

Shipbuilding 2021

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

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

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

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

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PARTICIPATION AND OWNERSHIP

Restrictions on foreign participation and investment

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

The Turkish shipbuilding industry is open to foreign participation and investment and there are not any restrictions provided for foreign participation in the shipbuilding industry.

Furthermore, as per article 935/2(c) of the Turkish Commercial Code (Law No. 6102) (the TCC) and the provisions referred to therein, newbuilding vessels can be registered with the Newbuilding Registry, regardless of whether their owners are foreign persons or entities.

Government ownership of shipbuilding facilities

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

The Constitution of the Republic of Turkey and Coastal Law No. 3621 stipulates that the coasts are under the authority and at the disposal of the state, and the public (national) interest shall have priority in benefiting from the coasts. Therefore, the state retains ownership of the coastal areas in which shipbuilding facilities are established under the permission granted by the state through a contract for usufruct and servitude rights. The state only retains the ownership of the allocated land and does not interfere with the business or the management of the shipyard, while keeping the right to monitor and supervise compliance issues. There is no announced plan for the government to divest itself of such control. Nevertheless, there are some exceptions, such as instances where the shipyard is directly owned by private entities, or the rent or usufruct right is granted by free-zone authorities.

KEY CONTRACTUAL CONSIDERATIONS

Statutory formalities

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

Entering into a shipbuilding contract is not subject to any statutory formalities. General provisions of the Turkish Code of Obligations (Law No. 6098) (the TCO) and the Turkish Commercial Code (TCC) are applicable to the signing and execution of shipbuilding contracts; however, the permissions stipulated under the Regulation on the Construction, Refit and Maintenance-Repair of Ships and Watercraft should be obtained to commence such works under the relevant contract.

Choice of law

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

The parties to a shipbuilding contract are free to agree on the law to be applied to the shipbuilding contract as per article 24/1 of the Code on International Private and Procedural Law (Law No. 5718) (the IIPL). According to article 2/1 of the IIPL, the courts shall apply ex officio the law agreed by the parties. Pursuant to the aforementioned article 24/1 of the IIPL, the choice of law that is clearly understood under the provisions of the contract or under the present conditions of the case shall also be deemed valid and binding. If the parties to the contract have not expressly chosen a governing law, then the contract shall be governed by the law of the country with which it is most closely connected pursuant to the conflict of laws rule as set out in article 24/4 of the IIPL, which shall be the law of the jurisdiction where the shipyard is located and incorporated and wherein the vessel is constructed. As per article 31 of the IIPL, in any case, the court may also choose to apply the overriding mandatory provisions of a state that is most closely connected with the contract. Furthermore, if a foreign law is chosen under the contract, the exceptions based on public policy (article 5 of the IIPL) and overriding mandatory provisions (article 6 of the IIPL) may apply.

Nature of shipbuilding contracts

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

The nature of shipbuilding contracts is not statutorily defined in Turkish law. However, according to the precedents of the Supreme Court (*Yargıtay*) and scholarly opinion, in principle, shipbuilding contracts are regarded as contracts for works and services, which fall within the scope of the general provisions of the TCO. Having said that, there may be different interpretations according to the provisions of the relevant shipbuilding contract, such as being a sui generis contract bearing obligations on the sale of both goods and services.

Hull number

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

The hull number is one of the key elements to distinguish a vessel from others. Therefore, the reference made to the hull number in a shipbuilding contract shall serve the ease of identification and proof. The hull number is one of the alternatives (including its name and any other identification mark) required for the registration of a hull with the Newbuilding Registry (NBR) as set out in article 988/1(a) of the

TCC. Thus, the hull number can be considered as an essential element of the contract from registration and identification points of view.

Deviation from description

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

Unless otherwise agreed by the parties in the shipbuilding contract, the builder, in principle, does not have the right to deviate from the figures specified in the contract. Any deviation from the figures and descriptions stipulated in the contract shall be deemed as a defect. Having said that, approximate dimensions and descriptions stipulated in a contract might provide certain flexibility to the builder, as long as the result is reasonably close to the contracted figure and does not fall against the principle of good faith (article 2 of the Turkish Civil Code (Law No. 4721) (the Civil Code)). However, if a specific figure is stipulated in the specifications or plans and drawings, this will supersede the approximate figure stipulated in the contract.

