed), *Encyclopaedia of Forms and Precedents* (vol 39(1) pt 1(B)(A) LexisNexis 2016) art XVII.]

⁴⁹⁹ Mario Riccomagno, ‘Italy’ in Arnold J van Steenderen (ed), *Getting The Deal Through Shipbuilding 2014* (3rd edn, Law Business Research 2014) 49

⁵⁰⁰ Tae Jeong Kim, ‘Korea’ in George Eddings and others (eds), *The Shipping Law Review* (4th edn, Law Business Research 2017) 316

In Japan, shipbuilding contracts are characterised as contracts for ‘work and materials’⁵⁰¹ under arts 632 to 642 of the Japanese Civil Code.⁵⁰² The code defines such contracts as those under which ‘one of the parties promises to complete work and the other party promises to pay remuneration for the outcome of the work’.⁵⁰³ The fact that the definition focuses on the performance of *work* indicates that Japanese law characterises the shipbuilding contract as a service contract. Furthermore, under Brazilian law, rather than the shipyard’s obligations under a shipbuilding contract lying merely in the supply of work (and also perhaps materials⁵⁰⁴), the shipyard will also transfer finance, know-how and patented technologies to its contracting counterpart.⁵⁰⁵ As a result, shipbuilding contracts are treated as ‘turnkey’⁵⁰⁶ provisions under ss 610-626 of the Brazilian Civil Code,⁵⁰⁷ entailing the supply of work, materials and additional services.⁵⁰⁸

Overall therefore, were English law to characterise a shipbuilding contract as something other than a sale of goods contract, it could be dealt with either by English supply of goods and services legislation, or by general construction legislation. Other possible characterisations of (and approaches to characterising) the shipbuilding contract can also be found in the law of foreign jurisdictions – from which English judges and lawmakers can learn.

⁵⁰¹ Tetsuro Nakamura and others, ‘Japan’ in George Eddings and others (eds), *The Shipping Law Review* (4th edn, Law Business Research 2017) 305

⁵⁰² Japanese Civil Code 1896.

⁵⁰³ *ibid* art 632

⁵⁰⁴ Godofredo Mendes Vianna, ‘Brazil’ in Arnold J van Steenderen (ed), *Getting The Deal Through Shipbuilding 2016* (5th edn, Law Business Research 2016) 5

⁵⁰⁵ Adie O’Reilly, ‘The construction contract’ in Vivian Ramsey, Ann Minogue, Jenny Baster, Michael O’Reilly and Hamish Lai (eds), *Construction Law Handbook* (2009 edn, Thomas Telford Ltd 2009) 187

⁵⁰⁶ A turnkey contract is defined as ‘[a]n agreement under which a contractor completes a project, then hands it over in fully operational form to the client, which needs to do nothing but “turn a key”, as it were, to set it in motion’. [Financial Times, ‘Definition of turnkey contract’ (ft.com/lexicon) <<http://lexicon.ft.com/Term?term=turnkey-contract>> accessed 2 December 2016.]

⁵⁰⁷ Brazilian Civil Code, ss 610-626.

⁵⁰⁸ Turnkey contracts uphold the norm of party cooperation being explored in this piece, by encouraging the ‘exchange of information and expertise during performance’. [Alessandro Arrigheti, Reinhard Bachmann and Simon Deakin, ‘Contract law, social norms and inter-firm cooperation’ (1997) 21 *Cambridge Journal of Economics* 171, 172.]

2.5 – *Sui Generis* characterisations of the shipbuilding contract

Given the unique characteristics and practices which make up the shipping industries, shipping contracts have occasionally been characterised as *sui generis* provisions. Characterising shipping contracts as *sui generis* contracts, ‘rather than as mere members of one...category or another’,⁵⁰⁹ means that the law is ‘correspond[ing] to...commercial practice, rather than forcing commercial practice to correspond to law’⁵¹⁰ and fit into pre-defined characterisations. This is testament to the virtues of the common law which reflects ‘real situations with all their complexities and nuances’,⁵¹¹ in contrast to codified or civil law systems which are often developed conceptually or in abstraction.⁵¹² The following writings will thus explore an instance where shipping contracts were given *sui generis* treatment. This will in turn be a precursor for Section 5.3.2, which considers whether shipping contracts should have their own *sui generis* remedies.

Gravity for the view that shipbuilding contracts might be viewed in English law as *sui generis* provisions could arise by drawing analogy with *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd.*⁵¹³ The case involved a string of bunker sale contracts, of whom RN-Bunker was the physical supplier. RN-Bunker then contracted with supplier Rosneft Marine UK, who in turn contracted with defendants OW Bunker Malta (OWBM). Finally, OWBM contracted with the ship-owners for the sale. The latter contract was governed by terms which stated that title to the bunkers would remain with the seller until the buyer had paid for the goods. Before this point, the buyer was merely bailee to the bunkers. Payment from the ship-owners was due 60 days after delivery, during which time the buyers were granted permission to

⁵⁰⁹ Girardeau Spann, ‘A Critical Legal Studies Perspective On Contract Law And Practice’ [1988] Annual Survey of American Law 223, 227

⁵¹⁰ *ibid* 227-228

⁵¹¹ Law Teacher, ‘Legal Systems In English Law’ <www.lawteacher.net/free-law-essays/english-legal-system/the-english-legal-system.php> accessed 6 March 2018

⁵¹² Gerhard Dannemann and Basil Markesinis, ‘The Legacy of History on German Contract Law’ in Ross Cranston (ed), *Making Commercial Law: Essays in Honour of Roy Goode* (Clarendon Press 1997) 16

⁵¹³ [2015] EWHC 2022 (Com Ct); [2015] EWCA Civ 1058; [2016] UKSC 23

consume the bunkers. Unfortunately however, consideration did not pass for the Rosneft Marine UK–OWBM contract, as OWBM’s parent company OWBAS had become insolvent and were thus unable to pay.⁵¹⁴ Having become aware of this situation, the ship-owners failed to pay OWBM, and a claim in non-payment was brought by OWBM’s assignee bank ING against the ship-owners shortly after.⁵¹⁵

In rebuttal, counsel for the ship-owners began by asserting that the Sale of Goods Act governed the transaction. Counsel believed that the contract was a sale of goods because: (i) it was labelled as such, (ii) the parties were referred to as ‘buyer’ and ‘seller’, (iii) it used language typical of contracts for sale, and (iv) it contained terms such as those reasonably expected to be included in a sale of goods contract.⁵¹⁶ Counsel then reminded the court that a claim under the Sale of Goods Act s 49 can only be made for transactions for which ‘property in the goods has passed to the buyer’.⁵¹⁷ It was on this basis that the ship-owners denied being liable to OWBM because, by the time payment was due, ‘some or all of the bunkers will have been consumed with the result that property in them...ceased to exist and...could not...be transferred to the shipowners’.⁵¹⁸ As no property in the goods will have been transferred from OWBM to the ship-owners, OWBM could not demand payment from the ship-owners under s 49.

However, it so transpires that the transaction did not satisfy the requirements for a sale of goods contract under the Sale of Goods Act, meaning that the ship-owners’

⁵¹⁴ The OW Bunker & Trading A/S parent company is discussed in Section 4.2.1

⁵¹⁵ Related proceedings continue to rumble on. In June 2018, an American 2nd Circuit appeal court gave a ruling in *ING Bank NV v M/V TEMARA* No 16-3923 (2d Cir) (2018) on this issue. [Ship & Bunker, ‘OW Bunker: Beginning of the End in Sight for Legal Battle Over Who Bunker Buyers Need to Pay’ (Americas News, 18 June 2018) <<https://shipandbunker.com/news/am/378712-ow-bunker-beginning-of-the-end-in-sight-for-legal-battle-over-who-bunker-buyers-need-to-pay>> accessed 19 June 2018.] Here, the court found that the assignee of a bunker contract (ING bank) could have a lien against the vessel in which the bunker fuel was used, on the basis that the bunker supplier was itself in a position to benefit from such a lien. [Justia US Law, ‘ING BANK N.V. v. M/V TEMARA’ (13 June 2018) <<https://us2ndcircuitcourtofappealsopinions.justia.com/2018/06/13/ing-bank-n-v-m-v-m-v-temara/>> accessed 19 June 2018.]

⁵¹⁶ Steven Wise, ‘When is a Sale Contract not a Sale Contract’ (rpc, 15 July 2015) <www.rpc.co.uk/index.php?option=com_easyblog&view=entry&id=1575&Itemid=149> accessed 5 November 2015

⁵¹⁷ Sale of Goods Act 1979, s 49.

⁵¹⁸ [2015] EWHC 2022 (Com Ct) [1] (Males J)

arguments (which presupposed that the Act did govern the transaction) were rendered otiose. The ship-owners were not therefore at liberty to cite the Act when justifying its non-payment, as the transaction was not governed under the Act in the first place. To claim for the price under s 49,⁵¹⁹ the following must be true: (i) the contract must be for the sale of goods, (ii) property in the goods must pass from seller to buyer, (iii) the buyer must pay consideration for the goods, and (iv) there must be a link between payment and the passage of property.⁵²⁰ The ship-owners in the present case had however consumed the bunkers before the price had been paid, meaning that the passage of title was rendered impossible and therefore not at issue in this transaction. As Males J put it ‘the effect of consumption of the bunkers was to extinguish any property in them. You cannot own something which does not exist’.⁵²¹ Accordingly, the requirements of s 49 were not met, nor s 2 of the Act under which a sale of good contract is defined as ‘a contract by which the seller transfers or agrees to transfer the property in goods to the buyer’.⁵²² The inapplicability of the Sale of Goods Act to the bunker sale meant that the ship-owners were not paying for the bunkers (nor title to them), but were instead paying for a right to consume them.⁵²³ In this regard, OWBM were merely owed a contractual debt by the ship-owners through ING bank, as opposed to being able to recover the price under s 49 (as it would have done had the transaction been a sale of goods).

The decision was subsequently referred upward to the Court of Appeal. Moore-Bick LJ began by contending that the contract in question was not one for the sale of goods, but one of bailment coupled with an agreement to sell the unused bunkers.⁵²⁴ The presence of a sale element in his characterisation of the contract meant that he could in turn offer OWBM the same remedy as he would have had

⁵¹⁹ This remedy will be explored in Section 5.2.1

⁵²⁰ Wikborg Rein, ‘Bunker supply contract not contract for sale of goods’ (Lexology, 19 August 2015) <www.lexology.com/library/detail.aspx?g=374e0d76-351f-4294-b62b-fa11c115d246> accessed 5 November 2015

⁵²¹ [2015] EWHC 2022 (Com Ct) [24] (Males J)

⁵²² Sale of Goods Act 1979, s 2.

⁵²³ Wikborg Rein, ‘Bunker supply contract not contract for sale of goods’ (Lexology, 19 August 2015) <www.lexology.com/library/detail.aspx?g=374e0d76-351f-4294-b62b-fa11c115d246> accessed 5 November 2015

⁵²⁴ [2015] EWCA Civ 1058 [33] (Moore-Bick LJ)

the contract fallen under the Sale of Goods Act in its entirety (this remedy being an action for the price.⁵²⁵) Crucially however, by characterising the contract as a bailment-sale hybrid, he did not go as far as declaring the transaction to be a sale of goods contract outright, but merely a sale of goods contract *pro tanto*. For Moore-Bick LJ, ‘the transfer of property in the bunkers from OWBM to the owners was not the essential subject matter of the contract’.⁵²⁶ This eliminated the prospect of counter-argument by the ship-owners that they should not be liable to pay because there was no transfer of property in the bunkers – a requirement of a sale of goods contract under the Sale of Goods Act.

Finally, the case went to the Supreme Court, in which Lord Mance SCJ gave judgment. Whilst he agreed that the transaction in question was not a sale of goods contract, his Lordship’s conclusion was arrived at somewhat differently from Moore-Bick LJ in the Court of Appeal. Describing it as a *sui generis* transaction,⁵²⁷ he claimed that although ‘the basic form and language of the contract is that of sale... clauses H.1 and H.2 make clear that the contract has special features’.⁵²⁸ Lord Mance SCJ continued, listing the special features of bunker contracts:

‘First, they expressly provide not only for retention of title pending payment, but also expressly that, until such payment, the “Buyer” is to be in possession of the bunkers “solely as Bailee for the Seller”. After going on to provide that the Buyer “shall not be entitled to use the bunkers”, the terms introduce the qualification “other than for the propulsion of the Vessel”’.⁵²⁹

As a result, s 49 of the Sale of Goods Act (the provision under which the plaintiff’s remedies would lie if these were sale of goods contracts) was deemed unsuitable to the peculiarities of bunker transactions. ‘Section 49 does not focus on the position existing where delivery is made, title is reserved...the price is agreed to be paid...and the buyer is permitted to dispose of or consume the goods or they are at

⁵²⁵ This remedy will be explored in Section 5.2.1

⁵²⁶ [2015] EWCA Civ 1058 [33] (Moore-Bick LJ)

⁵²⁷ [2016] UKSC 23 [34] (Lord Mance SCJ)

⁵²⁸ *ibid* [26] (Lord Mance SCJ)

⁵²⁹ *ibid*

the buyer's risk and are destroyed or damaged'.⁵³⁰ For s 49 and s 2 of the Act to have applied to the bunker contracts in question, they would have had to include a term prohibiting consumption until payment is made (as per conventional contracts for sale.) In practice however, given the nature of the bunker industry, it is unlikely that parties to a bunker contract would have agreed upon such a term. '[T]he liberty to use the bunkers for propulsion prior to payment is a vital and essential feature of the bunker supply business'.⁵³¹ 'Bunker suppliers know that bunkers are for use...[and consequently] they grant relatively long credit periods combined with a reservation of title pending payment in full...authorising use in propulsion'.⁵³² Thus, for the Supreme Court, the special nature of the industry within which bunker contracts are used contributed to their view that bunker contracts are not sale of goods contracts. As per the Court of Appeal ruling, the ship-owners had no defence to OWBM's claim for the price.

In sum, the *OW Bunker Malta* decision is relevant to the overarching theoretical paradigm of this thesis, despite it concerning bunker shipping (rather than shipbuilding) contracts. Firstly, by not pigeon-holing bunker contracts into one of English law's pre-defined characterisations, and instead giving due regard to bunker *industry* practices when characterising the contract, the Supreme Court's decision took a 'liberal' stance on the overarching theoretical paradigm of this thesis – under which industry norms predominate (above the law) when characterising. Also, because the Supreme Court decided that bunker contracts were *sui generis* contracts on the basis of their special terms (which permit pre-payment consumption, pre-payment reservation of title, and lengthy credit periods), this adds gravity to the argument that shipbuilding contracts might also be characterised as *sui generis* contracts in light of their own nuances and also the nuances of the shipbuilding industry. Moreover, the *OW Bunker* case highlighted a mismatch between the ship-owner's legalistic characterisation of the bunker contract as a sale of goods, and the unique contractual terms and practices prevalent in the bunker industry.⁵³³ This

⁵³⁰ *ibid* [50] (Lord Mance SCJ)

⁵³¹ *ibid* [27] (Lord Mance SCJ)

⁵³² *ibid*

⁵³³ The mismatch between the law and industry in the context of *bunker* contracts might be reduced by use of BIMCO's 2018 bunker standard terms. [Baltic and International Maritime Council,

demonstrates that mismatches do potentially exist between legal characterisation and shipping industry practice – as is being argued in this thesis for the shipbuilding sub-industry.

One nation that has already applied a *sui generis* characterisation to the shipbuilding contract, which English law could learn from if it decided to do the same, is Indonesia. Indonesia hopes to become prominent on the world shipping stage, having seen orders in the country's shipyards soar of late.⁵³⁴ Indonesian law characterises shipbuilding contracts as *sui generis* provisions on the basis that shipbuilding contracts in this jurisdiction possess characteristics which differ from those under sale and service contracts. Firstly, since title is held jointly by the buyer and the shipyard during the transaction,⁵³⁵ shipbuilding contracts in this jurisdiction are clearly not sale of goods contracts (under which title is unconditionally held by the shipyard during construction, and passes to the buyer upon delivery.) Secondly, since the buyer and shipyard can agree on who will provide the materials, shipbuilding contracts in this jurisdiction are also not supply of workmanship and materials contracts⁵³⁶ (under which the shipbuilder supplies the materials regardless.) Accordingly, under Indonesian law, 'a shipbuilding contract is likely to constitute a contract *sui generis* which has its own characteristics'.⁵³⁷

2.6 – Unfair Contract Terms Act 1977

The characterisation of the shipbuilding contract determines which implied terms

'BIMCO Bunker Terms 2018' (BIMCO, 2018) <<https://www.bimco.org/contracts-and-clauses/bimco-contracts/bimco-bunker-terms-2018>> accessed 10 May 2018.] These have been drafted by representatives from the bunker industry to take into account industry nuances and norms. [James Kennedy, 'BIMCO adopts new Bunker Terms 2018' (Clyde & Co, 3 May 2018) <<https://www.clydeco.com/insight/article/bimco-releases-new-bunker-terms-2018>> accessed 10 May 2018.]

⁵³⁴ Prashanth Parameswaran, 'Indonesia: A New Shipbuilding 'Magnet' from ASEAN to Africa?' (18 July 2017) <<https://thediplomat.com/2017/07/indonesia-a-new-shipbuilding-magnet-from-asean-to-africa/>> accessed 31 January 2018

⁵³⁵ Sahat Siahaan and others, 'Indonesia' in James Gosling and Tessa Huzarski (eds), *The Shipping Law Review* (3rd edn, Law Business Research 2016) 268

⁵³⁶ Sahat Siahaan and others, 'Indonesia' in Arnold J van Steenderen (ed), *Getting The Deal Through Shipbuilding 2016* (5th edn, Law Business Research 2016) 37

⁵³⁷ *ibid*

govern performance under the contract (as explored in Section 2.4.2), which judicial remedies are open to a plaintiff following dispute (to be explored in Section 5.2), and also determines whether the Unfair Contract Terms Act 1977⁵³⁸ (UCTA) applies to the contract. In place to regulate terms which attempt to exclude or restrict a breaching party's liability,⁵³⁹ UCTA allows judges to strike down such clauses or make their use contingent upon them satisfying a test. Accordingly, if a contract's characterisation means that it falls outside the scope of the Act, parties are at liberty to draft the contract's exclusion terms as they wish – because the Act's restrictions and prohibitions on such terms will not apply to it.⁵⁴⁰ The Act's characterisation criteria are set out in s 26 as follows:

‘26. International supply contracts.

(1) The limits imposed by this Act on the extent to which a person may exclude or restrict liability by reference to a contract term do not apply to liability arising under such a contract as is described in subsection (3) below.

(2) The terms of such a contract are not subject to any requirement of reasonableness under section 3: and nothing in Part II of this Act shall require the incorporation of the terms of such a contract to be fair and reasonable for them to have effect.

(3) Subject to subsection (4), that description of contract is one whose characteristics are the following—

(a) either it is a contract of sale of goods or it is one under or in pursuance of which the possession or ownership of goods passes; and

(b) it is made by parties whose places of business (or, if they have none, habitual residences) are in the territories of different States (the Channel Islands and the Isle of Man being treated for this purpose as different States from the United Kingdom).

(4) A contract falls within subsection (3) above only if either—

(a) the goods in question 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; or

(b) the acts constituting the offer and acceptance have been done in the territories of different States; or

⁵³⁸ Unfair Contract Terms Act 1977.

⁵³⁹ Hugh Beale, *Chitty On Contracts*, vol 1 (31st edn, Sweet & Maxwell 2012) para 14-059

⁵⁴⁰ Ewan McKendrick, *Contract Law* (9th edn, Palgrave Macmillan 2011) 196

(c) the contract provides for the goods to be delivered to the territory of a State other than that within whose territory those acts were done'.⁵⁴¹

Before assessing a contract's characterisation (in order to determine whether its terms will be subject to UCTA), a prerequisite question is whether the contract was made between 'parties whose places of business...are in the territories of different States'⁵⁴² as per s 26(3)(b). This prerequisite will be satisfied for shipbuilding contracts struck between an English buyer and an Asian or continental European shipyard for instance. Note however that UCTA s 27⁵⁴³ renders the Act's prohibitions and restrictions inapplicable to contracts which, but for an English governing law clause, would have been governed by the foreign law of one of the contracting parties.⁵⁴⁴

If a shipbuilding contract satisfies UCTA s 26(3)(b), then the question of its characterisation can be asked – in order to determine whether the contract can be exempted from UCTA's restrictions and prohibitions as an 'International Supply Contract'. For one, if a shipbuilding contract is characterised as 'a contract of sale of goods...under...which the possession or ownership of goods passes'⁵⁴⁵ (the entrenched characterisation under English law⁵⁴⁶) then, provided it satisfies the cross-border criterion in s 26(3)(b), it will be considered an 'International Supply Contract' to which UCTA cannot apply. The terms of the contract can thus exclude or restrict liability as they wish, without fear that UCTA will either strike them down or subject them to its 'reasonableness' test (to be explored below). Conversely, a shipbuilding contract will fall outside the s 26 definition of an 'International Supply Contract', and consequently be subject to UCTA, if it is characterised as an outright service contract.⁵⁴⁷ If a shipbuilding contract was however characterised as a hybrid service-sale contract (namely one encompassing

⁵⁴¹ Unfair Contract Terms Act 1977, s 26.

⁵⁴² *ibid* s 26(3)(b)

⁵⁴³ Unfair Contract Terms Act 1977, s 27.

⁵⁴⁴ The law which applies to contracts with a cross-border element can be determined by reference to the European Rome I Regulation. [Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.]

⁵⁴⁵ Unfair Contract Terms Act 1977, s 26(3)(a).

⁵⁴⁶ See Sections 2.2 and 2.3

⁵⁴⁷ Outright service contracts are defined and explored in Section 3.3

service contract obligations and sale of goods contract obligations, such as that in *Stocznia*),⁵⁴⁸ the presence of the sale element⁵⁴⁹ would *prima facie* mean that the contract falls under s 26(3)(a) as an ‘International Supply Contract’ to which UCTA’s restrictions and prohibitions would not apply. It is also worthy of note that a shipbuilding contract characterised as a work and materials contract under the Supply of Goods and Services Act 1982⁵⁵⁰ would be subject to UCTA as a ‘[m]iscellaneous contract...under which goods pass’.⁵⁵¹

What is more unclear is whether a shipbuilding contract characterised as a *sui generis* provision⁵⁵² would be subject to UCTA. This would perhaps depend upon the desires of industry parties, as to whether they deemed UCTA’s protections necessary or not for the successful operation (and subsequent discharge) of shipbuilding contracts. Determining this would require the law to interact with industry perspectives, as per the overarching theoretical paradigm of this thesis. If these industry parties did wish for UCTA to apply to shipbuilding contracts, then their clauses would have to be drafted in accordance with the Act’s restrictions and prohibitions. Conversely, if the parties did not want UCTA to apply to shipbuilding contracts, they could draft their contracts as they wish – the downside being that there would no longer be a statutory safety-net in place to curtail or strike down unfair exclusion clauses.

Now to look at the UCTA provisions which would affect shipbuilding contracts if they were not exempted from the Act. Firstly, s 3(2) states that terms claiming to entitle one of the contracting parties to: (i) exclude or restrict his liability following breach, (ii) render a contractual performance significantly different from that which was agreed, or (iii) render no performance at all, will be subject to UCTA’s

⁵⁴⁸ See Section 2.4.1 and Section 3.3

⁵⁴⁹ Richard Christou, *Drafting Commercial Agreements* (6th edn, Sweet & Maxwell 2016) para 1-11

⁵⁵⁰ As mentioned in Section 2.4.1, the shipbuilding contract in *Stocznia Gdanska SA v Latvian Shipping Co* was characterised as a work and materials contract. Such contracts are governed by a combination of the 1982 Act and the common law, as explained in Section 2.4.2.

⁵⁵¹ Unfair Contract Terms Act 1977, s 7.

⁵⁵² See Section 2.5

‘reasonableness’ test⁵⁵³ (to be explored later on in this section). Terms in the shipbuilding context permitting a party to render ‘no performance’ include Force Majeure clauses,⁵⁵⁴ which can entitle a shipyard to discontinue construction of a newbuild following a Force Majeure event.⁵⁵⁵ One pre-requisite for s 3 to apply to such a term however, is that the parties are dealing on one party or the other party’s written ‘standard terms of business’.⁵⁵⁶ In specifying that the standard-terms must be those of ‘one’ party to the contract or the ‘other’ party to the contract, it is arguable that standard-terms issued by a third-party institution (such as a shipbuilding association⁵⁵⁷) will not fall under s 3. Nonetheless, in *British Fermentation Products v Compair Reavell*⁵⁵⁸ Judge Bowsher indicated that industry Model Forms can constitute a party’s standard-terms, provided that the party shows, ‘either by practice or by express statement’,⁵⁵⁹ that those are its standard business terms.⁵⁶⁰ Moreover, the Court of Appeal in the 2017 decision of *African Export-Import Bank v Shebah Exploration & Production*⁵⁶¹ held that an *amended* standard-form can also constitute standard-terms under UCTA s 3, provided that the amendments are ‘insubstantial’.⁵⁶² This is likely to be the case for standardised (shipbuilding) projects, which often employ standard-forms (either as printed or with minor changes) before merely inserting prices and party names in the gaps provided⁵⁶³ – as indicated at First Instance by the High Court in *African Export-Import Bank v Shebah Exploration & Production*.⁵⁶⁴ More broadly, what this shows is that the application of UCTA s 3 to a shipbuilding contract will bring the industry into play (as per the overarching theoretical paradigm of this thesis), by requiring courts to assess whether a shipbuilding party has embraced an *industry* standard-form as its own.

⁵⁵³ Unfair Contract Terms Act 1977, s 3(2).

⁵⁵⁴ The doctrine of Force Majeure will be explored in Sections 4.3.1 and 5.4

⁵⁵⁵ Michael G Bridge, *Benjamin’s Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 13-096

⁵⁵⁶ Unfair Contract Terms Act 1977, s 3(1).

⁵⁵⁷ These were listed in Section 1.1.6

⁵⁵⁸ (2000) 2 TCLR 704 (QB)

⁵⁵⁹ *ibid* at 718 (Judge Bowsher)

⁵⁶⁰ Richard Lawson, *Exclusion Clauses and Unfair Contract Terms* (12th edn, Sweet & Maxwell 2017) para 8-012

⁵⁶¹ [2017] EWCA Civ 845

⁵⁶² *ibid* [25] (Longmore LJ)

⁵⁶³ [2016] 1 CLC 292 (Com Ct) 300 (Phillips J)

⁵⁶⁴ [2016] 1 CLC 292 (Com Ct)

Secondly, if a shipbuilding contract subject to UCTA contained a clause which attempted to exclude or restrict liability for breach of Sale of Goods Act 1979 s 12⁵⁶⁵ (an implied term regarding title), then the clause will be struck down by UCTA s 6(1)(a).⁵⁶⁶ Moreover, under s 6(1A)(a),⁵⁶⁷ if the contract contained a clause which attempted to exclude or restrict liability for breach of s 13⁵⁶⁸ of the Sale of Goods Act 1979 (an implied term regarding compliance with description) or s 14 of the 1979 Act⁵⁶⁹ (an implied term regarding the good's quality and fitness for purpose), then its operability would be subject to UCTA s 11's 'reasonableness' test (explored below).⁵⁷⁰ By way of example, unless it was deemed to be an 'International Supply Contract' within the meaning of UCTA s 26, exclusion terms in the contract in *The Union Power*⁵⁷¹ would have been subject to the 'reasonableness' test, as they sought to exclude liability for breach of s 14's implied term as to quality.

Similarly, take a situation where a shipbuilding contract is governed by the Supply of Goods and Services Act 1982 as a work and materials provision 'under which goods pass'.⁵⁷² According to s 7(1A) of UCTA,⁵⁷³ clauses under the contract which attempt to exclude or restrict liability in regards to the good's correspondence with description (under s 3 of the 1982 Act⁵⁷⁴), or for the good's quality and fitness for purpose (under s 4 of the 1982 Act⁵⁷⁵), would only be operable if they satisfy UCTA s 11's 'reasonableness' test (explored below). Similarly, any clause in the contract which sought to exclude or restrict liability for breach of the 1982 Act's implied term as to title (under s 2⁵⁷⁶) would be struck down by UCTA s 7(3A).⁵⁷⁷

⁵⁶⁵ Sale of Goods Act 1979, s 12.

⁵⁶⁶ Unfair Contract Terms Act 1977, s 6(1)(a).

⁵⁶⁷ *ibid* s 6(1A)(a)

⁵⁶⁸ Sale of Goods Act 1979, s 13.

⁵⁶⁹ *ibid* s 14

⁵⁷⁰ *ibid* s 55(1)

⁵⁷¹ This case was introduced in Section 2.3

⁵⁷² Unfair Contract Terms Act 1977, s 7.

⁵⁷³ *ibid* s 7(1A)

⁵⁷⁴ Supply of Goods and Services Act 1982, s 3.

⁵⁷⁵ *ibid* s 4

⁵⁷⁶ *ibid* s 2

⁵⁷⁷ Unfair Contract Terms Act 1977, s 7(3A).

Now to discuss the ‘reasonableness’ test itself, which applies to clauses falling under UCTA s 3(2), s 6(1A) and s 7(1A). The test can be found under s 11 of UCTA,⁵⁷⁸ and requires that a term ‘shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made’.⁵⁷⁹ The guidelines that inform a court as to the reasonableness of a clause are to be found in sch 2 to the Act.⁵⁸⁰ Those of most relevance to the industry paradigm of this thesis will be explored here – these being guideline (a), pertaining to the parties’ respective bargaining positions, and guideline (c), as to the parties’ knowledge of the existence and extent of the term in light of trade custom and previous course of dealing between the parties.

The first relevant guideline to the question of reasonableness is ‘the strength of the bargaining positions of the parties relative to each other, taking into account...alternative means by which the customer’s requirements could have been met’.⁵⁸¹ For Burton LJ in *AXA Sun Life v Campbell Martin*,⁵⁸² the starting point is to assess the sizes of the organisations to the contract⁵⁸³ – namely how big the ship-owning company (buyer) is relative to the shipbuilding company (seller). As per Potter LJ in *Overseas Medical Supplies v Orient Transport Services*,⁵⁸⁴ the court must then assess whether the buyer was obliged to use that particular seller, and also how feasible it would have been for him to source another seller willing and able to fulfil the same contract.⁵⁸⁵ An inquiry into these factors thus requires the court to investigate the *industry* surrounding a transaction – as per the overarching theoretical paradigm of this thesis. In the shipbuilding context, the court must assess the market position of the ship-owner, in order to decide whether he would have been of similar bargaining power to the shipbuilder he was contracting with. Additionally, the court must look into the supply-side shipbuilding market in the

⁵⁷⁸ *ibid* s 11

⁵⁷⁹ *ibid* s 11(1)

⁵⁸⁰ *ibid* sch 2

⁵⁸¹ *ibid* sch 2(a)

⁵⁸² [2011] 1 CLC 312 (CA)

⁵⁸³ *ibid* at 328 (Burton LJ)

⁵⁸⁴ [1999] CLC 1243 (CA)

⁵⁸⁵ *ibid* at 1248 (Potter LJ)

country or region where the shipbuilder was based. If it found there to be a small group of shipbuilders with a monopoly over shipbuilding in that particular area, this would reduce the number of alternative shipbuilders that the ship buyer could deal with in a bid to evade contracting on his counterpart's alleged unreasonable terms.

Another guideline relevant to the question of reasonableness is 'whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard...to any custom of the trade and any previous course of dealing between the parties)'.⁵⁸⁶ In *Schenkers v Overland Shoes*⁵⁸⁷ it was declared that, for a clause to be reasonable under this particular guideline, it would have to be 'in common use and well known...[to] reputable and representative bodies...in the trade concerned'⁵⁸⁸ and, as per Judge Waksman in *Allen Fabrications Ltd v ASD Ltd*,⁵⁸⁹ it would have to be 'prevalent' in the industry.⁵⁹⁰ In the shipbuilding context, judges would therefore be required to assess whether a particular clause is commonplace based upon the 'general view'⁵⁹¹ among shipbuilding industry parties. This would require judges to interact with industry perspectives, as per the overarching theoretical paradigm of this thesis. Moreover, this mirrors Lord Hoffmann's reliance on industry understandings and custom when delivering judgment in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilles)*⁵⁹² (to be explored in Section 5.3.1), and also the Supreme Court's acknowledgment in *OW Bunker* that pre-payment consumption clauses are prevalent in the bunker industry.⁵⁹³

Finally, as a caveat note that the aforementioned Court of Appeal decision in *AXA Sun Life* stated that the chances of an exclusion term being struck down as 'unreasonable' are reduced if the contracting parties are commercial entities. This is because the courts assume that commercial parties are accustomed to reading

⁵⁸⁶ Unfair Contract Terms Act 1977, sch 2(c).

⁵⁸⁷ [1998] 1 Lloyd's Rep 498 (CA)

⁵⁸⁸ *ibid* at 507 (Pill LJ)

⁵⁸⁹ [2012] EWHC 2213 (TCC)

⁵⁹⁰ *ibid* [75] (Judge Waksman)

⁵⁹¹ [1998] 1 Lloyd's Rep 498 (CA) 507 (Pill LJ)

⁵⁹² [2009] 1 AC 61 (HL)

⁵⁹³ See Section 2.5

written terms,⁵⁹⁴ and are consequently accustomed to determining whether such terms are onerous. The court's pre-requisite inquiry into whether the parties to a contract are commercial or not requires an examination of both the nature of their transactions and also the *industry* in which they operate – as per the overarching theoretical paradigm of this thesis.

Accordingly, characterisation of a shipbuilding contract will affect whether or not the Unfair Contract Terms Act 1977 applies to it. If UCTA applies, then the contract's exclusion terms will be either struck down or be subject to the Act's 'reasonableness' test – a test which requires judges to look to the *industry* circumstances surrounding that particular contract and the parties to it.⁵⁹⁵

2.7 – Conclusion

Overall therefore, this Chapter demonstrated how the shipbuilding contract and relationship are characterised by English law. Shipbuilding contracts are pigeon-holed into a set characterisation, which determines the legislation which they are governed by and therefore the rights, duties and obligations under them. The shipbuilding contract has long been characterised as a sale of goods contract, whose chief obligation is delivery of a completed newbuild from seller to buyer. The contract's governing legislation – the Sale of Goods Act 1979 – shapes the parties' contracting relationship as one in which they operate at arm's length.

However, the entrenched characterisations of the shipbuilding contract and relationship have occasionally been deviated from. For one, owing to the predominance of service obligations due under certain shipbuilding contracts, judges have occasionally declared that they be subject to principles governing work and materials contracts or general construction contracts. Alternatively, judges have

⁵⁹⁴ [2011] 1 CLC 312 (CA) 328 (Burton LJ)

⁵⁹⁵ Richard Lawson, *Exclusion Clauses and Unfair Contract Terms* (12th edn, Sweet & Maxwell 2017) para 9-001

been known to characterise shipping contracts as *sui generis* provisions, in light of the peculiarities of the shipping industries. In doing so, they are taking a more ‘liberal’ stance on the overarching theoretical question being answered in this thesis, under which industry norms influence how contracts are characterised. Moreover, judges have been seen to characterise shipbuilding relationships not as those operating at arm’s length, but as those underpinned by cooperation.

Additionally, Section 2.6 established that the characterisation of a shipbuilding contract will determine whether the contract’s terms are subject to the Unfair Contract Terms Act 1977. Where a shipbuilding contract’s characterisation makes it subject to the 1977 Act, its exclusion clauses (such as Force Majeure clauses) will only be operable if deemed ‘reasonable’ in light of the parties’ bargaining powers, knowledge of trade custom and course of dealings. Assessment of these factors reflects the overarching theoretical paradigm of this thesis, in featuring judicial recourse to the industry surrounding a shipbuilding transaction.

While this Chapter demonstrated how the shipbuilding contract and thus the shipbuilding relationship are characterised at law, Chapter 3 will assess the industry norms underpinning shipbuilding relationships between buyer and shipyard, and also industry party perceptions of a shipbuilder’s role under a shipbuilding contract (and thus their perceptions of how the contract should be characterised). The findings from these two chapters will help prove whether shipbuilding law and shipbuilding industry practice are mismatched. If a mismatch is found, then this will perhaps indicate that the law should give greater regard to industry norms – as per the overarching theoretical paradigm of this piece.

Chapter 3

SHIPBUILDING INDUSTRY NORMS AND PERCEPTIONS

3.1 – Introduction

As explained in Chapter 2, the entrenched English law characterisation of the shipbuilding contract is as a sale of goods contract.⁵⁹⁶ The Sale of Goods Act 1979⁵⁹⁷ therefore characterises the shipbuilding relationship between ship-owner and shipbuilder. However, in the industry, certain shipbuilding relationships operate differently from how shipbuilding relationships are characterised at law under the Act, embodying different norms. Also, some in the industry perceive a shipbuilder's role under certain shipbuilding contracts to differ from the obligations which English law imposes upon shipbuilders under all shipbuilding contracts. Accordingly, shipbuilding industry norms and perceptions will be assessed in this chapter. These norms and perceptions will be drawn from standard-form shipbuilding contracts, specially drafted shipbuilding contracts, and from the information on the websites of shipyards. Standard-form shipbuilding contracts are especially good indicators of industry norms and perceptions because they are drafted and issued by shipbuilding industry associations.⁵⁹⁸ Moreover, by relying on standard-form and specially drafted contracts as evidence of shipbuilding industry norms and perceptions, this chapter emphasises the importance of contracts.

⁵⁹⁶ The only reported exceptions to this characterisation are the cases of *Hyundai Heavy Industries v Papadopoulos*, *Stocznia Gdanska SA v Latvian Shipping Co* and also *Adyard Abu Dhabi v SD Marine Services*, all assessed in Section 2.4.1.

⁵⁹⁷ Sale of Goods Act 1979.

⁵⁹⁸ These associations were listed in Section 1.1.6

The purpose of assessing the shipbuilding industry is to ascertain the extent to which its norms and perceptions are mismatched with the legal characterisation of shipbuilding. Doing this will inform a response to the overarching theoretical question of this thesis, regarding the extent to which the law should be influenced by industry norms and perceptions.

3.2 – Industry norms underpinning the shipbuilding relationship

Whilst shipbuilding law was assessed in Chapter 2, the shipbuilding industry will be assessed in this chapter – in order to determine whether there is a mismatch between shipbuilding law and shipbuilding industry practice. English law characterises shipbuilding contracts as sale of goods contracts under the Sale of Goods Act.⁵⁹⁹ The Act in turn characterises contracting relationships falling under it (such as shipbuilding relationships) as ones where the parties operate at arm's length to each other.⁶⁰⁰ This section will however prove that relationships in the shipbuilding industry are heterogeneous, and that some of them operate differently to the arm's length characterisation prescribed to them under English law.

On the one hand, parties to standard-form contracts to build standardised vessels⁶⁰¹ operate at arm's length to one another – thus mirroring how all contracting relationships (including shipbuilding contract relationships) are characterised under English law. The relationship operates this way because the shipbuilder will likely be experienced at building standardised 'off-the-shelf' vessels,⁶⁰² meaning that the buyer can simply sign the standard-form and leave the shipbuilder to get on with

⁵⁹⁹ The only reported exceptions to this characterisation are the cases of *Hyundai Heavy Industries v Papadopoulos*, *Stocznia Gdanska SA v Latvian Shipping Co* and also *Adyard Abu Dhabi v SD Marine Services*, all assessed in Section 2.4.1.

⁶⁰⁰ See Section 2.2

⁶⁰¹ 'It is very common...in the context of shipbuilding...for there to be standard form contracts which the parties [use]' for standardised projects. [Filippo Lorenzon and Ainhoa Campas Velasco, 'Shipbuilding, Sale, Finance And Registration' in Yvonne Baatz (ed), *Maritime Law* (3rd edn, Informa 2014) 67.]

⁶⁰² Klaas Van Dokkum, *Ship Knowledge A Modern Encyclopedia* (3rd edn, Dokmar 2001) 80

the job from then on.⁶⁰³ On the other hand, parties to specially drafted contracts to build bespoke vessels⁶⁰⁴ often cooperate with one another⁶⁰⁵ – thus deviating from the characterisation of the shipbuilding relationship under English law. The relationship operates this way because the vessel’s unique specification means that regular cooperative discussion between the parties is necessary to ensure the buyer’s desires are being fulfilled and his visions recreated.

Therefore, this section will firstly explore industry examples which demonstrate the existence of arm’s length shipbuilding relationships (which mirror the arm’s length characterisation of shipbuilding relationships at law). This section will then explore industry examples which demonstrate the existence of shipbuilding relationships underpinned by cooperative norms (which differ from the arm’s length characterisation of shipbuilding relationships at law).

Firstly, the dispute resolution clauses found in industry standard-forms (which often govern projects to build standardised vessels) shape contracting parties’ relationships such that they operate at arm’s length. The clauses often oblige parties to litigate or arbitrate, rather than settle disputes internally between themselves. Take BIMCO’s NewBuildCon form for instance. Unless a dispute concerns the vessel’s compliance with Classification Society rules (for which referral is made to the society), or concerns the vessel’s performance or compliance with specification and design (for which referral is made to an independent expert), NewBuildCon states that ‘any dispute...shall be referred to arbitration’⁶⁰⁶ – without any mention

⁶⁰³ The buyer will leave the shipbuilder to his own devices, apart from attending any inspections or trials which he (or his representative) is *obliged* to attend under the terms of the contract. [*Zhoushan Jinhaiwan Shipyard v Golden Exquisite Inc* [2014] EWHC 4050 (Com Ct).]

⁶⁰⁴ ‘[T]he bespoke nature of [such]...projects make the use of standard printed forms of contract very rare’ with specially drafted contracts favoured instead. ‘[I]ndividual yards or their lawyers will usually produce their own draft forms of contract’ or ‘[s]ome yards may even be willing to negotiate a contract based on a draft submitted by a buyer’s lawyer’. [Richard Coles and Filippo Lorenzon, *Law of Yachts and Yachting* (Informa 2012) para 1-001.]

⁶⁰⁵ Anil Sachdev, ‘The Shipbuilding Contract – A Brief Affair Or An Intimate Relationship Between The Builder And The Buyer’ [2002] 4(2) *Rajan & Tann Law Lines* <<http://eoasis.rajahtann.com/eOASIS/ll/pdf/Shipbuilding-Contract.pdf>> accessed 3 August 2016

⁶⁰⁶ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix A citing Baltic and International Maritime Council, ‘BIMCO Standard Newbuilding Contract (NEWBUILDCON Form)1’ (BIMCO, Copenhagen, 2007) s 5 cl 42(c)

of the parties trying to resolve the dispute internally first. The presence of dispute resolution clauses such as this in their contract might therefore lead parties to view their contracting counterpart as an adversary to be kept at arm's length, rather than a party with whom problems can be amicably discussed.

Also, while specially drafted shipbuilding contracts often limit a shipbuilder's ability to subcontract (by stating that he can only subcontract work to 'suitably experienced and qualified'⁶⁰⁷ contractors stipulated in a buyer approved 'maker's list'⁶⁰⁸), the subcontracting clauses contained in certain standard-forms impose no such limitations. For instance, the SAJ standard-form subcontracting clause states that '[t]he BUILDER may, at its sole discretion and responsibility, subcontract any portion of the construction work of the VESSEL'.⁶⁰⁹ By allowing the shipyard to subcontract as it pleases and to whom it pleases, without allowing the buyer to have any say, the clause seemingly places a wall between the parties – whose relationship therein operates non-cooperatively and at arm's length.

In a similar vein, the AWES standard-form shapes the relationship between the buyer and the shipyard's *supplier* to operate at arm's length. By stating that 'all contact with the CONTRACTOR's suppliers concerning supplies intended for the VESSEL under this CONTRACT shall be made through the CONTRACTOR',⁶¹⁰ channels of communication between the parties are firmly restricted. It effectively places a wall between the buyer and the shipyard's network, allowing the shipyard (and his suppliers) to keep the buyer at arm's length.

⁶⁰⁷ US Securities and Exchange Commission, 'Shipbuilding Contract between Meyer Werft GmbH and Breakaway Two, Ltd. and NCL Corporation Ltd.' (Hull No. S.692, 24 September 2010) <www.sec.gov/Archives/edgar/data/1318742/000119312511018810/dex1056.htm> accessed 27 May 2018, art 1(5)(1)

⁶⁰⁸ Andrew Tettenborn, 'Contracting By Numbers: The Different Characteristics of the Main Shipbuilding Contracts' in Barış Soyer and Andrew Tettenborn (eds), *Ship building, sale and finance* (Routledge 2016) 45

⁶⁰⁹ Stuart Beare, Graeme Bowtle and Jane Martineau, 'Shipbuilding contract of the Shipowners Association of Japan (SAJ)1' in Lord Millett (ed), *Encyclopaedia of Forms and Precedents* (vol 39(1) pt 1(B)(A) LexisNexis 2016) art I(4)

⁶¹⁰ Association of European Shipbuilders and Shiprepairers, 'Standard Shipbuilding Contract' (Scribd, uploaded by api-3739585, 15 October 2008) <www.scribd.com/doc/6745831/Awes-Shipbuilding-Contract> accessed 10 November 2016, art 2 para b

Moreover South Korean shipyard Daewoo (DSME), which builds vessels including standardised bulk carriers,⁶¹¹ seemingly shapes its shipbuilding relationships as those operating at arm's length. This is the case because its website states '[o]ur core value...[t]ransparency enables us to...disclose *our* decisions openly'⁶¹² to contracting counterparts. Given the standardised nature of the projects which it carries out, and thus the tried-and-tested designs it follows, DSME is able to make certain decisions regarding the project on its own – before presumably informing the ship-owner with whom it is contracting at the next available opportunity. It is thus able to operate at arm's length to its contracting counterparts.

The examples used so far in this section demonstrate that industry standard-forms, and also shipbuilders specialising in the building of standardised vessels, often shape the shipbuilding relationship to operate at arm's length – thus mirroring how contracting relationships (such as the shipbuilding relationship) are characterised under English law. However, this is only half the story. Parties to specially drafted contracts to build bespoke vessels instead often choose to cooperate with one another – in sharp contrast to the law which, as mentioned above, characterises shipbuilding relationships as those in which buyer and shipyard operate at arm's length.

For instance, two contracts between a Bermudan buyer and a French shipbuilder to build bespoke cruise vessels state that '[t]he Builder and the Buyer will co-operate and Work closely together on an “open-book” basis',⁶¹³ with another contract struck

⁶¹¹ DSME, 'Business Area; Shipbuilding' <www.dsme.co.kr/epub/business/business010201.do> accessed 6 February 2018

⁶¹² DSME, 'About DSME' <www.dsme.co.kr/epub/introduction/introduction0103.do#none> accessed 7 December 2016

⁶¹³ US Securities and Exchange Commission, 'Shipbuilding Contract between ER Yards S.A. and F3 Two, Ltd' (Hull No. D33, 7 September 2006) <www.sec.gov/Archives/edgar/data/1318742/000095014407001914/g05791exv4w44.htm> accessed 7 February 2018, art 14(16); US Securities and Exchange Commission, 'Shipbuilding Contract between Aker Yards S.A. and F3 One, Ltd' (Hull No. C33, 7 September 2006) <www.sec.gov/Archives/edgar/data/1318742/000095014407001914/g05791exv4w43.htm> accessed 7 February 2018, art 14(16)

between Bermudan buyers and a German shipbuilder stating the exact same.⁶¹⁴ The fact that these contracts prescribe cooperative relationships exemplifies a potential mismatch between the law's uniform characterisation of all shipbuilding relationships (as operating at arm's length), and the shipbuilding relationships under specially drafted contracts to build bespoke vessels such as these (under which parties often cooperate).

Also, whilst the dispute resolution clauses in standard-forms shape the shipbuilding relationship to operate at arm's length (as explained above), the dispute resolution clauses contained within certain specially drafted contracts shape the shipbuilding relationship as a cooperative one. They do this by prescribing internal discussion, rather than litigation or arbitration, as the chief method for dispute resolution. For instance, one bespoke tanker building contract between an US buyer and US shipyard stipulates that, before litigating disputes in court, the parties should try and settle disputes internally. In particular, the clause suggests that '[e]ach Party shall submit any Dispute to a "Disputes Panel" composed of Purchaser's Senior Vice President and General Manager, Technical Services and Contractor's Program Manager. The Disputes Panel shall meet and confer and shall engage in...discussions toward resolving any such Dispute'.⁶¹⁵ Moreover, a bespoke supply vessel building contract between two US parties takes this one step further. Before stipulating that disputes be arbitrated, this particular contract prescribes that firstly 'the Builder and Owner will attempt to resolve the issue(s) involved by good faith discussion and mutual agreement as soon as practicable'.⁶¹⁶ Thus, not only does it expressly stipulate that parties try and resolve disputes between themselves, but it also stipulates the character by which they should do so – namely, in 'good

⁶¹⁴ US Securities and Exchange Commission, 'Shipbuilding Contract between Meyer Werft GmbH and Breakaway Two, Ltd. and NCL Corporation Ltd.' (Hull No. S.692, 24 September 2010) <www.sec.gov/Archives/edgar/data/1318742/000119312511018810/dex1056.htm> accessed 27 May 2018, art 3(1.5)

⁶¹⁵ US Securities and Exchange Commission, 'Contract For Construction between Seabulk Tankers, Inc and National Steel and Shipbuilding Company' (10 September 2013) <http://ir.stockpr.com/seacorholdings/all-sec-filings/content/0000859598-13-000144/exhibit101contractforconst.htm??TB_iframe=true&height=auto&width=auto&preload=false> accessed 7 February 2018, art 33(a)

⁶¹⁶ US Securities and Exchange Commission, 'Shipbuilding Contract between VT Halter Marine, Inc., and Hornbeck Offshore Services, LLC' (Contract No. 1420110868, 14 November 2011) <www.sec.gov/Archives/edgar/data/1131227/000119312512089201/d270624dex1041.htm> accessed 7 February 2018, art 25.1

faith' and as quickly as possible. In doing so, the contract upholds the importance of relationships in small community oriented industries such as shipbuilding, where protracted disputes cause significant damage to both the reputations and relationships of contracting parties. The dispute resolution clauses contained in these two specially drafted contracts thus reveal that the shipbuilding relationships under them take on a distinctly cooperative, non-litigious shape – which markedly contrasts with the law's characterisation of shipbuilding relationships as those operating at arm's length.

Overall therefore, whilst the relationships under standard-form shipbuilding contracts to build standardised vessels often operate at arm's length (thus mirroring the arm's length characterisation of shipbuilding relationships at law), the relationships under specially drafted shipbuilding contracts to build bespoke vessels often feature cooperation between buyer and shipyard (thus deviating from the arm's length characterisation of shipbuilding relationships at law). This in turn demonstrates that there is a mismatch between the law and certain aspects of shipbuilding industry practice.

3.2.1 Industry norms underpinning the general construction relationship

Courts in both the *Hyundai Heavy Industries v Papadopoulos*⁶¹⁷ and *Adyard Abu Dhabi v SD Marine Services*⁶¹⁸ cases⁶¹⁹ considered the shipbuilding context in the same breath as the building or general construction context. One could argue that legal reconciliation of shipbuilding and general construction makes sense because the relationship between ship-owner and shipbuilder under specially drafted contracts to build bespoke vessels, and the relationship between employer and contractor under general construction contracts, embody similar cooperative norms. Therefore, the purpose of this section will be to illustrate that the cooperative norms underpinning some shipbuilding relationships are not incongruous, by virtue of the

⁶¹⁷ [1980] 1 WLR 1129 (HL)

⁶¹⁸ [2011] EWHC 848 (Com Ct)

⁶¹⁹ These cases were introduced in Section 2.4.1

fact that such norms are also common to relationships in related industries such as general construction.

