

# Netherlands

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### 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.

Participation is open to foreign investors in the shipbuilding industry in the Netherlands. Dutch tax law provides a very attractive fiscal climate for foreign investors generally. For innovative shipbuilders companies in the field of R&D can benefit from the 'innovation box' resulting in an effective corporate tax rate of 5 per cent as well as an allowance on wage tax and social security contribution deductions. There are no restrictions on foreign participation.

### 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 government of the Netherlands has not retained ownership or control of shipbuilding facilities.

### 3 Statutory formalities

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

The parties are free to negotiate the terms of a shipbuilding contract and design it as they wish. There are no statutory formalities to be met in entering into a shipbuilding contract.

### 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?

The parties to a shipbuilding contract are free to make a choice of the law applicable to their contract. The choice of law shall be made expressly or clearly demonstrated by the terms of the contract (preferably) or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract. The parties may at any time agree to subject the contract to a law other than that which previously governed it as a result of an earlier choice. The Rome I Regulation (EC No. 593/2008 of 17 June 2008) on the law applicable to contractual obligations applies. The choice of law made by the parties will be upheld by the court and the existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of articles 10, 11 and 13 of the Rome I Regulation.

### 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?

Although the wording of a specific shipbuilding contract will be decisive to conclude whether it should be construed as a contract for the sale of goods, or as a contract for the supply of workmanship and materials, generally speaking a shipbuilding contract is qualified as a contract to construct a vessel in accordance with construction law principles. If the vessel does not meet specifications there is a breach of contract on the builder's side.

### 6 Hull number

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

The hull number stated in the contract is an essential element to identify and apportion title to building materials and equipment. The builder should label any building materials and equipment with the hull number for identification purposes upon their arrival at the builder's premises. All goods labelled with the hull number are identifiable as belonging to the particular building project unless there is a reservation of title in materials and equipment (see question 33) from a supplier.

### 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 use of the word 'approximate' in the dimensions and description will allow the builder to deviate slightly from the figure stated. A court will have to decide on a case-by-case basis the exact latitude the builder has. If it is of paramount importance that a certain number (eg, the draft of a vessel) is not exceeded or underscored, it is therefore advisable for the commissioning party to not accept approximate dimensions or descriptions.

### 8 Guaranteed standards of performance

May parties incorporate guaranteed standards of performance whose breach entitles the buyer to liquidated damages or rescission?

Clauses guaranteeing certain standards of performance are frequently included in shipbuilding contracts. If upon delivery the guaranteed performance standards cannot be met by the builder, the building contract may allow for payment of liquidated damages by the builder and if a certain benchmark cannot be met, rescission of the contract can be applied for. The correct phrasing of a liquidated damages

clause is of great importance. Dutch courts can mitigate contractual penalties upon request of the builder, whereas a liquidated damages clause reflecting a genuine compensation for the loss of the owner cannot easily be set aside in whole or in part.

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### 9 Quality standards

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

The inclusion of a certain contractual benchmark will make the standard of performance of the builder more transparent. Reference to 'highest North European shipbuilding standards' will eventually have to be demonstrated by an expert opinion to the court, should there be a dispute between the parties what the scope or application of the standard is.

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### 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?

The party commissioning construction of a newbuilding will decide upon the intended flag of the vessel once delivered and also upon the preferred choice of classification society. The contract with the classification society, however, will be between the builder and the classification society. In this regard the commissioning party is a third party and the classification society does not owe a contractual duty of care to him. If any defects in the vessel are attributable to errors or omissions of the classification society the claim should be directed to the builder based on contract. A claim from the buyer directly against the classification society should be based on tort. If a claim is brought in tort by the buyer the classification society may seek to rely on any exonerating clauses contained in the contract with the builder.

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### 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 flag state authorities of the Netherlands have outsourced compliance with flag state legislation to the classification societies. In the Netherlands the governmental agency responsible is the Netherlands Shipping Inspectorate of the Ministry of Infrastructure and Environment. The Dutch Shipping Act applies to all seagoing vessels flying the Dutch flag and the Shipping Inspectorate of the Netherlands monitors vessels flying the Dutch flag, but also foreign vessels, crews, shipping companies and classification societies. The Inspectorate has authorised a number of organisations, including classification societies to perform certain inspections. The Netherlands has appointed seven classification societies as recognised organisations to act on its behalf and the working method and procedures are laid down in an agreement combined with a mandate. It concerns inspections and certification required by international conventions (eg, SOLAS, MARPOL, Tonnage Measurement, Load Lines and ILO 152).

