

# Shipbuilding

*Contributing editor*  
**Arnold J van Steenderen**



**2018**

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# Shipbuilding 2018

*Contributing editor*

**Arnold J van Steenderen**

**Van Steenderen MainportLawyers BV**

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# Preface

## Shipbuilding 2018

Seventh edition

**Getting the Deal Through** is delighted to publish the seventh edition of *Shipbuilding*, which is available in print, as an e-book and online at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

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

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

**Getting the Deal Through** titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

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

**Getting the Deal Through** gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Arnold J van Steenderen of Van Steenderen MainportLawyers BV, for his continued assistance with this volume.

GETTING THE   
DEAL THROUGH 

London  
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# China

Xianming Lu, Henry Zhu and Andrew Rigden Green

Stephenson Harwood – Wei Tu (China)

## 1 Restrictions on foreign participation and investment

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

The shipbuilding industry in China is generally open to foreign participation and investment subject to certain restrictions pursuant to the Catalogue for the Guidance of Foreign Investment Industries (2017). For example, for companies set up to engage in the business of designing, constructing and repairing vessels, Chinese shareholders must hold controlling shares whereas foreign investment are encouraged in relation to designing low and middle-speed diesel engines and relevant components.

## 2 Government ownership of shipbuilding facilities

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

The Chinese government through the state-owned Assets Supervision and Administration Commission of the State Council owns the two giant shipbuilding groups in China (China State Shipbuilding Corporation Limited and China Shipbuilding Industry Corporation), which reportedly have 60 per cent of the shipbuilding capacity in China. The shipbuilding industry is seen as (particularly in relation to marine engineering, offshore products and high-tech vessels) among the core areas for development as laid down in ‘Made in China 2025’ – the Chinese government’s plan to upgrade manufacturing industries for the coming years. There have been reports on the merger of the two state-owned shipbuilding groups to consolidate their shipbuilding capacity, but there has been no published plan for the government to divest itself from participation or control.

## 3 Statutory formalities

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

No.

## 4 Choice of law

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

Parties to a shipbuilding contract involving a foreign element (such as party, subject matter, etc) may choose the governing law for the shipbuilding contract, whereas a party’s choice of foreign law as governing law for a shipbuilding contract without a foreign element (for example, two Chinese parties concluding a contract to build a vessel in China) will not be upheld by Chinese courts.

## 5 Nature of shipbuilding contracts

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

Under Chinese law, a shipbuilding contract could either be a contract for the sale of goods or a contract for supply of workmanship and materials, depending on the specific terms of the contract.

## 6 Hull number

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

It is essential to state the hull number in the contract to identify the vessel when it is being built, as the hull number is assigned to the vessel from the date of signing the building contract, whereas the Chinese permanent identification number or International Maritime Organization number can only be applied for at a later stage.

## 7 Deviation from description

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

The vessel should be built pursuant to the agreed specifications whereas ‘approximate’ dimensions and description of the vessel allow deviation but within the scope of the agreed specifications, relevant class rules and trade standards.

## 8 Guaranteed standards of performance

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

Parties may agree on the standards of performance and the consequences of failing to meet such standards. There are also trade standards for coating, noise and vibration.

## 9 Quality standards

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

There are compulsory and recommended trade standards for quality standards. These are normally minimum standards and the parties may agree on higher quality standards.

**10 Classification society**

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

If the builder contracts with the classification society, depending on the specific terms of the contract, it is generally believed that the society does not owe a duty of care to the buyer.

**11 Flag-state authorities**

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

The China Maritime Safety Administration has outsourced part of the compliance with flag-state legislation to the China Classification Society, mainly in relation to compulsory inspections.

**12 Registration in the name of the builder or the buyer**

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

Registration of a vessel under construction is allowed in the name of either the builder or the buyer or jointly in the name of both the builder and the buyer (if supporting documents can be provided to evidence such joint ownership). Registration can serve as prima facie evidence that the registered owner has ownership to the vessel and the registered owner can create and register a mortgage over the vessel.

**13 Title to the vessel**

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

The parties can contract from when the title passes to the buyer. The parties can agree that the title is vested with the buyer from the outset.

**14 Passing of risk**

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

Unless otherwise agreed between the parties, as a general principle, risk will pass upon delivery and title will pass upon delivery (or as per the agreement between the parties).