Guaranteed standards of performance

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

As per the principle of freedom of contract, the parties can freely incorporate guaranteed standards of performance in a shipbuilding contract. In the case of a breach of the guaranteed standards of performance, as per article 475 of the TCO, the buyer may:

- request a reduction in the contract price;
- request the elimination of the defect, if possible; or
- use its rescission rights, provided that the acceptance of the vessel cannot be expected from the buyer under the breach of such standards of performance.

The parties may also agree on a clause in the contract regarding liquidated damages or penalties in the case of a breach of certain performance or remedies, as they deem appropriate. Currently, there are no trade standards applicable for coating, noise and vibration in Turkey. Therefore, it is recommended that the parties to a shipbuilding contract mutually agree upon the benchmark levels regarding these standards.

Quality standards

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

Under Turkish law, there are no statutory provisions or court precedents that give greater definition to contractual quality standards. Articles 471/1 and 471/2 of the TCO states that the duty of care of the contractor (ie, the builder) shall be determined on the basis of acts of a prudent businessperson in the relevant area.

Classification society

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

The classification society's liability against the parties with whom they do not have a contractual relationship is not yet finally settled under

Turkish law. There are no statutory provisions clearly establishing the liability of the classification society against third parties (eg, the buyer). Among scholars, it has been suggested that a classification society may be held liable by a third-party buyer on the basis of the breach of the trust that is created by the class certificate; such liability is based directly on the general duty of good faith as set out in article 2 of the Turkish Civil Code. Another scholarly opinion goes to the effect that a classification society may be held liable in tort by a third-party buyer.

There have been only a few cases decided by the Istanbul Maritime Court where the liability of the classification societies have been discussed; however, to the best of our knowledge, one of these cases was settled before appeal, and the other case is still pending following various appeal decisions. Therefore, the Turkish Supreme Court is yet to have a final say on this issue.

Flag-state authorities

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

Yes, the flag-state authorities may delegate their powers to classification societies in accordance with the provisions of the Regulation on Institutions Authorised for Vessels. The powers may be wholly or partially delegated and include the performance of surveys and inspections and the issuance of certifications.

Registration in the name of the builder or the buyer

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

As per article 986/1 of the TCC, the vessel or yacht under construction (VUC) can be registered in the NBR upon request of the buyer, the builder, the creditor having a precautionary injunction over the vessel, or the mortgagee (if any). The registration can be made in the name of the builder or the buyer, which can be agreed upon in the contract. Upon the mentioned registration, the registered title and encumbrances (if any) become public.

Title to the vessel

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

The parties are free to agree on to whom the title will belong during construction. In the event that the parties have not clearly agreed on this issue in the contract, it is disputed under Turkish legal doctrine whether the buyer or the builder shall be entitled to the title of the VUC until delivery. The matter was in fact discussed during the drafting of the new TCC, where some legal scholars opined that the title should belong to the buyer until delivery, whereas the builder should have a statutory mortgage right over the VUC. Ultimately, this view was upheld in the TCC, where articles 986/1 and 987/1 of the TCC clearly distinguish between the 'owner of the VUC' and the 'owner of the shipyard who is granted a statutory mortgage over the VUC'. In practice, however, it is usually the builder who obtains in his or her own name the building licence for the VUC from the Harbour Master. If so, the title of the VUC would be deemed to be held by the builder. It is strongly recommended that the parties register the VUC with the NBR to clarify the title issue. The parties are also free to agree on the gradual passing of the title,

upon the progress of the vessel's construction, or at a certain stage. The buyer can obtain title to the vessel by means of registering the vessel in the NBR when the construction level of the vessel is sufficient to distinguish the vessel from the other vessels; whereby, this is a condition for the registration of the vessel and not the ship mortgage.

Passing of risk

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

In a shipbuilding contract that the risk shall remain with the builder until delivery of the vessel in cases where the VUC is registered in the buyer's name. As per article 477/1 of the TCO, the risk shall pass to the buyer upon the delivery and acceptance of the vessel, save for hidden defects and defects concealed on purpose by the builder.