Projects in the general construction industry tend to be regulated by standard-forms deriving out of commercial practice.⁶²⁰ One such contract is the Joint Contracts Tribunal's 'JCT' form, which now claims to be the UK's most commonly used standard-form general construction contract.⁶²¹ Much akin to the cooperative relationship embodied under certain specially drafted shipbuilding contracts for bespoke newbuilds, the JCT form embodies cooperation by encouraging project participants to 'work together'⁶²² 'in an open, *cooperative* and collaborative manner'.⁶²³ This encouragement of cooperation is observable in JCT's dispute resolution procedure, which states that '[a]n important strand of collaborative working is not the absence of disputes but their swift and efficient resolution achieved without damage to the parties' relationships'.⁶²⁴ Clause 9.1 of the 2011 JCT form does just this, declaring that only when a dispute 'cannot be resolved by direct negotiations'⁶²⁵ between the parties can they then pursue mediation, arbitration or litigation. This directly parallels cooperative shipbuilding relationships (under specially drafted contracts to build bespoke vessels), which also often prescribe internal dispute resolution as a first port of call.

Also, the relationships under standard-form engineering contracts used in the general construction industry embody similar cooperative norms to the shipbuilding relationships under many specially drafted shipbuilding contracts for bespoke newbuilds. The New Engineering Contract known as 'NEC' provides 'a complete range of contract documents covering all types of procurement and construction'.⁶²⁶

⁶²⁰ Hugh Beale, *Chitty On Contracts*, vol 1 (31st edn, Sweet & Maxwell 2012) para 1-092

⁶²¹ Out-Law.com, 'Standard form contracts: JCT' (November 2012) <www.out-law.com/en/topics/projects--construction/construction-standard-form-contracts/standard-form-contracts-jct/> accessed 10 November 2016

⁶²² Jeremy Glover, 'Framework Agreements: Practice and Pitfalls' (Fenwick Elliott, 22 May 2008) <www.fenwickelliott.com/files/Practice%20and%20Pitfalls.pdf> accessed 10 November 2016, 6

⁶²³ *ibid*

⁶²⁴ *ibid* 7

⁶²⁵ Vivian Ramsey and Stephen Furst, *Keating on Construction Contracts* (10th edn, Sweet & Maxwell 2017) para 20-523

⁶²⁶ Hugh Beale, *Chitty On Contracts*, vol 2 (31st edn, Sweet & Maxwell 2012) para 37-022

In a similar vein to JCT, the focus of NEC contracts is on ‘getting the project built efficiently with both parties having a duty to identify risks, [and] to collaborate in overcoming those risks’,⁶²⁷ ‘in a spirit of mutual trust and *co-operation*’⁶²⁸ – the latter being stated in cl 10.1 of the contract itself. For instance, cl 25.1 expressly obliges the builder to ‘*co-operate* with Others’⁶²⁹ involved in the project. An example would be the contract’s ‘early warning procedure’, under which the builder must give its contracting counterparts prior warning as to any relevant issues which could delay the project, significantly increase its cost, or affect the building’s utility once in use.⁶³⁰ This gives ‘an opportunity for the parties to discuss and resolve the matter in the most efficient manner’.⁶³¹ In doing so, there is a stark similarity between cooperative shipbuilding relationships (under specially drafted contracts to build bespoke vessels) and the cooperative engineering relationship under the NEC contract.

As well as through its early warning procedure, NEC’s cooperative nexus is exemplified by its in built ‘pain share–gain share’ protocol, which ‘drives the contracting parties to the common goal of completing the works at least cost and in the shortest possible construction period’.⁶³² In *Alstom Signalling Ltd v Jarvis Facilities Ltd*⁶³³ for example, the parties’ NEC contract stated that ‘if the “Final Cost/Price” came in below the adjusted “Target Cost/Price”, the gain would be shared by Railtrack (the client), Alstom (the contractor) and the sub-contractors’.⁶³⁴ Whereas ‘[i]f the final cost/price was up to £500,000 above the target cost/price,

⁶²⁷ Vivian Ramsey, Ann Minogue, Jenny Baster and Michael O’Reilly (eds), *ICE Manual of Construction Law* (Thomas Telford Ltd 2011) 100

⁶²⁸ Vivian Ramsey and Stephen Furst, *Keating on Construction Contracts* (10th edn, Sweet & Maxwell 2017) para 23-012

⁶²⁹ *ibid* para 23-100

⁶³⁰ Nicholas Gould, ‘NEC3: construction contract of the future?’ (2008) 24(4) *Construction Law Journal* 286, 296

⁶³¹ *ibid*

⁶³² Simon Fullalove ‘An Interview with Wai Chi-sing of the Hong Kong Government’ (necontract.com) <http://webcache.googleusercontent.com/search?q=cache:2XU9K6K-GkAJ:https://www.neccontract.com/getmedia/237b2e08-5c91-4d80-8788-6d5e56035499/NEC_Wai-Chi-sing-Interview_June2014_WebReady.pdf.aspx&cd=3&hl=en&ct=clnk&gl=uk> accessed 11 February 2015

⁶³³ [2004] EWHC 1285 (TCC)

⁶³⁴ Ellis Baker, ‘Partnering strategies: the legal dimension’ (2007) 23(5) *Construction Law Journal* 344, 353

Alstom and Railtrack would share the initial “pain”,⁶³⁵ and pay the excess. Protocols such as these therefore encourage parties to cooperate in order to achieve a cost effective result. In this way, engineering relationships under the NEC contract uphold the very same cooperative norm as many shipbuilding relationships under specially drafted contracts to build bespoke vessels.

Overall therefore, in embodying cooperative norms, relationships under the NEC engineering contract and JCT building contract strongly resemble the relationships under specially drafted shipbuilding contracts for the building of bespoke vessels, which embody similar norms.

3.2.2 Industry norms underpinning the offshore construction relationship

As stated in Section 1.1.4, commercial shipbuilding includes the building of certain offshore installations. It is for this reason that offshore construction is being considered in this section. The offshore construction relationship (between company and contractor) is often underpinned by cooperative norms. This in turn mirrors the cooperative norms underpinning shipbuilding relationships (between buyer and shipyard) to build bespoke ‘onshore’ commercial vessels under specially drafted contracts.⁶³⁶ Accordingly, the purpose of this section will be to illustrate that the cooperative norms found in certain onshore shipbuilding relationships are not in isolation, because such norms are also common to contracting relationships in offshore construction.

In the offshore construction industry, ‘extensive use’⁶³⁷ is made of standard-forms pioneered by LOGIC. Two examples are LOGIC’s ‘General Conditions of Contract for Marine Construction’,⁶³⁸ a standard-form applicable to offshore installation

⁶³⁵ *ibid*

⁶³⁶ This was explored in Section 3.2

⁶³⁷ William Cecil and Fiona Cain, ‘England & Wales’ in Arnold J van Steenderen (ed), *Getting The Deal Through Shipbuilding 2017* (6th edn, Law Business Research 2017) 36

⁶³⁸ LOGIC, ‘General Conditions of Contract (including Guidance Notes) for Marine Construction’ (Standard Contracts for the UK Offshore Oil & Gas Industry, Edition 2, October 2004)

projects,⁶³⁹ and LOGIC's 'General Conditions of Contract for Construction',⁶⁴⁰ applicable to 'construction services...for topsides work'⁶⁴¹ amongst other things. LOGIC itself says that the offshore construction industry is one 'where little value, but significant cost, attaches to a[n]...adversarial approach'.⁶⁴² The clauses contained within the LOGIC standard-form contracts reflect this, in taking a cooperative approach – rather than an adversarial or arm's length one.

For example, the variation clauses within LOGIC's marine construction and construction contracts both state that 'the effect (if any) of a VARIATION on CONTRACT PRICE and SCHEDULE OF KEY DATES shall be agreed before the instruction is issued or before work starts, using the estimates prepared by the CONTRACTOR'.⁶⁴³ The contract therefore shapes the relationship between company and contractor as discursive, in requiring one party to consult the other prior to work starting on any project variation. In doing so, this clause performs a dispute prevention function, by ensuring that there is agreement as to a variation before the project goes any further – as stated in the Guidance Notes to each contract.⁶⁴⁴ The cooperative nature of this clause is confirmed by its sister provision, which avers that if the parties fail to agree on the contractor's variation estimate, the effects of variation should be determined *non-litigiously* under

⁶³⁹ *ibid* Guidance Notes 2

⁶⁴⁰ LOGIC, 'General Conditions of Contract (including Guidance Notes) for Construction' (Standard Contracts for the UK Offshore Oil & Gas Industry, Edition 2, October 2003) <www.logic-oil.com/sites/default/files/documents/Construction%20Edition%202.pdf> accessed 11 June 2017

⁶⁴¹ *ibid* Guidance Notes 2

⁶⁴² LOGIC, 'General Conditions of Contract (including Guidance Notes) for Marine Construction' (Standard Contracts for the UK Offshore Oil & Gas Industry, Edition 2, October 2004), Guidance Notes 1

⁶⁴³ LOGIC, 'General Conditions of Contract (including Guidance Notes) for Marine Construction' (Standard Contracts for the UK Offshore Oil & Gas Industry, Edition 2, October 2004), cl 14.5; LOGIC, 'General Conditions of Contract (including Guidance Notes) for Construction' (Standard Contracts for the UK Offshore Oil & Gas Industry, Edition 2, October 2003) <www.logic-oil.com/sites/default/files/documents/Construction%20Edition%202.pdf> accessed 11 June 2017, cl 14.5

⁶⁴⁴ LOGIC, 'General Conditions of Contract (including Guidance Notes) for Marine Construction' (Standard Contracts for the UK Offshore Oil & Gas Industry, Edition 2, October 2004), Guidance Notes 7; LOGIC, 'General Conditions of Contract (including Guidance Notes) for Construction' (Standard Contracts for the UK Offshore Oil & Gas Industry, Edition 2, October 2003) <www.logic-oil.com/sites/default/files/documents/Construction%20Edition%202.pdf> accessed 11 June 2017, Guidance Notes para 2.6

principles therein listed in the contract – such as making a fair valuation of the work.⁶⁴⁵

Another marine construction contract commonly used in the offshore construction industry is that of International Marine Contractors Association (IMCA).⁶⁴⁶ IMCA's contracts come off the back of a 2002 survey conducted into offshore industry transactions, which revealed that there was an 'inequitable balance of risk and reward for contractors...[and that] the problem was almost always in the conditions of contract'.⁶⁴⁷ Accordingly, IMCA contracts are said to embody 'an equitable contractual balance based on the parties' respective risks and rewards',⁶⁴⁸ thus reducing the prospect of inter-party resentment and a subsequent lack of willingness to cooperate.

Take IMCA's procedure for when a Force Majeure event affects a project. Clause 15.5 of IMCA's marine construction contract states that '[f]ollowing notification of a force majeure occurrence...the COMPANY and the CONTRACTOR shall meet without delay with a view to agreeing a mutually acceptable course of action to minimise any effects of such occurrence and shall thereafter meet and discuss at such intervals as the parties may agree'.⁶⁴⁹ The requirement of regular discussion shapes the contracting relationship as a discursive one, whilst the requirement for the parties to come to a mutually acceptable course of action facilitates party cooperation. Moreover, cl 15.6 states that, once a Force Majeure event has passed,

⁶⁴⁵ LOGIC, 'General Conditions of Contract (including Guidance Notes) for Marine Construction' (Standard Contracts for the UK Offshore Oil & Gas Industry, Edition 2, October 2004), cl 14.5; LOGIC, 'General Conditions of Contract (including Guidance Notes) for Construction' (Standard Contracts for the UK Offshore Oil & Gas Industry, Edition 2, October 2003) <www.logic-oil.com/sites/default/files/documents/Construction%20Edition%202.pdf> accessed 11 June 2017, cl 14.5

⁶⁴⁶ International Marine Contractors Association, 'IMCA Marine Construction Contract' (Rev. 3, February 2017) <www.imca-int.com/publications/402/imca-marine-construction-contract/> accessed 14 September 2017

⁶⁴⁷ International Marine Contractors Association, 'IMCA General Contracting Principles' (Rev. 4, February 2017) <www.imca-int.com/publications/401/imca-general-contracting-principles/> accessed 14 September 2017, 3

⁶⁴⁸ *ibid*

⁶⁴⁹ International Marine Contractors Association, 'IMCA Marine Construction Contract' (Rev. 3, February 2017) <www.imca-int.com/publications/402/imca-marine-construction-contract/> accessed 14 September 2017, cl 15.5

‘the CONTRACTOR shall prepare a revised PROGRAMME to include for rescheduling of the WORK so as to minimise the effects of the delay...[which] the COMPANY shall authorise’.⁶⁵⁰ The clause thus ensures that a contingency plan is agreed between company and contractor,⁶⁵¹ preventing one of them from trying to unjustly benefit from the Force Majeure event (for instance by using the event as an excuse for its own delay or performance failure.⁶⁵²) Overall therefore, by encouraging parties to communicate, IMCA contracts facilitate cooperative contracting relationships.

Thus, by virtue of the fact that they are both underpinned by cooperative norms, the offshore construction relationship (between company and contractor) resembles ‘onshore’ vessel building relationships (between ship-owner and shipyard) for the construction of bespoke onshore vessels.

3.3 – Industry perceptions of the shipbuilder’s role under a shipbuilding contract

Section 3.2 talked of the potential mismatch between the characterisation of shipbuilding relationships at law, and the norms in fact underpinning certain industry shipbuilding relationships. There may however lie another mismatch, between how the law characterises the shipbuilder’s obligations under all shipbuilding contracts, and what shipbuilders in fact perceive their role under some shipbuilding contracts to be. As explained in Chapter 2, English law characterises shipbuilding contracts as sale of goods contracts under the Sale of Goods Act.⁶⁵³ As a result, the shipbuilder constitutes a ‘seller’ for the purposes of the Act, whose legal obligation under the contract is thus to ‘deliver the good’⁶⁵⁴ (namely the

⁶⁵⁰ *ibid* cl 15.6

⁶⁵¹ *ibid* Guidance Notes para 2.12

⁶⁵² This prospect will be revisited in Section 4.3.1

⁶⁵³ The only reported exceptions to this characterisation are the cases of *Hyundai Heavy Industries v Papadopoulos*, *Stocznia Gdanska SA v Latvian Shipping Co* and also *Adyard Abu Dhabi v SD Marine Services*, all assessed in Section 2.4.1.

⁶⁵⁴ Sale of Goods Act 1979, s 27.

completed vessel). However, whilst all English law governed shipbuilding contracts will operate in this way *at law*, industry party perceptions of a shipbuilder's role under certain shipbuilding contracts often differ from this.

This section will accordingly demonstrate the industry perception that a shipbuilder's role under a shipbuilding contract largely differs based upon whether the project is to build a standardised vessel (under a standard-form contract), or to build a bespoke vessel (under a specially drafted contract). Firstly, assessment will be made of the perceived role of shipbuilders engaged in (standard-form) contracts to build *standardised* vessels.⁶⁵⁵ They often perceive their primary role as lying in the delivery of the vessel once built (thus mirroring the English law characterisation of the shipbuilding contract as a sale of goods), since the standardised 'off-the-shelf' nature of the vessel's design and specification means that the shipbuilder will simply need to follow tried-and-tested procedures to build it⁶⁵⁶ – a 'production line' process mildly resembling how fungible goods are manufactured. Secondly, assessment will be made of the perceived role of shipbuilders engaged in (specially drafted) contracts to build *bespoke* vessels.⁶⁵⁷ Rather than merely to deliver the completed vessel (as per their legal obligation), shipbuilders under such contracts typically perceive their role in one of two ways. Under the first way, termed the 'hybrid' perception, certain shipbuilders perceive their role under a bespoke shipbuilding contract to lie in both the vessel's construction (a service obligation) and its delivery (customary of a sale of goods contract) – despite the fact that the shipbuilding contract will nonetheless operate *in law* as a sale of goods (meaning the shipbuilder's legal obligation is merely to deliver the completed vessel). Alternatively under the second way, termed the 'outright' perception, certain shipbuilders perceive their role under a bespoke shipbuilding contract to lie

⁶⁵⁵ 'It is very common...in the context of shipbuilding...for there to be standard form contracts which the parties [use]' for standardised projects. [Filippo Lorenzon and Ainhwa Campas Velasco, 'Shipbuilding, Sale, Finance And Registration' in Yvonne Baatz (ed), *Maritime Law* (3rd edn, Informa 2014) 67.]

⁶⁵⁶ Klaas Van Dokkum, *Ship Knowledge A Modern Encyclopedia* (3rd edn, Dokmar 2001) 80

⁶⁵⁷ '[T]he bespoke nature of [such]...projects make the use of standard printed forms of contract very rare' with specially drafted contracts favoured instead. '[I]ndividual yards or their lawyers will usually produce their own draft forms of contract' or '[s]ome yards may even be willing to negotiate a contract based on a draft submitted by a buyer's lawyer'. [Richard Coles and Filippo Lorenzon, *Law of Yachts and Yachting* (Informa 2012) para 1-001.]

‘outright’ in the service of constructing the vessel – despite the fact that, once again, the shipbuilding contract will operate *in law* as a sale of goods (meaning the shipbuilder’s legal obligation is merely to deliver the completed vessel). The ‘hybrid’ and ‘outright’ perceptions are shaped by the *bespoke* nature of the vessel being constructed, which requires the shipbuilder to impart artisan labour so that the buyer’s design is correctly reproduced – in other words, the shipbuilder is providing a labour *service*.

There therefore lies a divergence between standardised shipbuilds (perceived as a sale of goods) and bespoke shipbuilds (perceived either as a hybrid service-sale or as an outright supply of services) – a divergence which has already been recognised in German and Canadian law.⁶⁵⁸ This section will thus assess the three differing perceptions of a shipbuilder’s role under a shipbuilding contract, in turn.

Sale of goods: Delivery of the vessel

Standard-form shipbuilding contracts (predominantly used in standardised vessel building projects), and the website information of shipyards engaged in standardised vessel building, perceive the role of a shipbuilder under a shipbuilding contract as being the sale and delivery of the completed vessel (thus mirroring the law’s characterisation of the shipbuilding contract as a sale of goods). Take the Chinese Maritime Arbitration Commission (CMAC) standard-form for instance. Unlike other standard-form shipbuilding contracts which refer to the shipyard as the ‘builder’ or ‘contractor’, CMAC refers to the shipyard as the ‘seller’⁶⁵⁹ (with the ship-owner referred to as the ‘buyer’.⁶⁶⁰) The nexus of the contract is thus framed as being a seller selling something to a buyer. This potentially indicates the overarching ambit of the contract to lie in a sale of goods, mirroring the characterisation of the shipbuilding contract under English law.

⁶⁵⁸ See Section 2.4.2

⁶⁵⁹ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix B citing China Maritime Arbitration Commission (CMAC), ‘CMAC Standard Newbuilding contract (Shanghai Form)1’ (CMAC, China) Witnessst

⁶⁶⁰ *ibid*

Shipbuilders who specialise in standardised vessel building also perceive their role under a shipbuilding contract identically to the obligations imposed on them under English law's characterisation of the contract – namely sale and delivery of the completed newbuild. This is the case because they refer to newbuilds as 'products'. Take Japanese shipyard Namura⁶⁶¹ and South Korean shipyards Daehan⁶⁶² and Shinan,⁶⁶³ who are all primarily engaged in the building of bulk carriers. Given the high volumes of standardised 'off-the-shelf' carriers which they build, their websites refer to them as their 'products'. Linguistically, products are said to be sold or leased, whilst services are said to be provided or performed.⁶⁶⁴ In this way, each shipyard's description of a newbuild as being a 'product' could be indicative of the fact that the activity it applies to the newbuild is a 'sale', and therefore that the contract governing the shipbuild is that of a sale of goods or products.

A further example proving that shipbuilders engaged in standardised vessel building perceive their role under a shipbuilding contract the same way as English law characterises their legal obligations under the contract (namely to sell and deliver the good), derives from their assertion that any services they provide are reserved for the period after *sale* of the completed newbuild. For instance, China's Dalian SIC shipyard, which is engaged in the building of standardised bulk carriers, is said to provide 'high-quality and comprehensive after-sale service to ensure the rights and interests of the customers'.⁶⁶⁵ Similarly, Japanese shipyard Mitsui (MES), which is also engaged in standardised bulk carrier building, asserts that it 'will not only sell the product, but also...[provide] after service'.⁶⁶⁶ The sale of the

⁶⁶¹ Kensuke Namura, 'Corporate Philosophy "Presence"' (Namura Shipbuilding Co Ltd) <www.namura.co.jp/en/company/greeting.html> accessed 7 December 2016

⁶⁶² Daehan Shipbuilding Co Ltd, 'Outline summary of DHSC' <www.daehanship.com/homecont/English/Page/ContPage/Company/Company01> accessed 7 December 2016

⁶⁶³ Shinan Heavy Industries Co Ltd, 'Company Introduction' <<http://shinanheavy.en.ec21.com/>> accessed 7 December 2016

⁶⁶⁴ Raymond T Nimmer, 'Services Contracts: The Forgotten Sector Of Commercial Law' (1992) 26 Loyola of Los Angeles Law Review 725, 738

⁶⁶⁵ Dalian Shipbuilding Industry Offshore Co Ltd, 'After-Sale Service' (25 April 2011) <www.dsic-offshore.cn/ENDetailZ.aspx?ID=204> accessed 7 December 2016

⁶⁶⁶ Takao Tanaka, 'Greeting' (Mitsui Engineering & Shipbuilding Co Ltd) <www.mes.co.jp/english/company/greeting.html> accessed 7 December 2016

completed newbuild is thus perceived by these shipbuilders to be their role under shipbuilding contracts (mirroring the contract's legal characterisation as a sale of goods), with any services being provided post-discharge of the contract.

Service-sale 'hybrid'

The above examples show that shipbuilders engaged in *standardised* vessel building perceive their role under shipbuilding contracts identically to how the law characterises a shipbuilder's obligations under shipbuilding contracts (namely as delivery of the completed vessel, under a sale of goods). However, shipyards specialising in *bespoke* vessel building under specially drafted contracts often perceive their role under shipbuilding contracts differently to the obligations which the law otherwise imposes upon them. Whilst the Sale of Goods Act treats a shipbuilder's obligations as being the delivery of a completed vessel (regardless of whether the vessel is standardised or bespoke), shipbuilders often perceive their role under a bespoke vessel building contract as either: (i) also *including* the service which goes into constructing the vessel before delivery (thus rendering the contract a hybrid service-sale contract) or (ii) solely *being* the service which goes into constructing the vessel (thus rendering the contract an 'outright' service contract).

In terms of the hybrid view, some specially drafted industry contracts governing bespoke shipbuilds list the shipbuilder's obligations as lying in construction, design, equipping, launch and testing of the vessel (service obligations) *and* also in delivery of the vessel (as per a sale of goods contract). In this regard, the obligations form a service-sale hybrid – similar to those owed by the shipbuilder in the *Stocznia Gdanska SA v Latvian Shipping Co*⁶⁶⁷ case.⁶⁶⁸ For instance, one specially drafted newbuild contract between a US ship-owner and Italian shipyard for a bespoke cruise ship stated that the shipyard's obligations are to 'design, construct, test and deliver'⁶⁶⁹ the newbuild. Whilst this English law governed contract would

⁶⁶⁷ [1998] CLC 540 (HL)

⁶⁶⁸ This case was explored in Section 2.4.1

⁶⁶⁹ US Securities and Exchange Commission, 'Shipbuilding Contract between Fincantieri Cantieri Navali Italiani SpA and Explorer New Build, LLC' (Hull No. 6250, 5 June 2013)

nonetheless operate as a sale of goods contract *in law*, the shipyard would likely perceive its role under the contract to be a hybrid consisting of a supply of services (design, construction and testing) and a sale of goods (delivery). Moreover, two other examples make this hybrid service-sale perception of a shipbuilder's role under specially drafted contracts even starker. The first is a contract between a British ship-owner and South Korean shipyard for the construction of a bespoke oil-chemical tanker, which states that the shipyard must 'design, *build*, launch, equip and complete [the vessel]...and to deliver and *sell* [it]'.⁶⁷⁰ The second is a contract between a Bermudan ship-owner and German shipyard for the construction of a bespoke cruise ship, which states that the subject matter of the contract is to '*build, sell* and purchase'⁶⁷¹ the newbuild. In both contracts, express use of the terms 'build' (a service obligation) and 'sell' (a sale of goods obligation) is indicative of the fact that, whilst the contacts would nonetheless operate as a sale of goods in law, shipbuilders often perceive their role as being a service-sale hybrid – as reflected in the specially drafted contracts for bespoke vessels which they often enter into.

Moreover, the websites of shipbuilders engaged in bespoke shipbuilding indicate that they perceive their role under a shipbuilding contract to be a service-sale hybrid, despite the fact that English law characterises the contract (and the shipbuilder's obligations under it) as a sale of goods. For instance, Hyundai Mipo shipyard in South Korea, which is engaged in the building of bespoke vessels such as Floating Storage and Offloading Units (FSOs), states that its tasks under shipbuilding projects involve design and steel cutting (which are services) and also the final delivery of the vessel (as per a sale of goods contract).⁶⁷² Accordingly,

<www.sec.gov/Archives/edgar/data/1534814/000153481413000037/exhibit101explorernewbuild.htm> accessed 7 February 2018, art 2(2.1)

⁶⁷⁰ US Securities and Exchange Commission, 'Shipbuilding Contract between Forth Shipco LLC and SPP Shipbuilding Co., Ltd' (Hull No. S-5118, 18 May 2011)

<www.sec.gov/Archives/edgar/data/1577437/000119312513277511/d559582dex101.htm> accessed 7 February 2018, Witnessst

⁶⁷¹ US Securities and Exchange Commission, 'Shipbuilding Contract between Meyer Werft GmbH and Breakaway Two, Ltd. and NCL Corporation Ltd.' (Hull No. S.692, 24 September 2010)

<www.sec.gov/Archives/edgar/data/1318742/000119312511018810/dex1056.htm> accessed 27 May 2018, art 1

⁶⁷² Hyundai Mipo Dockyard Co Ltd, 'Ship Building: Building Process' <www.hmd.co.kr/english/03/01_2.php> accessed 7 December 2016

whilst a shipbuilder's legal obligation under a shipbuilding contract is to deliver the completed ship, industry dicta indicates that shipbuilders engaged in bespoke shipbuilding often perceive their role as lying both in the provision of services and also the vessel's delivery to the ship-owner.

Additionally, warranties of quality in specially drafted shipbuilding contracts (to build bespoke vessels) often reflect the fact that shipbuilders perceive their role under such contracts as being to undertake a hybrid of service and sale obligations. They do so by guaranteeing the vessel against defects in 'materials and workmanship'.⁶⁷³ Guaranteeing the quality of physical materials is archetypal of sale of goods contracts subject to the Sale of Goods Act s 14(2)'s implied term of satisfactory quality. However, guaranteeing the quality of *workmanship* is archetypal of a service contract under which work is being provided. Thus, in extending the shipbuilder's assurance beyond the quality of the final product to include the quality of workmanship, the guarantees contained within specially drafted shipbuilding contracts for bespoke newbuilds exemplify the difference between the law's characterisation of a shipbuilder's obligations under such contracts (to merely guarantee delivery of an item of satisfactory quality⁶⁷⁴), and the industry perception of a shipbuilder's role under such contracts (to guarantee workmanship of satisfactory quality, and also delivery of an item of satisfactory quality.)

⁶⁷³ The following clauses from bespoke shipbuilding contracts guarantee vessels against 'materials and workmanship' defects: US Securities and Exchange Commission, 'Shipbuilding Contract between VT Halter Marine, Inc., and Hornbeck Offshore Services, LLC' (Contract No. 1420110868, 14 November 2011)

<www.sec.gov/Archives/edgar/data/1131227/000119312512089201/d270624dex1041.htm> accessed 7 February 2018, art 11.2; US Securities and Exchange Commission, 'Shipbuilding Contract between Solstrand AS and Trico Shipping AS' (Builder's Hull No: 83, 13 March 2006) <www.sec.gov/Archives/edgar/data/921549/000092154906000004/contract.htm> accessed 7 February 2018, art X(2); US Securities and Exchange Commission, 'Contract For Construction between Seabulk Tankers, Inc and National Steel and Shipbuilding Company' (10 September 2013) <http://ir.stockpr.com/seacorholdings/all-sec-filings/content/0000859598-13-000144/exhibit101contractforconst.htm?TB_iframe=true&height=auto&width=auto&preload=false> accessed 7 February 2018, art 13.

⁶⁷⁴ Sale of Goods Act 1979, s 14.

Furthermore, guarantee clauses in specially drafted contracts to build bespoke vessels often state that they supersede any other term pertaining to the vessel's 'construction and sale'. For instance, the guarantee clause in one contract between an Irish ship-owner and a South Korean shipyard for the construction of a bespoke oil-chemical tanker states that '[t]he guarantees...exclude any other liability, guarantee, warranty and/or condition imposed or implied by law, customary, statutory or otherwise on the part of the Builder by reason of the construction and sale of the Vessel'.⁶⁷⁵ If taken as evidence of the how the parties perceive their role under this bespoke contract, the phrase 'construction and sale of the Vessel' alludes to the contract being a service-sale hybrid – entailing the *service* of constructing the vessel, followed by its final *sale*.

Thus, whilst all English law governed shipbuilding contracts will operate *in law* as sale of goods contracts (under which the shipbuilder's legal obligation is to deliver the completed vessel), shipbuilders engaged in bespoke shipbuilding often perceive their role as in fact being a hybrid of the *service* to construct the vessel followed by its delivery.

'Outright' service

Whilst English law characterises a shipbuilder's obligations under a shipbuilding contract as being delivery of the completed vessel (as per a sale of goods), certain specially drafted shipbuilding contracts for the building of bespoke vessels, and also the websites of shipyards engaged in bespoke vessel building, perceive a shipbuilder's role under bespoke shipbuilds as lying in the service of constructing the vessel.

⁶⁷⁵ US Securities and Exchange Commission, 'Shipbuilding Contract between Forth Shipco LLC and SPP Shipbuilding Co., Ltd' (Hull No. S-5118, 18 May 2011) <www.sec.gov/Archives/edgar/data/1577437/000119312513277511/d559582dex101.htm> accessed 7 February 2018, art 9(d)

For example, one contract between a Hong Kong based ship-owner and a Chinese shipyard to build a bespoke containership, and another contract entered into by the very same ship-owner with a Korean shipyard for a bespoke container carrier, both state that the shipbuilder's role is to 'design, build, launch, equip and complete'⁶⁷⁶ the vessel. Moreover, under a contract between a US ship-owner and a US shipyard to build a chain of bespoke offshore vessels, it was agreed that '[t]he object of the Contract is the design and construction by the Builder of [the]...Vessels'.⁶⁷⁷ None of the shipbuilder obligations listed under these contracts pertain to the vessel's 'sale' or 'delivery', indicating that whilst shipbuilding contracts are *in law* sale of goods contracts (under which the shipbuilder's legal obligation is to deliver the completed vessel), shipbuilders will often perceive their role under bespoke vessel building contracts to be more akin to the provision of services.

The websites of shipyards specialising in complex bespoke shipbuilds take the same stance, revealing that these shipyards perceive their role as lying in the service of constructing a vessel, rather than delivering a completed vessel (as is the legal obligation of a shipyard under shipbuilding contracts as presently characterised). For instance, Japanese shipyard Mitsubishi Heavy Industries asserts that its trade is to '*build...*a wide range of large ships'⁶⁷⁸ (including bespoke LNG carriers and other vessels built for a ship-owner's specific purposes.⁶⁷⁹) Similarly, STX France states that it is engaged in '*building...*highly complex ships'.⁶⁸⁰ Moreover, Italian shipyard Fincantieri states that it is 'able to *build...*special ships and highly

⁶⁷⁶ US Securities and Exchange Commission, 'Shipbuilding Contract between Seaspan Corporation and Jiangsu Yangzijiang Shipbuilding Co., Ltd. and Guangdong Machinery Imp. & Exp. Co., Ltd.' (Hull No. YZJ2006-721C, 4 July 2006) <www.sec.gov/Archives/edgar/data/1332639/000119312507055526/dex424.htm> accessed 27 May 2018, Witnessst; US Securities and Exchange Commission, 'Shipbuilding Contract between Seaspan Corporation and Hyundai Heavy Industries Co., Ltd' (Hull No. 1970, 8 August 2006) <www.sec.gov/Archives/edgar/data/1332639/000119312507055526/dex426.htm> accessed 27 May 2018, Witnessst

⁶⁷⁷ US Securities and Exchange Commission, 'Shipbuilding Contract between VT Halter Marine, Inc., and Hornbeck Offshore Services, LLC' (Contract No. 1420110868, 14 November 2011) <www.sec.gov/Archives/edgar/data/1131227/000119312512089201/d270624dex1041.htm> accessed 7 February 2018, art 2.1

⁶⁷⁸ Mitsubishi Heavy Industries, 'Products; Ship & Ocean' <www.mhi.com/products/ship.html> accessed 7 February 2018

⁶⁷⁹ Mitsubishi Heavy Industries, 'Special Purpose Vessels' <www.mhi.com/products/category/special_purpose_ship.html> accessed 7 February 2018

⁶⁸⁰ STX France, 'Ships' <<http://stxfrance.fr/en/bu-ships/>> accessed 27 November 2017

complex ferries’.⁶⁸¹ Finally, German shipyard Meyer Werft states that is involved in the ‘special purpose’⁶⁸² *construction* of ‘large, modern and sophisticated’⁶⁸³ cruise ships.⁶⁸⁴ Use of the verbs ‘build’ and ‘construct’ indicate that shipyards such as these, who primarily undertake bespoke shipbuilds, perceive their role under shipbuilding contracts as not being delivery of the completed vessel (as is their legal obligation under English law), but as lying in the service of constructing the vessel.

Also, because shipyards engaged in bespoke shipbuilding use service oriented semantics to describe their trade, it is arguable that they perceive their role under shipbuilding contracts as being *service* providers (namely designers and builders) as opposed to sellers or deliverers. For instance, Norwegian company OSM Group describes bespoke vessel and rig building as one of the ‘services’⁶⁸⁵ it offers, consisting of ‘design...drawing appraisal...commissioning...and sea trial[s]’.⁶⁸⁶ The final sale and delivery of the vessel is not mentioned on OSM’s webpage. Moreover, Danish shipyard Hvide Sande describes its trade not as ‘selling newbuilds’ to ship-owners but as ‘provid[ing]...solutions’⁶⁸⁷ to ship-owners. Where a ship-owner is faced with a problem of not having a vessel suitable to carry out a specific commercial purpose (such as wind farm servicing), Hvide state that – by building the ship-owner a bespoke vessel able to carry out this purpose (in this example, a wind farm service vessel⁶⁸⁸) – it is *providing* him with a solution. As mentioned above in this section, linguistically products are said to be sold or leased,

⁶⁸¹ Fincantieri, ‘Who We Are’ <www.fincantieri.com/en/group/who-we-are/> accessed 7 February 2018

⁶⁸² Meyer Werft, ‘About the shipyard’ <www.meyerwerft.de/en/meyerwerft_de/werft/das_unternehmen/ueber_die_werft/das_unternehm_en.jsp> accessed 27 November 2017

⁶⁸³ *ibid*

⁶⁸⁴ For example, this bespoke contract which Meyer Werft signed with a Bermudan ship-owner for the building of a bespoke cruise vessel. [US Securities and Exchange Commission, ‘Shipbuilding Contract between Meyer Werft GmbH and Breakaway Two, Ltd. and NCL Corporation Ltd.’ (Hull No. S.692, 24 September 2010) <www.sec.gov/Archives/edgar/data/1318742/000119312511018810/dex1056.htm> accessed 27 May 2018.]

⁶⁸⁵ OSM, ‘Services’ <www.osm.no/en/OSM_Maritime_Group_Maritime_Offshore_Services/> accessed 20 February 2018

⁶⁸⁶ OSM, ‘Newbuild Process’ <www.osm.no/en/OSM_Maritime_Group_Maritime_Offshore_Services/New-Building-Management/New-Building-Process/> accessed 20 February 2018

⁶⁸⁷ Hvide Sande, ‘Shipyard; New Build’ <<https://hvsa.dk/shipyard/#new-build>> accessed 7 February 2018

⁶⁸⁸ Hvide Sande, ‘New Builds’ <<https://hvsa.dk/cases/new-builds/>> accessed 7 February 2018

whilst services are said to be provided or performed.⁶⁸⁹ Accordingly, stating that its trade is to ‘provide’ indicates that Hvide shipyard perceives its role to lie in providing a service – namely the construction of a vessel.

Therefore, whilst all shipbuilding contracts are presently characterised *in law* as a sale of goods, under which the shipbuilder’s legal obligation is to deliver the completed vessel, shipbuilders engaged in bespoke vessel building often perceive their role as lying in the construction *and* delivery of the vessel (a hybrid of service and sale obligations) or as purely lying in the service of constructing the vessel. The law is thus mismatched with certain aspects of industry practice and perception.

3.4 – Conclusion

This chapter illustrated that the law’s homogenous characterisation of shipbuilding relationships and contracts does not do justice to the shipbuilding industry’s heterogeneous nature. Whilst English law’s characterisation of contracting relationships (as being at arm’s length) mirrors the relationships under standardised shipbuilds governed by standard-form contracts, it tends not to reflect the relationships under bespoke shipbuilds governed by specially drafted contracts – in which parties often cooperate with one another.⁶⁹⁰ Similarly, whilst English law’s characterisation of a shipbuilder’s obligations under a shipbuilding contract (namely delivery of the completed vessel) largely mirrors how shipbuilders perceive their role under standardised shipbuilds, it tends not to reflect how shipbuilders often perceive their role under bespoke shipbuilds – as lying (either partly or wholly) in the specialist service of constructing the vessel to its bespoke design and specification. The law is thus found to be a blunt instrument, which ‘impose[s] on the parties a legal structure based on an acontextual and highly

⁶⁸⁹ Raymond T Nimmer, ‘Services Contracts: The Forgotten Sector Of Commercial Law’ (1992) 26 Loyola of Los Angeles Law Review 725, 738

⁶⁹⁰ Section 3.2.1 and Section 3.2.2 illustrated that party cooperation is also apparent in contracting relationships in the general construction and offshore construction industries.

abstract model of contracting behaviour’,⁶⁹¹ rather than giving due regard to the heterogeneity inherent in the shipbuilding industry. This heterogeneity is emphasised by the breadth of the English law definition of a ‘ship’ which – as alluded to in Section 1.1.4 – can include anything from ‘Waverunner’ jet skis⁶⁹² (which are mass produced, such that their purchase essentially constitutes the sale of a product⁶⁹³) to bespoke vessels (whose builders are in fact providing specialist labour to construct them).

To avoid this mismatch between the law and the shipbuilding industry, the law (including judicial practice) must develop by taking into account: (i) industry norms underlying different shipbuilding relationships, and (ii) industry perceptions of the shipbuilder’s role under different shipbuilding contracts. Firstly, the law could uphold the industry perception that building a standardised vessel is a sale of goods, while building a bespoke vessel is more akin to the provision of services, by drawing on the example of German and Canadian law which already do so.⁶⁹⁴ Secondly, judges could uphold the cooperative norm underpinning certain shipbuilding relationships by implying a duty of cooperation into shipbuilding contracts. This was advocated by Longmore LJ in the *Swallowfalls Ltd v Monaco Yachting & Technologies SAM*⁶⁹⁵ case.⁶⁹⁶ Alternatively, the law could uphold cooperation in these shipbuilding contracts by imposing a statutory duty to cooperate. Such duties have already been proven to work in industries like nuclear power. Here, the Energy Act 2013 obliges nuclear health and safety executives to cooperate with the Office for Nuclear Regulation (ONR) by exchanging information regarding their respective roles,⁶⁹⁷ and also obliges nuclear plant employees to cooperate with the member tasked with enforcing the relevant nuclear

⁶⁹¹ Catherine Mitchell, *Contract Law and Contract Practice; Bridging the Gap Between Legal Reasoning and Commercial Expectation* (1st edn, Hart Publishing 2013) 2

⁶⁹² *R v Goodwin* [2005] EWCA Crim 3184; Yamaha UK, ‘Waverunners’ <www.yamaha-motor.eu/uk/products/waverunners/index.aspx#> accessed 12 February 2018

⁶⁹³ Yamaha UK, ‘Yamaha Offers YOU’ <www.yamaha-motor.eu/uk/services/yamaha-offers-you/index.aspx> accessed 21 February 2018

⁶⁹⁴ See Section 2.4.2

⁶⁹⁵ [2014] EWCA Civ 186

⁶⁹⁶ This case was introduced in Section 2.4.1

⁶⁹⁷ Energy Act 2013, s 96.

safety policy.⁶⁹⁸ Moreover, a similar obligation has successfully been initiated in the oil and gas sector under s 9(A)(1)(b) of the Petroleum Act 1998⁶⁹⁹ which, having come into force in October 2016, imposes upon petroleum license holders, operators and owners a duty to collaborate with one another in order to maximise economic recovery.⁷⁰⁰ Upholding similar duties in the shipbuilding context would mean that the cooperative practices embodied in certain industry shipbuilding relationships would gain *legal* standing, and would therein be an example of the industry influencing shipbuilding law (as per the overarching theoretical paradigm of this thesis).

As a caveat regarding the law enforcing a duty to cooperate in shipbuilding relationships, Devlin J warned in *Mona Oil Equipment & Supply Co v Rhodesia Railways*⁷⁰¹ that ‘the law can enforce co-operation only in a limited degree—to the extent that is necessary to make the contract workable’.⁷⁰² In this regard, cooperative contracting relationships could instead be promoted by partnering agreements, which operate extra-legally and are entered into voluntarily.⁷⁰³ Already successfully used in the UK to foster cooperation between local authorities and service providers,⁷⁰⁴ partnering agreements oblige parties to resolve disputes by means of discussion and negotiation (rather than arbitration and litigation) where possible.⁷⁰⁵ In doing so, they ‘avoid the adversarial approach...to construction [projects]...[by] engendering a co-operative and collaborative approach and by encouraging openness and trust between the parties’.⁷⁰⁶

⁶⁹⁸ Energy Act 2013, s 102; Legislation.gov.uk, ‘Energy Act 2013; General duties of employers, employees and others’ (Explanatory Notes, ss 102-104) <www.legislation.gov.uk/ukpga/2013/32/notes/division/5/3/5/1> accessed 13 February 2018.

⁶⁹⁹ Petroleum Act 1998 s 9(A)(1)(b).

⁷⁰⁰ Geoff Hewitt and Terence Daintith, *United Kingdom Oil & Gas Law* (Sweet & Maxwell 2017) para 3-834/1

⁷⁰¹ (1949-50) 83 Lloyd’s Rep 178 (KB)

⁷⁰² *ibid* at 187 (Devlin J)

⁷⁰³ Helena Haapio and James Groton, ‘From Reaction to Proactive Action: Dispute Prevention Processes in Business Agreements’ (ResearchGate article, January 2007) <www.researchgate.net/publication/242148632_From_Reaction_to_Proactive_Action_Dispute_Prevention_Processes_in_Business_Agreements> accessed 13 February 2018

⁷⁰⁴ The Royal Borough of Kensington And Chelsea, ‘Partnership Charter’ <www.rbkc.gov.uk/pdf/Procurement%20partnership%20charter.pdf> accessed 12 February 2018

⁷⁰⁵ *ibid* cl 5

⁷⁰⁶ Vivian Ramsey and Stephen Furst, *Keating on Construction Contracts* (10th edn, Sweet & Maxwell 2017) para 1-047

Chapter 4

CAUSES OF DISPUTE

4.1 – Introduction

Shipbuilding contract disputes continue to occur to this day, which means that the law on shipbuilding contracts still has challenges to overcome to prevent their occurrence. In order to do so, the law must understand what *causes* the disputes, and also ensure that any solutions reflect industry practices (such as cooperative contracting.⁷⁰⁷) Whilst industry practice was covered in Chapter 3, this chapter will examine shipbuilding dispute causes. This chapter is placed here in the narrative of this thesis (namely before Chapter 5) as it examines the disputes for which remedies, to be talked about in Chapter 5, are awarded.

The disputes referred to in this chapter are caused by: (i) defective or failed performance by buyer or shipbuilder (referred to as ‘Party Performance Related Causes’⁷⁰⁸), or (ii) an event which cannot be controlled by the contracting parties and is thus unconnected to their performance (referred to as ‘Extenuating Causes’.⁷⁰⁹) Also, instances will be given of disputes which, whilst not *caused* by performance related failures or extenuating circumstances, result from a party attempting to justify termination or modification of a contract through either alleging that his contracting counterpart failed in his performance obligations, or through alleging that an extenuating circumstance prompted his resulting action. These are referred to as instances of ‘opportunism’, to be explored in Section 4.2.5. Similarly, instances will be given of disputes which, whilst not caused by performance related failures in themselves, resulted from one party attempting to justify his own *breach* by alleging that this was in response to a performance failure

⁷⁰⁷ See Section 3.2

⁷⁰⁸ See Section 4.2

⁷⁰⁹ See Section 4.3

by his contracting counterpart. Examples of this include where the buyer deliberately fails to pay instalments claiming that he is unsatisfied with the shipyard's progress on the build (see Section 4.2.1).

4.2 – Party Performance Related Causes

The obligations of a buyer (ship-owner) under a shipbuilding contract statutorily lie in accepting the vessel and paying for it,⁷¹⁰ and have also been argued to include an obligation not to prevent the shipbuilder from completing the project.⁷¹¹ The obligations of the seller (shipbuilder) statutorily lie in delivering the vessel,⁷¹² with some shipbuilding contracts asserting that the shipyard's contractual obligations also include construction (and even design) of the vessel.⁷¹³ It therefore follows that defective or failed performance of any of these obligations can lead the shipbuilding contract into dispute.

4.2.1 Financial Issues

Shipbuilding disputes can be caused by financing issues, such as buyer payment default or shipyard insolvency. In regards to buyer payment default, its prevalence is such that the AWES standard-form shipbuilding contract contains a provision which deals with this very prospect.⁷¹⁴ Two notable examples of such disputes were the cases of *Hyundai Heavy Industries v Papadopoulos*⁷¹⁵ and *Stocznia Gdanska SA v Latvian Shipping Co*,⁷¹⁶ the particulars of which were dealt with at length in Section 2.4.1. Another example is when some industry analysts tipped Taiwanese shipping company Yang Ming to default on 20 boxship building contracts in

⁷¹⁰ Sale of Goods Act 1979, s 27.

⁷¹¹ See *Adyard Abu Dhabi v SD Marine Services*, referred to in Section 2.4.1 and Section 4.2.2

⁷¹² Sale of Goods Act 1979, s 27.

⁷¹³ This idea was explored in Section 2.4, and in Section 3.3 in respect of bespoke shipbuilds

⁷¹⁴ Association of European Shipbuilders and Shiprepairers, 'Standard Shipbuilding Contract' (Scribd, uploaded by api-3739585, 15 October 2008) <www.scribd.com/doc/6745831/Awes-Shipbuilding-Contract> accessed 10 November 2016, art 10

⁷¹⁵ [1980] 1 WLR 1129 (HL)

⁷¹⁶ [1998] 1 CLC 540 (HL)

December 2017 – as it was reportedly in over 80 billion Taiwanese dollars worth of debt.⁷¹⁷

Moreover, payment default could be indicative of (or caused by) underlying financial difficulties or issues besetting the ship-owning company. In 2016, the bleak state of the container industry markedly hit the commercial revenues of Hanjin Shipping – a South Korean container company which long heralded itself as one of the world’s largest.⁷¹⁸ Hanjin was given the go ahead to restructure its debts in a bid to keep the company afloat.⁷¹⁹ This hope was however short lived as, in late August 2016, the company was effectively pushed into court receivership⁷²⁰ following a decision by its creditors to discontinue financial support.⁷²¹ As a result, not only was Hanjin ordered to sell its existing fleet,⁷²² but it would have been unable to pay instalments on any newbuild contracts it was entered into at the time of its receivership – thus leaving these contracts to fall into payment default disputes. A similar assertion can be made of Danish bunker fuel company OW Bunker & Trading A/S, which was at the helm of the *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd*⁷²³ decision explored at length in Section 2.5. The world’s largest ship fuel supplier at the time, OW Bunker filed for bankruptcy in late 2014 following a series of underlying governance issues.⁷²⁴ Firstly, employees from one of OW Bunker’s subsidiary companies agreed to loan another company over \$125

⁷¹⁷ Cichen Shen, ‘Can Yang Ming afford to make ship orders?’ (Lloyd’s List, 13 December 2017) <<https://lloydslist.maritimeintelligence.informa.com/LL1120499/Can-Yang-Ming-afford-to-make-ship-orders>> accessed 14 December 2017

⁷¹⁸ Hanjin Shipping, ‘Overview’ (Aims to become Global Logistics Leader)

<www.hanjin.com/hanjin/CUP_HOM_1700.do?sessLocale=en> accessed 10 November 2016

⁷¹⁹ World Maritime News, ‘Hanjin Shipping Sees Red Ink amid Falling Freight Rates’ (World Maritime News Staff, 17 August 2016) <<http://worldmaritimenews.com/archives/199759/hanjin-shipping-sees-red-ink-amid-falling-freight-rates/>> accessed 10 November 2016

⁷²⁰ SeaIntel Maritime Analysis, ‘SeaIntel Suday Spotlight’ (4 September 2016, Issue 278) <www.tln.nl/actueel/nieuws/Documents/CI128b_seaintel.pdf> (accessed 10 November 2016), 2

⁷²¹ World Maritime News, ‘Creditors to End Hanjin Shipping’s Financial Support’ (30 August 2016) <<http://worldmaritimenews.com/archives/200768/creditors-to-end-hanjin-shippings-financial-support/>> accessed 10 November 2016

⁷²² Turkey SeaNews, ‘Hanjin hopes to sell ships to European shipping giants’ (18 October 2016) <www.seanews.com.tr/hanjin-hopes-to-sell-ships-to-european-shipping-giants/162392/> accessed 19 November 2017

⁷²³ [2015] EWHC 2022 (Com Ct); [2015] EWCA Civ 1058; [2016] UKSC 23

⁷²⁴ BBC News, ‘Danish ship fuel supplier OW Bunker goes bankrupt’ (Business, 7 November 2014) <www.bbc.co.uk/news/business-29961566> accessed 7 November 2014

million without consulting the OW Bunker board.⁷²⁵ Secondly, OW Bunker's executive vice president of distribution (whose role would likely have required her to take risks) also acted as the company's chief risk officer (whose role it was to advise board members in how to mitigate risks) – a clear conflict in roles.⁷²⁶ Thirdly, the company was using derivative financial products for both hedging and outright market trading purposes, but had only disclosed that it was using them for the former.⁷²⁷ If OW Bunker had already ordered newbuild oil tankers, which were in the process of being built at the time of the company's bankruptcy, then it would have been unable to pay the instalments due on these – leaving the contracts to fall into payment default disputes.