**15 Subcontracting**

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

With consent of the buyer, the shipbuilder can subcontract part or all of the contract, but generally the shipbuilder shall complete the major or principal part of the work, and could subcontract the completion of any auxiliary part of its contracted work to a third party. Depending on the terms of the shipbuilding contract, the builder will remain liable towards the buyers either solely or jointly with the subcontractor. It is customary to include a maker's list of major suppliers and subcontractors in the contract.

**16 Extraterritorial construction**

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

Subject to the terms of the shipbuilding contract, the builder normally will need to obtain prior consent of the buyer to have main items constructed in another country.

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

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

Pricing is subject to agreement between the parties. Parties can agree either to build a vessel on a 'fixed price' basis or on a 'labour and cost plus' basis.

**18 Price increases**

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

If there is a change of circumstances that is: unforeseeable at the time of signing the shipbuilding contract; not caused by force majeure; and not falling within the commercial risks, and if such a change is to such a degree that it will result in obvious unfairness to the builder, or it will result in frustration of the purpose of the shipbuilding contract, the builder can request the court to amend the terms of the shipbuilding contract (including price).

**19 Retracting consent to a price increase**

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

If the shipbuilding contract is entered into or an amendment to the terms of a shipbuilding contract (including price) is made under duress, and entering to the contract or amendment to the contract is contrary to the true intention of the buyer, the buyer can request the court to amend or set aside the contract. However, whether economic duress could be proved to be such a duress before the court will be questionable.

**20 Exclusions of buyers' rights**

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

Generally, the parties could agree to exclude their rights. However, if the shipbuilding contract is in the standard form supplied by the builder and excludes the major rights of the buyer, such exclusion clause is not valid.

**21 Refund guarantees**

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

There are no particular rules in regard to the form and wording of the refund guarantee. Parties may agree on the form and wording. No permission from any authority is required for the builder to have the refund guarantees issued (normally by its bank).

**22 Advance payment and parent company guarantees**

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

There are no particular formalities in regard to the advance payment guarantees and parent company guarantees. If a Chinese company is providing a guarantee in favour of a foreign company for the payment obligations of another foreign company (for example the builder

### Update and trends

A recent hot topic is the conflict between the effect of the mortgage over a vessel under construction and the mortgage over the vessel (after delivery). The Chinese ship registration regulations allow parties (either the builder or the buyer) to create and register a mortgage over a vessel under construction. In practice only, builders have been seen creating and registering mortgages over the vessels under construction. Such mortgage should be deregistered from the ship registry after the vessel has been completed and before delivery to the buyer. However, on some occasions a builder may fail to deregister the mortgage that was created and registered over the vessel when it is under construction (in China). After the delivery of the vessel to the buyer, the buyer also creates and registers a mortgage over the vessel (in the flag state). This may result in two co-existing registered mortgages over the same vessel. Buyers are recommended to check whether the mortgage over the vessel created and registered when it is being built has been deregistered before or upon delivery of the vessel to the buyer.

is registered in a jurisdiction other than China), such a guarantee will need to be registered with the relevant branch of the state administration of foreign exchange.

### 23 Financing of construction with a mortgage

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

The current ship registration rules allow the owner of the vessel under construction to create and register a mortgage over that vessel.

### 24 Liability for defective design (after delivery)

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

Courts will determine liability for defective design (after delivery) based on the terms of the shipbuilding contract, warranty clauses and the actual circumstances, such as who contracted the design company, etc.

### 25 Remedies for defectiveness (after delivery)

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

Third parties could claim against the builder for compensation of actual losses suffered as a result of defectiveness on the basis of tort.

### 26 Liquidated damages clauses

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

If the parties agree on a liquidated damages clause or a penalty provision for late delivery or not meeting the guaranteed performance criteria, the agreed level of compensation does not have to absolutely represent a genuine link with the damage suffered. However, either party could request the court to increase the liquidated damages if the agreed liquidated damages are not sufficient to cover the damage suffered by that party. Or they could request the court to mitigate the liquidated damages or penalties if the amount is significantly higher than the actual damage suffered by the other party.

### 27 Preclusion from claiming higher actual damages

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

If the agreed liquidated damages are not sufficient to cover the damage suffered, the buyer can request the court to award proven higher damages.

### 28 Force majeure

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

The parties are free to design the force majeure clause.

### 29 Umbrella insurance

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

'Umbrella' insurance (construction all risks) is available in the market covering the builder and all (named) subcontractors of a particular project for the builder's risks.