Subcontracting

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

As per article 471/3 of the TCO, the builder is obliged to construct the vessel either itself or have it constructed by others under its own supervision, unless the builder's own qualifications are important in the building of the relevant vessel. It is important to stipulate in the contract whether the buyer allows the builder to subcontract the whole or a part of the works or not. The builder will be responsible for the works carried out by its subcontractors as if these were carried out by the builder itself, unless otherwise agreed upon in the contract. Even though including a maker's list in the contract completely depends on the negotiation between the parties, it is very frequently used.

Extraterritorial construction

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

In general practice, the parties are free to decide on the place where the vessel will be wholly or partially constructed, as well as on the qualifications and origin of the materials that will be used. In the event that there is no such provision in the contract, then it is important to check whether the builder is allowed under the contract to construct the vessel in a different country than the country of the shipyard. If there are no such provisions in the contract, then article 471/3 of the TCO shall apply, according to which the builder will be obliged to construct the vessel itself, or have it constructed by others under its supervision.

PRICING, PAYMENT AND FINANCING

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

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

The general principle in vessel and yacht construction agreements is the turnkey practice, thus fixed price. Needless to say, the parties may choose to include an adjustment clause to determine situations when the fixed price will be altered, such as a change in material and class requirements. According to article 480 of the Turkish Code of Obligations (TCO), if a contract includes a fixed-price provision, the builder will then be obliged to carry out the construction against the determined price and cannot request an increase in price even if the construction

requires more cost and effort. However, in the event that certain conditions that could not be foreseen or were not considered in the beginning by the parties prevent or significantly hinder the performance of the builder, then the builder may ask the court to adapt the agreement to new conditions or, if this is not possible or cannot be expected from the buyer, the builder may rescind the contract. The builder may only be entitled to use its termination right in cases where this is required under the principle of good faith.

As per article 481 of the TCO, in the event that the price is not predetermined or determined approximately in the contract (which is unlikely in practice), then the price shall be determined in accordance with the value of the vessel at the place and date of construction, as well as the costs suffered by the builder.

Price increases

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

According to article 480/1 of the TCO, if a fixed price is determined in the contract, there will be no statutory remedies for the builder to charge the buyer for price increases of labour and materials unless otherwise agreed in the contract. However, in unforeseeable or foreseeable but unconsidered circumstances, the builder may request the court to adjust the price in accordance with the new conditions. In such cases, general principles such as good faith and prudent merchant shall be taken into consideration.

Retracting consent to a price increase

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

Article 480 of the TCO entitles the court to adjust the price of a contract provided that the circumstances envisaged under the law has arisen. In cases where the parties have already entered into a contract with free will, it will be difficult to challenge the price thereafter based on the claim that their consent was impaired due to economic duress. Having said that, this will require a case-by-case analysis taking into account the specific claims of the parties regarding economic duress.

Exclusions of buyers' rights

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

The parties to a shipbuilding contract are free to agree on the buyer's right to set off, suspend payment or deduct certain amounts, unless this falls against public policy.

Refund guarantees

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

In practice, refund guarantees are issued by banks in the form of bank letters of guarantee. In this respect, the response to this question is provided on the assumption that the refund guarantee is provided by a bank. There is no standard form or wording for refund guarantees under Turkish law, and the content is subject to negotiation of the parties and the bank. However, the guaranteed amount, the beneficiary, the party whose obligation is being guaranteed and the conditions under which the refund will be made shall be included in the relevant refund guarantee.

Under Turkish law, guarantee agreements (including refund guarantees) do not have any statutory validity condition, and a simple written agreement is sufficient to prove its existence and validity (provided that such an agreement does not violate any mandatory provision of Turkish law). Refund guarantees are not subject to any permission from any governmental authority; however, there is an obligation of the Turkish guarantor to provide a notice upon providing guarantees to third parties located outside of Turkey.

This response does not extend to or cover personal guarantees or surety.

Advance payment and parent company guarantees

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

Under Turkish law, guarantee agreements, including advance payment guarantees and parent company guarantees, do not have any statutory validity conditions, and a simple written agreement is sufficient to prove their existence and validity, provided that such an agreement does not violate any mandatory provision of Turkish law. In practice, advance payment guarantees are issued by banks in the form of letters of guarantee.

