



**Shipbuilding 2014**

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*Getting the Deal Through* is delighted to publish the fully revised and updated third edition of *Shipbuilding*, a volume in our series of annual reports, which provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and clients.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 20 jurisdictions featured.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are referring to the latest print edition or to the online version at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

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**Getting the Deal Through**

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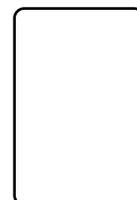
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# Poland

## Marek Czernis and Rafał Czyżyk

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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.

The shipbuilding industry in Poland is open to foreign participation and investment concerning the construction and repair of vessels. Restrictions that could apply to foreign participation in the shipbuilding industry in Poland are contained in the Act on Acquisition of Real Estate by Foreigners and the Act on Seaports and Sea Marinas.

The Act on Acquisition of Real Estate by Foreigners might in some cases require that a foreign investor purchasing a real property or majority of shares in a company owning real property obtains prior permission from the Ministry of Internal Affairs for such a purchase, however the aforesaid is not relevant to entities that are based within the European Union or the European Economic Area.

The Act on Seaports and Sea Marinas, meanwhile, provides that prior consent from the Ministry of Treasury must be obtained for the sale of real estate within certain port areas and that purchase rights may be obtained in favour of the port authority, State Treasury and local municipality. Furthermore, pursuant to the Act, a lease for longer than 10 years within certain port areas requires prior consent from the Ministry of Treasury.

### 2 Government ownership of shipbuilding facilities

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

Currently the government indirectly owns certain real estate in Szczecin, which was previously used for shipbuilding. However, this is entirely due to the sale of that property during a special 'compensation procedure' that was implemented to satisfy the requirements of the European Commission under its decision regarding the demand for reimbursement by the Polish shipbuilding industry (ie, shipyards in Gdańsk, Gdynia and Szczecin) of Polish state aid that had not been authorised by the European Commission.

### 3 Statutory formalities

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

The only statutory formalities may arise out of the provisions of the Commercial Companies Code, by-laws of the relevant Polish company or the Civil Code, all in respect of various corporate approvals required by companies to enter into a shipbuilding contract and the representation rules concerning the execution (signing) of the 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 are free to select the law applicable to the shipbuilding contract and such a choice will generally be upheld by the courts unless it is contrary to the principles of public policy in Poland, which is a rare situation.

Polish law is very rarely chosen in respect of shipbuilding contracts related to the construction of ships in Poland. Usually it is the law of the country where the owner of the particular company that is party to the shipbuilding contract has its legal seat (eg, Norwegian or German law) or, in most cases, English law.

### 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?

Unless the shipbuilding is construed otherwise, under Polish law a shipbuilding contract would be regarded as a contract for constructing a specific thing (namely, a ship). However, under the free contract principle that operates in Polish law, the parties are free to draft the contract in accordance with their requirements. Consequently, the contract can also be drafted as a contract for the sale of goods or as a contract for the supply of workmanship and materials, or otherwise (ie, as a contract sui generis).

### 6 Hull number

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

Generally the hull number stated in the contract is merely a label in respect to the vessel's description, however, from a practical point of view it is recommended that it is the same as the hull number given to the hull by the shipyard (for the purpose of identifying the materials or supplies relevant to the construction of the particular vessel and avoiding any discussions in this regard with, for example, creditors of the vessel, etc).

### 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?

'Approximate' dimensions and the description of the vessel in some cases might allow the builder to slightly deviate from the figure stated in the contract, however, the latitude of the relevant deviation has to be assessed on a case-by-case basis and established in close relation to the relevant project and technology used. In any case, a deviation of over 5 per cent would tend to be considered as excessive.

**8** Guaranteed standards of performance

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

Under Polish law the parties are free to incorporate guaranteed standards of performance (cargo-carrying capacity, speed, fuel consumption, vibration and noise, etc) whose breach entitles the buyer (ordering party) to liquidated damages or rescission of the shipbuilding contract.