### 30 Disagreement on modifications

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

Courts or arbitration tribunals are normally reluctant to set terms for the parties even if the parties are unable to reach agreement on alteration to key terms of the contract or a modification to the specification.

### 31 Acceptance of the vessel

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

A buyer's signature of a protocol of delivery and acceptance does not preclude a subsequent claim for breach of performance warranties or for defects latent at the time of delivery.

### 32 Liens and encumbrances

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

Suppliers or subcontractors can exercise a possessory lien over the vessel or work or equipment in their possession. There is statutory provision that the builder (as seller) shall hold the buyer (as buyer) harmless from any encumbrances from third parties.

### 33 Reservation of title in materials and equipment

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

A reservation of title by a subcontractor or supplier does not survive affixing to or incorporation in the vessel after the vessel has been delivered to the buyer. Before delivery of the vessel to the buyer, the situation will be more complicated, and the answers will depend on a number of factors, but it is generally believed that if the materials and equipment are separable from the vessel, the reservation of title will still be effective between the subcontractor or supplier and the builder.

**34 Third-party creditors' security**

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

Assuming that the title to the vessel under construction vests with the builder, the builder's third-party creditors can apply to the court to attach such vessel to secure their claim against the builder.

**35 Subcontractor's and manufacturer's warranties**

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

Subject to the specific terms of the warranty, it can normally be assigned to the buyer. After the warranty has been assigned to the buyer, the buyer can make a direct claim under the warranty against the subcontractor or the supplier. If the warranty has not been assigned to the buyer, the buyer could instead make a claim against the subcontractor or supplier for compensation of actual losses suffered as a result of defectiveness of the materials or equipment supplied on basis of tort.

**36 Default of the builder**

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

Subject to the mechanism agreed under the shipbuilding contract, there is no requirement to put the builder in default by sending notice before the buyer's remedies begin to accrue. Depending on the actual circumstances, the usual remedies include specific performance (if feasible) or claim for damages or both.

**37 Remedies for protracted non-performance**

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

In the event of protracted failure to construct or continue construction by the shipbuilder, apart from and subject to the contractual provisions, the buyer can ask for specific performance (if feasible) or claim damages or both.

**38 Builder's insolvency**

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

If it is expressly agreed under the shipbuilding contract that the buyer has the right to terminate the contract for the builder's insolvency, it is generally believed that such right should be enforceable. However, if this is not expressly contained in the contract, the administrator of the builder (if bankruptcy administrator has been appointed) will decide whether or not to terminate the contract.

**39 Judicial proceedings or arbitration**

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

For shipbuilding disputes, the China Maritime Arbitration Commission or the China International Economic and Trade Commission are most commonly agreed on by the parties to decide disputes. In any case, if arbitration agreement could not be reached by parties, disputes can be brought to the relevant Chinese Maritime Courts for resolution.

**40 Buyer's right to complete construction**

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

If the builder has entered into bankruptcy proceedings (either for liquidation or for restructuring), after a bankruptcy administrator has been appointed, the administrator has the right to decide whether to continue or terminate the contract. If the administrator decides to continue to perform the contract, the buyer is not allowed to terminate the contract but can ask the administrator to provide additional security. So basically the buyer's contractual right to take possession of the vessel and continue construction may be affected subject to review by the administrator.

**41 ADR/mediation**

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

It is not common to incorporate an ADR clause in shipbuilding contracts in China.

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**42 Default of the buyer**

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

Subject to the specific terms of the contract, the builder can cancel the contract, keep the advance payment, sell the vessel to a third party and claim for proven damages.

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**43 Standard contract forms**

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

Many shipyards use the form of the China Shipbuilding Trading Co that is very similar to the Shipbuilders' Association of Japan (SAJ) form. The China Maritime Commission has also published its recommended shipbuilding contract form.

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**44 Assignment of the contract**

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

Subject to the specific terms of the shipbuilding contract, the rights of a contracting party under the contract can be assigned to a third party by serving notice of the assignment to the other contracting party. After the assignment of rights, the assigning party remains as a party to the contract and continues to assume all obligations under the contract.

If a contracting party intends to transfer all its rights and obligations under the contract, such transfer (novation) must be consented to by the other contracting party and the novation agreement will normally be in the form of a tripartite agreement. After the novation, the new contracting party assumes all rights and obligations ab initio.

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