Whilst the previous examples featured an intention by the buyer to make payment but for financial difficulty, disputes can also result from deliberate default by the buyer where he intentionally withholds payment. The most common reason for deliberate default is where the buyer realises that he no longer requires a newbuild which he did need when he originally agreed to have it built.⁷²⁸ In other words, the contract lost its 'original attractiveness'.⁷²⁹ For instance, if a buyer's newbuild was intended to be used in a particular port or terminal, but this port or terminal can no longer accommodate the vessel, the buyer might choose to deliberately default in order to escape the contract. Ship-owner TOTE Maritime might have been tempted to do just this when it faced such a situation in 2018, but it sensibly decided to lawfully cancel the newbuild contracts to which it was party.⁷³⁰ Deliberate default also occurred in *Adams Bros v Blythwood Shipbuilding Co (No. 2)*.⁷³¹ Having

⁷²⁵ Fraser Tennant, 'OW Bunker files for bankruptcy' (Financier Worldwide, January 2015) <www.financierworldwide.com/ow-bunker-files-for-bankruptcy/#.WrPanmrFKzo> accessed 22 March 2018

⁷²⁶ Mak Yuen Teen and Christopher Bennett, 'OW Bunker and the failure in governance' (The Business Times, 6 March 2015) <<http://governanceforstakeholders.com/wp-content/uploads/2015/03/OW-Bunker-and-the-failure-in-governance-Opinion-THE-BUSINESS-TIMES.pdf>> accessed 22 March 2018

⁷²⁷ *ibid*

⁷²⁸ Oliver Weiss, 'Significant Developments In Shipbuilding Disputes Within London Arbitration' (2010) 76(3) Journal of the Chartered Institute of Arbitrators 440, 440

⁷²⁹ Anthony Kronman, 'Paternalism and the Law of Contracts' (1983) 92(5) The Yale Law Journal 763, 780

⁷³⁰ Wei Zhe Tan, 'Tote Maritime scraps order for boxship quartet' (Lloyd's List, 29 January 2018) <<https://lloydslist.maritimeintelligence.informa.com/LL1121035/Tote-Maritime-scraps-order-for-boxship-quartet>> accessed 31 January 2018

⁷³¹ (1922) 13 Lloyd's Rep 411 (Court of Session, Outer House)

realised that he no longer required a tanker being built for him, a buyer deliberately defaulted on the remaining pre-delivery instalments due under the shipbuilding contract. He then organised for his rights and obligations under the contract to be assigned to a secondary buyer who was interested in the ship. The secondary buyer however failed in his attempts to reclaim the pre-delivery instalments that the original buyer had paid before defaulting, meaning that shipyard Blythwood was free to sell the ship on its own accord.

Another example of deliberate default is where a buyer withholds payment citing insufficient build progress by the shipbuilder. This is particularly prevalent under the ‘milestone’ payment method, which makes a proportion of contract price payable upon completion of certain build milestones.⁷³² In connection with this, disputes may arise where the parties disagree on whether they think a milestone has been completed or not. A buyer might therefore default or hold back on payment of a certain instalment, on the basis that he deems the shipbuilder not to have reached the associated milestone for which the instalment is due. To combat this type of dispute, shipbuilding parties often give an external arbiter – namely a marine surveyor or naval architect – the authority to determine whether a build milestone has been reached.⁷³³

Much as dispute can be caused by the financial plight of the buyer, a shipyard might itself become unable to complete a project on the basis of its insolvency. One such example was a 2010 contract between Wadan Yards and buyer Laeisz & Co for two containerships. At a point when the vessels were almost complete, the shipyard became insolvent. The buyer subsequently refused to accept delivery and terminated the contract, claiming that the vessels’ value had substantially fallen following the shipyard’s insolvency. A dispute then emerged with the insolvency practitioner in the case, in which he accused buyer Laeisz & Co of ‘betraying the traditions of merchants from the Hanseatic League...by terminating the

⁷³² See Section 1.1.3

⁷³³ Brad M Caldwell, ‘Shipbuilding Contracts: The Allocation of Risk between Purchaser and Builder’ (Fisheries Law Papers and Articles)
<www.admiraltylaw.com/fisheries/Papers/ship_building_contracts.htm> accessed 6 January 2016

contract'.⁷³⁴ The dispute was eventually settled after both sides agreed that work on the second newbuild be ceased. Nonetheless, the case exemplifies the perils which accrue following shipyard insolvency – both for the going concern of the shipyard itself, and also for the shipbuilding contracts to which the shipyard is already party when it becomes insolvent. These perils recently came to pass in the 2016 decision in *Ronelp Marine v STX Offshore & Shipbuilding*.⁷³⁵ Overcapacity latent in the shipbuilding industry meant that shipyard STX went insolvent at a point where it had offshore vessel construction contracts ongoing with buyer Ronelp. This resulted in a dispute as to the buyer's entitlements under the contract's guarantee.

4.2.2 Delays

Shipbuilding disputes can also be caused by buyer or shipyard delay. On one hand, the buyer can cause a delay dispute by preventing completion of the newbuild project. In the *Adyard Abu Dhabi v SD Marine Services*⁷³⁶ case introduced in Section 2.4.1, a buyer sought to cancel two shipbuilding contracts on the basis of a delay in completion. However, the shipyard argued that the buyer had itself caused the project to be delayed by failing to specify whether it accepted a proposed amendment to the ship's specification in a timely fashion. The shipyard substantiated its claim with the assistance of the 'prevention principle',⁷³⁷ a non-maritime doctrine derived from the general construction context,⁷³⁸ which thwarts a buying party from claiming 'liquidated damages for delay in completion, and [from exercising his]...rights to cancel the contract, where his conduct has rendered such completion "impossible or impractical"'.⁷³⁹ The principle operates with two limitations. The first is that if the contract between the two parties contains an

⁷³⁴ Robert Wright, 'Shipbuilders must navigate the recession' (Financial Times Online Article, 2010) <www.ft.com/cms/s/0/79ae40a8-f893-11de-beb8-00144feab49a.html#axzz3QJJu4R8C> accessed 8 February 2015

⁷³⁵ [2016] EWHC 2228 (Ch)

⁷³⁶ [2011] EWHC 848 (Com Ct)

⁷³⁷ This principle was introduced in Section 2.4.1

⁷³⁸ Simon Kverndal, 'The Application of the 'Prevention Principle' in the Shipbuilding Context' in Barış Soyer and Andrew Tettenborn (eds), *Ship building, sale and finance* (Routledge 2016) 98

⁷³⁹ Simon Curtis and Louise Elmes, 'Owner cites prevention principle in shipbuilding dispute' (Online PDF Article) <www.cdg.co.uk/system/files/article/construction-law-principles-shipbuilding-contracts.pdf> accessed 4 October 2015

‘extension of time’ clause,⁷⁴⁰ and a delay occurs which is covered by the clause, then the clause will operate instead of the prevention principle. This reflects the ‘liberal’ stance on the overarching theoretical paradigm of this piece, in which (*industry*) contract clauses hold primacy over *legal* principles. Secondly, a shipbuilder can only rely on the prevention principle if he would have completed the project by its target completion date but for the buyer’s preventive conduct. The principle will therefore not apply where delay caused by the shipyard then happens to be followed by incidental preventive conduct by the buyer, whose magnitude is such that it will not result in further delay to the project. As Sara Cockerill QC put it in *Saga Cruises BDF Ltd v Fincantieri SpA*,⁷⁴¹ ‘unless there is a concurrency actually affecting the completion date’,⁷⁴² a builder cannot benefit from the prevention principle.

In addition to *Adyard Abu Dhabi v SD Marine Services*,⁷⁴³ another dispute case which features the prevention principle is *Zhoushan Jinhaiwan Shipyard v Golden Exquisite Inc.*⁷⁴⁴ Here, shipyard Zhoushan failed to complete the vessel on time, claiming that it was prevented from doing so by the buyer’s supervisor who had not attended vessel inspections promptly.⁷⁴⁵ Article IV in the contract stated that ‘[t]he SUPERVISOR shall have, at all times until delivery of the VESSEL, the right to attend tests according to the mutually agreed test list and inspect the VESSEL’.⁷⁴⁶ The wording of this provision led the buyer to counter-argue that, whilst the clause gave its supervisor a *right* to attend tests and inspections, there was no *obligation* to do so. Moreover, although the contract did indeed give the supervisor a right to attend tests, the shipyard was not obliged to wait for the supervisor to see if he

⁷⁴⁰ Shipbuilding contracts commonly contain ‘Extension of time’ clauses. [Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix B citing China Maritime Arbitration Commission (CMAC), ‘CMAC Standard Newbuilding contract (Shanghai Form)1’ (CMAC, China) art XV; Stuart Beare, Graeme Bowtle and Jane Martineau, ‘Shipbuilding contract of the Shipowners Association of Japan (SAJ)1’ in Lord Millett (ed), *Encyclopaedia of Forms and Precedents* (vol 39(1) pt 1(B)(A) LexisNexis 2016) art VIII.]

⁷⁴¹ [2016] EWHC 1875 (Com Ct)

⁷⁴² *ibid* [251]

⁷⁴³ [2011] EWHC 848 (Com Ct)

⁷⁴⁴ [2014] EWHC 4050 (Com Ct)

⁷⁴⁵ Simon Blows and Vanessa Tattersall, ‘Shipbuilding’ in George Eddings and others (eds), *The Shipping Law Review* (4th edn, Law Business Research 2017) 48

⁷⁴⁶ [2014] EWHC 4050 (Com Ct) [7] (Leggatt J)

would attend or not.⁷⁴⁷ The shipyard could not thus claim (as the shipbuilder did in *Adyard*⁷⁴⁸) that the buyer's conduct placed him in some sort of 'contractual limbo'.⁷⁴⁹ Accordingly, the shipyard was unable to excuse its delay under the prevention principle. Moreover, *Zhoushan* is exemplar of the overarching theoretical paradigm of this thesis; the law (in this case, the applicability of the prevention principle) was 'influenced by the terms of a shipbuilding contract'⁷⁵⁰ (in this case, art IV), thus proving that shipbuilding dispute cases are to an extent dependent upon both the law and (industry) contracts.

On the other hand, shipbuilding disputes can occur following delay caused by the shipyard.⁷⁵¹ Examples include the late 2016 dispute involving South Korean shipbuilder Daewoo (DSME), which was forced to delay construction and delivery of a drillship to an American buyer for two years due to insufficient funds – an insufficiency which accrued because DSME had been paid late for previous newbuild projects which it had completed for other ship-owners long before.⁷⁵² Moreover, in June 2018, Hyundai Heavy Industries announced it had delayed the construction and delivery of ten newbuilds to an Iranian shipping company, for fear that it might incur trade sanctions from the United States.⁷⁵³

Knock-On Delays

Moreover, not only do delays in a newbuild project delay that particular project, but they may also lead to 'knock-on' delays for both the shipyard (in occupying berths

⁷⁴⁷ *ibid* [48] (Leggatt J)

⁷⁴⁸ See Section 2.4.1

⁷⁴⁹ [2011] EWHC 848 (Com Ct) [245] (Hamblen J)

⁷⁵⁰ Simon Blows and Vanessa Tattersall, 'Shipbuilding' in James Gosling and Tessa Huzarski (eds), *The Shipping Law Review* (3rd edn, Law Business Research 2016) 50

⁷⁵¹ Provided that the cause of delay is not caught by the contract's in-built 'Permissible Delay' clause, the buyer will be entitled to remuneration at a rate stipulated under the contract's liquidated damages clause (to be explored in Section 5.4).

⁷⁵² Wei Zhe Tan, 'DSME delays drillship delivery' (Lloyd's List, 6 December 2016)

<www.lloydslist.com/ll/sector/ship-operations/article544511.ece?service=print> accessed 8 January 2017

⁷⁵³ Cichen Shen, 'HHI delays IRISL newbuilds amid sanction fears' (Lloyd's List, 11 June 2018) <<https://lloydslist.maritimeintelligence.informa.com/LL1122975/HHI-delays-IRISL-newbuilds-amid-sanction-fears>> accessed 3 July 2018

required for subsequent newbuild projects to be undertaken in the yard) and for the buyer (in preventing him from performing string or follow-on contracts originally entered into on the basis that the vessel would be completed on time.) As regards shipyard ‘knock-on’ delay, in *Matsoukis v Priestman*⁷⁵⁴ the 1912 General Coal Strike meant that shipbuilding projects being undertaken in the shipbuilder’s yard at the time could not be completed. The prolonged berth occupation of the newbuilds being constructed led to a delay in keel laying of the plaintiff’s vessel, and a subsequent delay in constructing and delivering the vessel to him. As regards buyer ‘knock-on’ delay, 2009 saw Norwegian ship-owner Petroleum Geo-Services (PGS) consider whether or not to cancel a contract for a newbuild which it was delayed in receiving. PGS’ original plan was for the vessel to be delivered in March, and then to charter it out to a company called WesternGeco. However, delays in delivery of the vessel led WesternGeco to cancel the follow-on charter contract.⁷⁵⁵ A further example, involving cancellation of a follow-on charter due to delays in performance of an original contract, occurred in the *Transfield Shipping Inc v Mercator Shipping Inc (The Achilles)*⁷⁵⁶ case to be explored at length in Section 5.3.1.

4.2.3 Vessel Defects and Errors in following Specification

Shipbuilding contract disputes can occur where a vessel is defective. The defect might mean that the vessel is unfit for purpose or of substandard quality, thus contravening the term implied into all shipbuilding contracts by s 14 of the Sale of Goods Act⁷⁵⁷ regarding quality and fitness for purpose. One example of this type of dispute occurred in *Diamante Sociedad de Transportes SA v Todd Oil Burners (The Diamantis Pateras)*,⁷⁵⁸ in which oil burning equipment installed on a newbuild began to fracture upon use. This led the buyers to claim damages equal to the costs of repairing the defects, plus consequential losses for their inability to use the vessel

⁷⁵⁴ [1915] 1 KB 681

⁷⁵⁵ Martyn Wingrove, ‘PGS mulls second newbuilding cancellation’ (Lloyd’s List, 3 August 2009) <www.lloydslist.com/ll/sector/ship-operations/article23668.ece?service=print> accessed 4 October 2015

⁷⁵⁶ [2009] 1 AC 61 (HL)

⁷⁵⁷ Sale of Goods Act 1979, s 14.

⁷⁵⁸ (1966) 1 Lloyd’s Rep 179 (QB)

for profit-making activities.⁷⁵⁹ Another example of such a dispute was *Admiralty Commissioners v Cox & King*.⁷⁶⁰ Here, a shipyard promised to build a boat which reached a certain speed. The buyer in turn stipulated that it would reject the finished product if it failed to live up to this expectation.⁷⁶¹ When delivered, the buyer found that the vessel could not reach the desired speed. This entitled him to claim damages on the basis that the vessel's performance value was materially affected as a result.

Also, under the Sale of Goods Act 1979 s 13,⁷⁶² goods being sold by description (such as newbuilds⁷⁶³) must correspond with this pre-agreed description⁷⁶⁴ or 'specification'. Another form of shipbuilding dispute is therefore where the shipyard fails to build to this description and, when examining the vessel upon delivery (as per his rights under s 34 of the Act⁷⁶⁵), the buyer realises and decides to litigate. If the error is deemed tantamount to a breach of warranty, the buyer can seek recourse under s 53 of the Sale of Goods Act⁷⁶⁶ – as will be explored further in Section 5.2.1. Bespoke vessel building contracts are particularly susceptible to disputes caused by errors in following the ship's specification, as the bespoke nature of the vessel means its specification will be previously unseen by the shipbuilder.⁷⁶⁷ For instance, *Austen v Pearl Motor Yachts*⁷⁶⁸ featured a bespoke newbuild yacht⁷⁶⁹ whose hull laminate was only 7mm thick – contrary to the ship's unique specification which stated that the laminate should be 20mm.⁷⁷⁰ Similarly, in *Dixon*

⁷⁵⁹ *ibid* at 179 (Lawrence J)

⁷⁶⁰ (1927) 22 Lloyd's Rep 223 (CA)

⁷⁶¹ Remedies for receipt of a newbuild which is unable to live up to pre-agreed performance standards can also be sought under a shipbuilding contract's designated liquidated damages clauses (to be explored in Section 5.4).

⁷⁶² Sale of Goods Act 1979, s 13.

⁷⁶³ Filippo Lorenzon and Ainhoa Campas Velasco, 'Shipbuilding, Sale, Finance And Registration' in Yvonne Baatz (ed), *Maritime Law* (3rd edn, Informa 2014) 68

⁷⁶⁴ 'The description is...contained in the shipbuilding contract (particularly details as to main dimensions, speed, deadweight, draught, fuel consumption etc)'. [Ian Gaunt and Alun Hatfield, 'Shipbuilding contracts and related ship finance issues' (London Shipping Law Centre, Maritime Business Forum, Ince & Co, 28 April 2010) <www.shippinglbc.com/content/uploads/members_documents/Shipbuilding_Part_1.pdf> accessed 6 January 2016, 10.]

⁷⁶⁵ Sale of Goods Act 1979, s 34.

⁷⁶⁶ *ibid* s 53

⁷⁶⁷ Marco Semini and others, 'Strategies for customized shipbuilding with different customer order decoupling points' (2014) 228(4) *Journal of Engineering for the Maritime Environment* 362, 370

⁷⁶⁸ [2014] EWHC 3544 (Com Ct)

⁷⁶⁹ The scope of this thesis is limited to commercial vessels, as defined in Section 1.1.4. However, *Austen v Pearl Motor Yachts* is included as it concerns a shipbuilding dispute.

⁷⁷⁰ [2014] EWHC 3544 (Com Ct) [7] (Eder J)

Kerly v Robinson,⁷⁷¹ a ship-owner alleged that the bespoke yacht⁷⁷² he received contravened the implied term to comply with description, as it failed to include a self-draining cockpit and a 4 foot 4 inch draught – as was originally contracted for.⁷⁷³ Also note, the buyer may claim that the newbuild does not comply with its specification as an excuse to evade the contract.⁷⁷⁴ This is known as ‘opportunism’, a concept which will be dealt with in Section 4.2.5.

The English courts have traditionally taken a strict line on the issue of compliance with descriptions and specifications, under which ‘even minor non compliances could be invoked as a justification for termination of the contract’.⁷⁷⁵ More recently however, the courts have opted for a softer approach, under which immaterial non-compliance with description would be considered breach of an innominate term, rather than a breach of condition. Under this approach, termination of a contract will only be allowed where the non-compliance is made on an element of the contractual description which is of ‘commercial significance’ to the buyer,⁷⁷⁶ since errors of this nature would likely affect the commercial utility of the vessel. For example, in October 2015 ship-owner Thaumass Marine filed an arbitration notification against shipyard CIMC Raffles alleging that CIMC had ‘significantly deviated from the agreed upon technical specifications’⁷⁷⁷ for cranes which Thaumass had requested to be on its newbuild. Not only did CIMC allegedly breach the implied term under s 13 of the Sale of Goods Act (that goods will correspond to their description), but the defects potentially also affected the commercial utility of the rig – since working cranes were integral to its profit making function.⁷⁷⁸

⁷⁷¹ (1965) 2 Lloyd’s Rep 404 (QB)

⁷⁷² The scope of this thesis is limited to commercial vessels, as defined in Section 1.1.4. However, *Dixon Kerly v Robinson* is included as it concerns a shipbuilding dispute.

⁷⁷³ (1965) 2 Lloyd’s Rep 404 (QB) 406 (Thompson J)

⁷⁷⁴ Scott Baker and Albert Choi, ‘Contract’s Role In Relational Contract’ (2015) 101(3) Virginia Law Review 559, 562

⁷⁷⁵ Ian Gaunt and Alun Hatfield, ‘Shipbuilding contracts and related ship finance issues’ (London Shipping Law Centre, Maritime Business Forum, Ince & Co, 28 April 2010) <www.shippinglbc.com/content/uploads/members_documents/Shipbuilding_Part_1.pdf> accessed 6 January 2016, 10

⁷⁷⁶ *ibid*

⁷⁷⁷ Wei Zhe Tan, ‘Coastal Contracts seeks arbitration to settle CIMC Raffles dispute’ (Lloyd’s List Asia, 12 October 2015) <<https://lloydslist.maritimeintelligence.informa.com/LL020974/Coastal-Contracts-seeks-arbitration-to-settle-CIMC-Raffles-dispute>> accessed 12 January 2016

⁷⁷⁸ *ibid*

Under the court's new approach, Thaumás would be permitted to terminate the contract because the vessel's non-compliance was significant enough to affect its commercial utility.

Alternatively, rather than rely on judges and arbitrators to resolve disputes regarding vessel defects and errors in following ship specification, shipbuilding contract parties could instead cooperate and find a solution between themselves. One way would be to include a clause in the contract which obliges the buyer to take delivery of a defective or non-compliant newbuild, provided the defect or non-compliance affects neither the vessel's seaworthiness nor commercial functionality. The shipbuilder would then be permitted to remedy the defects at his own expense. An example of this can be seen in one contract between a Bermudan ship-owner and a French shipyard for a bespoke passenger cruise vessel. Under this contract, provided the vessel is otherwise complete and compliant with its pre-agreed specification, the presence of one of a number of named minor defects will not entitle the buyer 'to withhold its technical acceptance of the Ship'.⁷⁷⁹ Instead, the shipbuilder will be allowed to make good the defect. The clause therefore 'help[s] resolve in advance the potential impasse which frequently arises in the run-up to delivery when a buyer seeks to refuse delivery because of a long punch list of minor defects',⁷⁸⁰ and in doing so, it shapes the contracting relationship between buyer and shipyard as one underpinned by cooperation.⁷⁸¹

Subcontractor Error

In order to reduce labour costs and tap into specific expertise, shipbuilders often

⁷⁷⁹ US Securities and Exchange Commission, 'Shipbuilding Contract between Aker Yards S.A. and F3 One, Ltd' (Hull No. C33, 7 September 2006) <www.sec.gov/Archives/edgar/data/1318742/000095014407001914/g05791exv4w43.htm> accessed 7 February 2018, art 6(1.15)

⁷⁸⁰ Chris Kidd, 'The BIMCO NewBuildCon Standard Form Shipbuilding Contract: Salient Features and Pitfalls' in Barış Soyer and Andrew Tettenborn (eds), *Ship building, sale and finance* (Routledge 2016) 74

⁷⁸¹ See Section 3.2

subcontract portions of a newbuild project to subcontractors.⁷⁸² Out of this can emerge disputes following error by a subcontractor. One example concerned a shipyard's refusal to replace a subcontractor after the buyer found it to have defectively installed instruments on his newbuild. Whilst this particular dispute was resolved, 'significant legal fees were incurred, with the matter being resolved just short of a hearing in an expedited arbitration'⁷⁸³ – a point which reveals the dangers of not vetting subcontractors and the work they carry out. It is for this reason that certain shipbuilding contracts state that a shipyard may only subcontract aspects of the project out to those on an approved list.⁷⁸⁴

4.2.4 Novation

Occasionally, ship-owners will attempt to transfer their rights, duties and obligations under a shipbuilding contract to a secondary ship-owner – known as discharging a contract by 'novation'. Novation is therefore not a dispute *cause*. However, disputes do occur where a shipyard rebuffs an attempted novation on the basis that he deems it impermissible under the contract. In *CMA CGM SA v Hyundai Mipo Dockyard*,⁷⁸⁵ buyers ER Schiffahrt contracted with shipyard Hyundai Mipo to build four vessels. The buyers later decided to novate the contracts to CMA-CGM, but Mipo refused to consent to this. CMA-CGM in turn issued proceedings in court, receiving over \$3 million in damages.⁷⁸⁶ Similarly, in *Inta Navigation v Ranch Investments*,⁷⁸⁷ Hyundai shipyard agreed to build a vessel (numbered S271) for buyer Geden. Geden in turn sought to resell the vessel to Wah Kwong, who itself then decided to sell it on to Centrofin. Under each of these agreements was a clause allowing the respective buyer the option to obtain a sister vessel (numbered

⁷⁸² ECORYS Research and Consulting, 'Study of Competitiveness of the European Shipbuilding Industry; Within the Framework Contract of Sectoral Competitiveness Studies - ENTR/06/054' (Final Report, Rotterdam, 8 October 2009) 97

⁷⁸³ The UK Defence Club, 'Shipbuilding Contracts – the Value of Defence Club Cover' (Online PDF, c/o Thomas Miller Defence Ltd, 2010) <www.ukpandi.com/fileadmin/uploads/uk-pi/Latest_Publications/UK_Defence/UKDC_2010_NewBuildingDisputes-web.pdf> accessed 23 July 2017, 4

⁷⁸⁴ Andrew Tettenborn, 'Contracting By Numbers: The Different Characteristics of the Main Shipbuilding Contracts' in Barış Soyer and Andrew Tettenborn (eds), *Ship building, sale and finance* (Routledge 2016) 45

⁷⁸⁵ [2009] 1 Lloyd's Rep 213 (Com Ct)

⁷⁸⁶ *ibid* at 216 (Burton J)

⁷⁸⁷ [2010] 1 Lloyd's Rep 74 (Com Ct)

S272) on novation terms.⁷⁸⁸ The second buyer in the chain, Wah Kwong, attempted to exercise this option, but was rebuffed by seller Hyundai who did not wish to consent to the novation. This in turn meant that Wah Kwong could not now sell S272 on to Centrofin, leading Centrofin to begin arbitral proceedings in pursuit of damages.⁷⁸⁹

4.2.5 Opportunism

Shipbuilding disputes can also occur in situations where, between agreement of a shipbuilding contract and delivery of the vessel, one of the parties tries to either terminate or modify the contract⁷⁹⁰ having found a better deal elsewhere⁷⁹¹ or having found that the agreement he made was a ‘bad bargain’.⁷⁹² This is known as ‘opportunism’, or where ‘one party exceeds the discretion reserved to it by the contract...to engage in conduct motivated primarily by self-interest’.⁷⁹³ Opportunism is not however a dispute *cause* in itself. Rather, it is where one party alleges that either the actions of his contracting counterpart (such as delayed performance,⁷⁹⁴ or a failure to build to specification⁷⁹⁵), or an extenuating circumstance, justify his decision to terminate the contract or modify obligations under it.

To begin with, a buyer may cause an opportunism based dispute by citing market downfall (occurring since agreement of a contract which he is entered into) as justification for escape from it. This issue will be explored in more detail in Section 4.3.3 in relation to market change, and concerns situations whereby ‘market

⁷⁸⁸ *ibid* at 74 (Teare J)

⁷⁸⁹ *ibid*

⁷⁹⁰ Scott Masten, ‘Equity, Opportunism, and the Design of Contractual Relations’ (1988) 144(1) *Journal of Institutional and Theoretical Economics* 180, 187

⁷⁹¹ Joshua Cender, ‘Knocking Opportunism: A Reexamination of Efficient Breach of Contract’ [1995] *Annual Survey of American Law* 689, 698

⁷⁹² Adam Shaw-Mellors and Jill Poole, ‘Recession, changed circumstances, and renegotiations: the inadequacy of principle in English law’ (2018) 2 *Journal of Business Law* 101, 104

⁷⁹³ Richard E Speidel, ‘The Characteristics And Challenges Of Relational Contracts’ (2000) 94(3) *Northwestern University Law Review* 823, 838

⁷⁹⁴ See Section 4.2.2

⁷⁹⁵ See Section 4.2.3

conditions are such that it suddenly becomes potentially financially rewarding for one party to try and walk away from the contract'.⁷⁹⁶ An example occurred in late 2015, when a group of Singaporean ship-owners were reported to have allegedly made unlawful repudiations of contracts for newbuild bulk carriers.⁷⁹⁷ The commodities market was at an all-time high when the bulk carriers were ordered. However, during the construction period, the markets tumbled. This led the ship-owners to seek an escape from the contracts. Similarly, in 2016 publicly owned Brazilian oil company *Petróleo Brasileiro SA* entered into a number of contracts for offshore vessels. Given tumbling oil prices and a waning offshore industry at the time, it was alleged to have deliberately contracted with shipbuilders who were based in countries with weak legal frameworks – in case it needed to terminate and escape from the contracts if oil prices continued their decline.⁷⁹⁸ Oil prices did indeed plummet, and in April 2016 *Petróleo* prematurely terminated the contract it had agreed with Greek shipbuilder *DryShips* to build an oil spill recovery ship.⁷⁹⁹

A buyer may also argue that market downfall occurring since agreement to a shipbuilding justifies him obliging the shipyard – part-way through the build⁸⁰⁰ – to convert the vessel into a ship-type capable of generating more earnings in the present (changed) state of the market. This is an example of opportunistic modification of contractual duties, whereby one party seeks to place further obligations on his contracting counterpart (such as an obligation to convert the vessel following market change) without supplementing the counterpart's rights or rewards.⁸⁰¹ An example of this occurred in *Northumberland Shipbuilding v*

⁷⁹⁶ Gard News, 'English law - Shipbuilding disputes' (Insight 182, May/July 2006) <www.gard.no/web/updates/content/52229/english-law-shipbuilding-disputes> accessed 3 October 2015

⁷⁹⁷ Hellenic Shipping News, 'Miners to be hit by impending shipbuilding disputes' (Shipbuilding News, Source: Sydney Morning Herald, 5 October 2015) <www.hellenicshippingnews.com/miners-to-be-hit-by-impending-shipbuilding-disputes/> accessed 12 January 2016

⁷⁹⁸ Offshore Post, 'Petrobras Tears Up Further Offshore Contracts' (22 September 2015) <www.offshorepost.com/petrobras-tears-up-further-offshore-contracts/> accessed 31 May 2016

⁷⁹⁹ Bunker Ports News Worldwide, 'DryShips Inc. Announces Cancellation of One of the OSRV Contracts With Petrobras' (DryShips Inc, 11 April 2016) <www.bunkerportsnews.com/News.aspx?ElementId=0ed12d93-8634-4593-9f12-bbc397d4138c> accessed 31 May 2016

⁸⁰⁰ This is termed 'intra-transactional' conversion and was introduced in Section 1.1.5

⁸⁰¹ Timothy J Muris, 'Opportunistic Behavior and the Law of Contracts' (1980) 65 *Minnesota Law Review* 521, 532

Christensen.⁸⁰² Realising that freight rates had significantly fallen in the year since he agreed to enter into a newbuild contract, a ship-owner insisted that the shipyard with whom he was contracting convert the vessel into a different type of vessel instead. He deliberately made this request just prior to the vessel being completed to its original specification, in the hope that the shipyard would refuse – thus allowing the ship-owner to terminate the contract (and therefore escape the prospect that the vessel would only generate meagre profits in the now depressed freight market.) In the end however, the court prevented the ship-owner from escaping the contract. Salter J stated that, having virtually completed the vessel to its original specification, ‘the one thing...[the ship-owner] could not do was to say “I will not take the ship at all.”’⁸⁰³ Overall, this case illustrated a form of opportunism whereby a party, in pursuit of an escape from a contract, ‘force[s] a renegotiation of the terms...so disagreeable that...[the contracting] partner finds it...[too] costly to accede to a renegotiation’.⁸⁰⁴

Despite the court’s ruling in *Northumberland Shipbuilding*, examples of market led opportunism still occur today. For instance, company Maersk Sealand have been known to seek conversion of partially completed boxships and bulk carriers, in order to mitigate the poor income which the vessels might otherwise have generated if chartered in times when the container freight market was at a low.⁸⁰⁵ This was also the case for Oceanbulk Containers, a company existing as a joint venture the Oceanbulk group and Star Bulk. Star had placed two newbuild orders for dry bulk carriers with Chinese shipyard Shanghai Waigaoqiao Shipbuilding (SWS), despite the lowly state of the dry bulk market at the time. Following this, sister company Oceanbulk decided to place orders for six boxships with SWS. It was subsequently suggested that two of the boxships ordered by Oceanbulk were substitutes for the two dry bulk carriers originally ordered by Star,⁸⁰⁶ on the basis that Star’s bulk

⁸⁰² [1923] 14 Lloyd’s Rep 336 (KB)

⁸⁰³ *ibid* at 337 (Salter J)

⁸⁰⁴ Scott Masten, ‘Equity, Opportunism, and the Design of Contractual Relations’ (1988) 144(1) *Journal of Institutional and Theoretical Economics* 180, 187

⁸⁰⁵ TradeWinds, ‘Box giant denies conversion scheme’ (Weekly News)

<www.tradewindsnews.com/weekly/173284/box-giant-denies-conversion-scheme> accessed 31 May 2016

⁸⁰⁶ Nigel Lowry, ‘Oceanbulk Containers eyes Wall Street’ (Lloyd’s List, 19 May 2015) <www.lloydslist.com/ll/sector/containers/article501813.ece> accessed 31 May 2016

carriers appeared to be ‘bad bargains’ when considered in light of the dry bulk market slump at the time when the orders were placed.⁸⁰⁷ It was thus alleged that Oceanbulk’s boxship order was made to offset the fact that Star would soon cancel its bulk carrier order prior to completion, therein evading the prospect that the bulk carriers – if completed and delivered – would be underutilised in the faltering dry bulk carriage market.

As aforementioned, opportunism led shipbuilding disputes can also be caused by the shipyard where it tries to escape an already agreed shipbuilding contract in order to find a better deal elsewhere. An example of this lay in the arbitration appeal of *Covington Marine Corp v Xiamen Shipbuilding Industry Co Ltd*,⁸⁰⁸ where shipyard Xiamen’s decision to repudiate a shipbuilding contract with buyer Covington coincided with a decision to sign contracts ‘to build...three of the same vessels for another buyer’⁸⁰⁹ at a higher price. It transpires however that there was never a legally binding contract between Xiamen and original buyer Covington, meaning that Xiamen was in fact at liberty to enter into the contract with the other buyer. Article 21 of the Xiamen-Covington contract provided that if final documentary exchange did not occur within twenty days of the contract date, the contract was automatically rescinded.⁸¹⁰ According to arbitrators in the original tribunal, the documentary exchange that had occurred during the negotiation period did not resemble a ‘final agreement’⁸¹¹ and was instead only ‘tentative and provisional’.⁸¹²

Finally, since this thesis is about English law and its approach to shipbuilding contract disputes, it is also fruitful to assess how opportunistic disputes might be theorised under English law. The starting point for the English law of contract is that the marketplace represents ‘a meeting point between two individuals with

⁸⁰⁷ *ibid*

⁸⁰⁸ [2005] EWHC 2912 (Com Ct)

⁸⁰⁹ *ibid* [21] (Langley J)

⁸¹⁰ *ibid* [7] (Langley J)

⁸¹¹ Gard News, ‘English law - Shipbuilding disputes’ (Insight 182, May/July 2006)

<www.gard.no/web/updates/content/52229/english-law-shipbuilding-disputes> accessed 3 October 2015

⁸¹² *ibid*

separate interests'.⁸¹³ As aforementioned in this section, it is also possible that each party's individual interests *change* during the years in which the shipbuilding contract is being performed, leading them to opportunistically 'take positions that were not contemplated at the time of the initial bargain'.⁸¹⁴ Whilst some view this as morally reprehensible and 'contrary to...contractual expectation',⁸¹⁵ such opportunism would in fact chime with the 'untrammelled individualism'⁸¹⁶ customary of classical English contract theory (introduced in Section 2.2), under which parties are assumed to act in pursuit of 'self-serving economic advantage'.⁸¹⁷ Gravity for this potential stance would derive from dicta by judges such as Lord Atkin who, in declaring for instance that parties should not assume 'the rights defined in the [Sale of Goods Act]...are in excess of business needs',⁸¹⁸ uphold market based opportunism in the English contracting arena. This stance would especially hold true if the idea of opportunistic escape from a contract (to sign a better deal with another party) was reconceptualised as a Free-Market⁸¹⁹ 'redistribution of an already allocated contractual pie',⁸²⁰ in which 'the only way to make a party better off is to make others worse off'.⁸²¹ In doing so however, this view would be innately repugnant to the idea of cooperation in contracting relationships.⁸²²

⁸¹³ Anat Rosenberg, 'Contract's Meaning and The Histories of Classical Contract Law' (2013) 59(1) McGill Law Journal 165, 178

⁸¹⁴ Ravi Achrol and Gregory Gundlach, 'Legal and Social Safeguards Against Opportunism in Exchange' (1999) 75(1) Journal of Retailing 107, 108

⁸¹⁵ George Cohen, 'The Negligence-Opportunism Tradeoff In Contract Law' (1991) 20 Hofstra Law Review 941, 942

⁸¹⁶ David Campbell, 'Arcos v Ronaasen as a Relational Contract' in David Campbell, Linda Mulcahy and Sally Wheeler (eds), *Changing Concepts Of Contract: Essays In Honour of Ian MacNeil* (Palgrave Macmillan 2013) 163

⁸¹⁷ Roger Brownsword, 'Suisse Atlantique Societe d'Armement SA v NV Rotterdamsche Kolen Centrale' in Charles Mitchell and Paul Mitchell (eds), *Landmark cases in the law of contract* (Hart Publishing 2008) 306

⁸¹⁸ *Arcos Ltd v EA Ronaasen & Son* [1933] AC 470 (HL) 480 (Lord Atkin)

⁸¹⁹ Whilst a Free-Market perspective will predominantly be taken in this thesis, other equally valid standpoints do exist such as that of Marxism and of Developmental Economics.

⁸²⁰ George Cohen, 'The Negligence-Opportunism Tradeoff In Contract Law' (1991) 20 Hofstra Law Review 941, 954

⁸²¹ Joshua Cender, 'Knocking Opportunism: A Reexamination of Efficient Breach of Contract' [1995] Annual Survey of American Law 689, 697

⁸²² See Section 3.2

4.3 – Extenuating Causes

Shipbuilding contract disputes are also caused by events which cannot be controlled by the ship-owner or shipbuilder, and therefore have nothing to do with their performance (or lack of it). As detailed in **Fig. 11**, construction contract disputes are predominantly caused by three types of extenuating event: Force Majeure events (such as Acts of God), frustrating events (such as government policy change) or significant market fluctuation.

4.3.1 Force Majeure

Typically, shipbuilding contracts contain ‘Permissible Delay’ clauses which allow a contract to be cancelled or suspended,⁸²³ or for the shipyard to be given more time to perform,⁸²⁴ if a Force Majeure event takes place during the construction period.⁸²⁵ Thus, if an event covered under the clause occurs, the non-performing or delayed shipyard is not deemed to be in breach of his contractual obligations.⁸²⁶ English contract law does not itself have a recognised Force Majeure doctrine.⁸²⁷ This means that, whilst a general definition of the term can be incorporated by

⁸²³ Hugh Beale, *Chitty On Contracts*, vol 1 (31st edn, Sweet & Maxwell 2012) para 14-140

⁸²⁴ Aleka Mandaraka-Sheppard, *Modern Maritime Law and Risk Management* (2nd edn, Informa 2009) ch 10 s 10.4

⁸²⁵ In permitting a contracting party to have more time to perform following an uncontrollable extenuation, the doctrine of Force Majeure has been justified – from a *theoretical* standpoint – as being in the interests of justice. [Mahmoud Reza Firoozmand, ‘Changed Circumstances And Immutability Of Contract: A Comparative Analysis of Force Majeure and Related Doctrines’ (2007) 8(2) *Business Law International* 161, 176.] Lord Sumner pioneered this view in *Hirji Mulji v Cheong Yue Steamship Company* where he proclaimed a Force Majeure clause to be ‘a device...by which the rules as to absolute contracts are reconciled with a special exception which justice demands’. [[1926] AC 497 (PC) 510 (Lord Sumner).] This was followed a few years later by Lord Wright in *Joseph Constantine Steamship v Imperial Smelting Corporation*, in which he described the intention of Force Majeure as being ‘to achieve a just and reasonable result’. [[1942] AC 154 (HL) 183 (Lord Wright).]

⁸²⁶ Force Majeure clauses exclude a shipyard’s liability in a way which may make them subject to the Unfair Contract Terms Act 1977 – as explored in Section 2.6. From a *theoretical* standpoint however, they must be demarcated from the concept of exemption clauses. Force Majeure clauses circumvent the prospect of a contracting party being accused of breaching the contract following failed performance. Exemption clauses on the other hand circumvent the liability of a party who has already breached. The latter clauses are thus contingent upon the occurrence of breach, whilst Force Majeure clauses are not. [Lee Mason, ‘Rethinking negligence in force majeure clauses: risk allocation, fairness and certainty in commercial contracts’ (2010) 3 *Journal of Business Law* 199, 201.]

⁸²⁷ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 3 art VIII

reference to the International Chamber of Commerce's Force Majeure Clause 2003 for instance,⁸²⁸ the scope of Force Majeure varies from contract to contract, and is dependent upon how particular parties have sought to draft their Force Majeure clause.⁸²⁹ Usually however, Force Majeure clauses in shipbuilding contracts will tend to cover '[Acts] of God, fire, flood, hurricanes, storms or other weather conditions not included in normal planning, earthquakes, intervention of government authorities, war, blockade, strikes, lockouts, labour shortage, explosions, shortage of materials, defects in materials, machinery, equipment, [and] delays in transportation'.⁸³⁰

Three examples will now be given of how different Force Majeure *events* can result in shipbuilding disputes. Firstly, *New Zealand Shipping v Société des Ateliers et Chantiers de France*⁸³¹ demonstrates how war can affect shipbuilds partially complete at the time. Here, a contract for a newbuild was signed in 1913 prior to the start of the First World War. An agreement was made that the vessel would be delivered by 30th January 1915, with an extension of time available to the shipyard in the event that his delay was the result of 'an unpreventable cause beyond his control'.⁸³² Moreover it was agreed that, if the shipyard was unable to deliver within eighteen months of the pre-agreed delivery date because of war, the contract would be rendered void. When France entered the war in August 1914, the shipyard's progress on the project was delayed. This led to a dispute between buyer and shipyard as to the consequences for the shipbuilding contract. The buyer wanted the contract performed as agreed, due to its unwavering and imminent need for the vessel. The shipyard on the other hand requested a project extension, claiming that his delay was unpreventable. The case was held in favour of the shipyard, and is exemplar of the type of dispute which might occur following a Force Majeure event

⁸²⁸ A Force Majeure situation occurs where a party cannot perform due to 'an impediment beyond its reasonable control...that it could not reasonably have been expected to have...taken into account at the time of the conclusion of the contract...[and] that it could not reasonably avoided or overcome'. [International Chamber of Commerce, 'ICC Force Majeure Clause 2003; ICC Hardship Clause 2003' <<https://iccwbo.org/resources-for-business/model-contracts-clauses/force-majeure/>> accessed 30 July 2017, 8.]

⁸²⁹ William Cary Wright, 'Force Majeure Delays' (2006) 26 *The Construction Lawyer* 33, 33

⁸³⁰ Aleka Mandaraka-Sheppard, *Modern Maritime Law and Risk Management* (2nd edn, Informa 2009) ch 10 s 10.4

⁸³¹ [1919] AC 1 (HL)

⁸³² *ibid* at 14 (Lord Wrenbury)

– as to whether such an event entitles the shipbuilder to an extension of time, or even whether it voids an ongoing shipbuilding contract and the performance obligations owed under it. Moreover, the litigious impasse which resulted between the buyer (who wanted the contract executed in the pre-agreed timeframe) and the shipyard (who disagreed), is exemplar of how the shipbuilding relationship is characterised under English law – as a relationship under which contracting parties operate at arm’s length to one another, with their own interests in mind.⁸³³

Another example of a Force Majeure event affecting shipbuilding contracts involved the Suez Canal,⁸³⁴ a popular route for trade between Europe and Asia throughout much of the 19th and 20th Centuries. Many shipbuilding contracts signed and being performed in this period were for tankers able to travel via the Canal. However, following conflict between the Canal’s neighbouring states of Egypt and Israel, it was shut between 1967 and 1975.⁸³⁵ This had adverse effects for newbuilds completed just before the closure, and for those which were in the process of construction at the time. For example, say a buyer and a shipyard agreed a shipbuilding contract in 1965 for a vessel whose fuel capacity was specifically set so that it could travel from Asia to Europe via the Canal. The Canal’s closure in 1967 would have meant that vessels travelling between Asia and Europe would need a far greater fuel capacity to make the next best alternative route via the Cape of Good Hope⁸³⁶ – something which the ship in this example did not possess. As a result, the buyer would most likely have tried to persuade the shipyard to amend the ship so that it had enough fuel capacity to make a journey from Europe to Asia via the Cape without refuelling.⁸³⁷ However, the ship would have been well on the way to completion by the time the Suez Canal was closed in 1967 and the buyer’s subsequent request was made. This would likely have meant that (contrary to the

⁸³³ See Section 2.2

⁸³⁴ Marianne Jennings, ‘Commercial Impracticability – Does It Really Exist?’ (1980) 2 Whittier Law Review 241, 249

⁸³⁵ The New York Times, ‘Egyptians Ready To Reopen Canal’ (Archives, 4 May 1975) <www.nytimes.com/1975/05/04/archives/egyptians-ready-to-reopen-canal-15-ships-trapped-in-1967-to-start.html> accessed 9 April 2018

⁸³⁶ Laleh Khalili, ‘How the (closure of the) Suez Canal changed the world’ (thegamming, 31 August 2014) <<https://thegamming.org/2014/08/31/how-the-closure-of-the-suez-canal-changed-the-world/>> accessed 9 April 2018

⁸³⁷ PJM Declercq, ‘Modern Analysis Of The Legal Effect Of Force Majeure Clauses In Situations Of Commercial Impracticability’ (1995) 15 Journal of Law and Commerce 213, 221

wishes of the buyer) the shipyard would have constructed the ship with its originally agreed fuel capacity – relying on the Sale of Goods Act which does not oblige ‘sellers’ of a future good to make changes to it beyond what was agreed in the original description. Conduct such as this would once again have been exemplar of how the shipbuilding relationship is characterised under English law – as a relationship under which contracting parties operate at arm’s length to one another, with their own interests in mind.⁸³⁸

As mentioned in Section 1.1.2, part of the shipbuilding industry’s significance lies in its job creation potential – both for ship workers, and for workers further down the supply chain (such as steel workers or painters). If these workers are however unable or unwilling to work (due to strikes or industrial action) then this will in turn scupper performance of ongoing shipbuilds.⁸³⁹ For instance, at the turn of the 20th Century many British shipbuilding operations were concentrated in the Harland & Wolff dock in Belfast. ‘The Edwardian period saw Belfast at the crest of a long wave of industrial and geographical expansion. Skilled workers in shipbuilding and engineering were, by UK standards, well paid, well housed, and unionised. Nevertheless, unskilled workers were poorly paid relative to their...[skilled] counterparts’.⁸⁴⁰ This led Labour Party activist James Larkin to organise strikes in pursuit of a reduction in the wage disparity. Whilst the 1907 strikes were originally intended only to involve dock workers, many other transport workers joined the strike effort, including shipbuilders and shipyard workers. ‘[O]nly one month after his arrival in Belfast, Larkin had again achieved membership of 400...[and within months] he had recruited 2000 new members’.⁸⁴¹ A consequence of the workers being on strike was that many shipbuilding projects ongoing at the time were delayed. By the end of the 20th Century, strike delays such as this were increasingly

⁸³⁸ See Section 2.2

⁸³⁹ The Force Majeure clauses of certain shipbuilding contracts cover the prospect of strikes occurring in the shipbuilder’s home nation. [US Securities and Exchange Commission, ‘Shipbuilding Contract between Seaspans Corporation and Jiangsu Yangzijiang Shipbuilding Co., Ltd. and Guangdong Machinery Imp. & Exp. Co., Ltd.’ (Hull No. YZJ2006-721C, 4 July 2006) <www.sec.gov/Archives/edgar/data/1332639/000119312507055526/dex424.htm> accessed 27 May 2018, art 8(1).]

⁸⁴⁰ Culture Northern Ireland, ‘The 1907 Dock Strike’ (26 April 2006)

<www.culturenorthernireland.org/features/heritage/1907-dock-strike> accessed 5 November 2015

⁸⁴¹ *ibid*

resulting in shipbuilding contract disputes. Take Gdansk in Poland for instance, whose shipyard played host to an employee trade union formed by shipyard worker Lech Walesa in September 1980.⁸⁴² This trade union led workers to protest against both low wages and a nominal increase in the price of goods in Poland. Not long after this was the shipbuilders strike in Cammell Laird in 1984. This strike was the largest in the UK in the 1980s,⁸⁴³ and occurred due to widespread redundancies in British shipbuilding. Its effect was such that employees at other nearby shipyards, including Scott-Lithgow, Robb Caledon and Swan Hunter, also decided to take action at the same time. Ultimately however, as above in the contexts of Harland & Wolff and Gdansk, strikes occurring in and around the shipyard would have protracted ongoing shipbuilds, ultimately resulting in newbuild delivery related disputes.

Disputes can also occur where a shipbuilder attempts to cite a Force Majeure event as an excuse for his own breach or failure.⁸⁴⁴ Force Majeure events are not therefore the *cause* of these types of dispute, but rather the excuse upon which the shipbuilder is attempting to justify or blame his breach. Two such situations will now be explored. The first of these concerns a Force Majeure event whose ultimate cause was an intentional breach of contract or negligence by the shipbuilder.⁸⁴⁵ Force Majeure cannot be used in this scenario because, as stipulated by Mccardie J in *Lebeaupin v Richard Crispin & Co*,⁸⁴⁶ ‘a man cannot rely upon his own act or negligence or omission or default as force majeure’.⁸⁴⁷

The second situation concerns a shipbuilder who is in breach of contract due to his delay, before a Force Majeure event occurs which causes yet further delay. The

⁸⁴² BBC, ‘1980 Shipyard Poles strike for their rights’ (BBC On This Day) <http://news.bbc.co.uk/onthisday/hi/dates/stories/august/14/newsid_2802000/2802553.stm> accessed 5 November 2015

⁸⁴³ James Moher and Alastair Reid, ‘The rise and fall of British shipbuilding from the 1870s’ (History & Policy Website, Trade Union Forum: Related Events, 7 November 2012) <www.historyandpolicy.org/trade-union-forum/event/the-rise-and-fall-of-british-shipbuilding-from-the-1870s> accessed 5 November 2015

⁸⁴⁴ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 3 art VIII

⁸⁴⁵ Hugh Beale, *Chitty On Contracts*, vol 1 (31st edn, Sweet & Maxwell 2012) para 14-141

⁸⁴⁶ [1920] 2 KB 714

⁸⁴⁷ *ibid* at 721 (Mccardie J)

courts are keen to assert that Force Majeure cannot be used to justify both delays, as Force Majeure clauses are not in place to assuage the consequences of the shipbuilder's personal breach. This was displayed in *Hull Central Dry Dock & Engineering Works Ltd v Ohlson Steamship Ltd*,⁸⁴⁸ in which ship repairers were prevented from using an ongoing labour strike as excuse for their own delay, because they were already late in delivery (and thus in breach of contract) when the strike began. Thus, if a Force Majeure event such as a strike were to occur 'at a time when the builder was already in breach of contract',⁸⁴⁹ the court would likely not permit reliance on Force Majeure. However, where a Force Majeure event occurs *concurrently* with a personal breach by the shipbuilder, the courts are willing to permit reliance on Force Majeure (and thus permit an extension of time).⁸⁵⁰ This view was elucidated by Dyson J in *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd*,⁸⁵¹ and is illustrated by means of the following example which relates to the general construction industry:

'[I]f no work is possible on a site for a week not only because of exceptionally inclement weather (a relevant event [for Force Majeure purposes]), but also because the contractor has a shortage of labour (and not a relevant event), and if the failure to work during that week is likely to delay the works beyond the completion date by one week, then if he considers it fair and reasonable to do so, the [judge]...is required to grant an extension of time of one week. He cannot refuse to do so on the grounds that the delay would have occurred in any event by reason of the shortage of labour'.⁸⁵²

4.3.2 Frustration

As mentioned in Section 1.1.3, one of the ways that a contract can be discharged is

⁸⁴⁸ (1924) 19 Lloyd's Rep 54 (KB)

⁸⁴⁹ UK P&I Club, 'Shipbuilding and Rig Construction contracts – Delay in Delivery' (Clifford Chance, 5 May 1998) <www.ukpandi.com/knowledge-publications/article/shipbuilding-and-rig-construction-contracts-delay-in-delivery-1918/> accessed 30 July 2017

⁸⁵⁰ On 30th July 2018, the Court of Appeal held that where parties include a clause in their contract which states that the builder will be liable for a personal breach occurring simultaneously with an uncontrollable event (such as a Force Majeure event or preventive conduct by his contracting counterpart), then an extension of time will not be given to him. [*North Midland Building Ltd v Cyden Homes Ltd* [2018] EWCA Civ 1744 [38] (Coulson LJ).]