This response does not extend to or cover personal guarantees or surety.

Financing of construction with a mortgage

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

As per article 1054/1 of the Turkish Commercial Code (TCC), either the buyer or the builder may create and register a mortgage over a vessel or yacht under construction (VUC) provided that the VUC is registered in their name. As per the provisions of article 1054 of the TCC, a mortgage can be established on a VUC from the date of its keel-laying until the date of its launching, beginning from the time of the vessel becoming clearly and permanently distinguishable by placement of its name and number on a visible spot thereon. Article 1055 of the TCC stipulates that the mortgage on a VUC shall be established upon written agreement of the owner and the creditor, which should be certified by a notary public and by registration of the mortgage with the Newbuilding Registry. Alternatively, an agreement may also be made before the registrar.

DEFAULT, LIABILITY AND REMEDIES

Liability for defective design (after delivery)

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

It is important to determine which party is liable for the design under the contract. If the design liability is on the buyer, then the builder cannot be held liable in this respect, unless it has acted in fault or in non-compliance with the design requirements set out in the contract. However, if the design liability rests on the builder, then the provision of article 474 et seq of the Turkish Code of Obligations (TCO) concerning the buyer's alternative rights in the case of defect becomes applicable.

Remedies for defectiveness (after delivery)

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

If it is determined in the contract that the builder's warranty liability shall continue within the warranty period against third parties (eg, buyers), then the builder can be held liable against the new buyers (thus third parties) under the determined conditions. There are no other statutory remedies for this purpose. In the event that a mortgage is established over the vessel or yacht under construction (VUC), then the mortgagee may file a lawsuit requesting the court to prevent the builder's act or failure to act that causes the deterioration of its physical condition or decrease in its value. Otherwise, the only option for a third party would be to raise a tort claim against the builder under the relevant provisions of the TCO, provided that the required conditions are met.

Liquidated damages clauses

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

If the contract bears any provisions regarding liquidated damages or penalties for late delivery or failure to meet the guaranteed performance criteria, these will be applicable and binding on the parties. The liquidated damages claim is not related to damages suffered. The parties are free to determine the amount of the liquidated damages or penalties and can determine a cap for liquidated damages or penalties payable.

Accordingly, it is recommended that a liquidated damages or penalty clause be determined by the parties whereby it shall be explicitly stated that any party's right to claim damages shall be reserved if damages exceed the amount of mutually agreed penalty or liquidated damage amount.

As provided under article 22 of the Turkish Commercial Code (TCC), Turkish law does not accept the intervention of the court to the amount of penalties set out in the contracts between merchants, save for certain limited exceptions such as the penalty amount being possible to lead to economical destruction of the merchant (as worded by the Supreme Court). However, these are determined on a case-by-case basis taking into consideration the actual circumstances and that the builders of vessel construction agreements are mostly merchants (ie, companies), they will not be entitled to request a decrease in a penalty from the court by alleging that it is excessive unless they provide sufficient documents and information evidencing that the penalty will cause irreversible damage.

Preclusion from claiming higher actual damages

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

If the contract bears any provisions regarding liquidated damages or penalties for late delivery or failure to meet the guaranteed performance criteria, these will be applicable and binding on the parties. The liquidated damages claim is not related to damages suffered. The parties are free to determine the amount of the liquidated damages or penalties and can determine a cap for liquidated damages or penalties payable.

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Force majeure

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

The parties to the contract are free to design the force majeure clause, as long as this is in line with public policy.

Umbrella insurance

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

Yes, construction all risks insurance, covering the builder and all the subcontractors of all tiers or each of the named subcontractors of a particular project, is available.

Disagreement on modifications

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

Theoretically, one of the parties may request the alteration of the key terms of the contract from the court or an arbitral tribunal, although this is very unlikely in practice. In such cases, in practice, courts tend to refer the case to expert panels upon hearing the statements of the other party, while arbitral tribunals or the technical experts appointed under the contract (if this is the case) may render a decision directly at the party's request.