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### 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 seagoing vessel under construction is only possible if it is under construction in the Netherlands (article 8:194 section 1

of the Civil Code). Registration must be requested by the shipowner and he must submit a declaration signed by him to the effect that, to the best of his knowledge, the vessel is registrable as a seagoing vessel. If it concerns a request for registration as a seagoing vessel under construction, this declaration must be accompanied by proof that it is a vessel under construction in the Netherlands. Shipbuilding contracts in this jurisdiction usually contain a provision allowing the commissioning party to register the vessel in his name as a seagoing vessel under construction upon payment of a certain milestone instalment. The earliest possible moment therefore is the laying of the keel of the vessel. The legal consequences of registration of the vessel are mainly in respect of the possibility to register a mortgage over the vessel under construction.

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### 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 are free to contract that title will pass from the builder to the buyer during construction and the earliest moment during construction is laying of the keel or reaching a similar milestone in construction. Title will then pass immediately to the buyer.

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### 14 Passing of risk

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

After delivery the vessel constructed shall be at the risk of the buyer. The risk of loss and damage will remain with the builder until delivery and acceptance of the vessel.

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### 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?

The builder will be entitled to have the works performed by one or more subcontractors under his supervision and, with respect to parts of the works, the builder will also be entitled to delegate the supervision to others, without prejudice, to his responsibility for the proper performance of the contract (article 7:751 of the Civil Code). If an owner wants a certain subcontractor to be involved in the project this will usually be agreed upon with the builder. The same agreement is required with the exclusion of a certain subcontractor or supplier.

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### 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?

The builder is under no obligation to inform the buyer of an intention to have certain main items constructed in another country, but to avoid claims for misrepresentation ('highest Dutch build quality') it is advisable that the builder discloses this fact, should he have the intention to construct main sections outside the country where the builder is located.

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### 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?

Where, at the time of entering into the building contract, no fixed price has been set or only a target price, the law provides that the

commissioning party owes a reasonable price (article 7:752 of the Civil Code). In setting the price account shall be taken of the prices usually stipulated by the builder at the time of entry into the contract and the expectations the builder has raised with respect to the presumed price. Where a target price has been set, it may not be exceeded by more than 10 per cent, unless the builder has warned the customer of the possibility of a further cost overrun in reasonable time to afford the customer the opportunity to limit or simplify the works at that stage. Within reasonable limits the builder must cooperate with such limitation or simplification.

## 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?

Where, after entry into the building contract, circumstances arise or become apparent that increase costs and that are not attributable to the builder, the court may upon the demand of the builder adjust the stipulated price to the cost increase in whole or in part, provided that the builder, in setting the price, was not obliged to take the likelihood of such circumstances happening into account. This shall only apply if the builder has warned the customer of the necessity of a price increase as soon as possible, so that the latter can exercise in good time the right to which he is entitled to make a proposal to limit or simplify the works.

## 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?

In general a juridical act may be annulled when it has been entered into as a result of economic duress, fraud or undue influence (article 3:44, section 1 of the Civil Code). Duress occurs where a person induces another person to perform a specific juridical act by unlawfully threatening him or a third party with harm to his person or his property. The duress must be such that a reasonable person would be influenced by it. This means that the person exercising economic duress will most probably also act in tort towards his victim. The recent economic and financial downturn after the summer of 2008 has led to a number of cases where parties have tried to invoke economic duress (eg, extreme price increase of steel), but as far as we know these attempts have not been successful.

## 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?

The parties are free to exclude the buyer's right to set off, suspend payment or deduct certain amounts when it is time for the buyer to make a milestone payment.

## 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?

If the contract price is payable by the buyer in pre-delivery instalments according to certain milestones, a refund guarantee from the builder will usually be in the form of an undertaking from his bank to refund the relevant instalment upon the buyer's first written demand. Shipyards are not subject to any governmental or statutory provision requiring consent of any authority to have the refund guarantees issued.