⁸⁵¹ (1999) 70 Con Lloyd's Rep 32 (TCC)

⁸⁵² Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 3 art VIII

by frustration. Frustration of a contract was defined by Lord Simon in *National Carriers v Panalpina (Northern) Ltd*,⁸⁵³ as when:

‘[A]n event (without default of either party and for which the contract makes no sufficient provision)...so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to [these obligations]’.⁸⁵⁴

The doctrine of frustration is sparingly used in the shipbuilding context, since shipbuilding contracts often contain clauses which operate following events which would otherwise have frustrated the contract.⁸⁵⁵ However, where a shipbuilding contract contains no such clause, frustration can be used by the parties following an event which renders performance of the contract illegal, impossible or completely unrewarding (such that the event has completely destroyed the contract’s commercial purpose).⁸⁵⁶ Shipbuilding dispute cases surrounding frustration have commonly arisen in wartime. Examples in the shipbuilding context typically involve a shipyard alleging that performance of a shipbuilding contract is either impossible (due to the government requisitioning the newbuild for use in the war) or illegal (due to the government ordering the shipyard to halt ongoing private newbuild projects in favour of building warships.)

⁸⁵³ [1981] AC 675 (HL)

⁸⁵⁴ *ibid* at 700 (Lord Simon)

⁸⁵⁵ Shipbuilding contracts contain ‘Total Loss’ clauses which entitle parties to take action *under the contract* (rather than *at law* under the doctrine of frustration) in the event that the shipyard is destroyed. [Stuart Beare, Graeme Bowtle and Jane Martineau, ‘Shipbuilding contract of the Shipowners Association of Japan (SAJ)1’ in Lord Millett (ed), *Encyclopaedia of Forms and Precedents* (vol 39(1) pt 1(B)(A) LexisNexis 2016) art VIII(1).] They either allow the shipyard to claim under the project’s insurance policy and use the proceeds to reconstruct the vessel in time for a re-agreed delivery date, or allow the buyer to reclaim all pre-delivery instalments with the contract rescinded therein. [Stuart Beare, Graeme Bowtle and Jane Martineau, ‘Shipbuilding contract of the Shipowners Association of Japan (SAJ)1’ in Lord Millett (ed), *Encyclopaedia of Forms and Precedents* (vol 39(1) pt1(B)(A) LexisNexis 2016) art XII(2)(b); Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 3 art VIII (standard form wordings (f) frustration).]

⁸⁵⁶ Following discharge of a shipbuilding contract under the doctrine of frustration, a buyer can reclaim the pre-delivery instalments he paid up until that point. [Law Reform (Frustrated Contracts) Act 1943 s 1(2).]

One example was the appeal in *Woodfield Steam Shipping v JL Thompson & Sons*.⁸⁵⁷ Here two shipbuilding contracts were agreed in July and November 1916 in the middle of the First World War, between shipyard JL Thompson and buyer Woodfield. Thompson was government controlled, and therefore often carried out warship building. However, when these two contracts were agreed, the government informed the shipyard that it would not require any more warships to be built, and that it was at liberty to continue with its private shipbuilding projects. Subsequently in December 1916, mere months into the construction of Woodfield's newbuilds, a change of government policy compelled the shipyard to direct their efforts towards naval shipbuilding to assist in the fight against German submarines.⁸⁵⁸ Thompson argued that it was illegal for it to go against a governmental order and complete private newbuild projects such as Woodfield's.⁸⁵⁹ In response, Woodfield stated that since the government had made no such order at the time when the newbuild contracts were agreed, the shipyard was obliged to perform the contracts and deliver the vessels. Rowlatt J at first instance, and Eve J on appeal, agreed with the shipyard. The contracts were deemed to be frustrated.

Similarly, in *Fisher, Renwick & Co v Tyne Iron Shipbuilding Co*,⁸⁶⁰ buyers Fisher contracted with shipyard Tyne Iron for a newbuild steamer which was to be delivered in January 1916. The commencement of the build was delayed due to the war, which led the buyers to lodge a claim in court. The shipyard argued that it would have been illegal to commence the build on the pre-agreed start date, as at that point the government was urging it to prioritise Admiralty shipbuilding projects over private shipbuilds such as Fisher's.⁸⁶¹ Moreover, it bolstered its claim by arguing that – even if the government had allowed it to begin Fisher's newbuild – the project would have been substantially more difficult to carry out than contemplated upon agreement, in light of the reduced supply of materials and labour that arose during wartime.⁸⁶² The buyer conversely argued that the shipyard owed

⁸⁵⁷ [1919] 1 Lloyd's Rep 126 (CA)

⁸⁵⁸ *ibid* at 126

⁸⁵⁹ *ibid* at 130 (Eve J)

⁸⁶⁰ (1920) 3 Lloyd's Rep 201 (KB)

⁸⁶¹ *ibid* at 201 (Bailhache J)

⁸⁶² *ibid*

him a duty to notify him in the event of build delay, and to suggest a new delivery date⁸⁶³ – a suggestion which the buyer claimed it would have been happy to accept. By not doing so, the buyer claimed that the shipyard was in breach. The court however agreed with the shipyard, holding that the contract had been frustrated.

Given the disputes that occur in connection with extenuating events, the rationale for the doctrine of frustration is evident. The doctrine has itself been theorised in various ways. Firstly, in *Taylor v Caldwell*,⁸⁶⁴ Blackburn J conceptualised frustration as being a silent implied condition which all contracting parties pre-emptively intend to operate when performance becomes impossible without fault by either of them.⁸⁶⁵ This view has since come under fire from certain academic circles however. For one, Wilmot-Smith's 2018 article on termination following breach argues that it would be farfetched to assume that contracting parties intend their contractual agreements to *impliedly* contain conditions of impossibility – especially conditions of the 'semantic load'⁸⁶⁶ or comprehensiveness envisaged by Blackburn J. Moreover, Treitel proclaimed that even if contracting parties pre-emptively intend for an implied condition to operate when performance becomes impossible, it is unlikely that they would both want the result to be discharge of the contract – the very result which the doctrine of frustration gives parties.⁸⁶⁷

Secondly, frustration has been conceptualised as being in place to remedy the absence of one or more of the elements forming the 'foundation' of a contract. Academics such as Mahmoud Firoozmand have asserted that 'foundation' elements include the contract's subject matter (such as the 'good' in a sale of goods contract),

⁸⁶³ The buyer in *Fisher, Renwick & Co* was suggesting that the shipyard owed it a duty to cooperate in the event of delay. Cooperative duties were explored in Section 2.4.1 in respect of *Swallowfalls Limited v Monaco Yachting* and *Gyllenhammar v Sour Brodogradevna Split*, and cooperative norms were explored in Section 3.2.

⁸⁶⁴ (1863) 3 B&S 826 (KB)

⁸⁶⁵ *ibid* at 833-834 (Blackburn J)

⁸⁶⁶ Frederick Wilmot-Smith, 'Termination after breach' (2018) 134(Apr) Law Quarterly Review 307, 319

⁸⁶⁷ Guenter Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) para 16-008

non-availability or non-existence of which would thus frustrate the contract.⁸⁶⁸ But, as identified by Treitel, determining the ‘foundations’ of non-sale of goods contracts⁸⁶⁹ can often be problematic:

‘How can one tell whether passage through the Suez Canal is the “foundation” of a charterparty? What is the “foundation” of a contract in which the parties take a deliberate risk as to the continued availability or existence of a specific thing or of some state of affairs?’⁸⁷⁰

Thirdly, it is common to talk of ‘*discharge by frustration*’,⁸⁷¹ as was the case in Section 1.1.3. That said however, it has been suggested that frustration is not strictly an example of discharge, but rather refers to a situation in which it is no longer justifiable to impose the contract’s obligations on the parties.⁸⁷² Thus, rather than being an agreement to discharge a contract, frustration is the result of a situation besetting contracting parties in which it is no longer appropriate to continue contractual performance. In this way, it would operate as a ‘legally mandated exception’⁸⁷³ to the otherwise strictly applied principle of ‘sanctity of contract’ under English law, whereby parties are generally bound to the agreements which they create.⁸⁷⁴

4.3.3 Market Change

As referred to in Section 1.1.2, shipbuilding can be affected both by wider economic factors and by economic factors operating at the party or ‘transaction’ level. If the *wider* market significantly fluctuates during the construction period of a newbuild,

⁸⁶⁸ Mahmoud Reza Firoozmand, ‘Changed Circumstances And Immutability Of Contract: A Comparative Analysis of Force Majeure and Related Doctrines’ (2007) 8(2) Business Law International 161, 176

⁸⁶⁹ Characterisation of the shipbuilding contract as something other than a sale of goods was explored in Section 2.4 and Section 2.5

⁸⁷⁰ Guenter Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) para 16-011

⁸⁷¹ *ibid* para 1-006

⁸⁷² Frederick Wilmot-Smith, ‘Termination after breach’ (2018) 134(Apr) Law Quarterly Review 307, 314

⁸⁷³ Mahmoud Reza Firoozmand, ‘Changed Circumstances And Immutability Of Contract: A Comparative Analysis of Force Majeure and Related Doctrines’ (2007) 8(2) Business Law International 161, 185

⁸⁷⁴ David Hughes Parry, *The Sanctity of Contracts In English Law* (10th Series, Stevens & Sons Limited 1959) 2

then this can hamper the ability of the shipyard to fund the build, and the ability of the buyer to pay the contract price – thus resulting in disputes owing to financial issues.⁸⁷⁵ At the *transaction* level, whilst shipbuilding contract prices are set upon agreement and fixed throughout the construction period,⁸⁷⁶ the market value of the vessel can change during the course of its construction. Inevitably this will misalign the expectations which the parties had upon agreement, potentially leading to disputes in which one party seeks an escape from a contract he now deems a ‘bad bargain’ in the current market – a prospect introduced in Section 4.2.5.

Specifically, if the market declines between agreement of a newbuild contract and delivery, this will increase the temptation for buyers to refuse delivery of the vessel (in light of its decreased market value post-decline).⁸⁷⁷ One example of such a dispute occurred in 1921, at which point the shipbuilding industry was in dire straits. The majority of UK ship workers were unemployed, and tonnage rates had plummeted compared to what they were two decades previously.⁸⁷⁸ As mentioned in Section 4.2.5 in reference to the *Northumberland Shipbuilding v Christensen*⁸⁷⁹ case, the value of newbuilds being constructed in the early 1920s was far less than what they might have been in the previous decade.⁸⁸⁰ Disputes subsequently arose because parties were acting at cross-purposes following the market change; shipyards wanted to deliver the vessel they had been contracted to build, whilst buyers were often unwilling to accept delivery (given the depleted value of their vessel following the market decline). Neither buyer nor shipyard was willing to deviate, conduct which reflects the characterisation of the shipbuilding relationship under English law – wherein contracting parties operate at arm’s length to one another, with their own interests in mind.⁸⁸¹

⁸⁷⁵ See Section 4.2.1

⁸⁷⁶ Simon Curtis, ‘Remedies for Breach of Shipbuilding Contracts – Is English Law ‘Fit for Purpose’?’ in Barış Soyer and Andrew Tettenborn (eds), *Ship building, sale and finance* (Routledge 2016) 86

⁸⁷⁷ *ibid*

⁸⁷⁸ ‘The Shipbuilding Dispute’ *The Saturday Review of politics, literature, science and art*; Financial Supplement (1 April 1922) 67

⁸⁷⁹ [1923] 14 Lloyd’s Rep 336 (KB)

⁸⁸⁰ *ibid* at 337 (Salter J)

⁸⁸¹ See Section 2.2

Conversely, if the market booms between agreement of a newbuild contract and delivery, a shipyard may threaten to discontinue the build if he is not given an increased contract price (equal to, or greater than, the profit he would make if he were to otherwise sell the vessel on the open market for its increased market value post-boom.⁸⁸²) If the buyer refused to heed to the shipyard's request, then this would lead to a dispute between the two parties as to how to progress. Such a request was made in the *North Ocean Shipping Co v Hyundai Construction (The Atlantic Baron)*⁸⁸³ case.⁸⁸⁴ Here, the US Dollar fell against the Korean Won at a point when the contract to build the buyer's tanker had been agreed, but had not yet been delivered. The Korean shipbuilder subsequently requested a 10 percent increase in contract price to reflect this. The particulars of the decision concerned issues such as whether the buyer's agreement to the shipyard's request was made under duress, and whether the increased contract price would have constituted good consideration.⁸⁸⁵ However, for the purposes of this thesis, *The Atlantic Baron* highlights how disputes can emerge in shipbuilding cases when significant market change occurs during the construction period.

Unfortunately for ship-owners and shipyards, they must bear the consequences of market change. Whilst English law will allow for contractual obligations to be discharged where performance has become impossible,⁸⁸⁶ financial hardship occurring out of market change is not recognised as a viable escape from a contract. Though making parties' performance more financially burdensome,⁸⁸⁷ the impacts of market change will not render performance impossible in the eyes of the law.⁸⁸⁸ Applied to the shipbuilding context, interim change in the value of (and thus

⁸⁸² Simon Curtis, 'Remedies for Breach of Shipbuilding Contracts – Is English Law 'Fit for Purpose'?' in Barış Soyer and Andrew Tettenborn (eds), *Ship building, sale and finance* (Routledge 2016) 92

⁸⁸³ [1979] QB 705

⁸⁸⁴ This case is revisited in Section 5.4.6

⁸⁸⁵ [1979] QB 705, 712 (Mocatta J)

⁸⁸⁶ Impossibility of performance can lead to a contract being frustrated, as explored in Section 4.3.2

⁸⁸⁷ Dietrich Maskow, 'Hardship and Force Majeure' (1992) 40(3) *The American Journal of Comparative Law* 657, 663

⁸⁸⁸ Marianne Jennings, 'Commercial Impracticability – Does It Really Exist?' (1980) 2 *Whittier Law Review* 241, 245

demand for) a vessel between agreement of a shipbuilding contract and vessel delivery is no justification for escape from a party's contractual obligations. The rationale for this stance lies in English law's endorsement of classical contract theory, and with it the 'security of transactions' doctrine. This doctrine states that 'where a party, having entered the market, reasonably assumes that he has concluded a bargain, then that assumption should be protected'.⁸⁸⁹ Though beneficial for party certainty, critics of classical English contract theory believe that this stance 'neither serves nor reflects reality...[nor] unforeseen changes in the world',⁸⁹⁰ making it unworkable in practice – with these practical realities explored at the end of Section 4.2.5, in regards to contracting in the Free-Market arena.

4.4 – Future of Shipbuilding Disputes

Until the law finds solutions to prevent their emergence, shipbuilding disputes will continue to occur in future. Such disputes are likely to emerge from the following sources. For one, despite showing some signs of resurgence in certain areas,⁸⁹¹ reduced demand to transport goods by sea in the past decade⁸⁹² has meant that shipbuilding industry overcapacity from 2008 has remained⁸⁹³ – an issue openly

⁸⁸⁹ John N Adams and Roger Brownsword, 'The Ideologies of Contract Law' (1987) 7(2) *Legal Studies* 205, 207

⁸⁹⁰ Ravi Achrol and Gregory Gundlach, 'Legal and Social Safeguards Against Opportunism in Exchange' (1999) 75(1) *Journal of Retailing* 107, 108

⁸⁹¹ For instance, increased demand for spot boxship tonnage in late 2017 began a small hike in time charter rates at the start of 2018. [Linton Nightingale, 'Charter market starts 2018 on firm footing' (Lloyd's List, 18 January 2018)

<<https://lloydslist.maritimeintelligence.informa.com/LL1120905/Charter-market-starts-2018-on-firm-footing>> accessed 24 March 2018.] This continued well into 2018, with daily spot rates exceeding \$26,000 by August. [Nigel Lowry, 'Navios in no rush for scrubbers as dry market heats up' (Lloyd's List, 2 August 2018)

<<https://lloydslist.maritimeintelligence.informa.com/LL1123718/Navios-in-no-rush-for-scrubbers-as-dry-market-heats-up>> accessed 3 August 2018.] Moreover, LNG trade volumes increased to record breaking levels in 2018. [Max Tingyao Lin, 'Global LNG trade breaks record for third consecutive year' (Lloyd's List, 28 June 2018)

<<https://lloydslist.maritimeintelligence.informa.com/LL1123220/Global-LNG-trade-breaks-record-for-third-consecutive-year>> accessed 29 June 2018.]

⁸⁹² Martin Stopford, 'Global Shipping Markets; Current Developments & Outlook' (Capital Link Forum, Cyprus, 9 February 2017)

<<http://forums.capitallink.com/shipping/2017cyprus/ppt/stopford.pdf>> accessed 24 November 2017, slide 11

⁸⁹³ Robert Wright, 'Shipbuilders must navigate the recession' (Financial Times Online Article, 2010) <www.ft.com/cms/s/0/79ae40a8-f893-11de-beb8-00144feab49a.html#axzz3QJJu4R8C> accessed 8 February 2015

acknowledged by Japanese, Chinese and South Korean government officials at their summit in May 2018.⁸⁹⁴ Faltering demand for sea transportation has subsequently hit the profitability of ship-owning companies, and will likely lead to the reoccurrence of three types of financially driven shipbuilding dispute in future. Firstly, buyers may seek to opportunistically escape from shipbuilding contracts they had previously entered into, on the basis that (once completed) the newbuild might not find employment in a declining freight market.⁸⁹⁵ Secondly, despite wanting to take delivery of their contracted-for newbuilds, the reduced cash flows of ship-owning companies caused by a declining freight market might lead them to default on their shipbuilding contract payments. Thirdly, the reduced demand for sea transportation, and consequential decline in demand for newbuilds, will likely hit the profit margins of shipyards. This may in turn mean they are unable to fund newbuild projects they have ongoing, thus leading the contracts into financial dispute,⁸⁹⁶ or worse, leading the shipyard into bankruptcy.

Moreover, in light of a regulatory clamp down on ship emissions⁸⁹⁷ (which has driven uptake of the eco-ships introduced in Section 1.1.4), shipbuilding disputes might arise where regulatory change occurs at a time when a newbuild is in the process of being built. For instance, current industry guidelines indicate that – to

⁸⁹⁴ Cichen Shen, 'Shipbuilding issues raised at Japan-China-South Korea summit' (Lloyd's List, 14 May 2018) <<https://lloydslist.maritimeintelligence.informa.com/LL1122576/Shipbuilding-issues-raised-at-JapanChinaSouth-Korea-summit>> accessed 25 May 2018

⁸⁹⁵ See Section 4.2.5

⁸⁹⁶ See Section 4.2.1

⁸⁹⁷ One might argue that the emissions clamp down in shipping should extend beyond the pollutants emitted while ships are in operation, to also cover environmental issues occurring whilst ships are being built. In this case, there would be an onus on shipbuilders to not only build vessels safely but also to do so in an environmentally sound way. Gravity for this view might come from the OECD Council Working Party on Shipbuilding, whose 2010 report found that shipbuilding activities including thermal metal cutting, welding, grinding, coating and painting all impact negatively on the environment. [OECD, 'Environmental And Climate Change Issues In the Shipbuilding Industry' (OECD Council Working Party on Shipbuilding (WP6), November 2010) <www.oecd.org/sti/ind/46370308.pdf> accessed 22 June 2018, 12.] The report also found that shipbuilding activities can damage the environment given the proximity of shipyards to open water. [OECD, 'Environmental And Climate Change Issues In the Shipbuilding Industry' (OECD Council Working Party on Shipbuilding (WP6), November 2010) <www.oecd.org/sti/ind/46370308.pdf> accessed 22 June 2018, 4.] The China Maritime Arbitration Commission have already begun to take into account the environmental issues occurring during a shipbuild, by inserting a provision into their CMAC standard-form which urges shipbuilders to use environmentally friendly materials, and to recycle any unused materials. [Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix B citing China Maritime Arbitration Commission (CMAC), 'CMAC Standard Newbuilding contract (Shanghai Form)1' (CMAC, China), art IV.]

comply with low-sulphur regulations coming into force in 2020 – vessels can use exhaust gas cleaning systems known as ‘scrubbers’.⁸⁹⁸ But say a regulation is subsequently enacted which forbids the use of scrubbers on commercial vessels,⁸⁹⁹ due to concerns about how scrubbing residues can be safely disposed of.⁹⁰⁰ This would affect newbuilds in construction at the time, whose specifications featured scrubber systems and were agreed before the regulatory prohibition. These vessels will now be in the process of being built to a specification which, following any regulatory phase-in period, will be commercially inutile.⁹⁰¹ What might therefore emerge are contractual disputes in which the buyer instructs the shipyard to amend the vessel to make it compliant with the new regulations (by replacing the scrubbers with a regulation compliant system), but the shipyard refuses – claiming that its sole obligation is to build according to the pre-agreed specification.

Additionally, shipbuilding contract disputes might arise out of the continuing threat of war⁹⁰² and political friction. In May 2017 it was reported that the outbreak of war in Korea would hamper ongoing shipbuilding projects in the country, and thus lead to delivery delays.⁹⁰³ Moreover, as mentioned in Section 4.2.2, in June 2018 Hyundai Heavy Industries was forced to delay delivering newbuilds to an Iranian buyer amid fears that this might levy sanctions from the US – whose political relationship with Iran became fractious in 2018.⁹⁰⁴ In order to prevent shipyards

⁸⁹⁸ International Maritime Organisation, ‘The 2020 global sulphur limit’ (Frequently Asked Questions) <www.imo.org/en/MediaCentre/HotTopics/GHG/Documents/FAQ_2020_English.pdf> accessed 22 June 2018, 2

⁸⁹⁹ This is a prospect which respondents to one 2018 ship-owner survey think could in fact transpire. [James Baker, ‘Majority of owners plan to use low-sulphur fuel’ (Lloyd’s List, 9 April 2018) <<https://lloydslist.maritimeintelligence.informa.com/LL1122128/Majority-of-owners-plan-to-use-lowsulphur-fuel?vid=Maritime&processId=24379f58-54f1-43f1-9b66-f27a2960dc72>> accessed 12 April 2018.]

⁹⁰⁰ Lorène Grandidier, ‘Are Scrubbers a relevant solution for shipping industry?’ (Schneider Electric, 21 January 2014) <<https://blog.schneider-electric.com/energy-management-energy-efficiency/2014/01/21/scrubbers-relevant-solution-shipping-industry/>> accessed 2 December 2017

⁹⁰¹ Cichen Shen, ‘Shipbuilding: Stage set for yards’ game of survival’ (Lloyd’s List, 1 December 2017) <<https://lloydslist.maritimeintelligence.informa.com/articles/2017/11/the-intelligence-i-annual-outlook-folder-is-under-here/annual-outlook/shipbuilding-stage-set-for-yards-game-of-survival>> accessed 1 December 2017

⁹⁰² Examples of how war can cause shipbuilding disputes were given in Section 4.3.1 and 4.3.2

⁹⁰³ Simon Curtis and Phoebe Anderson, ‘War in Korea: a cause for shipbuilding frustration?’ (Lloyd’s List, 2 May 2017) <<https://lloydslist.maritimeintelligence.informa.com/LL108678/War-in-Korea-a-cause-for-shipbuilding-frustration>> accessed 31 July 2017

⁹⁰⁴ Cichen Shen, ‘HHI delays IRISL newbuilds amid sanction fears’ (Lloyd’s List, 11 June 2018) <<https://lloydslist.maritimeintelligence.informa.com/LL1122975/HHI-delays-IRISL-newbuilds-amid-sanction-fears>> accessed 3 July 2018

from accruing liability for these extenuating delays, and thus prevent the contract from entering into dispute, the onus will be on parties to draft and incorporate Force Majeure clauses⁹⁰⁵ which account for the prospect of war⁹⁰⁶ and political friction. This is especially crucial where the contract is governed by English law⁹⁰⁷ because, as explained in Section 4.3.1, English law has no dedicated Force Majeure doctrine from which parties could otherwise seek recourse.

4.5 – Conclusion

Accordingly, this chapter illustrates that shipbuilding disputes can result from all kinds of party performance related causes (arising in connection with the actions of buyer or shipbuilder), and also from extenuating causes (which emerge from uncontrollable events not linked to party performance). The fact that party performance related disputes continue to occur is evidence of the fact that the law on shipbuilding contracts must be improved, so that it can better regulate party behaviour and performance. Lawmakers must firstly look to the root *causes* of these disputes, so that any suggested improvements to the law target these dispute causes. Moreover, any improvements in shipbuilding contract law and judicial practice must give due regard to the cooperative norms underpinning certain shipbuilding relationships,⁹⁰⁸ and also to the industry perception that some shipbuilds are more akin to the provision of services by the shipbuilder.⁹⁰⁹

Until the law and judicial practice develops in this way, the parties whose disputes reach court or arbitration could do the following. For one, they could seek to resolve

⁹⁰⁵ Force Majeure clauses were introduced in Section 4.3.1, and will be revisited in Section 5.4

⁹⁰⁶ Marie Kelly, ‘Shipbuilding contracts and the threat of war’ (Norton Rose Fulbright, Publications, February 2018) <www.nortonrosefulbright.com/knowledge/publications/163696/shipbuilding-contracts-and-the-threat-of-war> accessed 21 March 2018

⁹⁰⁷ ‘[T]he overwhelming proportion of South Korean export newbuildings are constructed under shipbuilding contracts... governed by English law’. [Simon Curtis and Phoebe Anderson, ‘War in Korea: a cause for shipbuilding frustration?’ (Lloyd’s List, 2 May 2017) <<https://lloydslist.maritimeintelligence.informa.com/LL108678/War-in-Korea-a-cause-for-shipbuilding-frustration>> accessed 31 July 2017.]

⁹⁰⁸ See Section 3.2

⁹⁰⁹ See Section 3.3

disputes using clauses within their contracts. This could include clauses which oblige parties to cooperate rather than litigate in the event of dispute, such as the minor defect acceptance clauses referred to in Section 4.2.3. Alternatively, parties could use contractual remedy clauses. Section 5.4 will accordingly outline factors which make contractual remedies ‘effective’ at resolving disputes, including the fact that they give due regard to industry context (as per the overarching theoretical paradigm of this thesis). A final option would be for parties to seek recourse to judicial remedies – which will be explored in Section 5.2.

Chapter 5

REMEDIES

5.1 – Introduction

Chapter 4 made clear that disputes continue to hamper the performance of shipbuilding contracts. Remedial solutions to these disputes can be offered at law⁹¹⁰ (by recourse to statute, common law and equity), or under the contract.⁹¹¹ This chapter will focus on such remedies, and in doing so will seek to demonstrate three things. Firstly, how does differing legal characterisation of the shipbuilding contract impact upon the judicial remedies available to contracting parties. Their statutory remedies for breach of a shipbuilding contract currently come from the Sale of Goods Act 1979,⁹¹² in light of the contract's entrenched sale of goods characterisation. However, were the shipbuilding contract legislatively characterised as something else, it would fall under a different statute and thus mean that parties' statutory remedies would come from that piece of legislation. The remedies under the 1979 Act would no longer be applicable. Secondly, this chapter will demonstrate how the industry influences both judicial and contractual remedy awards. Conclusions gleaned from this will contribute to the overarching theoretical question being asked in this thesis, regarding the extent to which the shipbuilding industry should influence shipbuilding law – including the remedies offered following dispute. Thirdly, this chapter will examine the factors which make contractual remedies 'effective' – with 'effectiveness' having been defined in Section 1.2. These include whether the clause allocates risk, whether it is convenient to operate, and whether it permits goodwill to be offered to the breaching party (thus allowing the contracting relationship to be preserved).

⁹¹⁰ See Section 5.2 and Section 5.3

⁹¹¹ See Section 5.4

⁹¹² Sale of Goods Act 1979.

5.2 – Judicial Remedies

This section will explore judicial remedies⁹¹³ (statutory, common law and equitable) available to shipbuilding contract parties. Judicial remedies serve various purposes. For one, they assist in the enforcement of the law.⁹¹⁴ Also, they bolster a contract in the event that parties' drafting of clauses (such as contractual remedy clauses⁹¹⁵) are not as comprehensive as required to avert dispute.⁹¹⁶ Finally, they fill the gap where the parties' contract contains no contractual remedy clauses whatsoever.⁹¹⁷ This particular section will demonstrate that differing legal characterisation of the shipbuilding contract affects the source (be it statute, or common law and equity) from which a plaintiff can seek judicial remedy in the event of dispute.⁹¹⁸ In doing so, commentary is provided on the judicial approach to implementing and awarding such remedies.

5.2.1 Remedies under the Sale of Goods Act 1979

Because shipbuilding contracts are currently characterised as contracts for the sale of goods under English law, statutory remedies of the shipyard (seller) and ship-owner (buyer) flow from the Sale of Goods Act 1979.⁹¹⁹ We begin with the remedies of the shipyard or seller. As illustrated in Section 4.2.1, one cause of shipbuilding contract dispute is buyer default. In this situation, the unpaid seller has various options at his disposal. For one, he can bring a statutory action directly against the buyer for damages,⁹²⁰ or an action against the buyer for the price.⁹²¹

⁹¹³ The term 'judicial remedies' in this thesis will be taken to include remedies awarded by a judge in court *and* also remedies awarded by an arbitrator in an arbitral tribunal.

⁹¹⁴ The law on shipbuilding was discussed in Chapter 2

⁹¹⁵ See Section 5.4

⁹¹⁶ 'It is unlikely that the contract was ever intended to be a complete statement of legal obligations'. [Catherine Mitchell, 'Contracts and Contract Law: Challenging the Distinction Between the 'Real' and 'Paper' Deal' (2009) 29(4) Oxford Journal of Legal Studies 675, 700.]

⁹¹⁷ Hugh Beale, *Chitty On Contracts*, vol 1 (31st edn, Sweet & Maxwell 2012) para 26-001

⁹¹⁸ '[D]ifferent [legal characterisation]...may govern...the remedies of the parties in the event of a breach'. [Michael G Bridge, *Benjamin's Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 1-041.]

⁹¹⁹ Aleka Mandaraka-Sheppard, *Modern Maritime Law and Risk Management* (2nd edn, Informa 2009) ch 10 s 2

⁹²⁰ Michael G Bridge, *Benjamin's Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 15-001

⁹²¹ Hugh Beale, *Chitty On Contracts*, vol 2 (31st edn, Sweet & Maxwell 2012) para 43-340

These are both known as ‘personal remedies’. Another option is for him to terminate the shipbuilding contract on the basis of non-payment.⁹²² Alternatively, the Sale of Goods Act also gives an unpaid seller three remedies against the goods themselves.⁹²³ Often referred to as ‘self-help’ or ‘real’ remedies,⁹²⁴ they effectively securitise payment of the contract price⁹²⁵ in the event that the buyer’s default is due to him being bankrupt.⁹²⁶ These real remedies – to be explored in turn herein – are implied by law under s 39(1), and are:

- ‘(a) a lien on the goods or right to retain them for the price while he is in possession of them;
- (b) in case of the insolvency of the buyer, a right of stopping the goods in transit after he has parted with the possession of them;
- (c) a right of re-sale’.⁹²⁷

Statutory Lien

The first statutory remedy against the good (ship) open to an unpaid seller is a statutory lien⁹²⁸ under s 41 of the Sale of Goods Act.⁹²⁹ Implied by law, this lien can be *negated* by express stipulation in the contract by the parties, or *superseded* by the inclusion of an alternative security clause such as a contractual lien⁹³⁰ in the contract.⁹³¹ The statutory lien comes into its own when the buyer’s default is a result of his insolvency.⁹³² When the lien is exercised in such a scenario, the unpaid seller is placed in a better position than general creditors on the basis that he can

⁹²² Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix A citing Baltic and International Maritime Council, ‘BIMCO Standard Newbuilding Contract (NEWBUILDCON Form)1’ (BIMCO, Copenhagen, 2007) s 5 cl 39(b)(ii); Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix B citing China Maritime Arbitration Commission (CMAC), ‘CMAC Standard Newbuilding contract (Shanghai Form)1’ (CMAC, China) s 5 art XXVII(2)(2)

⁹²³ David Kelly and others, *Business Law* (2nd edn, Routledge 2014) 195

⁹²⁴ Donald Harris, David Campbell and Roger Halson, *Remedies in Contract and Tort* (2nd edn, Cambridge University Press 2002) 49

⁹²⁵ Hugh Beale, *Chitty On Contracts*, vol 2 (31st edn, Sweet & Maxwell 2012) para 43-340

⁹²⁶ Michael G Bridge, *Benjamin’s Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 15-001

⁹²⁷ Sale of Goods Act 1979, s 39(1).

⁹²⁸ Aleka Mandaraka-Sheppard, *Modern Maritime Law Volume 2: Managing Risks and Liabilities* (3rd edn, Informa 2013) ch 7 s 12

⁹²⁹ Sale of Goods Act 1979, s 41.

⁹³⁰ Michael G Bridge, *Benjamin’s Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 15-031

⁹³¹ Contractual liens are explored in Section 5.4

⁹³² Donald Harris, David Campbell and Roger Halson, *Remedies in Contract and Tort* (2nd edn, Cambridge University Press 2002) 49

temporarily keep hold of the ship. The seller must however be ‘in possession’⁹³³ of the ship for this lien to be used. In terms of its effects, s 48(1) of the Sale of Goods Act⁹³⁴ makes clear that exercise of the statutory lien does not rescind the contract. Rather, the contract continues and the seller is put ‘in a position where he is able to resell the goods and to deliver them to a new buyer’,⁹³⁵ thus stripping the original buyer of any title which he may have held up until that point.⁹³⁶ Rescission of the contract will only occur upon the occurrence of an act such as resale.⁹³⁷ Furthermore, there are various scenarios in which an unpaid seller’s right to retain the goods under a statutory lien is lost. For one, where a buyer pays for a newbuild in full, the seller’s right to retain the vessel is terminated⁹³⁸ – since the seller could no longer be considered an ‘unpaid seller’⁹³⁹ for the purposes of s 38(1) of the Act.⁹⁴⁰ The seller’s lien is also terminated where, following the buyer’s bankruptcy, payment is made in full by his trustee⁹⁴¹ or guarantor.⁹⁴² Moreover, as per s 43(1)(a) of the Act,⁹⁴³ the statutory lien will be terminated where the unpaid seller delivers the ship to the buyer, because he would no longer be ‘in possession’ of the vessel for the purposes of s 41(1).

Right of Stoppage in Transit

The second statutory remedy against the good (ship) open to an unpaid seller is a right of stoppage in transit under s 44 of the Act.⁹⁴⁴ Here, ‘transit’ is taken to mean the period between when the ship is handed over to a carrier for transportation to the buyer, and the buyer taking delivery.⁹⁴⁵ Much akin to the statutory lien, the

⁹³³ Sale of Goods Act 1979, s 41(1).

⁹³⁴ *ibid* s 48(1)

⁹³⁵ Michael G Bridge, *Benjamin’s Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 15-003

⁹³⁶ Hugh Beale, *Chitty On Contracts*, vol 2 (31st edn, Sweet & Maxwell 2012) para 43-340

⁹³⁷ Resale is explored below in this section

⁹³⁸ Business Dictionary, ‘Unpaid seller’s lien’ <www.businessdictionary.com/definition/unpaid-seller-s-lien.html> accessed 29 March 2018

⁹³⁹ Hugh Beale, *Chitty On Contracts*, vol 2 (31st edn, Sweet & Maxwell 2012) para 43-357

⁹⁴⁰ Sale of Goods Act 1979, s 38(1).

⁹⁴¹ Hugh Beale, *Chitty On Contracts*, vol 2 (31st edn, Sweet & Maxwell 2012) para 43-353

⁹⁴² Michael G Bridge, *Benjamin’s Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 15-058

⁹⁴³ Sale of Goods Act 1979, s 43(1)(a).

⁹⁴⁴ *ibid* s 44

⁹⁴⁵ *ibid* s 45(1)

unpaid seller's right of stoppage in transit is implied by law,⁹⁴⁶ which means that it can be superseded by means of express contractual stipulation. Unlike his right to a statutory lien however, the right of stoppage is contingent upon the seller having already parted with possession of the ship. What this means is that whilst a seller's entitlement to exercise a statutory lien is lost once he delivers the goods to the carrier, he would still be at liberty to exercise his right of stoppage in transit at this point.⁹⁴⁷ In terms of its effects, mere exercise of the right of stoppage does not terminate the contract.⁹⁴⁸ Rather, it resumes the unpaid seller's lien⁹⁴⁹ so that he is in a position to resell the vessel⁹⁵⁰ if the buyer never ends up paying the contract price.⁹⁵¹ Also it is worthy of note that, unlike the statutory lien, a right of stoppage is exercisable upon partial default on the contract price.⁹⁵² This is particularly relevant to shipbuilding contracts as the contract price is typically paid in instalments,⁹⁵³ meaning that partial default (namely default on *some*, but not all, instalments) is possible.

Right of Resale

The third statutory remedy against the good (ship) open to an unpaid seller is an entitlement to resell the vessel under s 48 of the Sale of Goods Act.⁹⁵⁴ This becomes available under s 48(3) where an unpaid seller 'gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price'.⁹⁵⁵ As regards the length of a seller's notice of intention to resell, '[a] court is unlikely to permit...five minutes notice because this could impose severe

⁹⁴⁶ Olanrewaju Olamide, 'Rights of an Unpaid Seller' (Djet lawyer) <www.djetlawyer.com/rights-unpaid-seller/> accessed 29 March 2018

⁹⁴⁷ Michael G Bridge, *Benjamin's Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 15-048

⁹⁴⁸ The Free Dictionary by Farlex, 'Stoppage in Transit' (Collins Dictionary of Law, WJ Stewart, 2006) <<https://legal-dictionary.thefreedictionary.com/stoppage+in+transit>> accessed 24 January 2018

⁹⁴⁹ Michael G Bridge, *Benjamin's Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 15-062

⁹⁵⁰ Resale is explored below in this section

⁹⁵¹ Michael G Bridge, *Benjamin's Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 15-091

⁹⁵² Business Law, 'Rights Of An Unpaid Seller Against The Goods' (Mercantile Laws Blogspot, 2018) <<http://mercantilelaws.blogspot.co.uk/2012/05/rights-of-unpaid-seller.html>> accessed 24 January 2018

⁹⁵³ See Section 1.1.3

⁹⁵⁴ Sale of Goods Act 1979, s 48.

⁹⁵⁵ *ibid* s 48(3)

dislocation costs for little apparent reason'.⁹⁵⁶ Rather, a 'reasonable period'⁹⁵⁷ of notice is required, with the question of what constitutes a reasonable period ultimately falling to the judge to decide⁹⁵⁸ – thus requiring him to implement a *discretionary* judicial approach to this remedy.

Action for the Price

Instead of, or in addition to,⁹⁵⁹ the three 'real' remedies talked of above, an unpaid seller can make an 'action for the price' under s 49 of the Sale of Goods Act.⁹⁶⁰ Operation of the remedy is contingent upon the fact that property in the goods has either 'passed to the buyer'⁹⁶¹ as per s 49(1), or that payment is due to be made 'on a day certain'⁹⁶² as per s 49(2). Since property in a shipbuilding contract passes after all pre-delivery instalments have been paid, any default will thus occur before property has passed – meaning that s 49(1) is inapplicable to the shipbuilding context. At face value therefore, s 49(2) is the only subsection applicable to shipbuilding. However, a day can only be 'certain' for the purposes of s 49(2) 'if it is fixed in advance by the contract in such a way that it can be determined independently of the action of either party or of any third person'.⁹⁶³ This is plainly not the case in shipbuilding, where payment is not made on pre-agreed dates but is instead contingent upon the completion of construction 'milestones'.⁹⁶⁴ Fortunately however, the court in *Workman, Clark & Co v Lloyd Brazilleno*⁹⁶⁵ clarified that 'the terms of [Sale of Goods Act s 49] appear...to apply to the sale of goods for a price to be paid by instalments',⁹⁶⁶ such as in shipbuilding contracts. Accordingly, '[a] seller could sue for instalments falling due as he reached the specified stages of

⁹⁵⁶ Alan Schwartz, 'Relational Contracts In The Courts: An Analysis Of Incomplete Agreements And Judicial Strategies' (1992) 21(2) Journal of Legal Studies 271, 306

⁹⁵⁷ *ibid*

⁹⁵⁸ '[A] long history [of]...cases...have enumerated the criteria which a court must take into account in assessing "reasonableness"'. [John F Burrows, 'Contract Statutes and Judicial Discretion' (1981) 1 Canterbury Law Review 253, 255.]

⁹⁵⁹ Michael G Bridge, *Benjamin's Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 16-001

⁹⁶⁰ Sale of Goods Act 1979, s 49.

⁹⁶¹ *ibid* s 49(1)

⁹⁶² *ibid* s 49(2)

⁹⁶³ Michael G Bridge, *Benjamin's Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 16-027

⁹⁶⁴ See Section 1.1.3

⁹⁶⁵ [1908] 1 KB 968 (CA)

⁹⁶⁶ *ibid* at 978 (Farwell LJ)

construction of the ship’,⁹⁶⁷ ‘notwithstanding that this was defined by reference to an event’,⁹⁶⁸ rather than by reference to a pre-agreed date or dates. Thus, by stretching the s 49(2) definition of ‘day certain’ to encompass instalment-based payment regimes, the court in *Workman* created an ‘exception’⁹⁶⁹ for shipbuilding contracts (a context to which they felt s 49(2) was otherwise unsuitable.) This is indicative of a judicial tendency toward accounting for the niceties of shipbuilding industry practice, as per the overarching theoretical paradigm of this thesis.

Debt and Damages Claims

It is important to delineate the aforementioned ‘actions for the price’ from claims for damages.⁹⁷⁰ Actions for the price are *debt* claims used in situations where the buyer has failed to make payment for the seller’s performance. *Damages* claims on the other hand are for situations where the buyer has breached an obligation other than paying the price.⁹⁷¹ A practitioner will often see no point in making the distinction between an action for damages and an action for debt, since he would argue that his client will end up with his monies either way. However, characterisation of a claim (as being either in debt or in damages) is warranted, because the hurdles of proof for making each claim markedly differ.⁹⁷² When making a debt claim, the seller need not prove causation,⁹⁷³ the seller need not mitigate his loss, the remoteness rule does not apply,⁹⁷⁴ and the law on penalties in

⁹⁶⁷ Michael G Bridge, *Benjamin’s Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 16-027

⁹⁶⁸ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 3 art II

⁹⁶⁹ Barry J Reiter, ‘The Control of Contract Power’ (1981) 1(3) *Oxford Journal of Legal Studies* 347, 359

⁹⁷⁰ Claims for damages are explored below in this section

⁹⁷¹ Michael G Bridge, *Benjamin’s Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 16-004

⁹⁷² Stephen Cogley and Jeremy Richmond, ‘Action for the price of goods: traps for the unwary’ (Thomson Reuters Practical Law, 28 November 2013)

<[https://uk.practicallaw.thomsonreuters.com/3-549-](https://uk.practicallaw.thomsonreuters.com/3-549-7946?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1)

7946?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1> accessed 29 March 2018

⁹⁷³ Simon Curtis, ‘Remedies for Breach of Shipbuilding Contracts – Is English Law ‘Fit for Purpose?’’ in Bariş Soyer and Andrew Tettenborn (eds), *Ship building, sale and finance* (Routledge 2016) 88

⁹⁷⁴ Stephen Cogley and Jeremy Richmond, ‘Action for the price of goods: traps for the unwary’ (Thomson Reuters Practical Law, 28 November 2013)

<[https://uk.practicallaw.thomsonreuters.com/3-549-](https://uk.practicallaw.thomsonreuters.com/3-549-7946?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1)

7946?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1> accessed 29 March 2018

respect of the price claimed does not apply either.⁹⁷⁵ Therefore, if a seller is neither able to mitigate his loss or resell the vessel following buyer breach, it would be beneficial for him to make a debt claim for the price since it imposes on him a lower burden of proof and obligation.⁹⁷⁶ Note also that the inapplicability of the mitigation and remoteness rules will also affect the judicial approach to debt claims. Judges will not need to make ‘substantive determinations’⁹⁷⁷ such as whether a claim is too remote, or ‘evaluative judgments’⁹⁷⁸ as to whether the plaintiff has sufficiently covered his loss. Instead, they need only apply the ‘rulebook’⁹⁷⁹ (in this case s 49 of the Sale of Goods Act) to factual issues surrounding the claim, such as whether property has passed to the buyer, or whether payment is due to be made on a ‘day certain’ – a distinctly *passive* judicial approach. In contrast, damage claims under the Sale of Goods Act are limited by the rules on mitigation and remoteness,⁹⁸⁰ rules which have been incorporated into the following heads of damages under the Act.⁹⁸¹ These will be explored herein.

Damages for Non-Acceptance

The first of these heads of damages works in favour of the seller, and is given ‘[w]here the buyer wrongfully neglects or refuses to accept and pay for the goods’.⁹⁸² Known as damages for non-acceptance, these fall under s 50 of the Sale of Goods Act.⁹⁸³ They are an alternative to a shipbuilder’s *contractual* right of termination for a buyer’s failure to take delivery⁹⁸⁴ and, as per Longmore LJ in

⁹⁷⁵ Michael G Bridge, *Benjamin’s Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 16-004

⁹⁷⁶ *ibid*

⁹⁷⁷ Alan Schwartz, ‘Relational Contracts In The Courts: An Analysis Of Incomplete Agreements And Judicial Strategies’ (1992) 21(2) *Journal of Legal Studies* 271, 274

⁹⁷⁸ Catherine Mitchell, *Contract Law and Contract Practice; Bridging the Gap Between Legal Reasoning and Commercial Expectation* (1st edn, Hart Publishing 2013) 147

⁹⁷⁹ John N Adams and Roger Brownsword, ‘The Ideologies of Contract Law’ (1987) 7(2) *Legal Studies* 205, 215

⁹⁸⁰ Samantha Cotton, ‘Remedies for breach of contract’ (Thomson Reuters Practical Law, 1 October 1999) <[https://uk.practicallaw.thomsonreuters.com/7-101-0603?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/7-101-0603?transitionType=Default&contextData=(sc.Default))> accessed 30 March 2018

⁹⁸¹ Michael G Bridge, *Benjamin’s Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 16-031

⁹⁸² Sale of Goods Act 1979, s 50(1).

⁹⁸³ *ibid* s 50

⁹⁸⁴ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix A citing Baltic and International Maritime Council, ‘BIMCO Standard Newbuilding Contract (NEWBUILDCON Form)1’ (BIMCO, Copenhagen, 2007) s 5 cl 39(b)(iii); Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix B citing China Maritime Arbitration

Caterpillar (NI) Ltd v John Holt & Co,⁹⁸⁵ displace a shipbuilder's right to claim an 'action for the price' (under s 49 of the Sale of Goods Act).⁹⁸⁶ However there are limits to s 50 damages for non-acceptance. For one, they are available only where title in the goods (ship) has not already passed to the buyer.⁹⁸⁷ Secondly, s 50 damages can only be claimed if the seller mitigated his loss, by reselling the goods to another buyer at the 'available market' rate.⁹⁸⁸ Thirdly, s 50(2) stipulates that only losses 'directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract'⁹⁸⁹ can be claimed – thus reflecting the first limb of the damages rule in *Hadley v Baxendale*.⁹⁹⁰

The quantum of damages for non-acceptance will be 'the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted'⁹⁹¹ – as per s 50(3). The rationale for this damage quantum is such that the 'available market' rate obtained by the seller upon resale, plus the 'contract price – market price' differential obtained by him under s 50(3), would leave him in 'the same position as he would have been in had the contract been performed'.⁹⁹² As a caveat, requiring judges to interact with *market* prices, when awarding damages under the 'contract price – market price' differential, is exemplar of the law having regard for commercial 'industry'⁹⁹³ practice⁹⁹⁴ in the wake of disputes – as per the overarching theoretical paradigm of this thesis. In the event that there is no available market for the goods, s 50(3) will be rendered unusable for lack of a 'market price' upon which to award damages. In this case, the court will award damages based upon the general principle in s 50(2) regarding

Commission (CMAC), 'CMAC Standard Newbuilding contract (Shanghai Form)1' (CMAC, China) s 5 art XXVII(2)(3)

⁹⁸⁵ [2013] 2 CLC 501 (CA)

⁹⁸⁶ *ibid* at 520 (Longmore LJ)

⁹⁸⁷ Hugh Beale, *Chitty On Contracts*, vol 2 (31st edn, Sweet & Maxwell 2012) para 43-404

⁹⁸⁸ Michael G Bridge, *Benjamin's Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 16-060

⁹⁸⁹ Sale of Goods Act 1979, s 50(2).

⁹⁹⁰ (1854) 9 Ex 341

⁹⁹¹ Sale of Goods Act 1979, s 50(3).

⁹⁹² James Edelman and others, *McGregor on Damages* (20th edn, Sweet & Maxwell 2017) para 8-158

⁹⁹³ The 'industry' was defined in Section 1.2 as encompassing the 'market' operating within it

⁹⁹⁴ John N Adams and Roger Brownsword, 'The Ideologies of Contract Law' (1987) 7 Legal Studies 2, 207-208

ordinary losses.⁹⁹⁵ By deducing rules ‘from generally applicable principles rather than mak[ing]...“unprincipled” compromises’⁹⁹⁶ (unprincipled compromises such as making discretionary damage awards in situations where there is no ‘available market’ price comparator), judges are embodying a *substantive* approach to decision making. In doing so, it is the ‘law, not discretion, which is in command’.⁹⁹⁷

Finally, as well as seeking recourse for non-acceptance under s 50, a plaintiff seller is also entitled to claim ‘a reasonable charge for the care and custody of the goods’⁹⁹⁸ under s 37, following the buyer’s failure to accept. In the shipbuilding context, this might constitute the economic wastage costs resulting from the prolonged berth occupation of the buyer’s ship – as explored previously in the context of build delays,⁹⁹⁹ and in the context of unwanted newbuilds.¹⁰⁰⁰

Damages for Non-Delivery

A ship-owner or buyer can also make a claim for damages. The first such claim is governed under s 51 of the Sale of Goods Act,¹⁰⁰¹ and operates ‘[w]here the seller wrongfully neglects or refuses to deliver the goods to the buyer’.¹⁰⁰² The buyer can only make such a claim however if he covered his loss.¹⁰⁰³ Like with the seller’s damages for non-acceptance, the buyer’s damages for non-delivery constitute ‘the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller’s breach’,¹⁰⁰⁴ as per s 51(2), with the damage quantum being ‘the difference between the contract price and the market or current price’¹⁰⁰⁵ at the time when the goods should have been delivered, as per s 51(3). One qualification upon

⁹⁹⁵ Hugh Beale, *Chitty On Contracts*, vol 2 (31st edn, Sweet & Maxwell 2012) para 43-416

⁹⁹⁶ Alan Schwartz, ‘Relational Contracts In The Courts: An Analysis Of Incomplete Agreements And Judicial Strategies’ (1992) 21(2) *Journal of Legal Studies* 271, 282

⁹⁹⁷ The Right Hon. Lord Justice Bingham, ‘The Discretion of the Judge’ (1990) 5(1) *The Denning Law Journal* 27, 27

⁹⁹⁸ Sale of Goods Act 1979, s 37(1).

⁹⁹⁹ See Section 4.2.2

¹⁰⁰⁰ See Section 4.2.1 and Section 4.2.5

¹⁰⁰¹ Sale of Goods Act 1979, s 51.

¹⁰⁰² *ibid* s 51(1)

¹⁰⁰³ Michael G Bridge, *Benjamin’s Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 17-004

¹⁰⁰⁴ Sale of Goods Act 1979, s 51(2).