**9** Quality standards

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

There are no statutory provisions or court decisions in Poland that give greater definition to contractual quality standards (eg, highest north European shipbuilding standards or Polish good shipbuilding standards). Under Polish law, including such contractual quality standards in the shipbuilding contract provides for the shipyard performance to be assessed by the court from the perspective of standards of performance expected from a professional entrepreneur experienced in the particular field of business (ie, shipbuilding).

**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?

Where the builder contracts with the classification society to ensure that construction of the vessel leads to the buyer's desired class notation, the society does not owe a duty of care to the buyer, and the buyer cannot sue the classification society if certain defects in the vessel escape the attention of the class surveyors, unless the buyer proves that it is due to the gross negligence of the classification society and that the latter's liability lies in tort.

**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 Polish flag-state authority has outsourced compliance with flag-state legislation to the classification societies. The legislation in question is as follows (in some cases the extent of compliance required is partial or limited):

- SOLAS (International Convention for the Safety of Life at Sea) – for cargo ships;
- SOLAS – for passenger ships;
- SOLAS – ISM Code;
- Marpol 73/78 – International Convention for the Prevention of Pollution from Ships;
- the 1966 International Convention on Load Lines;
- the 1969 International Convention on Tonnage Measurement of Ships;
- the Convention on the Control of Harmful Anti-Fouling Systems; and
- the International Ship and Port Security Code.

**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?

It is possible to register the vessel under construction in the Polish Register of Shipping in the name of the party that is the legal owner of the vessel under construction, which is either the builder – which would usually be the case in Poland – or the buyer if the contract provides for the buyer to be the legal owner of the vessel under construction at the stage when it is registered in the Polish Register of Shipping.

The legal consequences of the above registration are:

- the possibility of establishing a mortgage over a vessel under construction in favour of a creditor or another party (eg, the buyer); and
- if the vessel under construction is registered in the name of the buyer, this would safeguard the buyer from the hull being included in the bankruptcy estate of the shipyard.

**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?

As explained in question 5, the parties are free to draft the contract in accordance with their requirements. The parties can therefore agree that title to the vessel under construction would pass from the builder to the buyer during construction and everything affixed to the vessel after the passing of title would cause that affixed element to become a part of the vessel under construction, thus being under the ownership of the buyer. The earliest stage at which the buyer can obtain title to the vessel under construction is after keel-laying.

**14** Passing of risk

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

In general, under Polish law, the risk will pass to the buyer with title, however, the parties are free to draft the shipbuilding contract in such a manner that it provides for a different moment of passing the risk to the buyer (eg, on completing the entire construction of the vessel, as defined in the shipbuilding contract) and until that moment the vessel under construction remains in the custody of the builder.

**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?

Unless the parties provide otherwise in the shipbuilding contract, the builder may subcontract part or all of the contract. The builder is, however, liable for the performance of the subcontractor as if it was the builder performing the work himself. However, if the construction of a particular vessel depends on, for example, the experience, know-how or other qualifications of the originally contracted builder, then the builder is not allowed to subcontract any part of the contract. To avoid any disputes in this respect it is recommended that proper provisions are included in the shipbuilding 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?

Unless the parties provide otherwise in the shipbuilding contract, the builder may have certain main items (eg, the hull or superstructure) constructed in another country than where the builder is located – it is immaterial where and by whom certain performance of the contract is made, as long as it does not violate the provisions of the shipbuilding contract and provides for the relevant applicable quality and other standards (eg, class) to be met.

**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?

Under Polish law there are different provisions for 'fixed-price' contracts and 'labour-and-cost-plus' contracts.

**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?

Polish law provides the builder with statutory remedies available to charge the buyer for price increases in labour and materials despite the contract having fixed-price measures, but only if exceptional circumstances are met (ie, if the performance of the contract would cause the builder to suffer a significant loss). In such a case the builder may apply to the court to have the fixed price increased or the shipbuilding contract terminated.

**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?

Polish law does not allow the buyer to retract consent to an increase in price by arguing that consent was induced by economic duress.

**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?

Under Polish law, the builder and the buyer may agree to exclude the buyer's right to set-off, suspend payment or deduct certain amounts.