Acceptance of the vessel

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

The buyer's signature of a protocol of delivery and acceptance constitutes a statement that the buyer has accepted the apparent defects at the time of signing. However, latent defects are not deemed to fall within this scope, thus will not be deemed as accepted by the buyer. Therefore, in such cases, the remedies stipulated in the mandatory provisions of law and the builder's warranty liability shall remain valid. If the buyer notices any defect after the delivery of the vessel, then it shall notify the builder within a reasonable period, unless otherwise agreed in the contract. Furthermore, if a latent defect or any defect within the scope of the warranty clause appears after delivery, the buyer shall also notify

the builder of this defect as soon as possible; otherwise, the buyer will be deemed to have accepted the vessel with such defect. Needless to say, specific provisions of the contract regarding the warranty liability shall also be taken into account, such as whether a notice requirement is determined to call the builder's warranty liability.

Repair location and associated costs

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

There is no explicit provision in the TCO dealing with these questions and therefore, in practice, it is generally regulated contractually. However, in the absence of any contractual agreement, given that article 471/3 of the TCO requires the builder to complete all works personally or under its own management, it could be held that the buyer does not have the right to request that the works for repair or replacement are undertaken elsewhere, except where it could be proven that the specific repair or replacement cannot be carried out at the builder's shipyard. On the other hand, article 475/1(3) of the TCO requires the builder to carry 'all costs' of repair or replacement, unless such costs are excessive. As such, it will have to be determined in each specific case whether dry-docking expenses could be deemed as reasonable or excessive.

Liens and encumbrances

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

The TCC explicitly grants the statutory lien right to the builder (shipyard) over the VUC for its receivables arising from the building and repair of the vessel, which shall be registered in the relevant NBR (article 1013 of the TCC). Subcontractors and suppliers are left outside the scope of this statutory lien right. However, the supplier or subcontractor may apply the right of retention if they have possession of the relevant equipment, while the title thereof belongs to the buyer. There is no explicit statutory provision to the effect that the vessel shall, at the time of delivery, be free from all liens, charges and encumbrances. However, it may be assumed that the general provision of article 475/1 of the TCO regarding the builder's liability for defects would apply in such cases as well.

Reservation of title in materials and equipment

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

The validity of the reservation of title in materials and equipment is subject to its compliance with the official form stipulated in article 764/1 of the Turkish Civil Code, which is required to be entered into and registered with a special registry before a notary public. If the materials and equipment are delivered without such registration and are installed on the VUC, then they fall within the scope of the buyer's ownership over the VUC, as these materials and equipment become an integral part or a supplement of the VUC upon their installation.

Third-party creditors' security

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

As long as the title of the VUC is with the builder, the third-party creditors of the builder can obtain a precautionary attachment or an enforcement lien over the vessel or equipment to be incorporated in the vessel or start an enforcement process. However, if the vessel is under construction within a free zone, the fact that all materials, machinery and equipment enter into free zones in the name of the shipyard, in practice, there are cases where third-party creditors have applied arrest over the machinery and equipment even though the VUC was registered in the name of the buyer.

Subcontractor's and manufacturer's warranties

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

The subcontractor's or manufacturer's warranty can be assigned to the buyer under the shipbuilding contract or otherwise. In the event that no assignment is made, the buyer may only be entitled to claim tort liability of the subcontractor or the manufacturer in cases where the criteria sought under articles 49 et seq of the TCO are present.

Default of the builder

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

The parties are free to determine a specific date for performance and a cure period for default, as well as the buyer's rights and remedies in cases of delay in performance. If the parties have already agreed on a specific date for the performance, there is no legal requirement to serve an official notice to put the builder in default; if not, then an official notice requesting the performance will be necessary to determine the date when the buyer's remedies begin to accrue. In the event that both parties are merchants, such notice should be served:

- through a notary;
- by registered return-receipt mail;
- by telegraph; or
- by a registered electronic mail system using a secured e-signature, as per article 18/3 of the TCC.

As per article 124 of the TCO, there is no need to grant a period for remedy of defaults if:

- the current status or behaviour of the debtor proves that granting a period will be ineffective (and will not yield the requested result);
- owing to the default of the builder, the performance of the obligation has become useless; or
- it is understood from the contract that due to non-performance of the obligation at a certain time or within a certain period, its performance will no longer be acceptable.