## 22 Advance payment and parent company guarantees

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

As for advance payment guarantees there are no formalities to be met prior to issuance of the letter of guarantee. The articles of association of the guarantor should allow the guarantor to issue letters of guarantee and the same applies for parent company guarantees intended to guarantee the performance of a daughter company. Under Dutch law such a letter of guarantee is usually in the form of a contract of suretyship, whereby one party, the guarantor, obliges himself towards the other party, the obligee, to perform an obligation to which a third person, the principal obligor, is or will be bound towards the obligee. Suretyship is dependent upon the obligation of the principal obligor in respect of which it has been entered into. Since the guarantor may also avail himself of the defences that the principal obligor has against the obligee if they relate to the existence, content or time of performance of the obligation and the guarantor is not obliged to perform until such time as the principal obligor has failed in the performance of his obligation, these defences are usually explicitly excluded in the wording of such a letter of guarantee.

## 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?

During construction of the vessel the builder or the buyer can create and register a mortgage over the vessel under construction if the buyer respectively the builder owns the 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?

Defective design does not fall within the scope of poor workmanship for which the shipbuilder is liable under the warranty clause of a building contract. Parties should explicitly include defective design if it is their intention the builder will be liable for that under the warranty clause.

## 25 Remedies for defectiveness (after delivery)

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

Third parties suffering loss or damage due to defectiveness of a vessel can try to make a claim against the shipbuilder based on tort. It will be difficult to successfully claim damages from a shipyard, since there is no obligation for the shipyard to repair the damage if the standard breached does not serve to protect against damage such as that suffered by the third party suffering the loss. Except where there are grounds for justification, the following are deemed tortious: the violation of a right and an act or omission breaching a duty imposed by law or a rule of unwritten law pertaining to proper social conduct.

## 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 damages suffered? Can courts mitigate liquidated damages or penalties agreed in the contract and for what reasons?

All clauses that provide that a shipyard (obligor), should it fail in the performance of any of the performance criteria of the building

contract, must pay a sum of money or perform another obligation, is considered to be a penalty clause, irrespective of whether this is to repair damage or an incentive only to encourage performance (article 6:91 of the Civil Code). The creditor may not demand performance of the penalty clause, where the failure in the performance of the obligation cannot be attributed to the shipyard. A notice will be required in order to demand performance of the penalty clause in the same cases as such is required to claim damages due by law. The court may reduce the stipulated penalty upon the demand of the debtor, if it is evident that fairness so requires. The court, however, may not award less than the damages due by law for failure in the performance. The Supreme Court has held in *Ampatil/Weggelaar* (Supreme Court 17 December 2004, NJ 2005, 271) that claiming payment of a penalty under certain circumstances can be unacceptable according to standards of reasonableness and fairness.

### 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?

Upon the demand of the creditor the court may award supplementary damages if it is evident that in a given case fairness so requires. These are in addition to the stipulated penalty intended to take the place of damages due by law.

### 28 Force majeure

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

A general definition of force majeure can be found in article 6:75 of the Civil Code: the failure in performance cannot be attributed to the obligor if it is neither due to his fault nor for his account pursuant to the law, a juridical act or generally accepted principles. The parties to a contract are free to include or exclude certain events from the contractual concept of force majeure.

### 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?

The Dutch Bourse Policy for Construction Risks 1947 is the prevailing builders' risk insurance available in the insurance market of the Netherlands. According to this policy a shipyard can take out insurance not only for itself, but also on behalf of all co- and subcontractors and suppliers in connection with the construction, conversion or repair of a certain named vessel. The insurance is to cover all risks, including fire and theft, in buildings, yards and shops of the assured, while under construction, fitting out, and during trials and it includes materials while in transit – except by sea – to and from the works and/or the vessel wherever she may be lying.

### 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?

The parties have contractual freedom, but if there is disagreement on the proper construction of a contractual term a court or arbitral tribunal will have to establish the presumed intentions of the parties. In *Vodafone Libertel NV/European Trading Company CV* (Supreme Court 19 October 2007, JOL 2007, 686) the Supreme

### Update and trends

The hot topics in shipbuilding litigation and arbitration in the Netherlands remain disputes over consequences of additional work and disputes about the extent of the warranty after delivery. For vessels built outside the Netherlands another topic of permanent litigation relates to claims for late delivery.