¹⁰⁰⁵ *ibid* s 51(3)

this differential is that it will apply neither where ‘the parties ought, at the time of making the contract, to have contemplated as reasonable men that the rule would not compensate the buyer for his loss, should the seller fail to deliver’,¹⁰⁰⁶ or if application of the rule would enrich the buyer for ‘more than his true loss’.¹⁰⁰⁷ This qualification is exemplar of the law’s disdain for over-enrichment by damage award, in ‘prevent[ing] recovery of damages whenever they seem to overcompensate the promisee’.¹⁰⁰⁸ Moreover, as with claims for non-acceptance damages, the s 51(3) differential will apply only where there is an ‘available market’ for the goods in which the plaintiff buyer can ‘cover’ his loss. Where there is no available market, damage quantum will be based upon s 51(2).¹⁰⁰⁹

It is crucial to also note that a buyer may, in certain circumstances, claim for special losses beyond the general damages available under s 51(2). Take a situation where a buyer’s newbuild is not delivered. He subsequently attempts to mitigate his loss by purchasing an identical substitute on the open-market. Unfortunately, given the bespoke nature of his newbuild, he is unable to find an identical replacement and instead has to settle for a similar ship. In this case, the buyer may attempt to claim the cost of converting this ship to his desired specification as special losses¹⁰¹⁰ under s 54(1) of the Act.¹⁰¹¹

Damages for Breach of Warranty

A buyer also has recourse under the Sale of Goods Act following a breach of warranty by the seller. As explored in Section 4.2.3, a shipyard could be in breach of warranty (or in breach of innominate term deemed to be a warranty) where he

¹⁰⁰⁶ Michael G Bridge, *Benjamin’s Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 17-007

¹⁰⁰⁷ *ibid*

¹⁰⁰⁸ Eric Posner, ‘Contract Remedies: Precaution, Causation and Mitigation’ in Boudewijn Bouckaert and Gerrit De Geest (eds), *Encyclopedia of Law and Economics* (Edward Elgar Publishing 2000) 176

¹⁰⁰⁹ Daniel Hemming, ‘Damages for non-delivery under Sale of Goods Act’ (International Law Office, 4 December 2012) <www.internationallawoffice.com/Newsletters/Litigation/United-Kingdom/RPC/Damages-for-non-delivery-under-Sale-of-Goods-Act#> accessed 29 March 2018

¹⁰¹⁰ Michael G Bridge, *Benjamin’s Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 17-037

¹⁰¹¹ Sale of Goods Act 1979, s 54(1).

has made an immaterial error in building to the vessel's pre-agreed specification. In this situation, under s 53(1) 'the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may...maintain an action against the seller for damages for the breach of warranty'.¹⁰¹² Akin to non-acceptance and non-delivery damages, claimable losses under s 53(2) are those arising 'directly and naturally...in the ordinary course of events, from the breach of warranty',¹⁰¹³ as per the first limb in *Hadley*. Damage quantum for breach of warranty is detailed under s 53(3), and represents the difference between the *warranted* value of the good (namely its value if the seller had fulfilled the warranty¹⁰¹⁴) and the *actual* value of the good (namely its value in its present defective condition¹⁰¹⁵). The warranted value of the good will be taken as the market price of an identical replacement,¹⁰¹⁶ known as the 'available market' price. As is customary under English law, the rationale for this damage quantum is to put the buyer 'into the financial position he would have been in if the seller had complied with his undertaking'.¹⁰¹⁷ This calculation of damages will however disapply where there is no available market for the goods. In this situation, the level of damages awarded will be that which allows the buyer to bring the defective vessel up to useable or saleable standard.¹⁰¹⁸

Where the buyer seeks to recover consequential losses in addition to s 53 damages for receipt of a defective good, he can only claim consequential losses for the period between delivery and when the defect was discovered.¹⁰¹⁹ The buyer cannot continue to reap the benefits of the seller's warranty of quality in the knowledge that the goods are defective,¹⁰²⁰ which once again demonstrates the law's disdain for over-enrichment by damage award.

¹⁰¹² *ibid* s 53(1)

¹⁰¹³ *ibid* s 53(2)

¹⁰¹⁴ *ibid* s 53(3)

¹⁰¹⁵ Michael G Bridge, *Benjamin's Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 17-051

¹⁰¹⁶ James Edelman and others, *McGregor on Damages* (20th edn, Sweet & Maxwell 2017) para 25-007

¹⁰¹⁷ Michael G Bridge, *Benjamin's Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 17-051

¹⁰¹⁸ Hugh Beale, *Chitty On Contracts*, vol 2 (31st edn, Sweet & Maxwell 2012) para 43-451

¹⁰¹⁹ James Edelman and others, *McGregor on Damages* (20th edn, Sweet & Maxwell 2017) para 25-071–25-072

¹⁰²⁰ Hugh Beale, *Chitty On Contracts*, vol 2 (31st edn, Sweet & Maxwell 2012) para 43-469

Additionally, in the commercial sphere, a buyer can recover loss of profits for receipt of a defective vessel in situations where: (i) the seller knew how the buyer intended to use the good (ship) commercially, and (ii) where delivery of a defective or inutile ship would hamper this intention.¹⁰²¹ This principle derives from the case of *Cullinane v British “Rema” Manufacturing*,¹⁰²² where a party was being sold a machine which the seller warranted could operate at a specified productive capacity. When delivered, the machine was unable to fulfil its potential. It was accordingly held that the buyer was entitled to the loss of profits accrued during the ‘useful life of the machine’,¹⁰²³ or his net loss in supply productivity (and thus profits) when using the machine.

5.2.2 Remedies under Work and Materials Legislation and General Construction Legislation

The *Stocznia Gdanska SA v Latvian Shipping Co*¹⁰²⁴ decision¹⁰²⁵ suggested that the shipbuilding contract in that case was akin to a contract for work and materials. The reasoning behind this was because, when building a ship, ‘the whole of the work or skill involved goes into the creation of the product which is ultimately delivered in performance of the contract’.¹⁰²⁶ As explained in Section 2.4.2, a shipbuilding contract characterised as a work and materials provision would be governed by a combination of the Supply of Goods and Services Act 1982 and the common law.¹⁰²⁷ The 1982 Act would govern the parties’ standards of performance by imposing implied terms,¹⁰²⁸ and the common law would govern the remedies available to the parties following breach.¹⁰²⁹ The reason for this setup is because the 1982 Act does not itself contain or prescribe any remedies. This is confirmed by its long title, which states that the Act was solely enacted ‘to amend the law with

¹⁰²¹ Andrew Tettenborn and others, *Contractual Duties: Performance, Breach, Termination and Remedies* (2nd edn, Sweet & Maxwell 2017) para 21-057

¹⁰²² [1954] 1 QB 292 (CA)

¹⁰²³ *ibid* at 292

¹⁰²⁴ [1998] CLC 540 (HL)

¹⁰²⁵ This case was explored in Section 2.4.1

¹⁰²⁶ Michael G Bridge, *Benjamin’s Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 1-047

¹⁰²⁷ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 5 II (the nature of the conversion contract)

¹⁰²⁸ See Section 2.4.2

¹⁰²⁹ Common law remedies will be explored fully in Section 5.2.3

respect to the terms to be implied in certain contracts...for the supply of a service'.¹⁰³⁰

Also, the *Hyundai Heavy Industries v Papadopoulos*¹⁰³¹ decision¹⁰³² suggested that the shipbuilding contract in that case was more akin to a building or 'general construction' contract. General construction contracts give the employer and contractor a number of remedies, both statutorily and at common law. Since common law remedies are at issue in Section 5.2.3, the *statutory* remedies which govern general construction contracts will be discussed here. If a shipbuilding contract was characterised as a general construction provision, it may fall under Part II of the Housing Grants, Construction and Regeneration Act 1996¹⁰³³ – subject to lawmakers broadening the scope of the Act to cover the construction of moveable items such as ships.¹⁰³⁴ Doing so would mean that the plaintiff to a shipbuilding contract dispute could seek remedy under the 1996 Act.¹⁰³⁵

One such remedy would be the builder's right to suspend performance for non-payment under s 112,¹⁰³⁶ with non-payment a common cause of dispute in the *shipbuilding* context too.¹⁰³⁷ This remedy is in place to supplement the fact that: (i) non-payment is not an event of sufficient magnitude to entitle a builder to terminate

¹⁰³⁰ Supply of Goods and Services Act 1982, Long Title.

¹⁰³¹ [1980] 1 WLR 1129 (HL)

¹⁰³² This case was explored in Section 2.4.1

¹⁰³³ Housing Grants, Construction and Regeneration Act 1996.

¹⁰³⁴ See Section 2.4.2

¹⁰³⁵ A plaintiff to a shipbuilding contract which is governed by English law and characterised as a general construction contract will perhaps only be able to seek remedy under the HGCR 1996 where the project is being undertaken in an *English* shipyard. This is because, as stated in Section 2.4.2, the provisions of the 1996 Act seem to be drafted with domestic projects in mind. [Housing Grants, Construction and Regeneration Act 1996, s 112.] For example, s 116 states that *English and Welsh* Bank Holidays should be excluded when calculating the length of a builder's work suspension period. In contemplating that a construction project (and thus its potential suspension) might coincide with English and Welsh holidays, the Act's draftsmen clearly intended the remedy to apply to construction projects occurring in England and Wales. [Housing Grants, Construction and Regeneration Act 1996, s 116.] What this means is that a plaintiff to a shipbuilding contract which is: (i) governed by English law, (ii) characterised as a general construction contract, and (iii) where the construction is taking place in an *overseas* shipyard, will likely only be able to seek remedy at common law. In such cases, the courts would nonetheless be minded to take into account the remedy provisions of the 1996 Act, as these will guide the courts in the *type* of relief to award the plaintiff at common law (despite the Act not applying to the plaintiff's contract directly.)

¹⁰³⁶ Housing Grants, Construction and Regeneration Act 1996, s 112.

¹⁰³⁷ See Section 4.2.1

the contract,¹⁰³⁸ and (ii) that there is no remedy at common law allowing work to be suspended.¹⁰³⁹ The s 112 remedy would be incorporated into the shipbuilding contract as an implied term.¹⁰⁴⁰ As per s 112(1),¹⁰⁴¹ it would be available in situations where the employer (or buyer) defaulted on a payment under the contract, and where no notice of an intention to withhold payment was given by him to justify his default. Subsequently, s 112(2)-(3) list the restrictions on using the remedy – namely that the builder must give at least seven days’ notice of his intention to invoke a suspension,¹⁰⁴² and that the right ceases once the buyer has paid in full.¹⁰⁴³ The remedy is further narrowed by s 112(4)¹⁰⁴⁴ which essentially states that the builder will only receive an extension of time for a period equalling the suspension period.¹⁰⁴⁵ For instance, if the buyer defaults for 30 days, during which time the builder suspends performance under s 112, the builder is only entitled to an extra 30 days to complete the project. No punitive extension will be granted. Moreover, the builder cannot claim for losses or expenses incurred as a result of him suspending performance for non-payment,¹⁰⁴⁶ and ‘[m]ust suspend *all* obligations’¹⁰⁴⁷ connected with the project.

5.2.3 Common Law and Equitable Remedies

As explained in Section 5.2.2, if a contract is characterised as a work and materials provision then, whilst appropriate legislative rules will be in place to regulate the parties’ performance (namely statutory implied terms under the Supply of Goods and Services Act 1982), the remedies available to the wronged party will derive

¹⁰³⁸ Hugh Beale, *Chitty On Contracts*, vol 2 (31st edn, Sweet & Maxwell 2012) para 37-210

¹⁰³⁹ Vivian Ramsey and Stephen Furst, *Keating on Construction Contracts* (10th edn, Sweet & Maxwell 2017) para 18-114

¹⁰⁴⁰ Ian Wright and Franco Mastrandrea, ‘Adjudication’ in Vivian Ramsey, Ann Minogue, Jenny Baster, Michael O’Reilly and Hamish Lai (eds), *Construction Law Handbook* (2009 edn, Thomas Telford Ltd 2009) 864

¹⁰⁴¹ Housing Grants, Construction and Regeneration Act 1996, s 112(1).

¹⁰⁴² *ibid* s 112(2)

¹⁰⁴³ *ibid* s 112(3)

¹⁰⁴⁴ *ibid* s 112(4)

¹⁰⁴⁵ Craig J Enderbury, ‘Changes to the Construction Act: Payment certainty...uncertain terms’ (The Chartered Institute of Building, Hill International)

<www.ciob.org/sites/default/files/Hill%20Int%20CIOB%20slides.pdf> accessed 8 August 2017, slide 35

¹⁰⁴⁶ *ibid*

¹⁰⁴⁷ *ibid*

from the common law.¹⁰⁴⁸ Moreover, if a contract is characterised as a general construction contract, remedies will not only come from dedicated statutes but will also be available at common law. Similarly, if a contract is characterised as a sale of goods, a plaintiff's remedies can be sought statutorily under the Sale of Goods Act 1979¹⁰⁴⁹ and also at common law¹⁰⁵⁰ – as s 62(2)¹⁰⁵¹ of the Act preserves the applicability of common law rules to sale of goods contracts.¹⁰⁵² Common law remedies will herein be explored.

Seller's Right to Repudiate

Firstly, the common law remedies of the shipbuilder or seller. As held in *Vitol SA v Norelf Ltd (The Santa Clara)*,¹⁰⁵³ where a buyer commits a fundamental or repudiatory breach such as failing to pay a contract price instalment,¹⁰⁵⁴ a shipbuilder has a common law right¹⁰⁵⁵ to elect between: (i) affirming the contract

¹⁰⁴⁸ Michael G Bridge, *Benjamin's Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 1-041

¹⁰⁴⁹ Sale of Goods Act 1979.

¹⁰⁵⁰ The term 'rules of the common law' in the Sale of Goods Act has been deemed to include equitable rules. [*Thomas Borthwick & Sons v South Otago Freezing* [1978] 1 NZLR 538; Michael G Bridge, *Benjamin's Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 1-009.]

¹⁰⁵¹ Sale of Goods Act 1979, s 62(2).

¹⁰⁵² The Sale of Goods Act 1979 s 62(2)'s declaration that common law rules also apply to contracts under the Act indicates that it is *not* framed as a code. Because the Act is silent on issues such as formation, fraud, misrepresentation and duress, recourse to the common law is required to fill these gaps. [Andrew Burrows, *English Private Law* (3rd edn, Oxford University Press 2013) 666.] For example, the 1976 sale of goods case of *The Hansa Nord* featured the courts wanting to recognise an innominate term in a contract. [*Cehave NV v Bremer Handelsgesellschaft GmbH (The Hansa Nord)* [1976] QB 44 (CA).] The Sale of Goods Act 1893, the latest iteration of the Act at the time, referred only to conditions and warranties however, meaning that the courts had to seek recourse to the common law in order to find an innominate term in that case. [Mary Arden, 'Time For An English Commercial Code?' (1997) 56(3) Cambridge Law Journal 516, 520.] If not considered to be a code in this way, plaintiffs to shipbuilding contracts characterised under the Sale of Goods Act can seek remedy under the Act or at common law. However, some do believe the Act to in fact be a code. If upheld, this would mean that plaintiffs to shipbuilding contracts characterised under the Act would have to seek remedy under the statute alone. [Michael G Bridge, *The Sale of Goods* (Oxford University Press 1998) 4.] For instance, the Court of Appeal in *Re Wait* stated '[t]he question in this case depends entirely upon the provisions of the Code in the Sale of Goods Act'. [[1927] 1 Ch 606 (CA) 609.] Similarly, in *Ashington Piggeries v Christopher Hill*, Lord Diplock referred to 'the English common law of contract, including that part of it which is codified in the Sale of Goods Act'. [[1972] AC 441 (HL) 502 (Lord Diplock).] Thus, whilst characterisation of the shipbuilding contract as a sale of goods contract under the 1979 Act would mean that parties can seek remedy under the Act or at common law (on the basis that the Act is not a code, as per s 62(2)), it is noteworthy that some do consider the Act to be a code.

¹⁰⁵³ [1996] AC 800 (HL)

¹⁰⁵⁴ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012), ch pt 3 art XI

¹⁰⁵⁵ 'In the absence of an express contractual provision saying that the contract may only be terminated on the grounds specified in the contract, under English [common] law a contract may

or (ii) accepting the repudiation.¹⁰⁵⁶ This common law right remains available even where the parties have included a termination¹⁰⁵⁷ or rescission¹⁰⁵⁸ clause within the contract¹⁰⁵⁹ – which in turn demonstrates how the law and (industry) contracts can coexist,¹⁰⁶⁰ as per the ‘liberal’ stance on the overarching theoretical question of this thesis. In terms of the options themselves, affirmation involves furtherance of the contract as if the breach had not occurred. Acceptance on the other hand ‘bring[s]...to an end the parties’ respective obligations to construct and purchase the vessel’,¹⁰⁶¹ thus discharging the contract. It does not however bring to an end the shipbuilder’s right to make a debt claim for any pre-delivery instalments unpaid at the time of repudiation,¹⁰⁶² nor his right to bring a claim in damages for loss of bargain.¹⁰⁶³

Another similar remedy open to the shipbuilder is his common law right to repudiate a contract following anticipatory breach by the buyer. Buyer anticipatory breach would occur where he ‘evinces an intention not to fulfil his obligations under the contract’,¹⁰⁶⁴ such as stating that he will refuse to accept delivery of the vessel.¹⁰⁶⁵ This right differs from the shipbuilder’s statutory right to claim non-

be terminated by the innocent party if the other party is in repudiatory or renunciatory breach of contract, or has breached a condition’. [Nicholas Vineall, Max Lemanski and Alexander McCooke, ‘Terminating shipbuilding contracts: Can I? Should I? And what will happen if I do?’ (London Shipping Law Centre, Maritime Business Forum, 3 December 2015) <www.shippinglbc.com/content/uploads/members_documents/Termination_Shipbuilding_Contracts_0312.pdf> accessed 30 July 2017, 19.]

¹⁰⁵⁶ Michael G Bridge, *Benjamin’s Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 15-110

¹⁰⁵⁷ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix A citing Baltic and International Maritime Council, ‘BIMCO Standard Newbuilding Contract (NEWBUILDCON Form)1’ (BIMCO, Copenhagen, 2007) s 5 cl 39(b)(ii); Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix B citing China Maritime Arbitration Commission (CMAC), ‘CMAC Standard Newbuilding contract (Shanghai Form)1’ (CMAC, China) s 5 art XXVII(2)(2)

¹⁰⁵⁸ Stuart Beare, Graeme Bowtle and Jane Martineau, ‘Shipbuilding contract of the Shipowners Association of Japan (SAJ)1’ in Lord Millett (ed), *Encyclopaedia of Forms and Precedents* (vol 39(1) pt 1(B)(A) LexisNexis 2016) art XI(3)

¹⁰⁵⁹ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 3 art XI

¹⁰⁶⁰ *Newland Shipping and Forwarding v Toba Trading FZC* (2014) EWHC 661 (Com Ct) [48] (Leggatt J)

¹⁰⁶¹ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 3 art XI

¹⁰⁶² *ibid*

¹⁰⁶³ Andrew Tettenborn and others, *Contractual Duties: Performance, Breach, Termination and Remedies* (2nd edn, Sweet & Maxwell 2017) para 21-037

¹⁰⁶⁴ Aleka Mandaraka-Sheppard, *Modern Maritime Law and Risk Management* (2nd edn, Informa 2009) ch 10 s 10.1.4

¹⁰⁶⁵ Michael G Bridge, *Benjamin’s Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 16-080

acceptance damages, and from any contractual right to rescind a contract for pre-delivery default,¹⁰⁶⁶ because it instead gives the shipbuilder the option of affirming the contract (continuing to treat the contract as binding ‘until the date fixed for delivery’¹⁰⁶⁷) or accepting the repudiation (and suing for damages.¹⁰⁶⁸) If he chooses the latter, his damages will be predicated upon him having mitigated his loss,¹⁰⁶⁹ and ‘will be calculated by reference to the market price at the date when the seller ought reasonably to have resold following his acceptance of the repudiation’.¹⁰⁷⁰

Buyer’s Right to Repudiate

Now to look at the common law remedies of the ship-owner or buyer. Much as a shipbuilder has a common law right to either affirm a contract or accept the repudiation where a buyer has committed a fundamental or repudiatory breach, the buyer has the same common law right if a shipbuilder has committed such a breach. Moreover, this common law right remains available even if the shipbuilding contract contains a termination¹⁰⁷¹ or rescission¹⁰⁷² clause – demonstrating how the law and (industry) contracts can coexist,¹⁰⁷³ as per the ‘liberal’ stance on the overarching theoretical question of this thesis. In terms of the buyer’s right to elect to accept the repudiation, if he chooses to do so, ‘the builder’s primary obligation

¹⁰⁶⁶ The CMAC standard-form shipbuilding contract contains a clause allowing a shipbuilder to rescind a contract for a buyer’s anticipatory breach (referred to as default before delivery of the vessel). [Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix B citing China Maritime Arbitration Commission (CMAC), ‘CMAC Standard Newbuilding contract (Shanghai Form)1’ (CMAC, China) s 5 art XXII(4).]

¹⁰⁶⁷ Michael G Bridge, *Benjamin’s Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 16-082

¹⁰⁶⁸ Andrew Tettenborn and others, *Contractual Duties: Performance, Breach, Termination and Remedies* (2nd edn, Sweet & Maxwell 2017) para 5-013

¹⁰⁶⁹ James Edelman and others, *McGregor on Damages* (20th edn, Sweet & Maxwell 2017) para 6-011

¹⁰⁷⁰ Michael G Bridge, *Benjamin’s Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 16-082

¹⁰⁷¹ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix A citing Baltic and International Maritime Council, ‘BIMCO Standard Newbuilding Contract (NEWBUILDCON Form)1’ (BIMCO, Copenhagen, 2007) s 5 cl 39(a); Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix B citing China Maritime Arbitration Commission (CMAC), ‘CMAC Standard Newbuilding contract (Shanghai Form)1’ (CMAC, China) s 5 art XXVII(1)

¹⁰⁷² Stuart Beare, Graeme Bowtle and Jane Martineau, ‘Shipbuilding contract of the Shipowners Association of Japan (SAJ)1’ in Lord Millett (ed), *Encyclopaedia of Forms and Precedents* (vol 39(1) pt 1(B)(A) LexisNexis 2016) art X

¹⁰⁷³ *Newland Shipping and Forwarding v Toba Trading FZC* (2014) EWHC 661 (Com Ct) [48] (Leggatt J)

to construct the vessel will cease'¹⁰⁷⁴ and be supplanted by an obligation to pay damages on losses which were reasonably foreseeable upon agreement of the contract.¹⁰⁷⁵ These damages will either be the difference between the contract price and the market price of a substitute vessel (the buyer's loss of bargain), or a value equalling the buyer's expenditure under the contract up until that point (the buyer's reliance loss).¹⁰⁷⁶ Regardless of which of these damage calculations is used, they demonstrate a willingness by judges to predicate damage awards upon verifiable information such as market prices and expenditures¹⁰⁷⁷ – further evidence of the market¹⁰⁷⁸ influencing the law (as per the overarching theoretical paradigm of this thesis). Alternatively, if these common law damages were being sought for repudiatory breach of a shipbuilding contract characterised as a *service* provision, for instance where construction of the vessel was substandard, then the damage quantum would equal either 'the cost of completing the work [to an appropriate standard]',¹⁰⁷⁹ or the difference in value between the structure in its (deficiently built) condition and its value if built to an appropriate standard.¹⁰⁸⁰

The buyer also has a common law right where the shipyard commits an anticipatory breach – this being where the shipyard reveals, before the pre-agreed delivery date,¹⁰⁸¹ that he does not intend to perform his obligations due under the contract.¹⁰⁸² In this situation, the plaintiff buyer can either affirm the repudiation or accept it and sue for damages.¹⁰⁸³ If he chooses to accept the repudiation, then damages will constitute the 'difference between the contract price and the market price of an alternative newbuilding judged as at the Delivery Date'.¹⁰⁸⁴ If the buyer

¹⁰⁷⁴ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 3 art X

¹⁰⁷⁵ *ibid*

¹⁰⁷⁶ William Cecil and Fiona Cain, 'England & Wales' in Arnold J van Steenderen (ed), *Getting The Deal Through Shipbuilding 2017* (6th edn, Law Business Research 2017) 34

¹⁰⁷⁷ Alan Schwartz, 'Relational Contracts In The Courts: An Analysis Of Incomplete Agreements And Judicial Strategies' (1992) 21(2) *Journal of Legal Studies* 271, 281

¹⁰⁷⁸ The shipbuilding 'market' operates within the shipbuilding 'industry', as defined in Section 1.2

¹⁰⁷⁹ Hugh Beale, *Chitty On Contracts*, vol 1 (31st edn, Sweet & Maxwell 2012) para 26-017

¹⁰⁸⁰ *ibid*

¹⁰⁸¹ Michael G Bridge, *Benjamin's Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 17-013

¹⁰⁸² William Cecil and Fiona Cain, 'England & Wales' in Arnold J van Steenderen (ed), *Getting The Deal Through Shipbuilding 2017* (6th edn, Law Business Research 2017) 34

¹⁰⁸³ Andrew Tettenborn and others, *Contractual Duties: Performance, Breach, Termination and Remedies* (2nd edn, Sweet & Maxwell 2017) para 7-020

¹⁰⁸⁴ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 3 art X

chooses to affirm the breach however, then the contract will roll-on until the pre-agreed delivery date. A failure by the seller to deliver by this date will then forcibly constitute a repudiatory breach.¹⁰⁸⁵

Breach of Condition or Warranty

Following on from the previous sections on repudiatory breach, a prerequisite question emerges as to what constitutes a repudiation worthy breach of condition, as opposed to a mere breach of warranty. Distinguishing between the two is apposite because they each ‘give the innocent party very different remedies’.¹⁰⁸⁶ In the shipbuilding context, it is generally thought that repudiation will only be permitted in situations where a shipyard has abandoned a project altogether,¹⁰⁸⁷ or where build completion is likely to be significantly protracted.¹⁰⁸⁸ As alluded to in Section 4.2.3, it is unlikely that immaterial breaches, such as ‘tendering a “non-conforming” vessel...[or] not completing the project by the agreed Delivery Date’,¹⁰⁸⁹ will constitute a repudiatory breach. As held in the *McDougall v Aeromarine of Emsworth*¹⁰⁹⁰ case,¹⁰⁹¹ ‘if the defect was one that could be remedied within a time, which would still permit the builder to deliver within the period of delivery permitted by the contract, the buyer would not be entitled to treat the contract as repudiated’.¹⁰⁹² Similarly, if a shipbuilding contract was characterised as a service provision, then breaches such as this (which could be remedied without causing the plaintiff loss) would likely not warrant repudiation of the contract, but instead entitle the plaintiff to claim nominal damages.¹⁰⁹³

¹⁰⁸⁵ Michael G Bridge, *Benjamin’s Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 17-016

¹⁰⁸⁶ Filippo Lorenzon and Ainhwa Campas Velasco, ‘Shipbuilding, Sale, Finance And Registration’ in Yvonne Baatz (ed), *Maritime Law* (3rd edn, Informa 2014) 70

¹⁰⁸⁷ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 3 art X

¹⁰⁸⁸ William Cecil and Fiona Cain, ‘England & Wales’ in Arnold J van Steenderen (ed), *Getting The Deal Through Shipbuilding 2017* (6th edn, Law Business Research 2017) 34

¹⁰⁸⁹ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 3 art X

¹⁰⁹⁰ [1958] 1 WLR 1126 (QB)

¹⁰⁹¹ This case was introduced in Section 2.3

¹⁰⁹² Aleka Mandaraka-Sheppard, *Modern Maritime Law and Risk Management* (2nd edn, Informa 2009) ch 10 s 10.3

¹⁰⁹³ Hugh Beale, *Chitty On Contracts*, vol 1 (31st edn, Sweet & Maxwell 2012) para 26-040

Common Law and Contractual Rights to Repudiate

A decade ago, ‘it was widely believed that the exercise by the buyer of a contractual right to terminate...precluded him from exercising any common law right to terminate for repudiatory breach and therefore from claiming damages for the loss of the contract’.¹⁰⁹⁴ However, this was clarified in *Stocznia Gdynia v Gearbulk Holdings Ltd*,¹⁰⁹⁵ in which a shipbuilding contract was struck between shipyard Stocznia and buyer Gearbulk. Following a delay in completion by Stocznia, Gearbulk sought to terminate the contract. Article 5 of the contract stated ‘the Seller shall forthwith refund to the Purchaser the aggregate amount of such instalments’.¹⁰⁹⁶ In addition to seeking recourse under the contract (namely a repayment of his pre-paid instalments), the buyer also claimed that, as is customary under English contract law, he was thus entitled to damages for the shipyard’s repudiatory breach.¹⁰⁹⁷ The buyer was essentially arguing that the fact it was claiming back its pre-paid instalments did not do away with the fact that the shipyard had breached the contract in the first place. It thus additionally claimed damages for loss of bargain at common law,¹⁰⁹⁸ for loss of the ability to benefit from the contract.¹⁰⁹⁹ In rebuttal, the shipyard argued that the contract’s refund guarantee (under which the buyer was entitled to reclaim his instalments) was a comprehensive code, operation of which displaced any rights to claim for damages outside of it – in this case, common law damages for loss of bargain.¹¹⁰⁰ The court ultimately found in favour of the buyers, stating that the wording of the contract did not indicate that contractual rights and common law rights were mutually-exclusive under it. As a general principle, the case conveyed that a party exercising its contractual right to terminate does not preclude it from also claiming damages at

¹⁰⁹⁴ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 3 art X

¹⁰⁹⁵ [2009] EWCA Civ 75

¹⁰⁹⁶ *ibid* [5] (Moore-Bick LJ)

¹⁰⁹⁷ *ibid* [7] (Moore-Bick LJ)

¹⁰⁹⁸ Since ‘the value of a vessel can rise or fall to a marked degree between the date of the contract and the date of delivery it would be surprising if a buyer entering into a contract for a new vessel were prepared to exchange the whole value of his bargain for [instalment repayments]...in the event of the builder’s repudiation’. [[2009] EWCA Civ 75 [41] (Moore-Bick LJ).] It is thus unsurprising that the buyer in this case sought instalment repayments *and* additional damages for loss of bargain, as recompense for the shipyard’s breach.

¹⁰⁹⁹ [2009] EWCA Civ 75 [14] (Moore-Bick LJ)

¹¹⁰⁰ Simon Blows and Vanessa Tattersall, ‘Shipbuilding’ in George Eddings and others (eds), *The Shipping Law Review* (4th edn, Law Business Research 2017) 49

common law for repudiatory breach. This case accordingly reveals the coexistence of *legal* remedies and contractual remedies (the latter being inserted into *industry* contracts¹¹⁰¹). Analogy can thus be drawn between this finding and the ‘liberal’ stance on the overarching theoretical question of this thesis – namely that the law and industry can coexist when attempting to give parties relief following shipbuilding dispute.

Damages for Late Delivery

Additionally, a buyer can seek recourse where his good is delivered late. This is not a statutory remedy under the Sale of Goods Act,¹¹⁰² hence why it is talked of here. Shipbuilding contracts generally include a liquidated damage regime¹¹⁰³ or an insurance regime¹¹⁰⁴ to take effect if delivery is delayed.¹¹⁰⁵ But if the contract contains no such regime, then the buyer may be awarded the difference between the market price of his goods at the date at which they should have been delivered, and the market price of his goods upon the date when they were in fact delivered.¹¹⁰⁶ In making this award, ‘the Court must pay regard to the actual situation of the parties...[not] some hypothetical ‘reasonable’ parties in a different situation’,¹¹⁰⁷ and make a damage award based on the agreed-delivery date and delayed-delivery date of that *particular* transaction. This is exemplar of an active stance toward judicial decision making in the commercial context, or a ‘judicial willingness to look into the facts’¹¹⁰⁸ of the case brought before them. Moreover, the fact that the

¹¹⁰¹ See Section 5.4

¹¹⁰² Michael G Bridge, *Benjamin’s Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 17-038

¹¹⁰³ BIMCO’s NewBuildCon standard-form, the China Maritime Arbitration Commission ‘CMAC’ standard-form and the Shipowner’s Association of Japan ‘SAJ’ standard-form all contain liquidated damages provisions for delivery delay. [Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix A citing Baltic and International Maritime Council, ‘BIMCO Standard Newbuilding Contract (NEWBUILDCON Form)1’ (BIMCO, Copenhagen, 2007) s 2 cl 13; Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix B citing China Maritime Arbitration Commission (CMAC), ‘CMAC Standard Newbuilding contract (Shanghai Form)1’ (CMAC, China) s 2 art VI(5)(2)-(3); Stuart Beare, Graeme Bowtle and Jane Martineau, ‘Shipbuilding contract of the Shipowners Association of Japan (SAJ)1’ in Lord Millett (ed), *Encyclopaedia of Forms and Precedents* (vol 39(1) pt 1(B)(A) LexisNexis 2016) art III(1).]

¹¹⁰⁴ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 3 art XII (Insurance, delayed delivery/cancellation insurances)

¹¹⁰⁵ Liquidated damages regimes for delay are discussed in Section 5.4

¹¹⁰⁶ Michael G Bridge, *Benjamin’s Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 17-038

¹¹⁰⁷ Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press 1985) 752

¹¹⁰⁸ *ibid* 736

damage differential is based upon market rates is exemplar of the fact that the market¹¹⁰⁹ can influence the resolution of shipbuilding disputes – as per the overarching theoretical paradigm of this thesis.

Furthermore, a buyer can claim for loss of profits accruing out of delivery delay. Where there is no available market for the vessel, he is entitled to ‘the loss of profits which he would have made from use of the goods during the period after the goods should have been delivered until the actual date of delivery’.¹¹¹⁰ Crucially, these are predicated upon normal use of the item,¹¹¹¹ rather than an unusual or exceptional use which the seller is unaware of – a principle deriving from *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*.¹¹¹² This case saw a laundry owner agree to buy a boiler from the defendant sellers. Upon agreement, the buyer in turn agreed with the government to fulfil some dyeing contracts. The boiler was delivered late, which impinged upon the normal laundering activities of the business. The delay also meant that the laundrette could no longer fulfil the government dyeing contracts. The buyer subsequently claimed damages for delay in delivery, and also for loss of profits resulting out of the delay in delivery – namely the loss of new custom which the laundrette could have attracted had the boiler been operational on time, and loss of the amount which the laundry owner would have earned under the government contracts.¹¹¹³ The Court of Appeal found that the sellers were not liable to compensate for the launderer’s subsequent inability to fulfil the government dyeing contracts, since the sellers were unaware of both the existence of these contracts and moreover of their financial magnitude at the time of making the original boiler sale contract.¹¹¹⁴ Their obliviousness to these contracts did not however preclude Asquith LJ from awarding damages for loss of profits in respect of the normal business of the launderers.¹¹¹⁵ Unlike loss of the governmental contracts, losses incurred on normal business (laundering) activities flowed

¹¹⁰⁹ The shipbuilding ‘market’ operates within the shipbuilding ‘industry’, as defined in Section 1.2

¹¹¹⁰ Hugh Beale, *Chitty On Contracts*, vol 2 (31st edn, Sweet & Maxwell 2012) para 43-445

¹¹¹¹ Andrew Tettenborn and others, *Contractual Duties: Performance, Breach, Termination and Remedies* (2nd edn, Sweet & Maxwell 2017) para 23-046

¹¹¹² [1949] 2 KB 528 (CA)

¹¹¹³ Hugh Beale, *Chitty On Contracts*, vol 2 (31st edn, Sweet & Maxwell 2012) para 43-445

¹¹¹⁴ [1949] 2 KB 528 (CA) 543 (Asquith LJ)

¹¹¹⁵ *ibid*

‘directly’ and ‘naturally’ out of the seller’s delay breach (as per the first limb in *Hadley*). The rationale for this award is because one would reasonably expect¹¹¹⁶ such losses to be incurred following a period in which apparatus (that the business uses to make profit) cannot be used. Applied to the shipbuilding context, a claim for loss of profits following delivery delay might then be restricted to the value of charters which that type of ship would likely have undertaken, for the period between the pre-agreed delivery date and the date when the vessel was finally delivered.

Specific Performance

Up until now, this chapter has talked of legal remedies both statutorily and at common law. Under s 50 of the Senior Courts Act 1981¹¹¹⁷ however, the courts can also award equitable remedies to supplement any legal remedies which they may also have awarded. The first of these is specific performance, which ‘order[s]...the defendant to perform its promise’¹¹¹⁸ in situations where, following breach by the defendant, the plaintiff would rather the contract be performed than it be terminated and him claim damages.¹¹¹⁹ Orders of this nature are exemplar of an promissory judicial approach, wherein ‘making the person do what he had agreed to do’¹¹²⁰ is the paramount aim for a judge – rather than his ultimate aim being to financially compensate the victim, or punish the breaching party. Promissory theorists and judges view contractual obligations ‘as obligations that have been created by the parties through promises’.¹¹²¹ Accordingly, for them, ‘breach [of obligations] is wrong because breaking promises is wrong’¹¹²² – hence why they favour orders such as specific performance which oblige a party to keep its promise and perform. Specific performance is regulated by s 52 of the Sale of Goods Act, sub-s 1 of which

¹¹¹⁶ *ibid*

¹¹¹⁷ Senior Courts Act 1981, s 50.

¹¹¹⁸ Vivian Ramsey and Stephen Furst, *Keating on Construction Contracts* (10th edn, Sweet & Maxwell 2017) para 12-027

¹¹¹⁹ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 3 art X

¹¹²⁰ Alan Schwartz and Robert E Scott, ‘Contract Theory and the Limits of Contract Law’ (2003) 113(3) *The Yale Law Journal* 541, 569

¹¹²¹ Stephen A Smith, *Contract Theory* (Clarendon Law Series, Oxford University Press 2004) 54

¹¹²² Michael Knobler, ‘A Dual Approach to Contract Remedies’ (2011) 30(2) *Yale Law & Policy Review* 416, 424

states that the remedy is operable '[i]n any action for breach of contract to deliver specific or ascertained goods'.¹¹²³ A partially complete newbuild can be considered an 'ascertainable' good for the purposes of s 52, as the primary obligation of shipbuilding contracts is delivery of the final product.¹¹²⁴ Section 52(1) *prima facie* couches specific performance as a remedy for non-delivery,¹¹²⁵ indicating that the remedy is only open to the buyer. In theory however, the courts are also at liberty to make an order of specific performance in favour of the seller,¹¹²⁶ to compel the buyer to make payment for instance. Though, as explained below, damages will likely be a better avenue of recourse in this situation.

Specific performance is not available as a remedy in the following situations. Firstly, specific performance will not be ordered where this would inflict undue hardship on the breaching party.¹¹²⁷ It is therefore the court's discretion as to whether to make such an order, as is customary of equitable remedies. Under a *discretionary* judicial approach such as this, judges settle disputes according to what is 'fair and just to do in the particular case',¹¹²⁸ by assessing the evidence and then exercising their judgment¹¹²⁹ as to whether it would be *unfair* or not to make an order. Secondly, specific performance is not used to enforce payment obligations, since damages would adequately compensate the plaintiff here.¹¹³⁰ Moreover, in the shipbuilding context, payment obligations can instead be enforced under a performance guarantee. Thirdly, specific performance will not be awarded where the non-delivered good is 'of a very ordinary description',¹¹³¹ such as a standardised vessel. In this situation, the plaintiff can merely contract with another seller for an identical replacement, and have the courts reimburse him in damages for the difference between the contract price of the original good and the cost of the

¹¹²³ Sale of Goods Act 1979, s 52(1).

¹¹²⁴ Aleka Mandaraka-Sheppard, *Modern Maritime Law and Risk Management* (2nd edn, Informa 2009) ch 10 s 10.6

¹¹²⁵ Hugh Beale, *Chitty On Contracts*, vol 1 (31st edn, Sweet & Maxwell 2012) para 27-019

¹¹²⁶ *ibid* para 27-013

¹¹²⁷ Michael G Bridge, *Benjamin's Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 17-100

¹¹²⁸ The Right Hon. Lord Justice Bingham, 'The Discretion of the Judge' (1990) 5(1) *The Denning Law Journal* 27, 28

¹¹²⁹ *ibid* 42

¹¹³⁰ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 3 art X

¹¹³¹ Hugh Beale, *Chitty On Contracts*, vol 2 (31st edn, Sweet & Maxwell 2012) para 43-480

identical replacement.¹¹³² It follows from this that specific performance (rather than damages) will however be awarded where the non-delivered good is unique, such as a bespoke vessel. This is because, not only would it be nigh on impossible to quantify damages for non-receipt of a bespoke vessel,¹¹³³ but the buyer could not simply claim damages and use these to pay an alternative shipbuilder to build the vessel instead – since there may be a paucity of shipbuilders with the expert labour required to build it. This occurred in *Behnke v Bede Shipping*,¹¹³⁴ where the court ordered a contract for sale of a bespoke ship to be specifically performed as the ship was of ‘particular and practically unique value’¹¹³⁵ to the buyer. Finally, an order of specific performance will not be made where it is impossible to perform the contract’s primary obligation.¹¹³⁶

While specific performance has been employed in ship sale and purchase cases¹¹³⁷ such as *Behnke*, its applicability to shipbuilding contracts (characterised either as sale of goods or general construction provisions) will likely be sparing. There are three primary reasons for this. Firstly, damages might be an adequate remedy, especially where the vessel being built is standardised and the buyer is therefore able to find another shipbuilder able to carry out the build.¹¹³⁸ Secondly, it may be difficult to enforce performance of particularly complex projects, because the work will have to be completed exactly as described in the contract¹¹³⁹ – an unlikely prospect where the shipbuilding contract is characterised as a service provision containing a mix of bespoke design, work and labour obligations. Thirdly, the court often cannot justify the time and cost needed to supervise the specific performance of a long-term project such as a shipbuild.¹¹⁴⁰ This limit on the operation of specific performance is exemplar of a *societal* approach to judicial decision making. Under

¹¹³² *ibid* para 27-005

¹¹³³ *ibid* para 27-008

¹¹³⁴ See Section 2.3

¹¹³⁵ [1927] 1 KB 649, 661 (Wright J)

¹¹³⁶ JS McLellan, ‘Specific Performance and the Court’s Discretion’ (1986) 103 South African Law Journal 522, 524

¹¹³⁷ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 3 art X

¹¹³⁸ Hugh Beale, *Chitty On Contracts*, vol 1 (31st edn, Sweet & Maxwell 2012) para 27-028

¹¹³⁹ Vivian Ramsey and Stephen Furst, *Keating on Construction Contracts* (10th edn, Sweet & Maxwell 2017) para 12-029

¹¹⁴⁰ Robert Clay and Nicholas Dennys, *Hudson’s Building and Engineering Contracts* (13th edn, Sweet & Maxwell 2015) para 7-070

this approach, a judge will only make orders that would be cost-efficient¹¹⁴¹ to implement. To derogate from this would arguably ‘violate the consent of society’¹¹⁴² – since it is society (namely taxpayers) who would ultimately bear the costs of supervising the order.

Nonetheless, in *Liberty Mercian v Cuddy Civil Engineering*,¹¹⁴³ Ramsey J stated that ‘the courts are now more ready to enforce contracts requiring supervision’¹¹⁴⁴ such as shipbuilding contracts. In *Co-operative Insurance Society v Argyll Stores*,¹¹⁴⁵ Lord Hoffman shed light on why this development might have taken place. He cited a judicial distinction between orders for specific performance which compel the defendant to work towards a finite aim (for example, to finish constructing a ship),¹¹⁴⁶ from those which compel the defendant to continue an activity indefinitely (such as ‘continuing operation of a business’¹¹⁴⁷), stating that courts are minded only to make orders of the former type.¹¹⁴⁸

Injunctions

A second equitable remedy which a court might seek to award are injunctions, which are ordered to prevent a party from breaching.¹¹⁴⁹ Injunctions thus represent a negative obligation,¹¹⁵⁰ in stark contrast to the equitable remedy of specific performance which enforces a positive obligation to act.¹¹⁵¹ As with specific performance, injunctive orders can only be made in certain scenarios. For one, they

¹¹⁴¹ An order of specific performance will be deemed ‘cost-efficient’ when the supervision costs are ‘pragmatic, and consistent with public policy’. [Michael Knobler, ‘A Dual Approach to Contract Remedies’ (2011) 30(2) Yale Law & Policy Review 416, 455.]

¹¹⁴² Michael Knobler, ‘A Dual Approach to Contract Remedies’ (2011) 30(2) Yale Law & Policy Review 416, 437

¹¹⁴³ [2013] EWHC 4110 (TCC)

¹¹⁴⁴ *ibid* [11] (Ramsey J)

¹¹⁴⁵ [1998] AC 1 (HL)

¹¹⁴⁶ Simon Curtis, ‘Remedies for Breach of Shipbuilding Contracts – Is English Law ‘Fit for Purpose’?’ in Barış Soyer and Andrew Tettenborn (eds), *Ship building, sale and finance* (Routledge 2016) 94

¹¹⁴⁷ *ibid*

¹¹⁴⁸ [1998] AC 1 (HL) 13 (Lord Hoffmann)

¹¹⁴⁹ Michael G Bridge, *Benjamin’s Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 17-102

¹¹⁵⁰ Hugh Beale, *Chitty On Contracts*, vol 1 (31st edn, Sweet & Maxwell 2012) para 27-060

¹¹⁵¹ Michael G Bridge, *Benjamin’s Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 17-102

are discretionary,¹¹⁵² and thus will not be made where doing so would cause hardship to the breaching party. Moreover, an injunction will not be awarded where damages would adequately compensate the plaintiff.¹¹⁵³ Where an injunction is awarded however, the court may use it to supplement a concurrent order of specific performance.¹¹⁵⁴ This was the case in *Behnke v Bede Shipping*,¹¹⁵⁵ in which the seller was ordered to sell a ship to the buyer (under specific performance) and was restrained from selling the ship to anyone else (under an injunction).¹¹⁵⁶ Furthermore, the High Court is at liberty to award damages in addition to an injunctive order, under s 50 of the Senior Courts Act 1981.¹¹⁵⁷

In the general construction context, injunctions are ordered to prevent a builder from commencing a project without the requisite licenses or permits.¹¹⁵⁸ In the shipbuilding context specifically, an injunction was awarded in the case of *Merchants' Trading Company v Banner*.¹¹⁵⁹ Here, a shipbuilding contract contained a term allowing the ship-owners to enter the shipyard and complete their vessel if the shipbuilder refused or failed to do so. Part way through the build, the shipbuilder went bankrupt. The ship-owner subsequently wished to enter the shipyard and complete the project (as per the contract), but was prevented by the bankruptcy trustee. The ship-owner subsequently sought an injunctive order from the court preventing the trustee from selling the partially completed vessel as part of bankruptcy proceedings.¹¹⁶⁰

Also, injunctions might be particularly useful in the shipbuilding context where a newbuild is bespoke and requires the labour of a particular shipyard to build it, but

¹¹⁵² Vivian Ramsey and Stephen Furst, *Keating on Construction Contracts* (10th edn, Sweet & Maxwell 2017) para 12-034

¹¹⁵³ Jeremy Glover, 'Injunctions, limitation of liability clauses and the meaning of "adequate remedy"' (Fenwick Elliott) <www.fenwickelliott.com/research-insight/annual-review/2014/injunctions-limitation-liability-clauses-adequate-remedy> accessed 3 March 2018

¹¹⁵⁴ Michael G Bridge, *Benjamin's Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 17-102

¹¹⁵⁵ See Section 2.3

¹¹⁵⁶ [1927] 1 KB 649, 649 (Wright J)

¹¹⁵⁷ Senior Courts Act 1981, s 50.

¹¹⁵⁸ Robert Cushman and others, *Construction Disputes: Representing the Contractor* (3rd edn, Aspen Publishers 2001) 129-130

¹¹⁵⁹ (1871) Lloyd's Rep 12 Eq 18 (Ch)

¹¹⁶⁰ *ibid* at 20 (Lord Romilly)

where that particular shipyard is refusing to perform.¹¹⁶¹ Here, an injunction might be awarded to prevent the breaching shipbuilder from abandoning the project and siphoning its labour force to other projects. Alternatively, the court may wish to imply into the contract an obligation to cooperate,¹¹⁶² and then award an injunction to prevent the shipyard from acting non-cooperatively (in breach of the implied obligation).¹¹⁶³

5.3 – Industry Influence on Judicial Remedies

Rather than starting with the statutory, equitable and common law remedy rules explored in Section 5.2, alternative starting points for determining judicial remedies in shipping cases (such as shipbuilding cases) might either be: (i) the agreement between the parties (which would likely include any tacit *industry* understandings which the parties hold), or (ii) separate *sui generis* remedies for shipping (if the peculiarities of the shipping *industry* were sufficient enough to warrant separate remedial treatment). These alternatives uphold the influence of the industry when giving judicial remedies – reflecting the overarching theoretical paradigm of this thesis. They will now be assessed in turn.

5.3.1 Tacit Industry Understandings

There are ‘signs in the case law that the application of the rules and doctrines of contract *law* is diminishing in importance in favour of a broad process of interpreting the commercial *contract*’.¹¹⁶⁴ In the *Wood v Capita Insurance Services*¹¹⁶⁵ case,¹¹⁶⁶ Lord Hodge SCJ stated that the basis of this broad interpretative process is the agreement between the parties,¹¹⁶⁷ intrinsic to which

¹¹⁶¹ Hugh Beale, *Chitty On Contracts*, vol 1 (31st edn, Sweet & Maxwell 2012) para 27-068

¹¹⁶² This was suggested in Section 3.4

¹¹⁶³ Hugh Beale, *Chitty On Contracts*, vol 1 (31st edn, Sweet & Maxwell 2012) para 27-071

¹¹⁶⁴ Catherine Mitchell, ‘Obligations in Commercial Contracts: A Matter of Law or Interpretation?’ (2012) 65(1) *Current Legal Problems* 455, 456

¹¹⁶⁵ [2017] 2 UKSC 24

¹¹⁶⁶ This case is examined further in Section 5.4

¹¹⁶⁷ [2017] UKSC 24 [13] (Lord Hodge SCJ)

would be any tacit industry understandings which they hold. It may therefore be appropriate for judicial remedy awards to reflect this trend, in being based upon the parties' agreement and the industry understandings within it.

One judicial remedy case which demonstrates the prominence of party agreements (and their industry understandings) is *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)*.¹¹⁶⁸ Ship-owners Mercator Shipping agreed that 'The Achilleas' bulk carrier would be chartered to Transfield Shipping from January 2003, for redelivery between June and August 2003. The charter rate was agreed at \$13,500 per day.¹¹⁶⁹ By an addendum made in September of that year, it was then agreed that the vessel would be chartered for another five to seven months for ultimate redelivery on 2nd May 2004, at a rate of \$16,750 per day.¹¹⁷⁰ By April 2004, market rates had significantly increased from what they were when this addendum had been agreed. Mercator accordingly sought to exploit these favourable market conditions by agreeing to a follow-on charter (or 'fixture') with charterers Cargill to begin on 8th May 2004.¹¹⁷¹ The rate for this charter was agreed at \$39,500 per day, meaning that it was 'substantially greater than the original charter rate'.¹¹⁷²

Unfortunately, whilst in the hands of charterers Transfield, the ship was delayed and was not redelivered to owners Mercator until the 11th May 2004 (nine days later than the agreed cut-off.) The delay did not only affect the charter between Mercator and Transfield, but also meant that the vessel was late in being delivered to Cargill for the follow-on charter.¹¹⁷³ Whilst Cargill begrudgingly agreed to accept the ship despite its lateness, market rates had at this time fallen significantly.¹¹⁷⁴

¹¹⁶⁸ [2009] 1 AC 61 (HL)

¹¹⁶⁹ *ibid* at 65 (Lord Hoffmann)

¹¹⁷⁰ *ibid*

¹¹⁷¹ KW Lawson, 'The Remoteness Rules in Contract: Holmes, Hoffmann, and Ships that Pass in the Night' (2012) 23(1) *King's Law Journal* 1, 2

¹¹⁷² Victor P Goldberg, 'The Achilleas: Forsaking Foreseeability' (2013) 66(1) *Current Legal Problems* 107, 107

¹¹⁷³ [2009] 1 AC 61 (HL) 65-66 (Lord Hoffmann)

¹¹⁷⁴ Victor P Goldberg, 'The Achilleas: Forsaking Foreseeability' (2013) 66(1) *Current Legal Problems* 107, 107

Accordingly, it asked that the charter rate be reduced from \$39,500 to \$31,500, which owners Mercator agreed to.¹¹⁷⁵

On the basis of the loss incurred on its charter with Cargill (which resulted from Transfield's lateness in redelivering the vessel), Mercator lodged a claim in arbitration. They were seeking damages equal to the difference between their originally agreed charter rate with Cargill (\$39,500) and the reduced charter rate (\$31,500), over the follow-on charter period of around 170 days. Mercator were therefore claiming a total of \$1,364,584.37.¹¹⁷⁶ Charterers Transfield on the other hand were adamant that Mercator should not be entitled to calculate the damages which they were seeking 'by reference with their dealings with [Cargill]'.¹¹⁷⁷ Rather, Transfield averred that the damages should be calculated by reference to the charter between it and Mercator, and should equal the difference between the market rate and the agreed daily rate of their charter for the nine-day delay period between when the vessel should have been delivered (2nd May 2003) and when it was in fact delivered (11th May 2003).¹¹⁷⁸ The total sum of damages which Transfield was thus willing to pay out was \$158,301.17.¹¹⁷⁹ Essentially therefore, the question for the arbitrators was whether the owner's damage award should reflect the losses accrued on the entirety of the follow-on charter (as argued by owners Mercator), or whether the owners should be resigned to claiming damages purely for the delay period on the original charter¹¹⁸⁰ (as counter-argued by charterers Transfield).