If the builder defaults in the performance of the shipbuilding contract, then the buyer may:

- request the performance of the contract and a compensation for delay; or

- request the compensation of damages arising from non-performance of the contractual obligation, or rescind the contract, by notifying that it waives its right to request the performance and the compensation for delay (article 125 of the TCO), unless otherwise agreed under the contract.

In the event of rescission of the contract, the parties are discharged from their contractual obligations, and the buyer may request compensation for damages caused due to the invalidation of the contract, unless the defaulting builder proves that it had no fault.

Furthermore, article 473 of the TCO stipulates that, if it is clearly determined that there is no longer any prospect of completing the work on time owing to the builder's failure to commence the works on time, or delay in the works in contradiction with the contractual terms, or delays not attributable to the buyer, then the buyer may rescind the contract without waiting for the delivery date. This provision grants the buyer the right to rescind the contract. During the course of the work, if it becomes apparent that the work is going to be defective or not in compliance with the contractual specifications due to the builder's fault, to recover such, the buyer may serve a warning to the builder by which it grants an adequate period for remedying the defect or non-compliance and warns the builder that such remedy works shall otherwise be contracted to a third person while all the damage and expenses will be borne by the builder.

The buyer's alternative rights provided under article 475 of the TCO may also apply.

Remedies for protracted non-performance

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

The shipowner can request a precautionary injunction order for the delivery or relocation of the vessel when the builder fails to construct it. The court, while granting such an order, may request the claimant to lodge sufficient security in consideration of the losses or damage of the opponent if such request of the claimant is found unjust. In very rare cases, the court may grant a precautionary injunction for the delivery or relocation of the vessel for further construction by a different builder, the cost of which will be borne by the previous builder.

Builder's insolvency

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

It is indeed recommended to include a clause in the contract that would enable the buyer to terminate the contract if the builder becomes insolvent, or if it loses its right of disposition over its property, or its right to freely dispose is restricted. Furthermore, provisions stating that the contract may be terminated not only due to bankruptcy, but in the case of a concordat or other similar arrangements for the composition of bankruptcy or insolvency situations, may be included within the shipbuilding contract.

Judicial proceedings or arbitration

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

Foreign arbitration, such as the London Maritime Arbitrators Association, is the most common agreement reached by the parties in this regard whereas the jurisdiction of Turkish courts is also preferred occasionally. If the jurisdiction of Turkish courts is chosen, then the admiralty courts of the relevant province shall be competent to resolve these disputes, as set out in the recent decisions of the Appeal Court.

Buyer's right to complete construction

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

As per article 473/2 of the TCO, the buyer may exercise its contractual right to take possession of the vessel against the bankrupt's estate, provided that the VUC is registered in the name of the buyer. In such a case, the VUC can be recovered from the bankrupt's estate by claiming the recovery of property. However, if ownership of the VUC is with the builder, then the buyer will not be able to claim the return of the possession of the VUC.

ADR/mediation

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

The parties to a shipbuilding contract usually prefer to insert an arbitration clause rather than a mediation clause. If there is no arbitration clause in the contract and the parties have agreed on the jurisdiction of Turkish courts and the application of Turkish law, and the conditions stipulated in the legislation are fulfilled, then the parties shall apply to mediation before filing a lawsuit in the courts as a precondition (mandatory mediation).

Default of the buyer

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

If the buyer defaults in the performance of the shipbuilding contract (ie, in the payment terms), then the builder may:

- request the performance of the contract and an interest and compensation for delay;
- request the compensation of damages arising from non-performance of the contractual obligation; or
- rescind the contract, by notifying that it waives its right to request the performance and the compensation for delay.

In the event of rescission of the contract, the parties are discharged from their contractual obligations, and the builder may request compensation for damage caused due to the invalidation of the contract, unless the defaulting buyer proves that it has no fault. The builder may claim interest for monetary debts and request damages exceeding the interest amount.

Whether the title of the VUC will be on the buyer or on the builder to determine the consequences of the builder's cancellation of the contract. It is also important to agree in the contract the remedies of the builder in cases of the buyer's default, whether the default of the buyer will grant the builder the right to sell the VUC to a new buyer or to enforce its statutory lien right under the law. In cases of the buyer's default in the performance of the contract, the outstanding receivables under the contract constitute a maritime claim under article 1352/1(m) of the TCC, and the shipbuilder has the right to request precautionary attachment (arrest) over the VUC.