Court held that in finding the proper interpretation of a contractual clause a mere linguistic approach will not suffice. The test must be to try to establish the meaning parties reasonably have given to the disputed clause, taking into account each other's position. The rights and obligations of parties in relationship with one another are not only determined by the explicit contractual terms prevailing between them, but also by principles of reasonableness and fairness.

### 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?

The buyer's signature of a protocol of delivery and acceptance will not be final and binding if defects latent at the time of delivery have not been discovered and were not discoverable by a prudent buyer taking reasonable precautions to avoid such defects from escaping his attention. The liability of the shipyard for latent defects known to the shipyard and not disclosed cannot be excluded or limited and neither can it be made subject to shorter prescription period as provided for by law (article 7:761 of the Civil Code).

### 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?

The exercise of a lien over the vessel or work or equipment ready to be incorporated in the vessel as a security for payment of invoices can only be successfully obtained if the supplier or subcontractor effectively holds possession of the relevant work or equipment and it can prevent the shipbuilder, buyer or third parties without consent taking possession of this work or equipment. The work or equipment will therefore need to be in the custody of the relevant supplier or subcontractor.

### 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?

Suppliers and subcontractors engaged by the shipbuilder in constructing the vessel will lose any right retaining their title to the goods supplied and the work performed as from the moment the goods supplied and/or work performed are incorporated in the vessel. There is no implied term or statutory provision that a vessel at the time of delivery shall be free from all liens, charges and encumbrances. This has to be agreed in the building contract.

**34 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?

Unless the contract with the subcontractor or manufacturer would contain a provision explicitly denying the shipbuilder's right to assign the warranty to the buyer, the shipbuilder and the buyer will be at liberty to agree on such assignment of the subcontractor's or manufacturer's warranty. There is no specific legislation entitling the buyer to make a direct claim under the subcontractor's or manufacturer's warranty failing a contractual assignment.

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Where a builder defaults in the performance of the building contract, the buyer will have the following remedies to choose from, unless the building contract explicitly limits any of such rights:

- specific performance – as in most civil law jurisdictions – is the prevailing remedy. The plaintiff can request the court to impose a monetary penalty on an unwilling defendant and if ordered by the court any penalties forfeited will accrue to the plaintiff;
- as an alternative the plaintiff can request the rescission of the contract. Property should return if the damaged party so wants subject to protection of bona fide purchasers of chattels; or
- in both cases of specific performance and rescission the plaintiff may also recover damages for breach of contract.

**36 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 the buyer may seek a court order by way of an interim measure to force the shipbuilder to continue construction in accordance with the building schedule agreed upon. Such court order can be enforced by a penalty, which will accrue to the plaintiff should the shipbuilder default (again). As an alternative the buyer may at all times cancel the building contract in whole or in part. In the event of such cancellation the buyer must pay the price applicable to the entire works, after deduction of the savings resulting for the shipbuilder from the cancellation, against delivery by the shipbuilder of the works already completed. If the contract price was made dependent upon the costs actually to be incurred by the shipbuilder, the price

owed by the buyer shall be calculated on the basis of costs incurred, the labour performed and the profit that the contractor would have made for the entire works (article 7:764 of the Civil Code).

**37 Judicial proceedings or arbitration**

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

The parties to a shipbuilding contract are free to make a choice in favour of one of the institutional arbitration institutes or ad hoc arbitrators. The institutions most commonly agreed on by the parties are:

**Stichting TAMARA (Transport and Maritime Arbitration Rotterdam-Amsterdam)**

PO Box 23158  
3001 KD Rotterdam  
Tel: +31 10 436 3750  
www.tamara-arbitration.nl

and

**The Netherlands Arbitration Institute**

PO Box 21075  
3001 AB Rotterdam  
Tel: +31 10 281 6969  
www.nai-nl.org

Failing a choice in favour of arbitration the state courts of the Netherlands are competent to hear the case.

**38 ADR/mediation**

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

There is no tendency yet to incorporate an ADR clause in shipbuilding contracts.

**39 Standard contract forms**

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

The association of shipbuilders in the Netherlands (VNSI) has published a standard form of shipbuilding contract. The VNSI and AWES forms are predominantly used as a basis for drafting a shipbuilding contract.

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