The arbitrators assessed the foreseeability of the losses accrued on the follow-on charter, by reference to the test in *Hadley v Baxendale*.¹¹⁸¹ The test makes claimable those losses 'arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the

¹¹⁷⁵ [2009] 1 AC 61 (HL) 66 (Lord Hoffmann)

¹¹⁷⁶ *ibid*

¹¹⁷⁷ *ibid*

¹¹⁷⁸ Ewan McKendrick, *Contract Law* (9th edn, Palgrave Macmillan 2011) 356

¹¹⁷⁹ [2009] 1 AC 61 (HL) 66 (Lord Hoffmann)

¹¹⁸⁰ Catherine Mitchell, 'Contracts and Contract Law: Challenging the Distinction Between the 'Real' and 'Paper' Deal' (2009) 29(4) *Oxford Journal of Legal Studies* 675, 703

¹¹⁸¹ This test was introduced in both Sections 5.2.1 and 5.2.3

contemplation of both parties at the time they made the contract’.¹¹⁸² Finding for the owners, the arbitrators held (by a majority) that the loss on the follow-on charter fell within the rule in *Hadley*, as it was ‘of a kind which the [charterer], when he made the contract, ought to have realised was not unlikely to result from a breach of contract [following redelivery delay]’.¹¹⁸³ At first instance therefore, Mercator was awarded the \$1.364 million it desired – almost eight times the award which charterers Transfield argued that they in fact owed.

Unsurprisingly therefore, Transfield appealed the decision to the House of Lords. The appeal was allowed, meaning that Transfield’s liability was restricted to the difference between the market and charter rates during the nine day delay period (namely \$158,301.17). Led by Lord Hoffmann, the House of Lords made this decision on two grounds: (i) due to the unquantifiable nature of the loss on the follow-on charter, and (ii) due to an industry understanding of what damages for late redelivery of a chartered vessel should in fact be, which the parties tacitly factored into their agreement. While these two grounds will be explored in detail below, it is notable that neither was based upon the rule in *Hadley v Baxendale*. This is in sharp contrast to the approach by the arbitrators, whose decision was based purely upon application of the *Hadley* rule. Their Lordships’ decision accordingly reflects the decline in prominence of legal rules and doctrines mentioned at the beginning of this section.

The first reason behind their Lordships’ decision was because, at the time when the original charter was agreed, the magnitude of losses on any follow-on charters would have been unquantifiable. Rather than shaping the case around the *Hadley* rule (as to whether the losses flowed naturally or not from the breach), for Lord Hoffmann the question was ‘whether the charterers had assumed responsibility for the risk of a loss which was unquantifiable when the contract was made’.¹¹⁸⁴ His Lordship answered this question in the negative, because ‘although the parties

¹¹⁸² (1854) 9 Exch 341, 342 (Baron Alderson)

¹¹⁸³ [2009] 1 AC 61 (HL) 66 (Lord Hoffmann)

¹¹⁸⁴ Catherine Mitchell, ‘Contracts and Contract Law: Challenging the Distinction Between the ‘Real’ and ‘Paper’ Deal’ (2009) 29(4) Oxford Journal of Legal Studies 675, 703

would regard it as likely that the owners would at some time during the currency of the charter enter into a forward fixture, they would have no idea when that would be done or what its length or other terms would be'.¹¹⁸⁵ Stated differently, whilst Transfield might have assumed that the vessel would be chartered in subsequent fixtures at some time in the future, Mercator had not yet 'put pen to paper' on any such fixtures. Accordingly, Transfield had no knowledge or information regarding any follow-on fixtures (such as dates and payment rates) when it agreed to its original charter with Mercator. Therefore, the extreme loss incurred on the Cargill-Mercator follow-on charter cannot feasibly be said to have been within Transfield's contemplation at the time. It would not have foreseen that – in the event of a *short* delay in redelivery (of nine days) – it would incur an extraordinary loss (namely one which was measured over the entire 170 day term of a follow-on fixture).¹¹⁸⁶

The second reason behind Lord Hoffmann's decision in the House of Lords was because 'evidence existed of a custom in the charter market that liability on late redelivery of a ship was the difference between the charter rate and the market rate during the 'overrun' period (i.e. between when the ship should have been and actually was redelivered)'.¹¹⁸⁷ This 'custom' manifested itself as an industry understanding among the charterers' lawyers and P&I (insurance) club representatives,¹¹⁸⁸ which was tacitly factored into the parties' agreement. Lord Hoffmann's starting point for awarding damages was not therefore the rule in *Hadley* but was the 'agreement between the parties, which include[d]...the tacit understandings prevalent within the industry'¹¹⁸⁹ – departure or deviation from which would 'give rise to a real risk of serious commercial uncertainty which the industry as a whole would regard as undesirable'.¹¹⁹⁰

¹¹⁸⁵ KW Lawson, 'The Remoteness Rules in Contract: Holmes, Hoffmann, and Ships that Pass in the Night' (2012) 23(1) King's Law Journal 1, 12

¹¹⁸⁶ [2009] 1 AC 61 (HL) 88 (Lord Walker)

¹¹⁸⁷ Jonathan Morgan, *Contract Law Minimalism; A Formalist Restatement of Commercial Contract Law* (Cambridge University Press 2013) 135

¹¹⁸⁸ [2009] 1 AC 61 (HL) 66 (Lord Hoffmann)

¹¹⁸⁹ Catherine Mitchell, 'Contracts and Contract Law: Challenging the Distinction Between the 'Real' and 'Paper' Deal' (2009) 29(4) Oxford Journal of Legal Studies 675, 703

¹¹⁹⁰ [2009] 1 AC 61 (HL) 66 (Lord Hoffmann)

Recourse to industry understandings when resolving contractual disputes has also occurred in other areas of shipping law. In *Black King Shipping v Mark Randal Massie (The Litsion Pride)*,¹¹⁹¹ a ship-owner deliberately withheld telling its insurer that it intended to sail a ship through a war stricken area, so as to avoid paying an increased insurance premium.¹¹⁹² The ship sunk having been caught in a passing missile attack, following which the ship-owner sought to claim under the policy. The insurer refused, and the case went to court. When interpreting the contract in connection with the ship-owner's alleged fraudulent non-disclosure,¹¹⁹³ Hirst J relied on market understandings as to what constituted 'current war risk exclusions'.¹¹⁹⁴ Whilst this example concerns insurance,¹¹⁹⁵ it is nonetheless relevant here to demonstrate how 'taking into account the realities of the market',¹¹⁹⁶ such as its understandings, can benefit judges when resolving shipping contract disputes.

Additionally, much as how the remedy award in *The Achilleas* was based not upon some established legal rule but upon an understanding customary of the industry, English law similarly permits unstated terms to be implied into a contract on the basis that they represent industry custom.¹¹⁹⁷ Shipbuilding contracts acknowledge this very fact, often stating that terms implied by law, statute, usage or *custom* are excluded from the remit of the shipbuilder's warranty of quality.¹¹⁹⁸ An example of

¹¹⁹¹ [1985] 1 Lloyd's Rep 437 (QB)

¹¹⁹² The Maritime Advocate, 'Extent of Duty'

<www.maritimeadvocate.com/insurance/extent_of_duty.htm> accessed 31 October 2017

¹¹⁹³ Christopher Staughton, 'How Do The Courts Interpret Commercial Contracts' (1999) 58(2) Cambridge Law Journal 303, 311

¹¹⁹⁴ [1985] 1 Lloyd's Rep 437 (QB) 473 (Hirst J)

¹¹⁹⁵ Insurance clauses will be explored in Section 5.4

¹¹⁹⁶ Barış Soyer, *Warranties in Marine Insurance* (3rd edn, Routledge 2017) para 6.27

¹¹⁹⁷ It is not here being said that, in partly basing their decision upon industry custom, their Lordships in *The Achilleas* were implying a term by custom. The industry custom relied upon in *The Achilleas* would certainly not have been capable of satisfying the high hurdle required to be implied in a contract. [KW Lawson, 'The Remoteness Rules in Contract: Holmes, Hoffmann, and Ships that Pass in the Night' (2012) 23(1) King's Law Journal 1, 16.]

¹¹⁹⁸ Stuart Beare, Graeme Bowtle and Jane Martineau, 'Shipbuilding contract of the Shipowners Association of Japan (SAJ)1' in Lord Millett (ed), *Encyclopaedia of Forms and Precedents* (vol 39(1) pt 1(B)(A) LexisNexis 2016) art IX(4)(c); US Securities and Exchange Commission, 'Shipbuilding Contract between ER Yards S.A. and F3 Two, Ltd' (Hull No. D33, 7 September 2006) <www.sec.gov/Archives/edgar/data/1318742/000095014407001914/g05791exv4w44.htm> accessed 7 February 2018, art 7(2.14); US Securities and Exchange Commission, 'Shipbuilding Contract between Aker Yards S.A. and F3 One, Ltd' (Hull No. C33, 7 September 2006) <www.sec.gov/Archives/edgar/data/1318742/000095014407001914/g05791exv4w43.htm> accessed 7 February 2018, art 7(2.14); US Securities and Exchange Commission, 'Shipbuilding

a term implied into a contract by custom was given in the case of *Hutton v Warren*.¹¹⁹⁹ Here, a plaintiff was granted tenancy to the fields of the defendant – who was the rector of a parish. During his tenancy, the plaintiff had planted seeds on the fields but, before they were harvested, his tenancy was ended. While there was nothing in the tenancy agreement stating that costs of working on the fields and costs of sown seeds were reclaimable by the outgoing tenant,¹²⁰⁰ the court implied a term into the tenancy agreement stating that such costs should be reimbursed. The implication was made on the basis of farming industry custom of the time, ‘by which the tenant of a farm, cultivating it according to the course of good husbandry, is entitled, on quitting, to receive from the landlord or incoming tenant a reasonable allowance for seeds and labour bestowed on the arable land in the last year of the tenancy’.¹²⁰¹ Accordingly, reference to ‘implication of terms by custom’ cases such as *Hutton* illustrates how judges have looked to the industry when attempting to resolve a dispute, whether for the purposes of contractual gap-filling (as was the case in *Hutton*), or in remedial gap-filling (as was the case in *The Achilles*).

Overall, Lord Hoffmann’s general premise in *The Achilles* is relevant to the overarching theoretical paradigm of this thesis, and thus why the case formed the basis of this section. For him, the agreement between parties (intrinsic to which would be any tacit industry understandings held by them) should be the starting point when making remedy awards. Giving due regard to industry party understandings when making such awards ‘[unifies]...the law and the parties’ understandings into an integrated scheme that attempts to do some justice to...the complexity of agreements and relationships that contracting parties create’¹²⁰² – agreements which, in the shipbuilding industry, are underpinned by ‘a very long negotiating period, industry norms and customs, [and] previous dealings’.¹²⁰³ By

Contract between Forth Shipco LLC and SPP Shipbuilding Co., Ltd’ (Hull No. S-5118, 18 May 2011) <www.sec.gov/Archives/edgar/data/1577437/000119312513277511/d559582dex101.htm> accessed 7 February 2018, art 9(d)

¹¹⁹⁹ (1836) 1 M&W 466 (Court of Exchequer)

¹²⁰⁰ KW Lawson, ‘The Remoteness Rules in Contract: Holmes, Hoffmann, and Ships that Pass in the Night’ (2012) 23(1) King’s Law Journal 1, 14 fn 58

¹²⁰¹ (1836) 1 M&W 466 (Court of Exchequer) 466

¹²⁰² Catherine Mitchell, ‘Contracts and Contract Law: Challenging the Distinction Between the ‘Real’ and ‘Paper’ Deal’ (2009) 29(4) Oxford Journal of Legal Studies 675, 703

¹²⁰³ Catherine Mitchell, *Contract Law and Contract Practice; Bridging the Gap Between Legal Reasoning and Commercial Expectation* (1st edn, Hart Publishing 2013) 146-147

ensuring that judicial remedy awards are ‘underpinned by [industry] expectations and norms generated from within the relationship, rather than imposed externally by the law’,¹²⁰⁴ Lord Hoffmann’s view is exemplar of a ‘liberal’ stance on the overarching theoretical question of this thesis.

5.3.2 *Sui Generis* Judicial Remedies

On the basis that they are not confined to administering justice under legal codes (which are often drafted in abstraction, divorced from practical realities¹²⁰⁵), common law judges are able to decide cases based upon the real-world ‘complexities and nuances’¹²⁰⁶ of each case. This approach to decision-making began in the 20th Century, and since then judges have often been known to treat cases meritoriously, ‘rather than as mere members of one...category or another’.¹²⁰⁷ One aspect of this is the *sui generis* characterisation of contracts, as demonstrated in the *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd*¹²⁰⁸ case explored in Section 2.5. Another aspect of this is judges offering *sui generis* remedies when the particulars of a case or an area of law warrant them. An area of law to which this idea has been suggested is shipping contract law. In *Photo Production v Securicor Transport*¹²⁰⁹ Lord Wilberforce made clear that, owing to both commercial and historical reasons, ‘shipping contracts...should be considered as a body of authority *sui generis* with special rules’,¹²¹⁰ including special remedy rules.

If more and more exceptions to (or departures from) general remedy rules are made in shipping cases, in favour of offering unique *sui generis* remedies, then judges

¹²⁰⁴ Catherine Mitchell, ‘Contracts and Contract Law: Challenging the Distinction Between the ‘Real’ and ‘Paper’ Deal’ (2009) 29(4) Oxford Journal of Legal Studies 675, 676

¹²⁰⁵ Gerhard Dannemann and Basil Markesinis, ‘The Legacy of History on German Contract Law’ in Ross Cranston (ed), *Making Commercial Law: Essays in Honour of Roy Goode* (Clarendon Press 1997) 16

¹²⁰⁶ Law Teacher, ‘Legal Systems In English Law’ <www.lawteacher.net/free-law-essays/english-legal-system/the-english-legal-system.php> accessed 6 March 2018

¹²⁰⁷ Girardeau Spann, ‘A Critical Legal Studies Perspective On Contract Law And Practice’ [1988] Annual Survey of American Law 223, 227

¹²⁰⁸ [2015] EWHC 2022 (Com Ct); [2015] EWCA Civ 1058; [2016] UKSC 23

¹²⁰⁹ [1980] AC 827 (HL)

¹²¹⁰ *ibid* at 845 (Lord Wilberforce)

and lawmakers may want to consider whether the shipping industry warrants dedicated remedy provisions. In this way, judges would be able to directly implement or refer to these dedicated provisions, rather than going through the process of applying a general remedy to each case scenario and then assessing whether departure is warranted in each. Moreover, creating a separate remedial offshoot for shipping contracts on the basis of the unique nature of the shipping industry would be exemplar of industry nuances influencing the law – as per the overarching theoretical paradigm of this thesis.

One case featuring the unique remedial treatment of a shipping contract was the Court of Appeal’s decision in *MSC Mediterranean Shipping v Cottonex Anstalt*.¹²¹¹ Here, carrier MSC Mediterranean allowed shipper Cottonex Anstalt to use its containers to make a shipment of cotton to Chittagong, with the containers set to arrive at their destination between 13th May 2011 and 27th June 2011.¹²¹² The contract between shipper and carrier stated that the carrier was due to have his containers returned to him a short while after unloading had been completed.¹²¹³ Unfortunately however, citing a collapse in cotton prices since the goods had been shipped, the consignee refused to accept the cotton at Chittagong.¹²¹⁴ As the local customs office was unwilling to release the containers without a court order,¹²¹⁵ the shipper was unable to return them to the carrier on time. The resulting delay meant that the shipper began to incur demurrage fees at a rate of \$840 per day.¹²¹⁶ Resigned to the fact that he would likely be unable to reclaim his containers, on 2nd February 2012 (eight months after unloading of the containers was due to begin) the carrier offered to sell the shipper the containers – a turn of events which did not in fact transpire.¹²¹⁷ By this time, the breach delay was of such extent as to render it repudiatory.

¹²¹¹ [2016] EWCA Civ 789

¹²¹² *ibid* [2] (Moore-Bick LJ)

¹²¹³ *ibid* [3] (Moore-Bick LJ)

¹²¹⁴ *ibid* [2] (Moore-Bick LJ)

¹²¹⁵ *ibid* [27] (Moore-Bick LJ)

¹²¹⁶ *ibid* [5] (Moore-Bick LJ)

¹²¹⁷ *ibid* [4] (Moore-Bick LJ)

As explained in Section 5.2.3, at common law, the rule is that a victim of repudiatory breach can elect whether to: (i) affirm the contract and allow performance to continue in the hope that the breaching party eventually performs his contractual obligations,¹²¹⁸ or (ii) accept the breaching party's repudiation and terminate the contract. However, the Court of Appeal in *MSC Mediterranean* asserted that the plaintiff's customary common law entitlement to elect between affirming the contract and accepting the repudiation was superseded by automatic acceptance of the repudiation and termination of the contract. The option to affirm the contract was in other words unavailable.¹²¹⁹ The court ruled this way because the commercial purpose of the transaction had become obsolete and performance of the contract become impossible – thus frustrating the contract.¹²²⁰ Moreover, the court saw no merit in giving the carrier the option to affirm the contract (and seek return of the containers), because identical replacement containers could be obtained from an alternative source at Chittagong. Put simply, 'where a contract has become repudiated because it is no longer capable of performance, as was the case with the frustrating delay here, the innocent party does not have a right to elect to affirm the contract'.¹²²¹

The outcome of the case was a concurrent award of demurrage payments (for the period until frustration of the contract on 2nd February 2012) and damages (equal to

¹²¹⁸ This is available only if the plaintiff is able to continue performance without the cooperation of his contracting counterpart. [Simon Baughen, 'Repudiatory Breach and an End to Demurrage' (2017) 23(2) *Journal of International Maritime Law* 88, 89.] This is not available if, as Lord Reid put it in *White and Carter (Councils) Ltd v McGregor*, the plaintiff 'has no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages', and simply wishes to 'saddle the other party with an additional burden with no benefit to himself'. [[1962] AC 413 (HL) 431 (Lord Reid).]

¹²¹⁹ Allowing the carrier to affirm would have meant he could accrue demurrage monies for an irreparable breach by the shipper. [[2016] EWCA Civ 789 [43] (Moore-Bick LJ).] This in turn would have allowed him to sow the public pocket, and 'to generate an unending stream of free income'. [[2016] EWCA Civ 789 [30] (Moore-Bick LJ).]

¹²²⁰ Clifford Chance, 'Contentious Commentary' (Newsletter, August 2016) <<https://onlineservices.cliffordchance.com/online/freeDownload.action?key=OBWibFgNhLNomwBl%2B33QzdFhRQAhp8D%2BxrIGReI2crGqLnALtlyZe06RxJAqNvDwDWbFuT%2BJ9iLp%0D%0A5mt12P8Wnx03DzsaBGwsIB3EVF8XihbSpJa3xHNE7tFeHpEbaeIf&attachmentsize=249442>> accessed 10 September 2016, 3

¹²²¹ Simon Baughen, 'Repudiatory Breach and an End to Demurrage' (2017) 23(2) *Journal of International Maritime Law* 88, 90

the cost of container replacement).¹²²² More broadly however, in depicting a departure from a well-established remedy right, the case is exemplar of the courts treating a shipping contract differently at the post-discharge remedies stage. The court seemingly acknowledged that it had treated this contract differently by drawing analogy with *Geys v Société Générale*,¹²²³ a case in which a unique remedy was also given, but in the area of employment law – itself an area which Lord Wilson SCJ proclaimed to be ‘a special case...in terms of remedies’.¹²²⁴ *Geys* concerned the question of whether an employee’s contract is terminated at the time of his wrongful dismissal, or only when he has accepted the employer’s (wrongful) termination.¹²²⁵ In contrast to what would have been decided had the case concerned an area other than employment law,¹²²⁶ it was held that an employee cannot claim for wages which he earned whilst the contract remained in operation.

Overall therefore, the decision in *MSC Mediterranean* featured a departure from settled remedy rules. This departure was made because the particulars of the industry transaction in the case warranted such action – the particulars being how the consignee’s actions, the customs office’s demands, and the resulting delay impacted upon the ability to perform the contract. If similar departures from general remedial rules continue in shipping cases, to a point where these departures are made more frequently than implementation of the general rules themselves, judges and lawmakers may wish to consider if the industry should be given its own remedial regime. In this way, rather than having to start with remedies under general principles before then assessing whether departure is warranted, shipping contract law would have dedicated remedies which judges could implement from the outset if they saw fit.

¹²²² Diane Galloway, Stephen A Kirkpatrick and others, ‘Court of Appeal rules on indefinite demurrage claims’ (ReedSmith Client Alerts, 29 July 2016) <www.reedsmith.com/Court-of-Appeal-rules-on-indefinite-demurrage-claims-07-29-2016/> accessed 10 September 2016

¹²²³ [2013] 1 AC 523 (SC)

¹²²⁴ *ibid* at 578 (Lord Wilson SCJ)

¹²²⁵ *ibid* at 523

¹²²⁶ Guy Mundlak, ‘Generic or Sui-generis Law of Employment Contracts?’ (2000) 16(4) *International Journal of Comparative Labour Law and Industrial Relations* 309, 311

5.4 – Contractual Remedies

‘Parties who are free to create their own contractual obligations are also free to...specify the consequences of a breach of those obligations’.¹²²⁷ These consequences are specified in contractual remedy clauses inserted into the contract, whose function it is to mitigate or resolve disputes.¹²²⁸ The attractiveness of contractual remedies in the shipbuilding industry comes from the fact that recourse to judicial remedies, in court or arbitral tribunal, might lead a party to appear ‘unduly litigious’.¹²²⁹ This especially holds true for Asian parties, for whom ‘significant reputational issues...involving a public ‘loss of face’’,¹²³⁰ will result from taking legal action.

Contractual remedies differ from the judicial remedies at issue in Sections 5.2 and 5.3, because buyer and shipbuilder must agree to place them in the shipbuilding contract. For this reason they are often referred to as ‘agreed’ remedies in contract literature. Effect will always be given to any contractual remedies included in the parties’ contract, with recourse only made to judicial remedies if these contractual remedies prove to be deficient.

Deficiencies in contractual remedy clauses might arise by way of their wording.¹²³¹ If such a clause was ambiguous for instance, a judge would be required to construe it.¹²³² Judicial interpretation of contractual clauses is however controversial, as demonstrated by the divided opinions on how courts should approach the task.¹²³³ On one hand, some judges have argued that contractual clauses should be interpreted based upon their language alone. This is in order to militate against bias

¹²²⁷ Michael G Bridge, *Benjamin’s Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 16-031

¹²²⁸ Shipbuilding disputes were examined in Chapter 4

¹²²⁹ William Howarth, ‘Contract, reliance and business transactions’ [1987] *Journal of Business Law* 122, 123

¹²³⁰ Simon Curtis, ‘Remedies for Breach of Shipbuilding Contracts – Is English Law ‘Fit for Purpose’?’ in Barış Soyer and Andrew Tettenborn (eds), *Ship building, sale and finance* (Routledge 2016) 89

¹²³¹ See Section 5.4.5

¹²³² Richard Christou, *Drafting Commercial Agreements* (6th edn, Sweet & Maxwell 2016) para 1-14

¹²³³ Kim Lewison, *The Interpretation of Contracts* (6th edn, Sweet & Maxwell 2017) para 2.01

which might otherwise seep through to the interpretation process¹²³⁴ were surrounding facts such as party names, locations, reputations and prices known to the judge at the time. Lord Neuberger SCJ took this view in his 2015 Supreme Court judgment in *Arnold v Britton*,¹²³⁵ where he stated that ‘surrounding circumstances...should not be invoked to undervalue the importance of the language of the provision which is to be construed’.¹²³⁶ Conversely, other judges have argued that contractual clauses should be interpreted whilst keeping in mind the context which surrounds the contractual document¹²³⁷ – context described by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society*¹²³⁸ as the ‘matrix of facts’.¹²³⁹ This approach was taken by the Supreme Court in *Rainy Sky SA v Kookmin Bank*,¹²⁴⁰ where Lord Clarke SCJ¹²⁴¹ stated that ‘a court should primarily be guided by the contextual scene in which the stipulation in question appears...[and] would regard the commercial purpose of the contract as more important than niceties of language’.¹²⁴² Furthermore, the issue of how to interpret contractual clauses (such as contractual remedy clauses) was revisited in *Wood v Capita Insurance Services*,¹²⁴³ where Lord Hodge SCJ proclaimed that ‘[t]extualism and contextualism are not conflicting paradigms...[but] [r]ather, the lawyer and the judge, when interpreting any contract, can use them [both]’.¹²⁴⁴

The hope for shipbuilding contract parties is that their contractual remedy clauses are effective at resolving disputes, meaning that they need not subsequently resort to court or arbitration in pursuit of either judicial remedy or judicial interpretation of the contractual remedy clause. This section will identify the factors which make for an ‘effective’ contractual remedy clause.

¹²³⁴ Shawn J Bayern, ‘Rational Ignorance, Rational Closed-Mindedness, and Modern Economic Formalism in Contract Law’ (2009) 97(3) California Law Review 943, 949

¹²³⁵ [2015] AC 1619 (SC)

¹²³⁶ *ibid* at 1628 (Lord Neuberger SCJ)

¹²³⁷ Kim Lewison, *The Interpretation of Contracts* (6th edn, Sweet & Maxwell 2017) para 1.06

¹²³⁸ [1998] 1 WLR 896 (HL)

¹²³⁹ *ibid* at 912 (Lord Hoffmann)

¹²⁴⁰ [2011] UKSC 50

¹²⁴¹ Lord Clarke SCJ’s dicta is revisited in Section 5.4.7

¹²⁴² [2011] UKSC 50 [25] (Lord Clarke SCJ)

¹²⁴³ [2017] UKSC 24

¹²⁴⁴ *ibid* [13] (Lord Hodge SCJ)

5.4.1 Shipbuilding contractual remedy clauses

The contractual remedies often contained within shipbuilding contracts will be explained herein. Whilst unliquidated damages are obtained judicially,¹²⁴⁵ liquidated damages are those which have been contractually pre-agreed by the parties.¹²⁴⁶ Regardless of the actual magnitude of loss suffered,¹²⁴⁷ they are paid out at a rate pre-agreed by the parties. Liquidated damages clauses therefore come into their own where ‘shipbuilders are unwilling to contract on terms that involve assuming an unlimited liability in damages for the buyer’s loss of use or value in the vessel’,¹²⁴⁸ since liability will be limited to the level pre-agreed with the buyer. Parties tend to agree for liquidated damages to be paid to the buyer following delays in delivery, or following delivery of a vessel of insufficient speed, excessive fuel consumption or inadequate deadweight capacity¹²⁴⁹ compared to that which was contractually agreed. Contracts to build certain bespoke vessels might also require that liquidated damages are paid out for deficiencies in other performance criteria.¹²⁵⁰ Generally speaking, the shipbuilder will be given a grace period (in the case of delay) or a margin for error (in the case of performance defect) in which he will not incur liquidated damages. However, for delay thereafter or performance defect above the margin, he will incur liquidated damages. Moreover, once the delay or defect has reached a pre-agreed maximum, the buyer will be entitled to rescind the contract, accept the vessel at a lower price,¹²⁵¹ or (where the performance deficiency relates to fuel consumption) have the vessel’s engine replaced.¹²⁵²

¹²⁴⁵ Unliquidated damages were explored in Section 5.2.1

¹²⁴⁶ Hugh Beale, *Chitty On Contracts*, vol 1 (31st edn, Sweet & Maxwell 2012) para 26-007

¹²⁴⁷ Ewan McKendrick, *Contract Law* (9th edn, Palgrave Macmillan 2011) 368

¹²⁴⁸ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 3 art III

¹²⁴⁹ *ibid*

¹²⁵⁰ *ibid* ch pt 3 art III (Liquidated Damages (v))

¹²⁵¹ US Securities and Exchange Commission, ‘Shipbuilding Contract between Forth Shipco LLC and SPP Shipbuilding Co., Ltd’ (Hull No. S-5118, 18 May 2011)

<www.sec.gov/Archives/edgar/data/1577437/000119312513277511/d559582dex101.htm> accessed 7 February 2018, art 3(b)(iii)

¹²⁵² Association of European Shipbuilders and Shiprepairers, ‘Standard Shipbuilding Contract’ (Scribd, uploaded by api-3739585, 15 October 2008) <www.scribd.com/doc/6745831/Awes-Shipbuilding-Contract> accessed 10 November 2016, art 5 para d; Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix A citing Baltic and International

As ‘most commercial vessels are still built in the open air, often in harsh climatic conditions’,¹²⁵³ uncontrollable events may mean that the shipyard is unable to build a vessel.¹²⁵⁴ These are referred to as Force Majeure events,¹²⁵⁵ with shipbuilding contracts allocating the risk of such events occurring through use of Force Majeure clauses. These clauses operate by entitling the shipbuilder to an extension of time to complete the build, following a delay caused by a Force Majeure event.¹²⁵⁶ They also give the shipbuilder a right to rescind the contract if the Force Majeure delay reaches a pre-agreed maximum number of days (usually either 180 days¹²⁵⁷ or 210 days¹²⁵⁸) or if a pre-agreed calendar date is reached (known as a ‘drop dead’ date¹²⁵⁹). As for the events which constitute Force Majeure causes, BIMCO’s NewBuildCon contract classifies them into the following eleven categories:

- ‘(1) acts of God;
- (2) any government requisition, control, intervention, requirement or interference;
- (3) threat or act of war, warlike operations, terrorism or the consequences thereof;
- (4) riots, civil commotions, blockades or embargoes;
- (5) epidemics;
- (6) earthquakes, landslides, floods, tidal waves or extraordinary weather conditions;
- (7) strikes, lockouts or other industrial action...
- (8) fire, accident, explosion
- (9) any interruption to the supply of public utilities to the Builder
- (10) any other cause of a similar nature to the above beyond the control of the Builder or its Sub-Contractors

Maritime Council, ‘BIMCO Standard Newbuilding Contract (NEWBUILDCON Form)1’ (BIMCO, Copenhagen, 2007) s 2 cl 9(c)(ii)

¹²⁵³ Simon Curtis, ‘Force Majeure Provisions in a Shipbuilding Context’ in Ewan McKendrick (ed), *Force Majeure and Frustration of Contract* (CRC Press 2013) 139

¹²⁵⁴ *ibid*

¹²⁵⁵ Force Majeure events were introduced in Section 4.3.1

¹²⁵⁶ Aleka Mandaraka-Sheppard, *Modern Maritime Law and Risk Management* (2nd edn, Informa 2009) ch 10 s 10 (10.4)

¹²⁵⁷ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix A citing Baltic and International Maritime Council, ‘BIMCO Standard Newbuilding Contract (NEWBUILDCON Form)1’ (BIMCO, Copenhagen, 2007) s 5 cl 39(a)(iii)(1).

¹²⁵⁸ Stuart Beare, Graeme Bowtle and Jane Martineau, ‘Shipbuilding contract of the Shipowners Association of Japan (SAJ)1’ in Lord Millett (ed), *Encyclopaedia of Forms and Precedents* (vol 39(1) pt 1(B)(A) LexisNexis, 2016) art VIII(4).

¹²⁵⁹ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 3 (Standard Form Wordings (e))

(11) delays to sea trials...[due to] Weather Conditions'.¹²⁶⁰

While most of the aforementioned events are included in the Force Majeure clauses of other standard-form contracts (see **Fig. 12**), and also in the clauses of many specially drafted shipbuilding contracts, they sometimes vary from contract to contract.¹²⁶¹

Another contractual remedy clause customary of shipbuilding contracts are guarantee clauses. Performance guarantees (or bonds¹²⁶²) are often given in favour of the shipyard,¹²⁶³ and state that the guarantor will perform the buyer's obligations under the contract (namely to pay pre-delivery instalments in full and in a timely

¹²⁶⁰ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix A citing Baltic and International Maritime Council, 'BIMCO Standard Newbuilding Contract (NEWBUILDCON Form)1' (BIMCO, Copenhagen, 2007) s 5 cl 34(a)(i)

¹²⁶¹ In addition to the Force Majeure events covered under the BIMCO NewBuildCon standard-form, the following shipbuilding contracts also consider the following events as 'Force Majeure causes': revolution, mobilisation, sabotage, bankruptcy of material supplier [Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix B citing China Maritime Arbitration Commission (CMAC), 'CMAC Standard Newbuilding contract (Shanghai Form)1' (CMAC, China) s 4 art XV] insurrection, import or export restrictions, defects of casting and forging components, shortage of materials and equipment [Association of European Shipbuilders and Shiprepairers, 'Standard Shipbuilding Contract' (Scribd, uploaded by api-3739585, 15 October 2008) <www.scribd.com/doc/6745831/Awes-Shipbuilding-Contract> accessed 10 November 2016, art 6 para d] acts of princes or rules, plague, typhoons, hurricanes, labour shortages, collisions, strandings, delays in transportation of materials and equipment, delays in delivery of materials and equipment, delays in the builder's other commitments [Stuart Beare, Graeme Bowtle and Jane Martineau, 'Shipbuilding contract of the Shipowners Association of Japan (SAJ)1' in Lord Millett (ed), *Encyclopaedia of Forms and Precedents* (vol 39(1) pt 1(B)(A) LexisNexis 2016) art VIII] and tropical storms [US Securities and Exchange Commission, 'Shipbuilding Contract between VT Halter Marine, Inc., and Hornbeck Offshore Services, LLC' (Contract No. 1420110868, 14 November 2011) <www.sec.gov/Archives/edgar/data/1131227/000119312512089201/d270624dex1041.htm> accessed 7 February 2018, art 7.1.]

¹²⁶² US Securities and Exchange Commission, 'Shipbuilding Contract between VT Halter Marine, Inc., and Hornbeck Offshore Services, LLC' (Contract No. 1420110868, 14 November 2011) <www.sec.gov/Archives/edgar/data/1131227/000119312512089201/d270624dex1041.htm> accessed 7 February 2018, exhibit L.

¹²⁶³ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix A citing Baltic and International Maritime Council, 'BIMCO Standard Newbuilding Contract (NEWBUILDCON Form)1' (BIMCO, Copenhagen, 2007) annex A(ii); Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix B citing China Maritime Arbitration Commission (CMAC), 'CMAC Standard Newbuilding contract (Shanghai Form)1' (CMAC, China) annex B

way¹²⁶⁴) if the buyer fails to do so. Typically provided by banks,¹²⁶⁵ they accordingly represent ‘an easily realisable source of capital which can be used to maintain the transaction upon the occurrence of a default’.¹²⁶⁶ Refund guarantees, on the other hand, are often found in shipbuilding contracts in favour of the buyer.¹²⁶⁷ These represent an assurance by a guarantor that it will reimburse the buyer his pre-delivery instalments paid under the contract, should the shipyard fail to perform his contractual obligations and subsequently fail to repay the buyer himself.¹²⁶⁸ Refund guarantees are preferred to the *contractual* rights of rescission and entitlement to a refund of pre-delivery instalments, since repayment under the contract is contingent upon the shipbuilder being solvent and thus able to repay. Refund guarantees bypass this contingency however by transferring the credit risk to a guarantor.¹²⁶⁹ Performance and refund guarantees come in two forms – the simple type and the ‘on-demand’ type. Simple guarantees are only triggered following ‘proof of a factual default’¹²⁷⁰ under the contract to which the guarantee relates. Conversely, liability to pay-out under an ‘on-demand’ guarantee is contingent upon mere presentation of the relevant documents stating that default has occurred and therefore that payment is demanded from the guarantor.¹²⁷¹ In either case, the requisite notice of intention to claim (under an ‘on-demand’ guarantee) or notice of intention to attempt a claim (under a simple guarantee) is also required.¹²⁷²

¹²⁶⁴ Jason Chuah, *Law of International Trade: Cross-Border Commercial Transactions* (5th edn, Sweet & Maxwell 2013) 616

¹²⁶⁵ Nabarro, ‘How do performance bonds and parent company guarantees work?’ (February 2009) <www.nabarro.com/downloads/how-do-performance-bonds-and-parent-company-guarantees-work.pdf> accessed 26 July 2016

¹²⁶⁶ Hugh Beale, *Chitty On Contracts*, vol 2 (31st edn, Sweet & Maxwell 2012) para 37-126

¹²⁶⁷ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix A citing Baltic and International Maritime Council, ‘BIMCO Standard Newbuilding Contract (NEWBUILDCON Form)1’ (BIMCO, Copenhagen, 2007) annex A(iii); Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix B citing China Maritime Arbitration Commission (CMAC), ‘CMAC Standard Newbuilding contract (Shanghai Form)1’ (CMAC, China) annex A

¹²⁶⁸ Jason Chuah, *Law of International Trade: Cross-Border Commercial Transactions* (5th edn, Sweet & Maxwell 2013) 619

¹²⁶⁹ John Forrester, ‘Drafting and Interpreting Payment Refund Guarantees in the Shipbuilding Context’ in Barış Soyer and Andrew Tettenborn (eds), *Ship building, sale and finance* (Routledge 2016) 112

¹²⁷⁰ Michael G Bridge, *Benjamin’s Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 24-005

¹²⁷¹ Jason Chuah, *Law of International Trade: Cross-Border Commercial Transactions* (5th edn, Sweet & Maxwell 2013) 622

¹²⁷² *Crystal Handy C SA v Woori Bank* [2018] EWHC 1991 (Com Ct)

In Section 5.2.1, mention was made of the seller's statutory lien under s 41 of the Sale of Goods Act.¹²⁷³ This lien is only available if the unpaid seller (shipyard) is 'in possession'¹²⁷⁴ of the ship. Fortunately, even if the shipyard is not in possession of the ship at the time when he is unpaid, he might still have recourse to a *contractual* lien (if one was inserted into the shipbuilding contract to which he is party).¹²⁷⁵ In place 'to secure the unpaid portion of the contract price',¹²⁷⁶ the clause will allow him to retain the vessel until he is paid,¹²⁷⁷ but will not give him the right to sell the vessel on – unless this is expressly stipulated in the contract.¹²⁷⁸ A buyer will satisfy the lien by paying the unpaid amount to the shipyard.

Another form of security clause is a retention of title clause (also known as a Romalpa clause).¹²⁷⁹ These 'reserve to the seller the property in the goods supplied to the buyer, until the full price has been paid'.¹²⁸⁰ In the shipbuilding context, they are not commonly used to secure payment for the newbuild itself. Rather, they secure payment for the materials and equipment provided by the supplier to the shipbuilder for use in making the newbuild. Accordingly, '[w]here material has been delivered by the supplier to the ship-builder...the clause should be effective to ensure the property remains vested in the supplier'¹²⁸¹ until he is paid.

One other contractual remedy found in shipbuilding contracts are insurance clauses. While in the process of being constructed, a newbuild will be at risk of physical

¹²⁷³ Sale of Goods Act 1979, s 41.

¹²⁷⁴ *ibid* s 41(1)

¹²⁷⁵ Michael G Bridge, *Benjamin's Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 15-053

¹²⁷⁶ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 3 art VII (Title to the Vessel (c))

¹²⁷⁷ George Bruce and Ian Garrard, *The Business of Shipbuilding* (CRC Press 2013) 113

¹²⁷⁸ *ibid*

¹²⁷⁹ Note that retention of title clauses differ from charges registered under the Companies Act 2006. Charges will often grant the seller an equitable interest in the asset in question. [William Cecil and Fiona Cain, 'England & Wales' in Arnold J van Steenderen (ed), *Getting The Deal Through Shipbuilding 2017* (6th edn, Law Business Research 2017) 33.]

¹²⁸⁰ Hugh Beale, *Chitty On Contracts*, vol 2 (31st edn, Sweet & Maxwell 2012) para 43-343

¹²⁸¹ William Cecil and Fiona Cain, 'England & Wales' in Arnold J van Steenderen (ed), *Getting The Deal Through Shipbuilding 2017* (6th edn, Law Business Research 2017) 33

loss and damage.¹²⁸² It is for this reason that most shipbuilding contracts include a clause under which the shipbuilder has a duty to insure the newbuild for ‘builders’ risks’.¹²⁸³ Doing so will ensure that, ‘in the event of an unexpected casualty’¹²⁸⁴ occurring to the vessel, the shipyard can draw upon sufficient capital to continue the build¹²⁸⁵ without needing to ask the buyer for additional funds.¹²⁸⁶ On this basis, the contract usually stipulates that the value of the policy be (at least) the total of the pre-delivery instalments to be paid by the buyer. In this way, policy’s value is based upon the contract price.¹²⁸⁷ Occasionally however, an insurance clause in a shipbuilding contract will stipulate that the value of the policy reflect the vessel’s ‘market value’.¹²⁸⁸ As for duration, the shipbuilder’s duty to insure typically commences either at the point of steel cutting¹²⁸⁹ or keel-laying,¹²⁹⁰ the former being more commonplace amongst block assembly projects where a sizeable portion of the construction project is undertaken before the keel is laid.¹²⁹¹ The duty to insure usually lasts until when the vessel is completed, delivered and accepted by the buyer.¹²⁹² Furthermore, standard-form shipbuilding contracts recommend

¹²⁸² Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 3 art XII (Insurance)

¹²⁸³ *ibid*

¹²⁸⁴ Barış Soyer, ‘The Evolving Nature of Builders’ Risks Cover’ in Barış Soyer and Andrew Tettenborn (eds), *Ship building, sale and finance* (Routledge 2016) 122

¹²⁸⁵ *ibid*

¹²⁸⁶ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 3 art XII (Insurance)

¹²⁸⁷ *ibid*

¹²⁸⁸ US Securities and Exchange Commission, ‘Shipbuilding Contract between VT Halter Marine, Inc., and Hornbeck Offshore Services, LLC’ (Contract No. 1420110868, 14 November 2011) <www.sec.gov/Archives/edgar/data/1131227/000119312512089201/d270624dex1041.htm> accessed 7 February 2018, art 10.1(d)(a)

¹²⁸⁹ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix A citing Baltic and International Maritime Council, ‘BIMCO Standard Newbuilding Contract (NEWBUILDCON Form)1’ (BIMCO, Copenhagen, 2007) s 5 cl 38(a); Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix B citing China Maritime Arbitration Commission (CMAC), ‘CMAC Standard Newbuilding contract (Shanghai Form)1’ (CMAC, China) s 5 art XXVIII(1)

¹²⁹⁰ Stuart Beare, Graeme Bowtle and Jane Martineau, ‘Shipbuilding contract of the Shipowners Association of Japan (SAJ)1’ in Lord Millett (ed), *Encyclopaedia of Forms and Precedents* (vol 39(1) pt 1(B)(A) LexisNexis 2016) art XII(1)

¹²⁹¹ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 3 art XII (Insurance, The Duty To Insure)

¹²⁹² Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix B citing China Maritime Arbitration Commission (CMAC), ‘CMAC Standard Newbuilding contract (Shanghai Form)1’ (CMAC, China) s 5 art XXVIII(1); Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix A citing Baltic and International Maritime Council, ‘BIMCO Standard Newbuilding Contract (NEWBUILDCON Form)1’ (BIMCO, Copenhagen, 2007) s 5 cl 38(a); Stuart Beare, Graeme Bowtle and Jane Martineau, ‘Shipbuilding contract of the Shipowners Association of Japan (SAJ)1’ in Lord Millett (ed), *Encyclopaedia of Forms and Precedents* (vol 39(1) pt 1(B)(A) LexisNexis 2016) art XII(1).

which institute insurance terms the shipbuilder's policy should be based upon, such as the Institute Clauses for Builders' Risks 1988.¹²⁹³

5.4.2 Market Based

It is arguable that an effective contractual remedy is one which takes into account market context. This in turn reflects the idea of *industry* influence (as per the overarching theoretical paradigm of this thesis), since the term 'industry' was defined in Section 1.2 to include the market operating within it.

Take the doctrine of Force Majeure for instance. The AWES standard-form shipbuilding contract states that a shortage of materials and equipment is an event for which a shipbuilder can rely on Force Majeure.¹²⁹⁴ However, the case of *Hoecheong Products Co v Cargill Hong Kong*¹²⁹⁵ limits the use of Force Majeure in such scenarios, to instances where there was no 'alternative source of supply'¹²⁹⁶ available to the seller. This case concerned whether a plaintiff could rely on Force Majeure to justify his inability to procure cotton seed expellers which were to be sold under a sale of goods contract. The inability was said to have resulted from him being unable to obtain any expellers due to severely depleted market supply. Delivering judgment, Lord Mustill stated that reliance on Force Majeure following supply shortage requires the seller to show:

'[F]irst, that there had been an event of the kind stipulated by the clause operating at the relevant time; second, that this event had adversely affected the supply of the goods by the sellers; and third, that the sellers could not overcome this adverse effect by obtaining from a source other than the one which they had planned'.¹²⁹⁷

¹²⁹³ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix C citing 'Institute Clauses for Builders' Risks' (1 June 1988)

¹²⁹⁴ Association of European Shipbuilders and Shiprepairers, 'Standard Shipbuilding Contract' (Scribd, uploaded by api-3739585, 15 October 2008) <www.scribd.com/doc/6745831/Awes-Shipbuilding-Contract> accessed 10 November 2016, art 6 para d.

¹²⁹⁵ [1995] 1 WLR 404 (PC)

¹²⁹⁶ Aleka Mandaraka-Sheppard, *Modern Maritime Law and Risk Management* (2nd edn, Informa 2009) ch 10 s 10.4

¹²⁹⁷ [1995] 1 WLR 404 (PC) 409 (Lord Mustill)

This perspective does not however take into account the fact that, whilst alternative sources of supply might have been available, these suppliers may have been charging severely increased rates for the item on the basis of its short supply. Fortunately, the House of Lords in *Tennants (Lancashire) v CS Wilson and Co*¹²⁹⁸ held that Force Majeure can cover a seller following supply shortage, where alternative suppliers were charging an increased rate sufficient to preclude him from buying from them. This case concerned whether a plaintiff could rely on Force Majeure to justify his inability to procure magnesium chloride which was to be sold under a sale of goods contract. The inability was said to have resulted out of wartime stricken supply for the chemical.¹²⁹⁹ It was accordingly decided that, whilst a shortage of supply or an increase in price of an item will not be sufficient grounds for a seller to rely on Force Majeure when posited as standalone justifications, a price increase made by alternative suppliers *in response to* a supply shortage of the item would be sufficient. Thus Force Majeure could be relied on here irrespective of the fact that the seller theoretically had alternative suppliers from whom to purchase. This is beneficial to a seller (shipyard) as it means that he will not arbitrarily be denied from relying on the Force Majeure doctrine purely because the precedent (set in *Hoecheong*) states that a seller cannot do so where alternative materials suppliers exist. Regard will be had for *market* circumstances in order to establish whether the price charged by these alternative materials suppliers is extortionately high, and whether any hikes in price are in response to a supply shortage. If this is the case, then ‘the builder is entitled to rely upon the [Force Majeure] exclusion even if he could have acquired the materials by paying a higher price’.¹³⁰⁰ Otherwise, he would be being punished for not purchasing from suppliers who might have left him substantially out-of-pocket and thus unable to undertake other commitments (such as other newbuild contracts) – a wholly unreasonable and disproportionate mitigation requirement.

¹²⁹⁸ [1917] AC 495 (HL)

¹²⁹⁹ *ibid* at 495-496

¹³⁰⁰ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 3 art VIII (Standard Form Wordings (a))

Another example showing that effective contractual remedies are those which take into account the market, can be seen in the context of liquidated damages. Take liquidated damages clauses for delay in newbuild delivery. These clauses require a set amount to be paid to a buyer per day of delay above a grace period.¹³⁰¹ The decision in *Dunlop Pneumatic Tyre Co v New Garage & Motor Co*¹³⁰² held that this amount should be ‘a genuine pre-estimate of the probable damage’¹³⁰³ which the buyer would suffer as a result of delayed delivery. As for *how* liquidated damages pay-out rates are calculated to achieve this aim, one of two methods are typically employed.

The first method is where liquidated damages for delay are calculated based on the opportunity cost¹³⁰⁴ of not having use of the vessel during the delay period. This was pioneered by the Earl of Halsbury in *Clydebank Engineering and Shipbuilding v Don Jose Ramos Yzquierdo Y Castaneda*,¹³⁰⁵ who believed that a daily-rate should be set ‘by reference to an assumed market rate of hire for the vessel upon delivery’.¹³⁰⁶ Specifically, by ascertaining what the ordinary use of a newbuild of that type would be, and consequently what the hire rate of such a vessel would be, the daily liquidated damage delay rate would be ‘the [daily] equivalent in money of not obtaining the use of that vessel...during the period which had elapsed between

¹³⁰¹ The grace period for liquidated damages for delay clauses in shipbuilding contracts typically lasts for thirty days. [Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix A citing Baltic and International Maritime Council, ‘BIMCO Standard Newbuilding Contract (NEWBUILDCON Form)1’ (BIMCO, Copenhagen, 2007) s 2 cl 13; Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix B citing China Maritime Arbitration Commission (CMAC), ‘CMAC Standard Newbuilding contract (Shanghai Form)1’ (CMAC, China) s 2 art VI(5)(1); Stuart Beare, Graeme Bowtle and Jane Martineau, ‘Shipbuilding contract of the Shipowners Association of Japan (SAJ)1’ in Lord Millett (ed), *Encyclopaedia of Forms and Precedents* (vol 39(1) pt 1(B)(A) LexisNexis 2016) art III(1)(a).] Nonetheless, shipbuilding contracts are occasionally drafted with a shorter grace period. [US Securities and Exchange Commission, ‘Shipbuilding Contract between Solstrand AS and Trico Shipping AS’ (Builder’s Hull No: 83, 13 March 2006) <www.sec.gov/Archives/edgar/data/921549/000092154906000004/contract.htm> accessed 7 February 2018, art IV(1)(a).]

¹³⁰² [1915] AC 79 (HL)

¹³⁰³ *ibid* at 82

¹³⁰⁴ ‘Opportunity cost’ is an economic term meaning the cost of the next best opportunity foregone. [James Rafferty, ‘Economic evaluation: an introduction’ (1998) 316 *British Medical Journal* 1013, 1014.]

¹³⁰⁵ [1905] AC 6 (HL)

¹³⁰⁶ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 3 art III (Liquidated Damages (i)(b))

the time of proper delivery and the time at which it was delivered in fact'.¹³⁰⁷ Basing the day-rate upon market charter rates, rather than upon an arbitrary quotient, will prevent a buyer from being *undercompensated* in a booming freight market and *overcompensated* in a depressed freight market.¹³⁰⁸

A second method is far more commonplace in modern shipbuilding contracts,¹³⁰⁹ and takes into account the cost to the buyer 'of the investment represented by his advance instalments'.¹³¹⁰ It does so by making the daily liquidated damages pay-out for delay equal to the value of interest which the buyer would pay on a loan used to fund his pre-delivery instalments under the contract. By hinging upon central-bank determined interest rates, this pay rate ensures that – were he to receive his newbuild late – the buyer will at least be able to pay off the interest due on any pre-delivery instalment loan which he may have taken out to finance the shipbuild.¹³¹¹ If the daily rate was based on an otherwise arbitrary quotient, the buyer may be left out of pocket – for instance, if the interest rate payable to his financier was greater than what the buyer's daily liquidated damages pay-out could cover.