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CONTRACT FORMS AND ASSIGNMENT

Standard contract forms

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

All international standard forms are recognised and used in Turkish shipbuilding practice; however, shipyards usually prefer to use their own forms, which are mostly drafted taking the standard forms as a basis. For this reason, it is difficult to say that any one of the standard forms is predominantly used.

Assignment of the contract

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

The parties to a shipbuilding contract may assign the contract to a third party in accordance with article 205 of the Turkish Code of Obligations (TCO), which stipulates that assignment of an agreement is a tripartite agreement between the assignor, assignee and the other contracting party to the shipbuilding contract. With the assignment agreement, the assignor transfers all rights and obligations arising from the shipbuilding contract to the assignee, together with the capacity of being a party to the agreement. The assignment may also be made by way of notifying the shipbuilder and obtaining its acknowledgement. If the shipbuilding contract allows its assignment, then no prior consent of the other party is necessary. However, if the assignment is subject to the prior consent of the other party, then this consent should either be obtained in advance or be ratified by the other contracting party after its signature.

The validity of the assignment agreement is subject to the same form requirements with the original contract. There is no statutory requirement for shipbuilding contracts under Turkish law, therefore the assignment of shipbuilding contracts is also free of any statutory form requirements. However, if the parties agree on any form requirements on the shipbuilding contract, then these will also apply to the relevant assignment agreement. The parties may freely decide whether the

original contract will be discharged by the assignment, or whether the new contracting party will assume all rights and obligations ab initio.

UPDATE AND TRENDS

Recent developments

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

Along with the rest of the world, covid-19 and its implications have taken the headline of hot topics in Turkey throughout 2020 and continuing into 2021 with the secondary waves of the pandemic.

As anticipated, the crisis initiated by the covid-19 has deeply affected the Turkish economy in general due to lockdown measures, which has caused a disruption in a number of sectors with the supply chain becoming one of the most affected sectors. The government has adopted several measures to ease the burden on the market created by the covid-19.

Despite its numerous disadvantages and disruptive effects on the economy in general, covid-19 has positively affected the super-yacht building market and caused an increase in the demand in the yacht-building market.

Furthermore, the covid-19 also increased the ship-recycling volume because certain cruise liners opted to recycle some of their old cruise vessels at Aliaga, Izmir rather than incurring the burden of maintenance costs.

Coronavirus

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

The Turkish government has adopted and implemented various forms of emergency legislation, relief programmes and other initiatives to address the pandemic and ease the burden it has inflicted on the economy.

One of the first precaution measures was the prohibition of termination and short-term working allowance to ensure the employment guarantee of the employees while providing relief for employers via the short-term working allowance; under which scheme, the government (through social security institution) provided a certain percentage of the employees. There have been certain other legislative measures aimed to prevent and soften the disruption caused by the covid-19, which include postponement of certain tax and social security premium payments, postponement of judicial time limitations, and funding of banks to make available short-term loans with low interest rates. Even though there has been a huge number of legislative measures, it would be difficult to state that shipbuilding sector-specific measures have been adopted.

Furthermore, the Turkish government imposed several lockdowns since March 2020 (with the last one coming to an end at the end of May 2021) during which additional measures have been taken to ensure that supply chain and other essential sectors have kept operating while preventing majority of the population from interaction in order to help reduce the infection rate. These lockdown measures have been imposed via circulars issued by the Ministry of Internal Affairs and any form of domestic and international transportation and logistics as well as construction have been specified as, inter alia, essential sectors.

The Ministry of Transportation has issued separate circulars to ensure that seafarers and workers or employees operating as part of fishing vessels, drilling vessels, shipping agencies, shore facilities and

offshore facilities and service providers to ships and facilities are determined as 'essential workers' and, thus, these essential workers have been able to benefit from the exemptions introduced under the circulars of the Ministry of Internal Affairs.

LAW STATED DATE

Correct On

48 | Give the date on which the information above is accurate.

8 June 2021.

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