Accordingly, this demonstrates why liquidated damages pay-out rates for delay should be based upon market interest and freight rates. Coupled with the aforementioned example, of how the Force Majeure doctrine (and thus Force Majeure clauses) benefit shipyards when they take into account market circumstances, an effective contractual remedy is seen to be one which is market predicated. Not only does this reflect the Market-Individualist ideology posited by Adams and Brownsword, under which 'contract is concerned...with...market operations',¹³¹² but it reflects the overarching theoretical paradigm of this thesis by

¹³⁰⁷ [1905] AC 6 (HL) 12 (Earl of Halsbury)

¹³⁰⁸ The shipping markets were introduced in Section 1.1.2

¹³⁰⁹ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 3 art III (Liquidated Damages (i)(b))

¹³¹⁰ *ibid*

¹³¹¹ Shipbuild finance was introduced in Section 1.1.3

¹³¹² John N Adams and Roger Brownsword, 'The Ideologies of Contract Law' (1987) 7(2) *Legal Studies* 205, 207-208

emphasising the influence of the industry (a term defined in Section 1.2 to include the market operating within it).

5.4.3 Risk Allocating

On the basis that shipbuilding contracts extend three to four years into the future post-agreement, parties are exposed to the risk of dispute during this period. Theorists such as Ralph Nash have shown that it is not enough merely to build risk into the price term of a contract.¹³¹³ It is therefore arguable that a more effective method of allocating risk under a contract is to do so using contractual remedy clauses.

For example, as mentioned earlier in this section, a shipyard often asks that the buyer obtains a performance bond guaranteeing his performance¹³¹⁴ – namely his payment of pre-delivery instalments. These guarantees come in two forms, simple guarantees and ‘on-demand’ guarantees.¹³¹⁵ ‘On-demand’ guarantees, far more commonplace in the shipbuilding industry, are activated upon mere ‘presentation of a documentary demand that complies with the guarantee’s terms’,¹³¹⁶ without need for the shipyard to prove breach or loss. BIMCO NewBuildCon’s performance guarantee is an example, stating that the guarantor will ‘unconditionally [guarantee]...performance by the Buyer of all its liabilities and responsibilities under the Contract...[and if the Buyer fails, it will] upon receipt...of a written demand...[pay] the sum demanded’.¹³¹⁷ The overarching purpose of such a guarantee is thus to allocate the risk of default to the buyer, through his guarantor. In doing so, it insulates the shipbuilder against exposure in the event that the buyer

¹³¹³ Ralph C Nash Jr, ‘Risk Allocation in Government Contracts’ (1965) 34 *George Washington Law Review* 693, 718

¹³¹⁴ Jason Chuah, *Law of International Trade: Cross-Border Commercial Transactions* (5th edn, Sweet & Maxwell 2013) 616

¹³¹⁵ Geraldine Andrews and Richard Millett, *Law of Guarantees* (7th edn, Sweet & Maxwell 2015) para 1-016

¹³¹⁶ Michael G Bridge, *Benjamin’s Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 24-005

¹³¹⁷ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix A citing Baltic and International Maritime Council, ‘BIMCO Standard Newbuilding Contract (NEWBUILDCON Form)1’ (BIMCO, Copenhagen, 2007) annex A(ii) cl 2

falls into insolvency.¹³¹⁸ Moreover, it allocates transactional risk to the buyer since ‘the beneficiary’s [shipbuilder’s] resultant possession of funds [under the guarantee] strengthens its negotiating position in the event of any subsequent claim on the underlying contract’.¹³¹⁹ Stated differently, the shipbuilder’s reclamation of funds under the guarantee will subsidise the cost of any subsequent claims brought by the buyer under the contract.

Another contractual remedy clause which allocates a party’s risk is the contractual lien, which allows the unpaid seller the right to retain the good (ship) until he has been paid by the buyer.¹³²⁰ Much akin to their statutory counterparts, contractual liens effectively act as security for the price of the ship.¹³²¹ They eliminate the shipbuilder’s financial risk in the event that the buyer defaults or goes bankrupt,¹³²² and in doing so, the shipbuilder ‘gains better protection for his interests than he would by merely pursuing a claim for money’.¹³²³ A similar allocation of risk befalls the shipbuilder under a retention of title (Romalpa) clause. These clauses ensure that suppliers ‘retain title in the materials and equipment supplied to the shipbuilder until they receive payment’.¹³²⁴ Inclusion of these clauses in shipbuilding contracts therefore protects the supplier against the risk of shipyard liquidation or administration.¹³²⁵

Using the examples of performance guarantees, contractual liens and retention of title clauses therefore, an argument emerges that an effective contractual remedy is one which shifts a party’s risk under the contract entirely onto his contracting

¹³¹⁸ Michael G Bridge, *Benjamin’s Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 24-002

¹³¹⁹ *ibid*

¹³²⁰ Hugh Beale, *Chitty On Contracts*, vol 2 (31st edn, Sweet & Maxwell 2012) para 43-351

¹³²¹ *ibid* para 43-340

¹³²² Michael G Bridge, *Benjamin’s Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 15-001

¹³²³ *ibid*

¹³²⁴ Clifford Chance, ‘Shipbuilding contracts: Tips and traps’ (Briefing Note, November 2016) <<https://webcache.googleusercontent.com/search?q=cache:2APuAmn84GoJ:https://onlineservices.cliffordchance.com/online/freeDownload.action%3Fkey%3DOBWlbFgNhLNomwB1%252B33QzdFhRQAhp8D%252BxrIGReI2crGqLnALtlyZe5Tk7WzMKYBmi61Rhsa4rTDp%250D%250A5mt12P8Wnx03DzsaBGwsIB3EVF8XihbSpJa3xHNE7tFeHpEbaeIf%26attachmentsize%3D95297+&cd=3&hl=en&ct=clnk&gl=uk>> accessed 22 August 2017, 5

¹³²⁵ Nabarro, ‘Restructuring and insolvency; Retention of title’ (Spring 2012)

<www.nabarro.com/Downloads/Retention_of_title-Spring_2012.pdf> accessed 26 July 2016, 1

counterpart – whether that be from ship-owner to shipyard, shipyard to ship-owner or even supplier to shipyard. However, it is arguable that a *more* effective contractual remedy is one which allocates or apportions the risk *between* the contracting parties.

For instance, since ‘[e]xogenous events may affect a performing party’s physical ability to perform the contract[,]. . . contracts . . . allocate the risk of non-performance’¹³²⁶ using Force Majeure clauses. These clauses do so using two main components, which ‘*share* the potential exposures between the buyer and the builder’.¹³²⁷ The first component mitigates the risk of the shipbuilder, in allowing the delivery date to be extended when a Force Majeure event (such as those contained in **Fig. 12**) delays¹³²⁸ his progress. The second component mitigates the risk of the buyer, in allowing him to rescind the contract if the delay either: (i) exceeds a pre-agreed maximum delay period, or (ii) reaches a pre-agreed fixed date.¹³²⁹ Moreover, intrinsic to the two components are further risk allocation mechanisms, which limit the risk which the shipbuilder and buyer are respectively taking on.

Let us begin with the first component. For one, whilst a shipbuilder is entitled to an extension of time following a Force Majeure event listed under the contract, limits have been placed on the events which can be considered Force Majeure causes.¹³³⁰ This in turn limits the risk which the buyer must absorb under this component of the Force Majeure clause. For one, in the *Matsoukis v Priestman*¹³³¹ case,¹³³²

¹³²⁶ Alan Schwartz, ‘Relational Contracts In The Courts: An Analysis Of Incomplete Agreements And Judicial Strategies’ (1992) 21(2) Journal of Legal Studies 271, 286

¹³²⁷ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 3 art VIII (4)

¹³²⁸ ‘[T]he word “delayed” is not necessarily to be treated as equivalent to “prevented” and circumstances which merely hinder performance may fall within the provision’. [Hugh Beale, *Chitty On Contracts*, vol 1 (31st edn, Sweet & Maxwell 2012) para 14-147.]

¹³²⁹ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 3 art VIII (Standard Form Wordings (e))

¹³³⁰ Limiting the scope, and thus consequences, of a Force Majeure clause in this way will make it more likely to satisfy the test of ‘reasonableness’ under the Unfair Contract Terms Act 1977 (see Section 2.6), a piece of legislation which considers widely drafted exclusion clauses to be ‘unreasonable’ and thus unenforceable. [Hugh Beale, *Chitty On Contracts*, vol 1 (32nd edn, Sweet & Maxwell 2015) para 7-152.]

¹³³¹ [1915] 1 KB 681

¹³³² This case was introduced in Section 4.2.2

Bailhache J stated ‘[t]he term “force majeure” cannot...be extended to cover...football matches, or a funeral. These are the usual incidents interrupting work’.¹³³³ Accordingly, a buyer must bear only the risk of delay resulting from *unusual* interruptions to a shipbuild. In addition, a Force Majeure event merely coinciding with newbuild delay is not sufficient for operation of the doctrine.¹³³⁴ Rather, as asserted by Staughton J in *Navrom v Callitis Ship Management (The Radauti)*,¹³³⁵ ‘it is more a question of causation: whether the incidence of a particular peril...can really be said to have caused one party’s failure to performance’.¹³³⁶ The requirement of causation limits the risk which the buyer absorbs under the first component, to instances where ‘a causative link can be established between the *force majeure* event and delay experienced by the builder’.¹³³⁷

Now to the second component of Force Majeure clauses, which gives a buyer the right to rescind a newbuilding contract once Force Majeure delay has reached a pre-agreed maximum duration. Fortunately, Force Majeure clauses often limit the shipbuilder’s risk of succumbing to rescission in this situation, by allowing him to request that the buyer postpone the delivery date once more so that the newbuild can be completed (rather than have the buyer merely exercise his right to rescind.¹³³⁸) The Chinese CMAC standard-form¹³³⁹ and Japanese SAJ standard-form¹³⁴⁰ do just this, offering the shipbuilder a last chance to complete the newbuild even if the number of days of delay following a Force Majeure event have reached the pre-agreed maximum. Accordingly, the shipbuilder’s risk of succumbing to

¹³³³ [1915] 1 KB 681, 687 (Bailhache J)

¹³³⁴ See Section 4.3.1

¹³³⁵ [1987] 2 Lloyd’s Rep 276 (Com Ct)

¹³³⁶ *ibid* at 282 (Staughton J)

¹³³⁷ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 3 art VIII (Standard Form Wordings (b))

¹³³⁸ *ibid* ch pt 3 art VIII (Standard Form Wordings (e))

¹³³⁹ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix B citing China Maritime Arbitration Commission (CMAC), ‘CMAC Standard Newbuilding contract (Shanghai Form)1’ (CMAC, China) s 4 art XV(3)

¹³⁴⁰ Stuart Beare, Graeme Bowtle and Jane Martineau, ‘Shipbuilding contract of the Shipowners Association of Japan (SAJ)1’ in Lord Millett (ed), *Encyclopaedia of Forms and Precedents* (vol 39(1) pt 1(B)(A) LexisNexis 2016) art VIII(4)

rescission following a Force Majeure event is limited by the opportunity which he has to request that the buyer exercise his right to postpone the delivery date.

Another example of a contractual remedy clause which allocates or apportions the risk *between* the contracting parties, is an insurance clause. Shipbuilding contracts oblige the shipyard to take out appropriate insurance, in order to ‘reduc[e]...the costs associated with the risk that performance...may be more costly than anticipated’.¹³⁴¹ Some insurance clauses in shipbuilding contracts make the shipyard squarely liable for (and thus oblige him to insure against) *all* risks of loss and damage to the newbuild being constructed.¹³⁴² ‘This will usually include [loss or damage to] goods and materials...[and] the contractor’s plant and equipment’,¹³⁴³ which has been caused by risks including war, earthquakes and tidal waves.¹³⁴⁴ That said however, insurance clauses contained within other shipbuilding contracts limit the shipyard’s liability for (and thus his obligation to insure against) certain risks of loss and damage to the newbuild. Take the insurance clause contained within the AWES standard-form, which states that ‘[t]he VESSEL...shall be insured by the CONTRACTOR...against all risks customarily insured against in...[the] shipbuilding industry including trials with the exception of war risks’.¹³⁴⁵ Similarly, the SAJ standard-form shipbuilding contract states that the shipbuilder must take out insurance against ‘risk of loss of the VESSEL and her equipment...excepting risks of war, earthquakes and tidal waves’.¹³⁴⁶ In doing so, these insurance clauses allocate the risk of loss and damage (and thus duty to insure) *between* the contracting parties; the risks in respect of occurrences like war,

¹³⁴¹ Hugh Beale, William D Bishop, Michael P Furmston, *Contract Cases & Materials* (5th edn, Oxford University Press 2008) 395-396

¹³⁴² Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 3 art XII (Insurance)

¹³⁴³ Hugh Beale, *Chitty On Contracts*, vol 2 (31st edn, Sweet & Maxwell 2012) para 37-133

¹³⁴⁴ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 3 art XII (Insurance, The Duty To Insure)

¹³⁴⁵ Association of European Shipbuilders and Shiprepairers, ‘Standard Shipbuilding Contract’ (Scribd, uploaded by api-3739585, 15 October 2008) <www.scribd.com/doc/6745831/Awes-Shipbuilding-Contract> accessed 10 November 2016, art 9

¹³⁴⁶ Stuart Beare, Graeme Bowtle and Jane Martineau, ‘Shipbuilding contract of the Shipowners Association of Japan (SAJ)1’ in Lord Millett (ed), *Encyclopaedia of Forms and Precedents* (vol 39(1) pt 1(B)(A) LexisNexis 2016) art VII(5)

earthquakes and tidal waves are borne by the buyer, and all other risks of loss and damage are borne by the shipyard.

Thus, rather than merely place the entire contracting risk on the shoulders of one party, an effective contractual remedy will be one which apportions risk between buyer and shipyard.¹³⁴⁷ This reflects the view of Posner and Rosenfield in their work on impossibility, impracticability and frustration of contracts, for whom a ‘fundamental purpose of contracts is to allocate...risks *between* the parties to the exchange’.¹³⁴⁸

5.4.4 Convenient

It is also arguable that an effective contractual remedy is one whose implementation is convenient for the parties. Take the example of refund guarantees. These are commonplace under shipbuilding contracts, and operate where ‘if the builder should for any reason fail to refund the advance instalments of the contract price upon the buyer’s rescission, the [guarantor] bank...will make the payment on the builder’s behalf’.¹³⁴⁹ Refund guarantees come in two forms, simple guarantees and ‘on-demand’ guarantees. Under the ‘simple’ type, only when default is proven must the guarantor pay out under the guarantee.¹³⁵⁰ Crucially however, the refund guarantees contained in shipbuilding contracts tend to be of the ‘on-demand’ species, which make payment contingent upon mere *demand* by the beneficiary – as the name suggests.¹³⁵¹ The refund guarantee contained in BIMCO’s NewBuildCon standard-form is exemplar of this, stating that ‘the Builder becomes liable under the Contract to repay any part of any Instalment...upon receipt...from

¹³⁴⁷ Jason T Strickland, ‘The Importance of Construction Contracts and Items to Consider When Preparing Construction Contracts’ (Ward and Smith, 2017) <www.wardandsmith.com/articles/the-importance-of-construction-contracts> accessed 6 December 2017

¹³⁴⁸ Richard A Posner and Andrew M Rosenfield, ‘Impossibility and Related Doctrines in Contract Law: An Economic Analysis’ (1977) 6(1) *Journal of Legal Studies* 83, 88

¹³⁴⁹ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 4 (II)

¹³⁵⁰ Jason Chuah, *Law of International Trade: Cross-Border Commercial Transactions* (5th edn, Sweet & Maxwell 2013) 621-622

¹³⁵¹ *ibid* 622

[the buyer]...of a Demand'.¹³⁵² Since an on-demand guarantee is 'separated from the underlying contract and become[s] an independent security relationship between the guarantor and the beneficiary [buyer]',¹³⁵³ it operates without the buyer needing to prove that breach of the shipbuilding contract has occurred.¹³⁵⁴ This is in sharp contrast to the 'slow and onerous'¹³⁵⁵ nature of proving default under a simple refund guarantee, which is compounded by 'the general unwillingness...of banks to investigate...disputes arising on the underlying transaction'.¹³⁵⁶ On-demand guarantees are therefore highly convenient for the buyer, as they avoid any need for him to embark upon potentially lengthy court or arbitral proceedings to establish the shipyard's liability¹³⁵⁷ – proceedings which the defaulting shipyard might otherwise have used as a tactic to delay the claim, and thus any resulting repayment order from the court.¹³⁵⁸

However, it must be noted that the convenience for buyers of on-demand refund guarantees might in turn become a source of *inconvenience* for the shipyard. As explained by Kerr J in *RD Harbottle (Mercantile) v National Westminster Bank*,¹³⁵⁹ the ease with which on-demand guarantees can be activated means that they 'are sometimes drawn upon, partly or wholly, without any or any apparent justification, almost as though they represented a discount in favour of the buyers'.¹³⁶⁰ This goes to show that whilst a convenient contractual remedy clause might be beneficial for one contracting party, abuse of this convenience might in turn injure his contracting counterpart.

¹³⁵² Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix A citing Baltic and International Maritime Council, 'BIMCO Standard Newbuilding Contract (NEWBUILDCON Form)1' (BIMCO, Copenhagen, 2007) annex A(iii) cl 2

¹³⁵³ Lan Pingpang and Zheng Haotian, 'Risk Control of Refund Guarantee in Shipbuilding Contract' (Dalian Maritime University) 5

¹³⁵⁴ Hugh Beale, *Chitty On Contracts*, vol 2 (31st edn, Sweet & Maxwell 2012) para 37-127

¹³⁵⁵ Lan Pingpang and Zheng Haotian, 'Risk Control of Refund Guarantee in Shipbuilding Contract' (Dalian Maritime University) 4

¹³⁵⁶ Michael G Bridge, *Benjamin's Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 24-005

¹³⁵⁷ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 4 II

¹³⁵⁸ Andrew Tettenborn, 'Contracting By Numbers: The Different Characteristics of the Main Shipbuilding Contracts' in Barış Soyer and Andrew Tettenborn (eds), *Ship building, sale and finance* (Routledge 2016) 44

¹³⁵⁹ [1978] QB 146

¹³⁶⁰ *ibid* at 150 (Kerr J)

Another context which demonstrates that effective contractual remedies are those which are convenient for the parties to use, is that of liquidated damages. Recourse to liquidated damages means that a plaintiff is ‘spared the time and expense of a common law action for damages’,¹³⁶¹ in the following ways.¹³⁶² Firstly, when using liquidated damages, the claiming party need not prove its losses¹³⁶³ – as would otherwise be the case if he was claiming unliquidated damages in court.¹³⁶⁴ The proving of such losses is occasionally acknowledged in shipbuilding contract clauses as being particularly difficult, since ‘the Buyer will [have] suffer[ed] loss and damage (including reputational damage) in amounts which are extremely difficult to quantify’.¹³⁶⁵ Furthermore, since the *Hadley v Baxendale*¹³⁶⁶ rule prevents recovery of ‘consequential, indirect or idiosyncratic loss[es]’,¹³⁶⁷ unless these are proven to have been known to the breaching party upon agreement of the contract, a plaintiff seeking to recover consequential losses in court may risk under-compensation. Use of liquidated damages averts any need to prove this however, as consequential losses can be built into the pre-agreed liquidated damage pay-out value.¹³⁶⁸ Secondly, liquidated damages do away with the buyer’s obligation to ‘cover’ or ‘mitigate’ his loss¹³⁶⁹ – a requirement otherwise necessary to claim unliquidated damages for breach.¹³⁷⁰ Accordingly, if pre-agreed in a contract,

¹³⁶¹ Ashurst, ‘Liquidated Damages’ (Quick guides)

<www.ashurst.com/doc.aspx?id_Resource=4636> accessed 26 July 2016, 1

¹³⁶² Common law actions for damages were explored in Section 5.2.3

¹³⁶³ Hugh Beale and Tony Dugdale, ‘Contracts between businessmen: planning and the use of contractual remedies’ (1975) 2(1) British Journal of Law and Society 45, 55

¹³⁶⁴ See Section 5.2.1 and Section 5.2.3

¹³⁶⁵ US Securities and Exchange Commission, ‘Shipbuilding Contract between ER Yards S.A. and F3 Two, Ltd’ (Hull No. D33, 7 September 2006)

<www.sec.gov/Archives/edgar/data/1318742/000095014407001914/g05791exv4w44.htm>

accessed 7 February 2018, art 6(2.17); US Securities and Exchange Commission, ‘Shipbuilding Contract between Aker Yards S.A. and F3 One, Ltd’ (Hull No. C33, 7 September 2006)

<www.sec.gov/Archives/edgar/data/1318742/000095014407001914/g05791exv4w43.htm>

accessed 7 February 2018, art 6(2.17); US Securities and Exchange Commission, ‘Shipbuilding Contract between Meyer Werft GmbH and Breakaway Two, Ltd. and NCL Corporation Ltd.’

(Hull No. S.692, 24 September 2010)

<www.sec.gov/Archives/edgar/data/1318742/000119312511018810/dex1056.htm> accessed 27 May 2018, art 6(2.14)

¹³⁶⁶ (1854) 9 Exch 341

¹³⁶⁷ Hugh Beale, *Chitty On Contracts*, vol 1 (31st edn, Sweet & Maxwell 2012) para 26-171

¹³⁶⁸ Joshua Glazov, ‘Liquidated Damages In Construction Contracts Part 1 – What Are Liquidated Damages And Why Have Them’ (Construction Law Today, 30 April 2009)

<www.constructionlawtoday.com/2009/04/liquidated-damages-in-construction-contracts-part-1-what-are-liquidated-damages-and-why-have-them/> accessed 26 July 2016

¹³⁶⁹ Out-Law.com, ‘Liquidated damages’ (Construction contracts, August 2011) <www.out-law.com/en/topics/projects--construction/construction-contracts/liquidated-damages/> accessed 26 July 2016

¹³⁷⁰ See Section 5.2.1 and Section 5.2.3

liquidated damages can be a source of convenience for parties compared to unliquidated damages. As argued by Jimenez, they do so by ‘reducing the costs parties would otherwise expend’¹³⁷¹ making and proving unliquidated damages claims in court.

As a caveat however, note that whilst the buyer may prefer to claim liquidated damages rather than unliquidated damages in the event of dispute, the shipyard might not share the same view. As mentioned above, being awarded damages for consequential loss in court is not straightforward, like it otherwise is under a liquidated damages clause (where recompense for such losses can be pre-emptively built into the pay-out value). Knowing this, a shipyard may refuse to build consequential losses into a shipbuilding contract’s pre-agreed liquidated damages clauses and instead insist that – following dispute – the buyer seek to claim any consequential losses as unliquidated damages in court.¹³⁷²

Overall therefore, it is arguable that an effective contractual remedy is one which is convenient to implement. This is evident in the context of autonomous pay-out remedies such as ‘on-demand’ refund guarantees and liquidated damages clauses, where the buyer can claim without need to prove loss.

5.4.5 Reflects Industry Wordings

Before the advent of boilerplate terms and standard-forms, the drafting of contracts (including the contractual remedy clauses within them) was wholly dictated by the parties themselves. For instance, in the late 18th and 19th Centuries, mortgagees would draft mortgage contracts heavily in their own favour, so that they had a right to redeem within six months of commencing the agreement¹³⁷³ and also an

¹³⁷¹ Marco Jimenez, ‘The value of a promise: a utilitarian approach to contract law remedies’ (2008) 56(1) UCLA Law Review 59, 123

¹³⁷² Hugh Beale and Tony Dugdale, ‘Contracts between businessmen: planning and the use of contractual remedies’ (1975) 2(1) British Journal of Law and Society 45, 55

¹³⁷³ Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press 1985) 415

unconditional right of forfeiture upon the mortgagor's default.¹³⁷⁴ Nowadays, with more sophisticated legal infrastructure like the Unfair Contract Terms Act 1977¹³⁷⁵ in place to regulate contracts, parties must draft within the bounds of what the law permits. It is for this reason that industry associations have sought to issue standard-forms, whose terms are worded so that they comply with mandatory rules.¹³⁷⁶ This shift in drafting protocols has filtered through to shipbuilding, with '[a]lmost all vessels these days...built on the basis of one of five standard forms'¹³⁷⁷ listed originally in Section 1.1.6. In the shipbuilding context therefore, references to 'drafting' a contractual clause (such as a remedy clause) often in fact refer to use of a standard-term – whether verbatim, or amended 'to reflect the [ship-owner and] yard's individual policy and practice'.¹³⁷⁸

It is perhaps arguable that effective contractual remedy clauses are those which have been based upon the standard-form clause of an industry association. Such clauses in turn bring industry parties into play (specifically the lawyers employed by these associations to draft standard-form wordings), and are thus exemplar of industry influence on shipbuilding – as per the overarching theoretical paradigm of this thesis. Standard-form wordings ought really to be effective, since they are designed by industry lawyers acutely aware of: (i) how contractual disputes arise,¹³⁷⁹ (ii) how contractual remedy clauses should be drafted so that recourse to the courts (and judicial remedies) will not be required, and (iii) how clauses should be drafted so that they are not struck down by the Unfair Contract Terms Act 1977 and other mandatory rules.¹³⁸⁰

¹³⁷⁴ *ibid* 192

¹³⁷⁵ See Section 2.6

¹³⁷⁶ Robert Feldman and Raymond Nimmer, *Drafting Effective Contracts: A Practitioner's Guide* (2nd edn, Wolters Kluwer 1999) ch 1 §1.01[B] 1-6

¹³⁷⁷ Andrew Tettenborn, 'Contracting By Numbers: The Different Characteristics of the Main Shipbuilding Contracts' in Barış Soyer and Andrew Tettenborn (eds), *Ship building, sale and finance* (Routledge 2016) 40

¹³⁷⁸ Richard Coles and Filippo Lorenzon, *Law of Yachts and Yachting* (Informa 2012) para 1-001

¹³⁷⁹ Designing Buildings Wiki, 'Modifying clauses in standard forms of construction contract' (11 January 2017) www.designingbuildings.co.uk/wiki/Modifying_clauses_in_standard_forms_of_construction_contract accessed 19 September 2017

¹³⁸⁰ Richard Christou, *Boilerplate: Practical Clauses* (7th edn, Sweet & Maxwell 2015) para 7-020

Take the High Court decision in *Rainy Sky SA v Kookmin Bank*,¹³⁸¹ in which parties to a shipbuilding contract decided to draft the buyer's refund guarantee from scratch. Paragraph 2 of the guarantee entitled the buyer '[upon] termination, cancellation or rescission of the Contract...to repayment of the pre-delivery instalments of the Contract Price paid...prior to...termination'.¹³⁸² Paragraph 3 of the guarantee then went on to say that '[i]n consideration of...[the] agreement to make the pre-delivery instalments under the Contract...we hereby, as primary obligor, irrevocably and unconditionally undertake to pay to you, your successors and assigns, on your first written demand, all *such sums* due to you under the Contract'.¹³⁸³ During construction of the vessel, the shipbuilder experienced financial problems – an event for which, under para 3, the buyer could terminate the contract and be reimbursed the pre-delivery instalments he had already paid. The shipbuilder refused to do so, claiming that it was unclear¹³⁸⁴ which sums the phrase 'such sums' in para 3 of the refund guarantee was referring to.

The judge eventually held that it made 'grammatical sense'¹³⁸⁵ for 'such sums' to mean the sums mentioned most previously to this – namely the pre-delivery instalments. However, the case may not have had to go to court in the first place if para 3 had been based on an industry standard-form clause, which are drafted with clarity in mind. The parties might have used the CMAC standard-form refund guarantee wording for instance, which makes clear which sums the buyer will be repaid upon termination. It states 'we hereby guarantee that the Seller will repay to you an amount...representing the aggregate amount paid by you to the Seller under the Contract before the delivery of the Vessel'.¹³⁸⁶ Employing this clause would have allowed the parties to benefit from the drafting techniques customary of industry draftsmen working for shipbuilding associations like CMAC.

¹³⁸¹ [2009] EWHC 2624 (Com Ct)

¹³⁸² *ibid* [4] (Simon J)

¹³⁸³ *ibid*

¹³⁸⁴ Geraldine Andrews and Richard Millett, *Law of Guarantees* (7th edn Sweet & Maxwell 2015) para 2-020

¹³⁸⁵ [2009] EWHC 2624 (Com Ct) [18] (Simon J)

¹³⁸⁶ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix B citing China Maritime Arbitration Commission (CMAC), 'CMAC Standard Newbuilding contract (Shanghai Form)1' (CMAC, China) annex A

Accordingly, it is possible that an effective contractual remedy clause will be based upon a standard-form wording created by industry lawyers, given the clear and complete¹³⁸⁷ way in which they draft. This reflects the view of theorist Eric Posner, for whom an effective contract clause is one which uses ‘clear contracting language’.¹³⁸⁸ Compared to remedy clauses specially drafted by the parties from scratch, which might expose parties to unintended risks,¹³⁸⁹ the clarity and completeness of industry drafted remedy clauses may make them better equipped to resolve shipbuilding disputes (thus reducing the need for judicial remedies). This echoes the words of George Triantis, for whom ‘[t]he more a contract is complete’,¹³⁹⁰ ‘the less important is enforcement through court-assessed damages’.¹³⁹¹ Industry drafted remedy clauses will also be less likely to be struck down by mandatory prohibitions such as those in the Unfair Contract Terms Act 1977. Finally, recourse to standard-forms wordings drafted by shipbuilding industry associations reinforces the idea of industry influence in shipbuilding – as per the overarching theoretical paradigm of this thesis.

5.4.6 Incorporates Goodwill

In Section 1.1.3, mention was made of the long-term nature of shipbuilds, lasting anywhere from one year to three or four. On this basis, parties to shipbuilding contracts often develop close relationships with one another over the course of the project. To this end, ‘it is not at all surprising that...a significant proportion of shipbuilding projects represent repeat business’.¹³⁹² Stated differently, rather than being struck between random buyers and shipyards, a preponderance of shipbuilding contracts are struck between buyers and shipyards who have

¹³⁸⁷ Richard Christou, *Boilerplate: Practical Clauses* (7th edn, Sweet & Maxwell 2015) para 1-008

¹³⁸⁸ Eric Posner, ‘Contract Remedies: Precaution, Causation and Mitigation’ in Boudewijn Bouckaert and Gerrit De Geest (ed), *Encyclopedia of Law and Economics* (Edward Elgar Publishing 2000) 173

¹³⁸⁹ Tina L Stark, *Negotiating and Drafting Contract Boilerplate* (ALM Publishing 2003) 207

¹³⁹⁰ George Triantis, ‘The Evolution of Contract Remedies (And Why Do Contracts Professors Teach Remedies First?)’ (2010) 60(2) *The University of Toronto Law Review* 643, 646

¹³⁹¹ *ibid*

¹³⁹² Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 2 (shipbuilding practice: negotiation of the contract and specifications)

contracted on newbuilds together before. In order to tap into this propensity for ‘repeat business’, many shipyards expressly state their intention to engage in *long-term* relationships with ship-owners with whom they contract, relationships lasting beyond the life of the first newbuild contract which they sign together. For example, Dutch shipyard Damen states that it aims ‘for a long-term relationship with...clients’,¹³⁹³ with Greek shipyard Spanopoulos similarly asserting that its mission is to ‘build long term relationships with its customers’¹³⁹⁴ – indicating their aim to negotiate further newbuild transactions with a client or customer, beyond their first.

A question nonetheless remains as to *how* parties to shipbuilding contracts can ensure the longevity of a relationship with another. One method by which a shipyard could secure the repeat business of a buyer would be to lower the contract price for a newbuild. This was the case for Danish buyer TORM in 2017, who contracted for four newbuilds with Guangzhou Shipyard ‘at very favo[u]rable prices’¹³⁹⁵ – a deal made possible due to the long-term relationship which TORM had forged with the shipyard down the years.¹³⁹⁶ Alternatively, a buyer could maintain his relationship with a particular shipyard by paying the shipyard a bonus (subject to the rules of consideration) for completing a newbuild project which had become unprofitable to the shipyard following market change. This occurred in the *North Ocean Shipping Co v Hyundai Construction (The Atlantic Baron)*¹³⁹⁷ case.¹³⁹⁸ Here, a shipyard demanded that the buyer pay an additional 10% on a pre-agreed newbuild contract price, to offset the effects of a currency devaluation. The

¹³⁹³ Damen Shipyards, ‘Civil Works’ <www.damen.com/en/markets/civil/civil-works> accessed 21 September 2017

¹³⁹⁴ Spanopoulos Group, ‘Commercial Shipbuilding’ <www.spanopoulos-group.com/activities/shipyards/commercial-shipyard-salamina> accessed 21 September 2017

¹³⁹⁵ Hellenic Shipping News, ‘TORM plc: TORM purchases four new MR vessels’ (International Shipping News, 25 July 2017) <www.hellenicshippingnews.com/torm-plc-torm-purchases-four-new-mr-vessels/> accessed 21 September 2017

¹³⁹⁶ John Stansfield, ‘TORM purchases four new MR vessels’ (Vesselfinder, 31 July 2017) <www.vesselfinder.com/news/9841-TORM-purchases-four-new-MR-vessels> accessed 22 September 2017

¹³⁹⁷ [1979] QB 705

¹³⁹⁸ This case was introduced in Section 4.3.3

buyer duly paid this bonus, claiming that it did so ‘in order to maintain an amicable relationship with the Yard’.¹³⁹⁹

Another method by which shipbuilding parties could ensure the longevity of their relationships would be to temper the consequences of breach in their shipbuilding contracts. Doing so would involve drafting contractual remedy clauses with a sense of ‘goodwill’. For Arrighetti, Bachmann and Deakin, ‘goodwill’ means the ‘expectation that trading partners are committed to...exercise discretion...[where] they entertain shared principles’,¹⁴⁰⁰ with ‘discretion’ being defined as leeway given to the breaching party. In this way, it is arguable that an effective contractual remedy clause is one which – when exercised – allows the parties’ relationship to remain intact.

Take the example of liquidated damages clauses. As mentioned above, once performance defects reach a pre-agreed maximum, the buyer’s right to a liquidated damages pay-out ceases in favour of an alternative right to rescind the contract. For example, the clause relating to fuel consumption in the SAJ standard-form contract states that ‘[i]f such actual fuel consumption exceeds percent ... of the guaranteed fuel consumption of the VESSEL, the BUYER may ... reject the VESSEL and rescind this Contract’.¹⁴⁰¹ Whilst the buyer might argue that such a consequence is justified for excessive engine defect, clauses drafted this way will ‘cause considerable hardship to the builder in circumstances in which the engine can be modified or substituted without affecting the date of delivery of the vessel under the contract’.¹⁴⁰² Moreover, rescinding the contract would not only affect the contract in question, but might also cease any relationship which shipbuilder and buyer might otherwise have had – especially if rescission was followed by litigation (concerning the damages owed to the buyer for the shipbuilder’s breach). In this

¹³⁹⁹ [1979] QB 705, 710 (Mocatta J)

¹⁴⁰⁰ Alessandro Arrighetti, Reinhard Bachmann and Simon Deakin, ‘Contract law, social norms and inter-firm cooperation’ (1997) 21 *Cambridge Journal of Economics* 171, 175

¹⁴⁰¹ Stuart Beare, Graeme Bowtle and Jane Martineau, ‘Shipbuilding contract of the Shipowners Association of Japan (SAJ)1’ in Lord Millett (ed), *Encyclopaedia of Forms and Precedents* (vol 39(1) pt 1(B)(A) LexisNexis 2016) art III(3)(c)

¹⁴⁰² Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012), ch pt 3 (liquidated damages (iii))

way, the SAJ liquidated damage clause does not leave room for goodwill (or the allowance of leeway to evade the need for litigation), potentially ceasing any business relationship the parties had up to that point.

That said however, parties have been known to draft liquidated damages clauses which incorporate goodwill. One tanker contract between an Irish buyer and South Korean shipyard¹⁴⁰³ states that, if the vessel is delivered with a performance defect which exceeds a pre-agreed margin of allowance, the buyer's right to rescind the contract is subject to the shipbuilder first having an opportunity to try and rectify the defect. Specifically, this right is said to apply in situations where the delivered vessel runs with excessive fuel consumption,¹⁴⁰⁴ insufficient speed¹⁴⁰⁵ or inadequate deadweight capacity.¹⁴⁰⁶ Another tanker contract between a Floridian buyer and Californian shipyard¹⁴⁰⁷ takes a similar stance, asserting that a buyer's right to rescind on the basis of excessive performance defects is tempered by the shipbuilder's right 'to make reasonable adjustments or modifications...to cause such Vessel to meet the Key Performance Requirements'.¹⁴⁰⁸ These clauses therefore feature 'goodwill' by the Irish buyer and Floridian buyer toward their contracting counterparts. By allowing the shipbuilder a reprieve before any right of rescission is exercisable, these contractual remedy clauses do their utmost to ensure that the contract can remain non-litigious – potentially salvaging the relationship which the buyer and breaching shipyard have. This is reflected in the aforementioned work by Arrighetti, Bachmann and Deakin, who stated that 'resort to legal action carried a high price, particularly in the context of a long-term

¹⁴⁰³ US Securities and Exchange Commission, 'Shipbuilding Contract between Forth Shipco LLC and SPP Shipbuilding Co., Ltd' (Hull No. S-5118, 18 May 2011)

<www.sec.gov/Archives/edgar/data/1577437/000119312513277511/d559582dex101.htm> accessed 7 February 2018

¹⁴⁰⁴ *ibid* art 3(c)(iii)

¹⁴⁰⁵ *ibid* art 3(b)(iii)

¹⁴⁰⁶ *ibid* art 3(d)(ii)

¹⁴⁰⁷ US Securities and Exchange Commission, 'Contract For Construction between Seabulk Tankers, Inc and National Steel and Shipbuilding Company' (10 September 2013)

<http://ir.stockpr.com/seacorholdings/all-sec-filings/content/0000859598-13-000144/exhibit101contractforconst.htm?TB_iframe=true&height=auto&width=auto&preload=false> accessed 7 February 2018

¹⁴⁰⁸ *ibid* art 7(e)

relationship...[and is] likely to lead to an irrevocable breakdown of the relationship between the parties'.¹⁴⁰⁹

Another way that parties can inject goodwill into their liquidated damages clauses is by allowing the buyer to accept a defective vessel at a lower price, rather than the contract simply being rescinded and the buyer proceeding to court to claim damages – the former being attempted in the *McDougall v Aeromarine of Emsworth*¹⁴¹⁰ case.¹⁴¹¹ For instance, the shipbuilding contract between an Irish buyer and South Korean shipyard mentioned above states that, where the delivered vessel runs with an excessive fuel consumption or possesses inadequate deadweight capacity, 'the Buyer, at its option, may...cancel this Contract or may accept the Vessel with a...reduction in the Contract Price'.¹⁴¹² The BIMCO NewBuildCon standard-form contract does the same, providing that where the delivered vessel runs at a fuel consumption rate above the pre-agreed allowance, 'the Buyer shall have the option to...accept the main engine at a reduction in the Contract Price...or...terminate this Contract'.¹⁴¹³ These liquidated damage clauses accordingly allow for buyer goodwill toward the shipyard. By providing that a defective vessel can be accepted at a reduced price (and the contract be discharged by performance¹⁴¹⁴), such clauses aim to give disputes the best possible chance of staying out of court or arbitration – despite there having been an initial breach by the shipbuilder (namely his delivery of a defective good). In doing so, they reflect the buyer's potential 'unwillingness to go to court for fear that this would jeopardise the continuation of the trading relationship',¹⁴¹⁵ as per Arrighetti, Bachmann and Deakin.

¹⁴⁰⁹ Alessandro Arrighetti, Reinhard Bachmann and Simon Deakin, 'Contract law, social norms and inter-firm cooperation' (1997) 21 Cambridge Journal of Economics 171, 174

¹⁴¹⁰ [1958] 1 WLR 1126 (QB)

¹⁴¹¹ This case was introduced in Section 2.3

¹⁴¹² US Securities and Exchange Commission, 'Shipbuilding Contract between Forth Shipco LLC and SPP Shipbuilding Co., Ltd' (Hull No. S-5118, 18 May 2011)

<www.sec.gov/Archives/edgar/data/1577437/000119312513277511/d559582dex101.htm> accessed 7 February 2018, art 3(c)(iii)

¹⁴¹³ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix A citing Baltic and International Maritime Council, 'BIMCO Standard Newbuilding Contract (NEWBUILDCON Form)1' (BIMCO, Copenhagen, 2007) s 2 cl (9)(c)

¹⁴¹⁴ 'Discharge by performance' was defined in Section 1.1.3

¹⁴¹⁵ Alessandro Arrighetti, Reinhard Bachmann and Simon Deakin, 'Contract law, social norms and inter-firm cooperation' (1997) 21 Cambridge Journal of Economics 171, 187

On this basis, it is arguable that an effective contractual remedy clause is one which incorporates goodwill and therefore allows parties to resolve their disputes ‘non-litigiously’ under it – thus facilitating the maintenance of any longstanding relationship that the parties have with each other.

5.4.7 Commercially Justified

So far, this section has listed factors which make a contractual remedy effective in the eyes of one or both of the contracting parties. In the eyes of the courts however, a contractual remedy will be deemed effective if it is commercially justified.

Take the example of penalty clauses (which are unenforceable¹⁴¹⁶) and liquidated damages clauses (which are enforceable). Shipbuilding contracts often make clear that only the latter are enforceable, stating for example that ‘[t]he Builder agrees that certain deficiencies and certain delays in the delivery of the Ship shall oblige it to pay...the Buyer, by way of agreed and final liquidated damages and not as penalties’.¹⁴¹⁷ The distinction between a penalty clause and a liquidated damage clause was enunciated in *Dunlop Pneumatic Tyre Co v New Garage & Motor Co*,¹⁴¹⁸ where the pay-outs under liquidated damages clauses were identified as representing ‘a genuine pre-estimate of the probable damage’¹⁴¹⁹ to accrue from the breach. For many years, the courts would objectively¹⁴²⁰ classify a sum as a non-genuine pre-estimate if there was a ‘substantial discrepancy’¹⁴²¹ between the sum

¹⁴¹⁶ *Jobson v Johnson* [1989] 1 WLR 1026 (CA) 1040 (Nicholls LJ)

¹⁴¹⁷ US Securities and Exchange Commission, ‘Shipbuilding Contract between ER Yards S.A. and F3 Two, Ltd’ (Hull No. D33, 7 September 2006)

<www.sec.gov/Archives/edgar/data/1318742/000095014407001914/g05791exv4w44.htm> accessed 7 February 2018, art 6(2.1); US Securities and Exchange Commission, ‘Shipbuilding Contract between Aker Yards S.A. and F3 One, Ltd’ (Hull No. C33, 7 September 2006) <www.sec.gov/Archives/edgar/data/1318742/000095014407001914/g05791exv4w43.htm> accessed 7 February 2018, art 6(2.1)

¹⁴¹⁸ [1915] AC 79 (HL)

¹⁴¹⁹ *ibid* at 82

¹⁴²⁰ Hugh Beale, *Chitty On Contracts*, vol 2 (31st edn, Sweet & Maxwell 2012) para 37-121

¹⁴²¹ Ewan McKendrick, *Contract Law* (9th edn, Palgrave Macmillan 2011) 369

and the loss likely to be suffered. More recently however, even where there is a substantial discrepancy between these, the courts have been more inclined to classify as an enforceable liquidated damages clause (as opposed to an unenforceable penalty clause) if it is commercially justified.¹⁴²² This was demonstrated by Clarke LJ in *El Makdessi v Cavendish Square Holdings BV*,¹⁴²³ when he stated that even where a pre-agreed damage clause was ‘extravagant and unconscionable with a predominant function of deterrence’¹⁴²⁴ (which would have rendered it an unenforceable penalty clause under the old test), the courts would see it as an enforceable liquidated damages clause if it was ‘commercially justifiable, was not oppressive, and...[was] freely negotiated’.¹⁴²⁵ Accordingly therefore, in the eyes of the courts, an enforceable (and thus effective) liquidated damages clause is one which is commercially justified. This view is bolstered by Schwartz and Scott who argue that commercial parties ‘have good reasons’¹⁴²⁶ to draft liquidated damages clauses in the way they do. ‘Banning a liquidated damages clause...wrongly interferes with the parties’ [commercial] sovereignty’.¹⁴²⁷

Additionally, the courts are also using commercial justifiability as a means by which to classify guarantee clauses. At the beginning of this section, mention was made of the fact that refund and performance guarantees come in two types – simple and ‘on-demand’. Parties are often mistaken for thinking that giving a device the label ‘demand bond’,¹⁴²⁸ and incorporating phrases into it such as ‘this demand bond’ and ‘as *primary* obligor’,¹⁴²⁹ are sufficient for it to be considered an ‘on-demand’ device in the eyes of the law. However, ‘although the words “on demand” may appear in the bond, they are not a term of art and so are not determinative of the question of whether the bonded sum is payable on a conditional or on an “on

¹⁴²² Ashurst, ‘Liquidated Damages’ (Quick guides)

<www.ashurst.com/doc.aspx?id_Resource=4636> accessed 26 July 2016, 4

¹⁴²³ [2013] 2 CLC 968 (CA)

¹⁴²⁴ *ibid* at 1000 (Clarke LJ)

¹⁴²⁵ Michael G Bridge, *Benjamin’s Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 16-032

¹⁴²⁶ Alan Schwartz and Robert E Scott, ‘Contract Theory and the Limits of Contract Law’ (2003) 113(3) *The Yale Law Journal* 541, 617

¹⁴²⁷ *ibid*

¹⁴²⁸ John Forrester, ‘Drafting and Interpreting Payment Refund Guarantees in the Shipbuilding Context’ in Barış Soyer and Andrew Tettenborn (eds), *Ship building, sale and finance* (Routledge 2016) 117

¹⁴²⁹ *ibid* 118

demand” basis’.¹⁴³⁰ A legal device must be approached ‘without preconceptions as to what it is’,¹⁴³¹ preconceptions which might otherwise be communicated through its label or the phraseology used within it. Courts are increasingly therefore looking to the ‘overall presumed commercial purpose’¹⁴³² of a guarantee to determine whether it is of the ‘on-demand’ type or not. This was emphasised by Lord Clarke SCJ in the *Rainy Sky SA v Kookmin Bank*¹⁴³³ decision referred to in the introduction to Section 5.4, where he stated that ‘a court should primarily be guided by the contextual scene in which the stipulation in question appears...[and] would regard...commercial purpose...as more important than niceties of language’.¹⁴³⁴

Accordingly, a court would determine that a guarantee clause was of the ‘on-demand’ sort if the commercial purpose of the clause justified this. The fact that the courts increasingly look to the commercial or industry purpose of clauses emphasises the influence of the industry on law – as per the overarching theoretical paradigm of this thesis. Similarly, the courts would consider a liquidated damages clause to be enforceable if it was commercial justifiable. Overall, these examples demonstrate that, for the courts, the commercial justifiability of a contractual remedy determines its effectiveness – in terms of whether it is enforceable, and also in terms of whether the clause can be classified as the parties intended.

5.5 – Conclusion

Overall, Section 5.2 of this Chapter makes two major conclusions – one regarding the implications of contract characterisation for judicial remedies, and a second regarding the influence of the industry on judicial remedies. The first conclusion is that the entrenched characterisation of the shipbuilding contract as a sale of goods contract allows buyer (ship-owner) and seller (shipbuilder) to invoke statutory

¹⁴³⁰ Hugh Beale, *Chitty On Contracts*, vol 2 (31st edn, Sweet & Maxwell 2012) para 37-127

¹⁴³¹ John Forrester, ‘Drafting and Interpreting Payment Refund Guarantees in the Shipbuilding Context’ in Barış Soyer and Andrew Tettenborn (eds), *Ship building, sale and finance* (Routledge 2016) 117

¹⁴³² Hugh Beale, *Chitty On Contracts*, vol 2 (31st edn, Sweet & Maxwell 2012) para 37-127

¹⁴³³ [2011] UKSC 50

¹⁴³⁴ *ibid* [25] (Lord Clarke SCJ)

remedies under the Sale of Goods Act 1979 (s 62(2) of which also secures their right to invoke common law remedies¹⁴³⁵ and equitable remedies.¹⁴³⁶) Characterising a shipbuilding contract as a general construction provision would instead mean that the plaintiff's statutory remedies could arise out of legislation such as the Housing Grants, Construction and Regeneration Act 1996 (subject to the Act being broadened to cover the construction of items such as ships which do not form part of the land.¹⁴³⁷) If a shipbuilding contract was characterised as something else, then the remedies open to the plaintiff would arise solely at common law and in equity. In this way, Section 5.2 proves that there is mileage in characterising a shipbuilding contract, as this will determine which judicial remedies are available to the parties if the contract falls into dispute.

As regards the second conclusion, common law remedies were used to demonstrate the influence of the industry in shipbuilding – as per the overarching theoretical paradigm of this thesis. For one, common law damage awards often equal the difference between the contract price and market price of the good at the time of breach. Establishing the market price here warrants inquiry into the shipbuilding market operating at the helm of the shipbuilding *industry*. Additionally, the award of certain common law remedies does not preclude the concurrent exercisability of contractual remedies, thus demonstrating that the law (specifically legal remedies) and the industry (specifically remedy clauses in industry contracts) can coexist when attempting to resolve shipbuilding disputes. The context of common law remedies thus shows that the 'industry' (a term defined in Section 1.2 to include the contract clauses drawn up between industry parties, and also the market operating at the industry's helm) does influence shipbuilding contract law in the wake of dispute.

¹⁴³⁵ As acknowledged in Section 5.2.3, whilst s 62(2) of the Sale of Goods Act makes common law rules and remedies applicable to contracts falling under the Act, some nonetheless consider the Act to be a code. If upheld, this would mean that parties to contracts characterised under the Act would be forced to seek rights and remedies under the Act alone.

¹⁴³⁶ The term 'rules of the common law' in the Sale of Goods Act has been deemed to include equitable rules. [*Thomas Borthwick & Sons v South Otago Freezing* [1978] 1 NZLR 538; Michael G Bridge, *Benjamin's Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 1-009.]

¹⁴³⁷ See Section 2.4.2

Section 5.3 then went on to suggest that, rather than statutory, common law and equitable rules, alternative starting points for determining judicial remedies in shipbuilding cases might either be the parties' contractual agreement, or dedicated shipping remedy rules. Contractual agreements will undoubtedly incorporate any tacit industry understandings that the parties hold. Judicial remedy awards made on the basis of these agreements would thus in turn be giving regard to industry understandings. Alternatively, if courts increasingly begin to depart from general principles when offering remedies in shipping cases, it may be worth judges and lawmakers considering whether the nuances of the shipping industry warrant the creation of dedicated shipping remedies – as is already the case in the area of employment law. These alternative starting points for awarding judicial remedies in shipbuilding cases would demonstrate the influence of the industry at the post-discharge stage of shipbuilding contracts.

Finally, Section 5.4 concerned the contractual remedies which can help resolve or mitigate disputes such as those talked about in Chapter 4. Factors were suggested which make for an 'effective' contractual remedy clause, such as the fact that it allocates risk between parties, that it is convenient to exercise, and that it incorporates goodwill. Furthermore, it was suggested that a contractual remedy can be considered effective if – as per the overarching theoretical paradigm of this thesis – it gives regard to the industry, either by being based upon a standard-form industry wording, or through any pay-out under the clause being based on industry or market rates.

Overall, judicial and contractual remedies should give due regard to the industry (and its norms). Doing so would highlight the influence of the industry in the wake of a shipbuilding dispute, as per the overarching theoretical paradigm of this thesis.

Chapter 6

CONSOLIDATION AND FUTURE RESEARCH

6.1 – Introduction

This thesis has examined the characterisation of the shipbuilding contract and relationship under English law, shipbuilding industry norms and perceptions, the causes of shipbuilding disputes and also the remedial avenues open when this happens. The aim of this final chapter will be to give a normative answer to the overarching theoretical question of this thesis, which draws these examinations together and questions the extent to which shipbuilding industry norms should influence aspects of shipbuilding law. This chapter will then provide normative suggestions as to how the shipbuilding contract ought to be characterised under English law, when regard is given to industry perceptions. Finally, this chapter will suggest avenues from which future research on the topic of shipbuilding disputes, law and contracts might be undertaken – avenues which either fell outside the scope of this thesis or which emerged out of the conclusions made in certain chapters.

6.2 – Normative conclusions on industry influence and contract characterisation

The overarching theoretical question of this thesis asked to what extent shipbuilding industry norms should influence the characterisation of shipbuilding contracts and relationships, and the remedies offered in the wake of dispute. Chapters 2 and 3 proved that recourse to the industry is needed, by revealing there to be a mismatch between how the law presently characterises shipbuilding, and shipbuilding industry norms and perceptions.

For one, there seems to be a mismatch between how the Sale of Goods Act 1979¹⁴³⁸ characterises all shipbuilding relationships (as those in which parties operate at arm's length to one another) and how industry parties engaged in contracts to build bespoke vessels often perform (by cooperating with each other). This has been exacerbated by the fact that judges in *Swallowfalls Ltd v Monaco Yachting & Technologies SAM*¹⁴³⁹ and *Gyllenhammar & Partners International v Sour Brodogradevna Split*¹⁴⁴⁰ referred to cooperation as being a norm inherent within shipbuilding relationships.

Additionally, Chapter 2 and Chapter 3 reveal a potential mismatch between how the law characterises shipbuilder obligations under all shipbuilding contracts (namely as being to deliver the completed vessel, under a sale of goods), and how industry shipbuilders often perceive their role under bespoke vessel building contracts (as more being providers of a construction service). This disparity has been exacerbated by the fact that certain judges have sought to dislodge the entrenched characterisation of the shipbuilding contract by treating it either as a general construction contract (in *Hyundai Heavy Industries v Papadopoulos*¹⁴⁴¹ and *Adyard Abu Dhabi v SD Marine Services*¹⁴⁴²) or as a contract for work and materials (in *Stocznia Gdanska SA v Latvian Shipping Co*¹⁴⁴³) – contracts whose obligations lay predominantly in the provision of services.

Taking the findings from Chapter 2 and Chapter 3 together proves that the law may not reflect shipbuilding industry norms and perceptions. For this reason, sustainable development of the law (and judicial practice) will require greater regard to be had for the industry. '[C]ontract law should be better aligned with commercial practice

¹⁴³⁸ Sale of Goods Act 1979.

¹⁴³⁹ [2014] EWCA Civ 186

¹⁴⁴⁰ (1989) 2 Lloyd's Rep 403 (Com Ct)

¹⁴⁴¹ [1980] 1 WLR 1129 (HL)

¹⁴⁴² [2011] EWHC 848 (Com Ct)

¹⁴⁴³ [1998] CLC 540 (HL)

and expectations’,¹⁴⁴⁴ by permitting the law ‘to recognise the social values and behavioural norms that...commercial contractors...bring to bear on their trading relationships’.¹⁴⁴⁵ Until the law does so, parties to shipbuilding contracts will still be susceptible to disputes such as those explored in Chapter 4. As examined in Chapter 5, industry practice can also influence the remedies issued following dispute. This could be through direct recourse to market rates and context when determining liquidated damage pay-outs, through recourse to industry custom when calculating judicial damages (as argued by Lord Hoffmann in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)*¹⁴⁴⁶), or if judges and lawmakers determine that the peculiarities of the shipping industry are marked enough to warrant their own dedicated remedy provisions.

Now to answer the theoretical question posed in this thesis, as to *the extent* to which shipbuilding industry norms should influence the characterisation of shipbuilding contracts and relationships, and also influence shipbuilding remedies. As introduced in Section 1.1, the answer lies on a scale which includes a regulated stance at one end (under which the law predominates), and liberal and neo-liberal stances at the other (under which industry influence predominates). In light of the findings in Chapters 2-5, the law should characterise shipbuilding contracts and relationships, and it should also administer remedies following dispute – but only insofar as these characterisations and remedies reflect industry norms and perceptions. This answer thus occupies a position approaching the liberal stance on the aforementioned scale, and would entail the following. Firstly, courts and lawmakers should begin on the premise that the projects, contracts and relationships present in the shipbuilding industry are heterogeneous, and characterise with this in mind. Secondly, the courts should prescribe shipbuilding remedies but only insofar as these remedies give due regard to, and do not countervail, industry understandings and customs as to the appropriate remedy (and quantum) to be awarded in a given situation. Thirdly, as under other stances, courts should enforce the contract and also should police it against illegality. In sum, this stance will allow

¹⁴⁴⁴ Catherine Mitchell, *Contract Law and Contract Practice; Bridging the Gap Between Legal Reasoning and Commercial Expectation* (1st edn, Hart Publishing 2013) 14

¹⁴⁴⁵ *ibid*

¹⁴⁴⁶ [2009] 1 AC 61 (HL)

shipbuilding law to draw upon the industry to an extent, in that *legal* characterisation of shipbuilding contracts and remedies, and the remedies administered by the *law*, will draw upon *industry* norms. This mixture will ensure that the law does not become mismatched with the industry, and instead will ‘develop as business practice develop[s]...and recognize business custom and usage’.¹⁴⁴⁷

Now to the discrete sub-question at the helm of Chapter 2 and Chapter 3, regarding how the shipbuilding contract should be characterised. The law characterises shipbuilding contracts as sale of goods contracts, whose chief obligation is delivery of the completed vessel. However, this characterisation is mismatched with bespoke vessel building projects under which a tremendous amount of specialist ‘work or skill’¹⁴⁴⁸ is imparted by the shipyard prior to the vessel’s delivery. In this regard, the characterisation of the shipbuilding contract must be revisited.

One viable solution would be to characterise shipbuilding contracts, specifically those for the building of bespoke vessels, as hybrid service-sale provisions. This would do justice to the fact that the shipyard undertakes both service obligations and sale obligations during the project – an assertion confirmed by Lord Goff in *Stocznia*. Characterised this way, the contract would essentially be treated as a ‘[c]ontract...for work which involve[s] the supply of materials’.¹⁴⁴⁹ It would no longer fall under the Sale of Goods Act 1979, but rather the Supply of Goods and Services Act 1982,¹⁴⁵⁰ a change which would have various implications. Firstly, Part II of the 1982 Act¹⁴⁵¹ would impose implied terms on the service being supplied by the shipyard, in addition to the implied terms imposed by Part I¹⁴⁵² in respect of the supply of goods portion of the contract (which resemble those which would be imposed by the 1979 Act if the contract was otherwise characterised as a sale of

¹⁴⁴⁷ Bruce L Benson, ‘The Spontaneous Evolution of Contract Law’ (1989) 55(3) Southern Economic Journal 644, 654

¹⁴⁴⁸ Michael G Bridge, *Benjamin’s Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 1-047

¹⁴⁴⁹ Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) ch pt 5 II (the nature of the conversion contract)

¹⁴⁵⁰ Supply of Goods and Services Act 1982.

¹⁴⁵¹ *ibid* ss 12-16

¹⁴⁵² *ibid* ss 1-5

goods). Secondly, if the contract went into dispute, the parties would only have recourse to common law and equitable remedies, and would no longer have recourse to the statutory remedies under the 1979 Act. Moreover, amending the contract's characterisation from a sale of goods to a service-sale hybrid would mean that its terms might be subject to s 7 of the Unfair Contract Terms Act 1977.¹⁴⁵³

Another solution would be to characterise the shipbuilding contract as a *sui generis* provision. Gravity for doing so might be derived from *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd*,¹⁴⁵⁴ in which a bunker shipping contract was not treated 'as a straightforward agreement to transfer the property...to the Owners for a price'¹⁴⁵⁵ because of its unique terms and the industry practices surrounding it. Similarly, characterising shipbuilding contracts as *sui generis* provisions in light of their own unique features (such as the mixture of service and sale obligations owed under them) and also in light of shipbuilding industry practices (such as payment being made in pre-delivery instalments), would highlight the influence of the industry in the context of shipbuilding law. This is not unheard of, with jurisdictions such as Indonesian law already characterising shipbuilding contracts as *sui generis* provisions. A *sui generis* characterisation of the shipbuilding contract under English law would potentially mean that the remedies offered following dispute could be unique in nature also. If shipbuilding contracts were treated this way then, in the event of dispute, a judge may decide to make a meritorious award which takes into account shipping industry practice, rather than be forced to apply remedies in line with existing legislation and common law rules.

6.3 – Invitations for Future Research

This thesis has determined the extent to which the shipbuilding industry should influence the characterisation of shipbuilding contracts and relationships, and also shipbuilding remedies. In doing so, it has explored English law's characterisation

¹⁴⁵³ Unfair Contract Terms Act 1977, s 7.

¹⁴⁵⁴ [2016] UKSC 23

¹⁴⁵⁵ *ibid* [26] (Lord Mance SCJ)

of the shipbuilding contract and relationship, shipbuilding industry norms and perceptions, what causes shipbuilding disputes, and also judicial and contractual remedies (including their interactions with the industry). Future research might however be undertaken on issues which either fell outside the scope of this thesis, or emerged out of the conclusions gleaned in this thesis.

For one, this thesis was predicated upon the notion that courts and arbitrators are often required to administrate issues relating to shipbuilding contracts, and that third-party institutions such as banks are often brought in to securitise payment and performance. The advent of ‘blockchain’ technologies may however revolutionise how shipbuilding transactions are administrated. Described as ‘a decentralised public ledger...between different entities on a network without the need for a central authority to verify...transaction[s]’,¹⁴⁵⁶ maritime industry consultants have begun to laud blockchain as ‘a tool for the movement of money, goods and contractual agreement’.¹⁴⁵⁷ This was realised for the very first time in May 2018, where blockchain was used to facilitate documentary exchange between two parties to a shipping transaction,¹⁴⁵⁸ with logistics company Maersk announcing in August 2018 that it was trialling a blockchain product for use in container shipping.¹⁴⁵⁹ Applied to the context of shipbuilding, blockchain could administrate the buyer’s making of pre-delivery instalments (thus obviating the need for guarantees and bonds), as well as administrating the parties’ contractual agreements (thus obviating the need for judicial or arbitral intervention). The latter would be facilitated by means of blockchain’s ‘smart contracts’. These come ‘in the form of a computer program which is run and self-executed in blockchain and which shall automatically

¹⁴⁵⁶ Ahmad Khudeish, ‘The Rise of Blockchain and Decentralised Applications and What This Means for the Future of the Tech Industry’ (Medium, 21 January 2018)

<<https://medium.com/swlh/the-rise-of-blockchain-and-decentralised-applications-and-what-this-means-for-the-future-of-the-527e73e95926>> accessed 14 April 2018

¹⁴⁵⁷ Jörg Polzer, ‘Blockchain Technology: A Game Changer in Shipbuilding Industry’ (LinkedIn, 26 January 2018) <www.linkedin.com/pulse/blockchain-technology-game-changer-shipbuilding-industry-j%C3%B6rg-polzer> accessed 12 April 2018

¹⁴⁵⁸ Anastassios Adamopoulos, ‘HSBC makes first trade finance transaction using blockchain’ (Lloyd’s List, 14 May 2018)

<<https://lloydslist.maritimeintelligence.informa.com/LL1122594/HSBC-makes-first-trade-finance-transaction-using-blockchain>> accessed 25 May 2018

¹⁴⁵⁹ James Baker, ‘Maersk and IBM launch blockchain product’ (Lloyd’s List, 9 August 2018) <<https://lloydslist.maritimeintelligence.informa.com/LL1123805/Maersk-and-IBM-launch-blockchain-product>> accessed 10 August 2018

implement the terms and conditions of any agreement between the parties'.¹⁴⁶⁰ The fact that parties are able to remotely validate (or veto) changes to contractual agreements eliminates the risks of fraud, duress and undue influence which otherwise affect contracts as they are administrated presently.¹⁴⁶¹ Accordingly, whilst this thesis explored judicial practice in respect of shipbuilding contracts and also the securitisation of shipbuilding contract performance by guarantee, future research might wish to explore the role which blockchain technologies could play in both of these. In doing so, it might wish to touch upon the challenges which blockchain could bring with it, such as whether the 'sealed' nature of the smart contracting system would prevent parties from taking a commercially driven (but largely non-principled) approach to solving contractual issues, or whether the bespoke nature of certain shipbuilding agreements can be catered for under blockchain's universal contracting system.¹⁴⁶²

Also, this thesis approached (and defined¹⁴⁶³) the shipbuilding relationship as a bilateral one between ship-owner (buyer) and shipbuilder (seller). Dispute liability was accordingly framed as lying with one or both of these parties. However, as was exhibited in the case of *Marc Rich & Co AG v Bishop Rock Marine Co Ltd (The Nicholas H)*,¹⁴⁶⁴ a mistake in surveying a vessel could leave a third-party classification society liable on the basis of a perceived duty of care.¹⁴⁶⁵ As the issue of '[w]hether a classification society can be held liable in tort for negligence is controversial',¹⁴⁶⁶ future research may wish to explore this issue in the context of shipbuilding contract disputes. An examination of damages could form part of this, particularly the differing tests of remoteness and causation between tort law and

¹⁴⁶⁰ Opensea.pro, 'How Can The Shipping Industry Take Advantage Of The Blockchain Technology' (Blog) <<https://opensea.pro/blog/blockchain-for-shipping-industry>> accessed 12 April 2018

¹⁴⁶¹ Max-Groups, 'Blockchain Tech In Maritime & Supply Chain: Is It Just A Fad?' (Blog, 22 June 2017) <<http://max-groups.com/blockchain-tech-maritime-supply-chain-fad/>> accessed 12 April 2018

¹⁴⁶² Opensea.pro, 'How Can The Shipping Industry Take Advantage Of The Blockchain Technology' (Blog) <<https://opensea.pro/blog/blockchain-for-shipping-industry>> accessed 12 April 2018

¹⁴⁶³ See Section 1.2

¹⁴⁶⁴ [1993] ECC 121 (QB)

¹⁴⁶⁵ *ibid* at 152 (Hirst J)

¹⁴⁶⁶ William Cecil and Fiona Cain, 'England & Wales' in Arnold J van Steenderen (ed), *Getting The Deal Through Shipbuilding 2017* (6th edn, Law Business Research 2017) 27

contract law,¹⁴⁶⁷ and also the circumstances in which the Law Reform (Contributory Negligence) Act 1945¹⁴⁶⁸ applies to each.¹⁴⁶⁹

Thirdly, Chapter 2 of this thesis used illustrations from the law of foreign jurisdictions to show that it is not only English law which faces the challenge of how to characterise the shipbuilding contract. Foreign jurisdictions often choose to characterise the shipbuilding contract differently to how we do under English law (for instance Japanese law or Brazilian law¹⁴⁷⁰), and moreover they often choose a different *approach* by which to do (as examined in the Canadian decision of *Royal Bank of Canada v Saskatchewan Telecommunications*¹⁴⁷¹ for example.¹⁴⁷²) What we are left with is a nuanced and varied global tapestry of characterisations, under which the shipbuilding contract is legally treated as one thing in one country, and potentially as something completely different just across the border. This begs the question as to whether there ought to be strides made towards international harmonisation of shipbuilding law. There is arguably already a degree of harmonisation present in shipbuilding, in terms of the standard-form shipbuilding contract terms which parties can (and often do) use,¹⁴⁷³ as well as through the standards set by the International Maritime Organisation (IMO) on how ships such as bulk carriers and oil tankers should be built.¹⁴⁷⁴ It might therefore be worth future research looking into the feasibility of an international body of shipbuilding law, especially since harmonisation of maritime law is something which has been attempted and implemented in pockets. On a continental level for instance,

¹⁴⁶⁷ Simon Baughen, *Shipping Law* (6th edn, Routledge 2015) 255

¹⁴⁶⁸ Law Reform (Contributory Negligence) Act 1945

¹⁴⁶⁹ Simon Baughen, *Shipping Law* (6th edn, Routledge 2015) 255

¹⁴⁷⁰ See Section 2.4.2

¹⁴⁷¹ [1985] 20 DLR (4th) 415

¹⁴⁷² See Section 2.3.1

¹⁴⁷³ An analogical example can be found in the bunker context, where 2018 standard terms issued by BIMCO for *bunker* contracts have been lauded as a step toward harmonisation for the bunker industry. [Baltic and International Maritime Council, 'BIMCO Bunker Terms 2018' (BIMCO, 2018) <<https://www.bimco.org/contracts-and-clauses/bimco-contracts/bimco-bunker-terms-2018>> accessed 10 May 2018; Hellenic Shipping News, 'New Bunker Terms will boost harmonisation' (26 April 2018) <<https://www.hellenicshippingnews.com/new-bunker-terms-will-boost-harmonisation/>> accessed 10 May 2018.]

¹⁴⁷⁴ Eric Haun, 'IMO Ushers New Era for Shipbuilding Rules' (Marine Link, 13 May 2016) <www.marinelink.com/news/shipbuilding-ushers-rules409656> accessed 23 June 2018

European Directive 2000/59/EC¹⁴⁷⁵ seeks to harmonise port rules on ship and cargo waste. Future research might therefore wish to look into the prospect of similar legal harmonisation for shipbuilding.

Additionally, this thesis looked at the potential influence of *shipbuilding* industry norms on the law. For reasons given in Section 1.1.5, ship refit projects did not fall within the scope of this thesis, and thus were not considered in the detailed examinations undertaken in Chapters 2-5. However, given the faltering nature of shipping markets, and the consequential dearth in profits for ship-owning companies, refitting an existing ship is considered by some to be a more cost effective option than ordering a newbuild. For instance, in February 2018 it was reported that the Mediterranean Shipping Company (MSC) had agreed contracts for the refit of over 250 of its vessels, to increase the capacity of each vessel so that it could hold larger shipments.¹⁴⁷⁶ This was deemed a more viable solution than having an entirely new fleet of larger vessels built. Moreover, one Bahamian shipyard stated that it had received more refit orders in 2018 than it had any previous year of trading.¹⁴⁷⁷ Accordingly, given the popularity of ship refit in times of shipping market weakness such as this, future research might wish to look into ship refit law and contracts, and also at how ship refit industry norms might influence these.

6.4 – Closing

This thesis argued that, if the English law on shipbuilding contracts has regard for shipbuilding industry norms, it will develop in a way which means that shipbuilding disputes hopefully do not occur in future. This may also reinvigorate the idea of

¹⁴⁷⁵ Council Directive 2000/59/EC of 27 November 2000 on port reception facilities for ship-generated waste and cargo residues [2000] OJ L332/81

¹⁴⁷⁶ Janet Porter, 'MSC close to finalising five-year ship refit programme' (Lloyd's List, 12 February 2018) <<https://lloydlist.maritimeintelligence.informa.com/LL1121310/MSC-close-to-finalising-fiveyear-ship-refit-programme>> accessed 2 May 2018

¹⁴⁷⁷ Rebecca Moore, 'A record year and new boss for Grand Bahama Shipyard' (Passenger Ship Technology, Industry News, 21 May 2018) <http://www.passengership.info/news/view,a-record-year-and-new-boss-for-grand-bahama-shipyard_51865.htm> accessed 25 May 2018

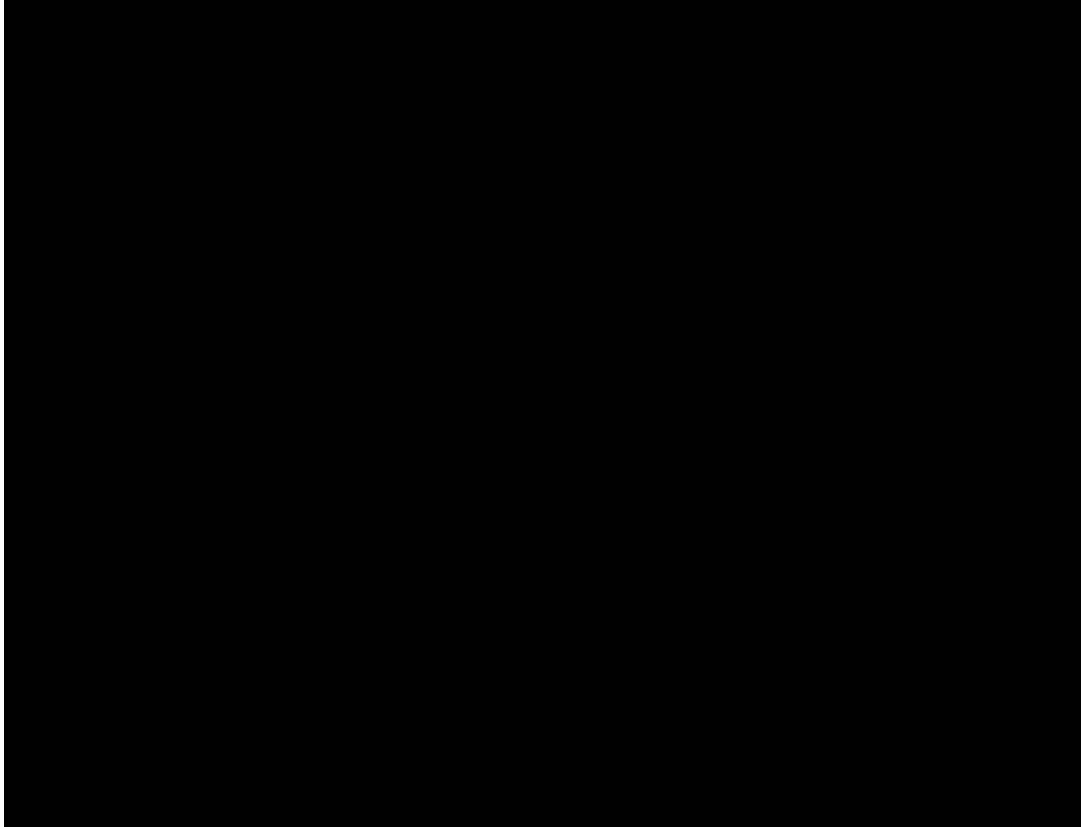
industry influence in the law of contract more generally, beyond merely coming into play in restricted circumstances (such as when courts imply a term by custom¹⁴⁷⁸ or when they void a contract in restraint of market trade.) As mentioned at the outset of this thesis, within commercial contracting exists two worlds: firstly that of industry parties, and secondly the legal framework which surrounds them. Reconciliation of the two, by means of industry influence on written law and judicial practice, is crucial to ensure that they do not diverge and result in a mismatch. After all, the beauty of the English common law system is that it is flexible enough to allow the law to develop in line with societal change and practices. Allowing commercial industry norms to influence the law in this way would do justice to this crucial pillar of English law.

¹⁴⁷⁸ See Section 5.3.1

Appendices

Fig. 1

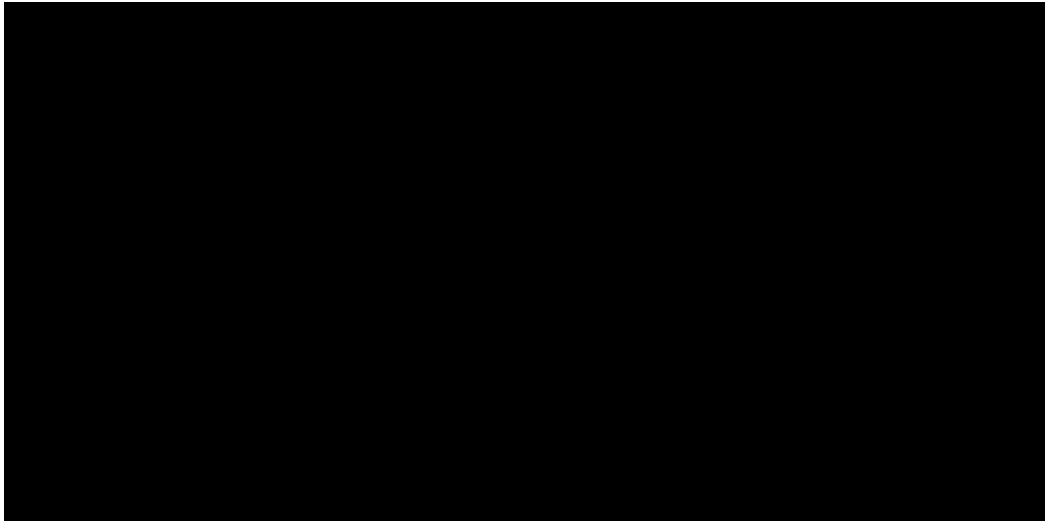
Interaction between the shipping sub-markets and the global economy



Information derived from: Duck Hee Won, 'A Study of Korean Shipbuilders' Strategy for Sustainable Growth' (BS, Seoul National University, Submitted to the MIT Sloan School of Management, June 2010), 39 (which cited Korea Institute for Industrial Economics & Trade, Edited by Author)

Fig. 2

Percentage of global ship launches undertaken by Europe, Japan, Korea, China and the rest of the world (1902 – 2015)



Information derived from: Martin Stopford, 'Global Shipping Markets; Current Developments & Outlook' (Capital Link Forum, Cyprus, 9 February 2017)
<<http://forums.capitallink.com/shipping/2017cyprus/ppt/stopford.pdf>> accessed 24 November 2017, slide 17

Fig. 3

Number of global orders and completions, and orderbook size (2017)



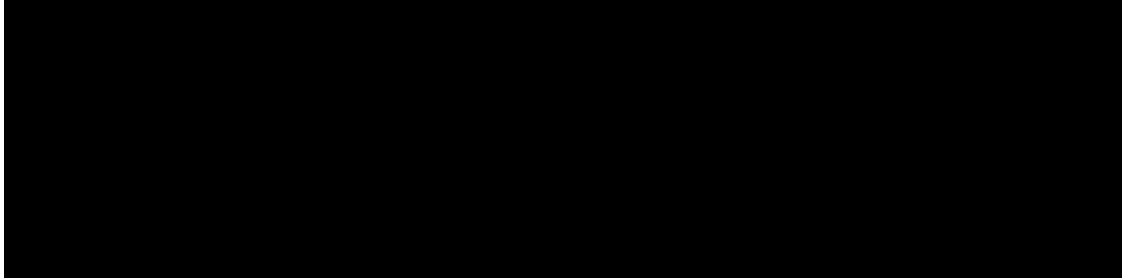
Vessels included: *Only those greater than or equal to 100 gross tons*

Information derived from: The Shipbuilders' Association Of Japan, 'Shipbuilding Statistics' (5 March 2018)

<https://www.sajn.or.jp/files/view/articles_doc/src/44fcbeaa8b99e973ce83c007e9650fad.pdf> accessed 13 May 2018, 1-3 (which cited IHS Markit "World Shipping Statistics")

Fig. 4

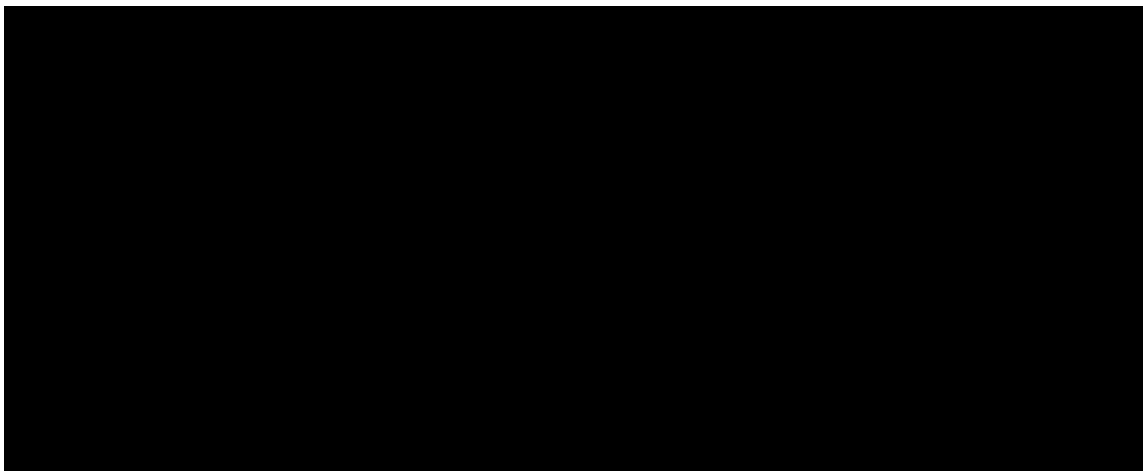
World's five largest shipbuilders by orderbook in \$US billions (March 2016)



Information derived from: Statista, 'Leading shipbuilding companies worldwide as of March 2016, by orderbook value (in billion U.S. dollars)' (March 2016) <www.statista.com/statistics/257865/leading-shipbuilding-companies-worldwide-based-on-volume/> accessed 30 November 2017

Fig. 5

Newbuilds delivered in major shipbuilding countries by ship type, in 000's of gross tons (2016)

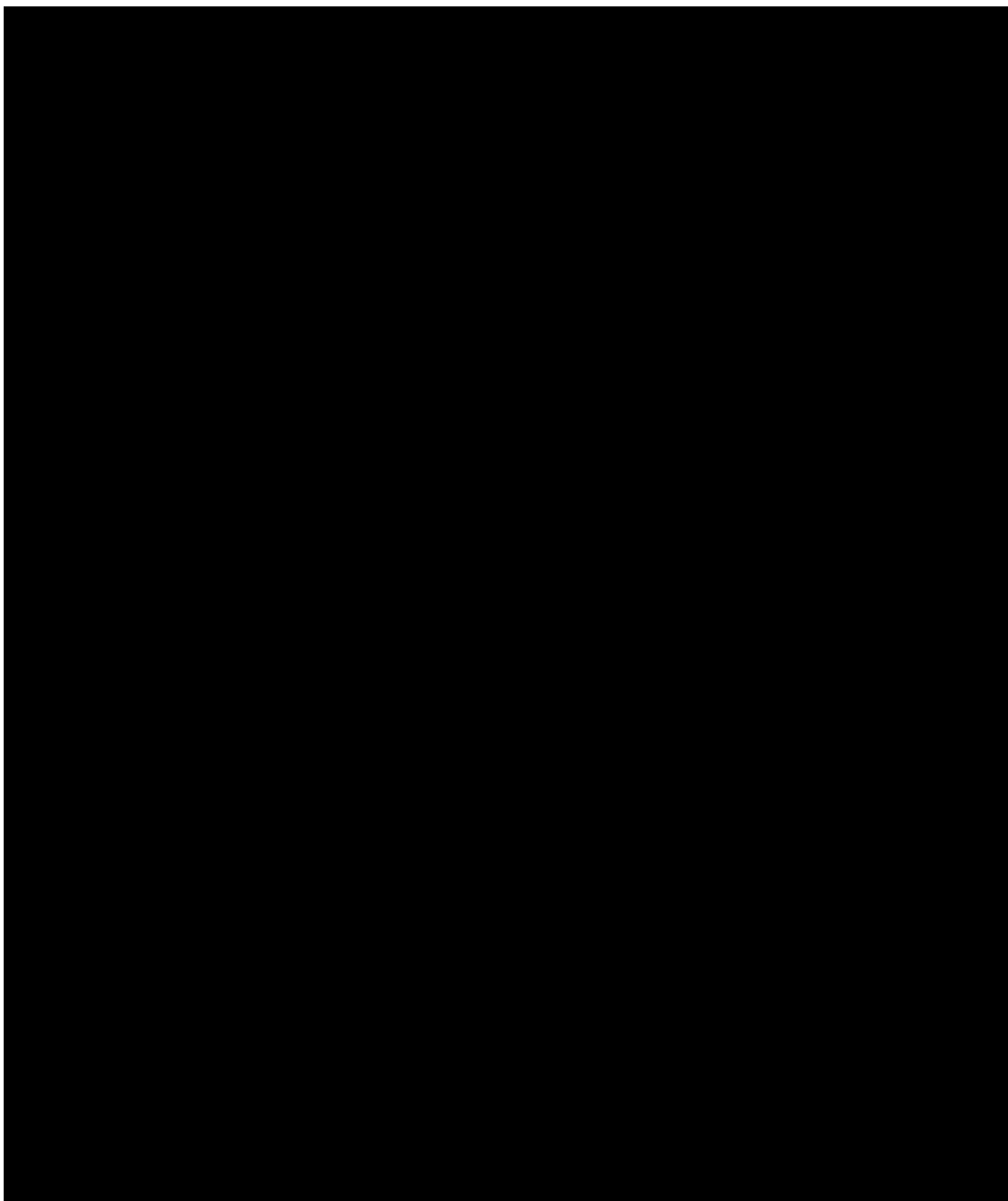


Vessels included: Only those greater than or equal to 100 gross tons

Information derived from: UNCTAD, 'Review of Maritime Transport 2017'
(United Nations Conference on Trade and Development, 2017)
<http://unctad.org/en/PublicationsLibrary/rmt2017_en.pdf> accessed 22
November 2017, 34 (which cited UNCTAD secretariat calculations, based on data
from Clarksons Research)

Fig. 6

South Korean orderbook by ship-owner's nationality (June 2015)

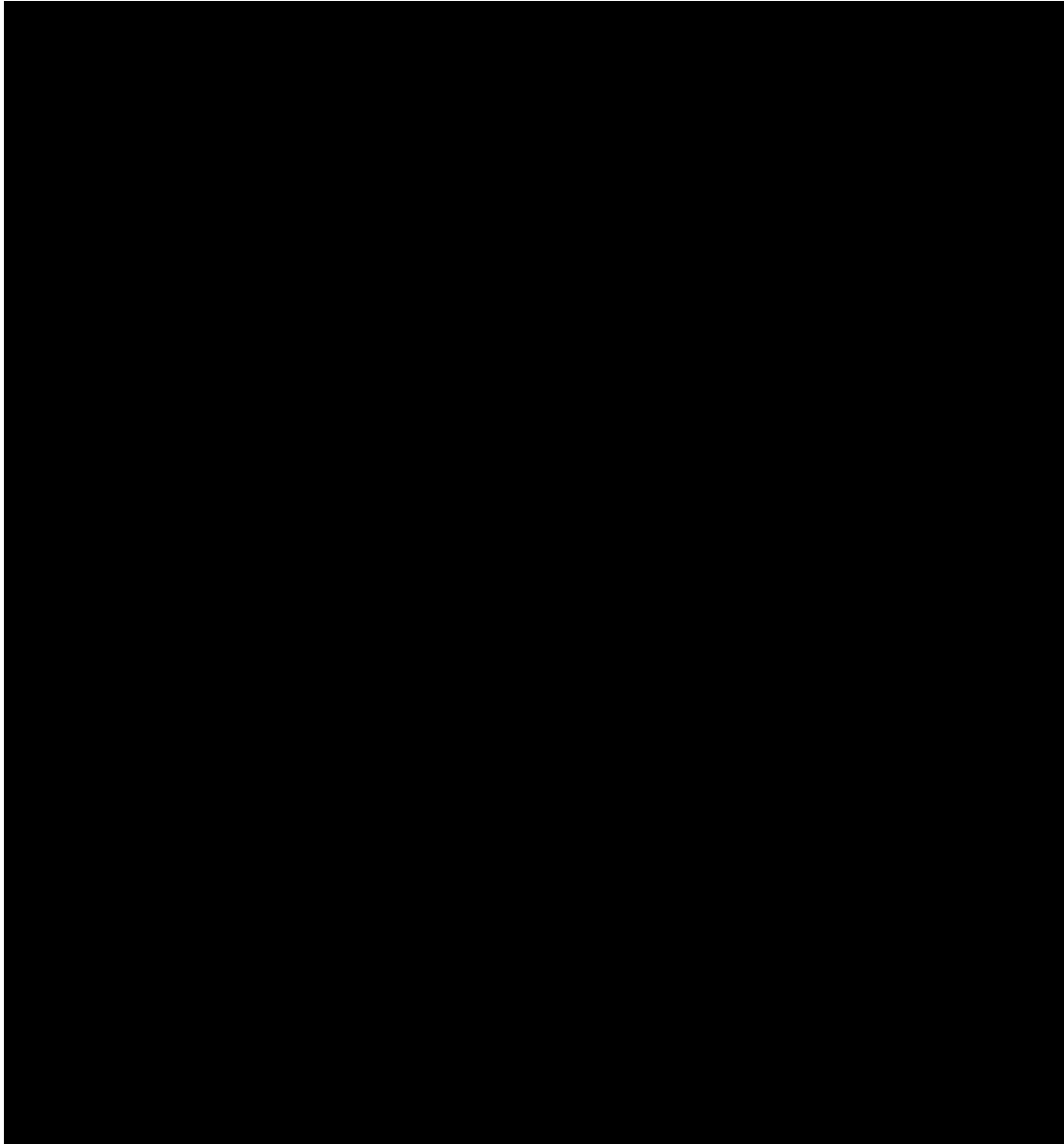


Vessels included: Only those greater than or equal to 100 gross tons

Information derived from: The Shipbuilders' Association Of Japan, 'Shipbuilding Statistics; September 2015' (Updated Statistics SAJ Presentation, 2015)
<www.sajn.or.jp/e/statistics/Shipbuilding_Statistics_Sep2015e.pdf> accessed 26 January 2016, 31 (which cited IHS "World Shipbuilding Statistics")

Fig. 7

Japanese orderbook by ship-owner's nationality (June 2015)

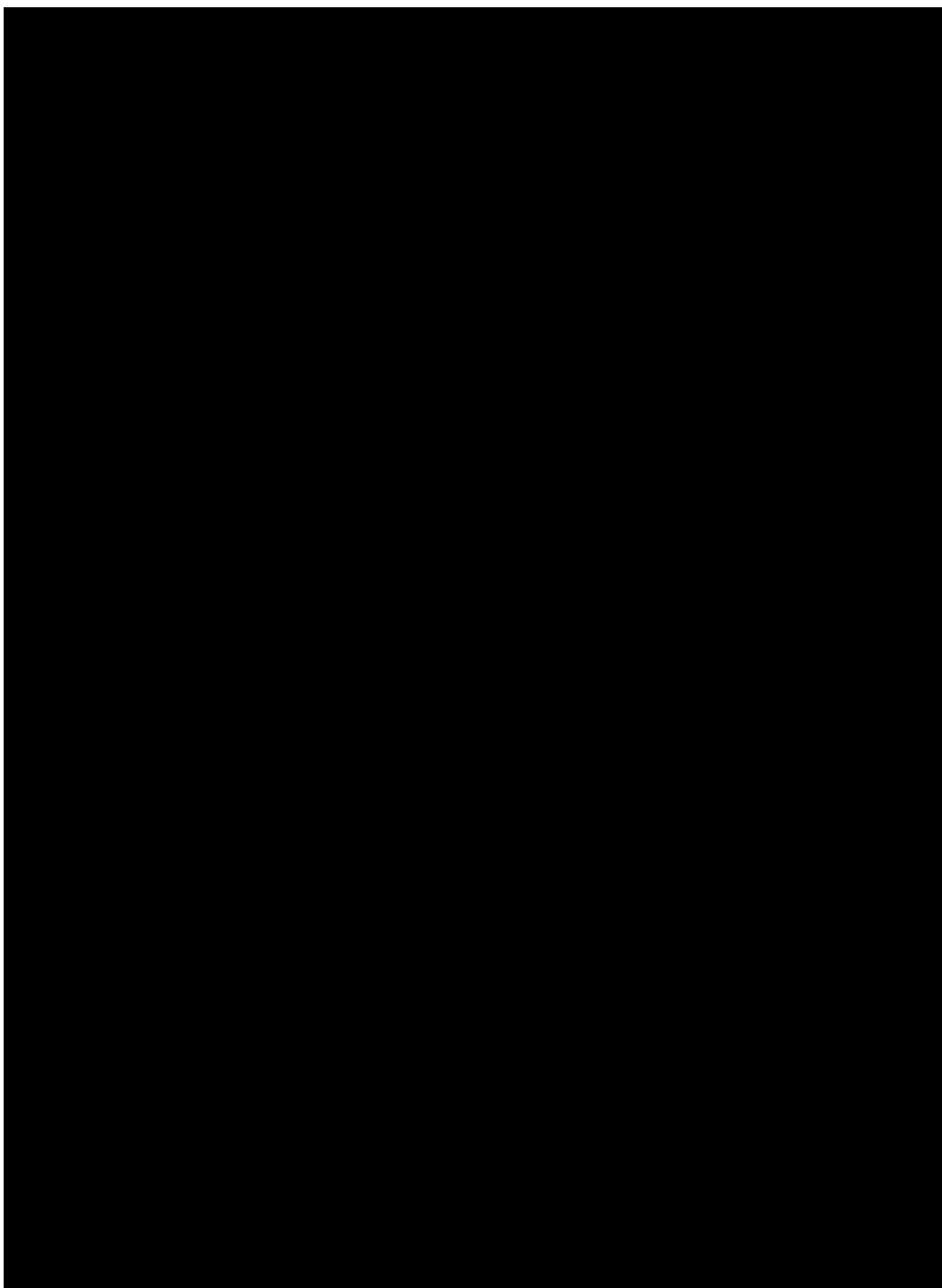


Vessels included: Only those greater than or equal to 100 gross tons

Information derived from: The Shipbuilders' Association Of Japan, 'Shipbuilding Statistics; September 2015' (Updated Statistics SAJ Presentation, 2015)
<www.sajn.or.jp/e/statistics/Shipbuilding_Statistics_Sep2015e.pdf> accessed 26 January 2016, 31 (which cited IHS "World Shipbuilding Statistics")

Fig. 8

Chinese orderbook by ship-owner's nationality (June 2015)



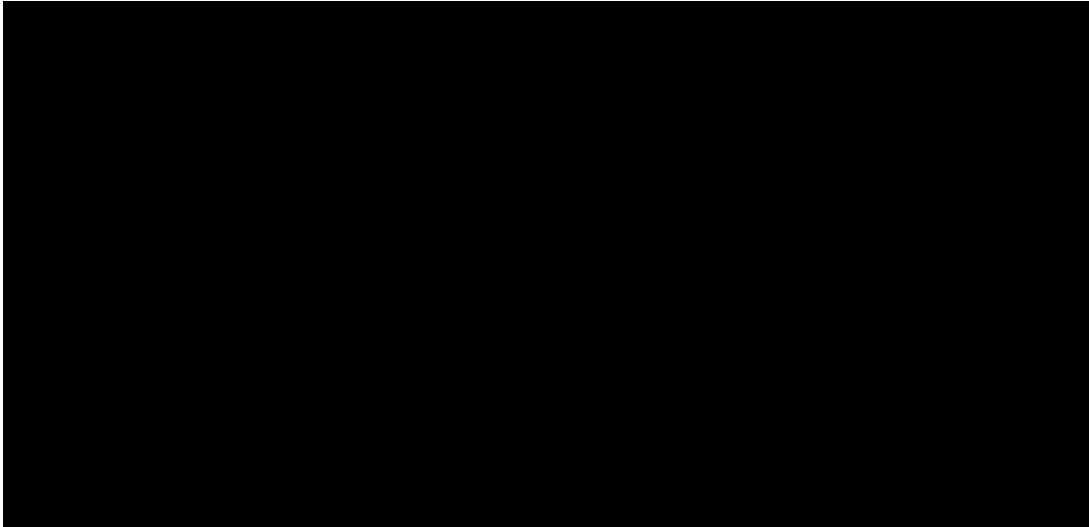
Vessels included: Only those greater than or equal to 100 gross tons

Information derived from: The Shipbuilders' Association Of Japan, 'Shipbuilding Statistics; September 2015' (Updated Statistics SAJ Presentation, 2015)

<www.sajn.or.jp/e/statistics/Shipbuilding_Statistics_Sep2015e.pdf> accessed 26 January 2016, 31 (which cited IHS "World Shipbuilding Statistics")

Fig. 9

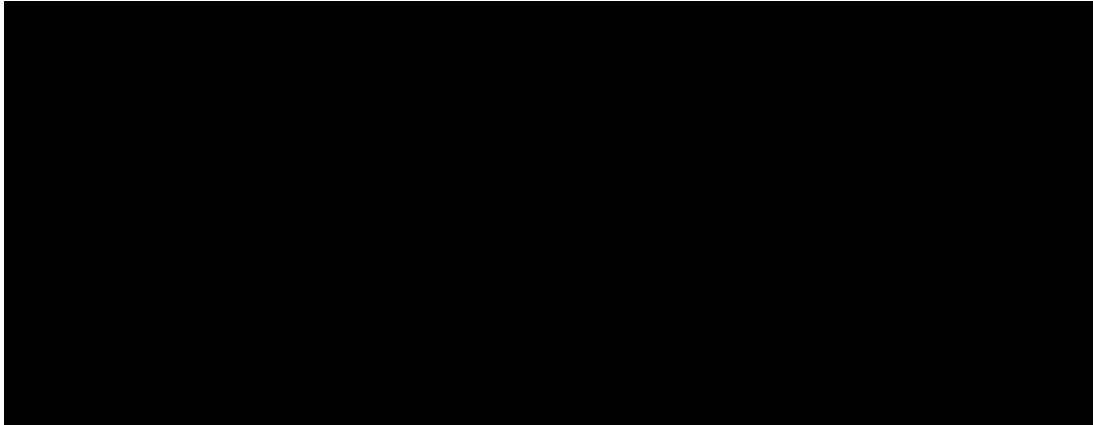
Classification of commercial ship types by function and freight carried



Information derived from: Duck Hee Won, 'A Study of Korean Shipbuilders' Strategy for Sustainable Growth' (BS, Seoul National University, Submitted to the MIT Sloan School of Management, June 2010), 17 (which cited The Korea Shipbuilders Association)

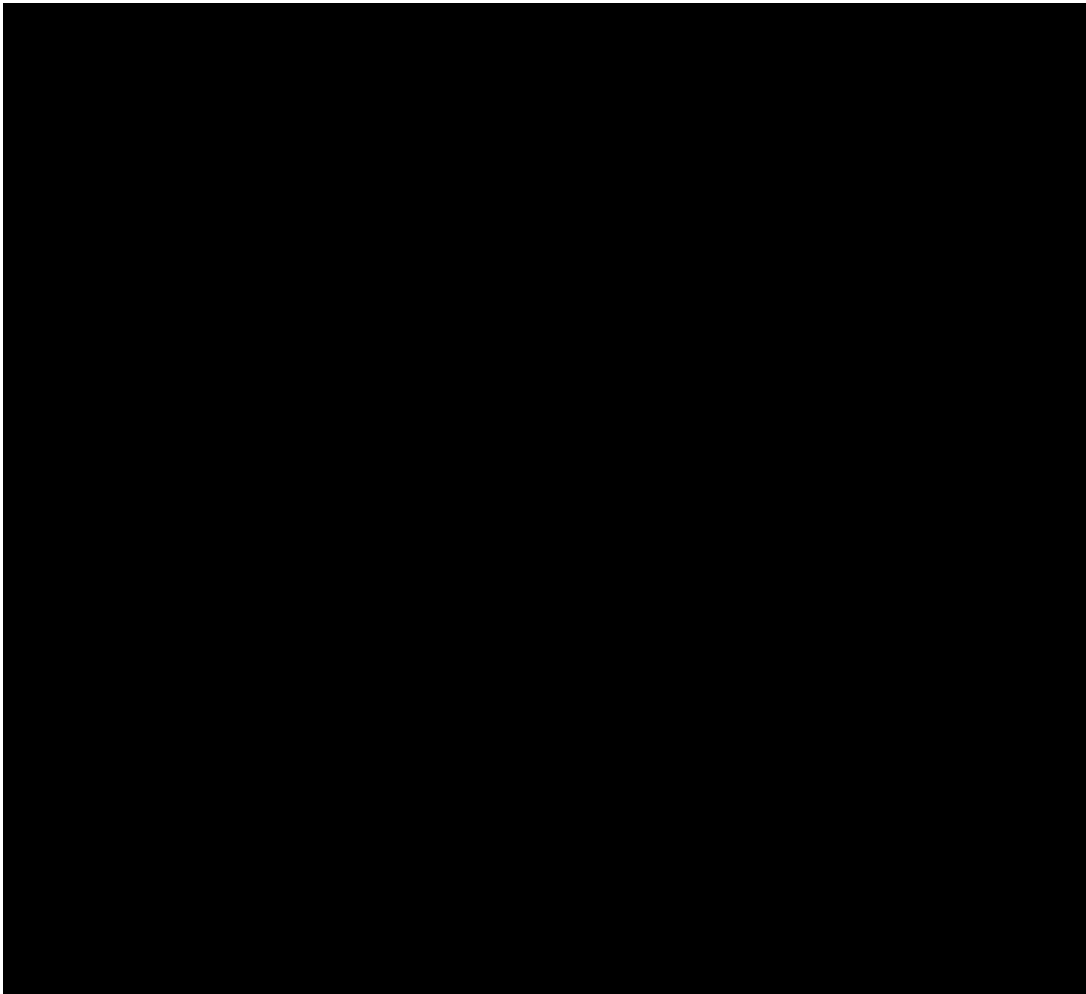
Fig. 10

Classification of ship types by build complexity and design sophistication



Information derived from: Duck Hee Won, 'A Study of Korean Shipbuilders' Strategy for Sustainable Growth' (BS, Seoul National University, Submitted to the MIT Sloan School of Management, June 2010), 18 citing Michael E Porter, *Competition in Global Industries* (Harvard Business School Press 1986)

Fig. 11
Construction contract dispute causes



Information derived from: Sigitas Mitkus and Tomas Mitkus, 'Causes of Conflicts in a Construction Industry: A Communicational Approach' (2014) 110 Procedia – Social and Behavioral Sciences 777, 780 citing NK Acharya, YD Lee, HM Im, 'Conflict factors in construction projects: Korean perspective' (2006) 13(6) Engineering, Construction and Architectural Management 543

Fig. 12**Force Majeure events included under standard-form shipbuilding contracts**

Force Majeure Event	BIMCO	CMAC	AWES	SAJ
Acts of God	√		√	√
Acts of princes or rules				√
Government requisition, control, intervention, requirement or interference	√			√
(Threat / Act of) War	√	√	√	
Warlike operations	√			
Terrorism	√			
Revolution		√		
Insurrection		√	√	
Mobilisation		√		
Riots	√	√	√	√
Civil Commotion	√	√		√
Vandalism				
Blockades	√	√	√	
Embargoes	√		√	
Import or Export restrictions			√	
Epidemics	√	√	√	
Plague				√
Quarantine				
Earthquakes	√		√	
Landslides	√		√	√
Floods	√	√	√	√
Tidal waves	√			
Typhoons		√		√
Hurricanes				√
Extraordinary / Abnormal weather conditions	√	√	√	√
Strikes	√	√	√	√
Lockouts	√	√	√	√
Industrial action	√			
Labour shortages				√
Sabotage		√		√
Fire	√	√	√	√
Accident[al damage]	√		√	
Explosion	√			√
Collisions				√
Strandings				√
Interruption to Public Utilities	√		√	√
Defects of casting and forging components		√	√	√
Bankruptcy of material supplier		√		
Shortage of materials and equipment			√	
Delays in transportation of materials and equipment				√
Delays in delivery of materials and equipment				√
Delays in the shipbuilder's other commitments			√	√

Information derived from:

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CMAC: Simon Curtis, *The Law Of Shipbuilding Contracts* (4th edn, Informa 2012) Appendix B citing China Maritime Arbitration Commission (CMAC), ‘CMAC Standard Newbuilding contract (Shanghai Form)1’ (CMAC, China) s 4 art XV

AWES: Association of European Shipbuilders and Shiprepairers, ‘Standard Shipbuilding Contract’ (Scribd, uploaded by api-3739585, 15 October 2008) <www.scribd.com/doc/6745831/Awes-Shipbuilding-Contract> accessed 10 November 2016, art 6 para d

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