**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, the form and wording of refund guarantees used to secure the payments are based in general on the standard form and wording developed internationally or used by the particular bank issuing the refund guarantee. In general, according to Polish law the guarantee should be unconditional, irrevocable and on first demand and provide a maximum amount of liability of the refund guarantor. In Poland, usually, even if a shipbuilding contract is to be governed by Polish law, the refund guarantee would not – it would most likely be based on English law.

Generally there is no permission required for the builder to have the refund guarantee issued.

**22 Advance payment and parent company guarantees**

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

Under Polish law the following formalities govern the issuance of both parent company guarantees (surety) and advance payment guarantees:

- strictly speaking, under Polish law, a 'guarantee' can only be issued by a bank or an insurance company; an entity that is not a bank or an insurance company may issue a 'surety'; the English term 'guarantee' is, however, commonly used in relation to both 'guarantee' and 'surety';
- a guarantee or surety has to be made in writing; it is particularly important that the obligation of the guarantor is made in writing; and
- a guarantee or surety for a future debt has to state:
  - the maximum amount of the future debt for which the guarantor is liable;
  - the final date of the validity of the guarantee or surety, otherwise the guarantee or surety can be cancelled until the date on which the future date comes into existence;
  - if the guaranteed obligations are amended so that they increase the liability of the guarantor, the latter should agree in writing to such an increase; and
  - the beneficiary of a guarantee or surety should immediately notify the guarantor about the debtor's default.

**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?

Further to question 12, Polish law provides for the party that is the legal owner of the vessel under construction to create and register a mortgage over the vessel to secure construction financing. If the buyer is the owner, he would be entitled to create and register a mortgage over the vessel; if the builder is the owner at this point, he could establish a mortgage over the vessel under construction in favour of a creditor or another party (ie, the buyer).

**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?

If the shipbuilding contract provides for the design to be prepared by the shipyard, then generally under Polish law in case of defective design the builder would be liable under the warranty clause or under the statutory provisions of Polish law. It is important, however, for the buyer to notify the builder about any defects in the design as soon as such defects are noticed, as otherwise the buyer can lose his warranty rights in this respect.

**25 Remedies for defectiveness (after delivery)**

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

Under Polish law there are no remedies available to third parties against the shipbuilder for defectiveness unless explicitly provided in the shipbuilding contract.

**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?

Generally, under Polish law a liquidated damages clause or a penalty provision for late delivery or not meeting guaranteed performance criteria does not require the agreed level of compensation to represent a genuine link with the damages suffered. However, in recent years the Polish courts, in some extreme cases, have allowed an argument of a lack of genuine link between the level of compensation and the damages suffered. As a result, there are certain provisions available to the parties to be included in the shipbuilding contract to minimise the risk of having the court lower the amount of liquidated damages due to a party under a shipbuilding contract.

**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?

Unless explicitly stated to the contrary in the shipbuilding contract, it is a rule under Polish law that if the shipbuilding contract contains a liquidated damages provision, the buyer is then precluded from claiming proven higher damages.

**28 Force majeure**

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

Under Polish law the parties are free to design the force majeure clause of the shipbuilding contract, however, it may not violate the principles of public policy.

**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?

There is an 'umbrella' insurance (construction all risks) available on the market in respect of insuring such risks relevant to Polish entities. Polish underwriters prefer one-year insurance policies related to the construction schedule under the relevant shipbuilding contract. They may, however, provide such an insurance in relation to a particular shipbuilding contract regardless of whether it exceeds one year.

The above insurance policies issued by the Polish underwriters are based on Polish law and jurisdiction with the Institute Clauses For Builders' Risks applicable.

**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?

It is unheard of for any Polish court or Polish arbitration tribunal 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. In theory, under certain provisions of the Civil Code and the Civil Procedure Code this seems to be possible (rather more so before an arbitration tribunal than a court of law) but in any case it would be a long and burdensome procedure for all parties involved.

**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 signing of the protocol of delivery and acceptance, stating that the buyer's acceptance of the vessel shall be final and binding regarding conformity of the vessel to the contract and specifications applies only in respect of irregularities of which the buyer was or should be aware (the buyer owing a duty of care in this respect) at that moment. The buyer is not precluded from raising claims against any irregularities of which the buyer was not or could not be aware at the time of signing of the protocol of delivery and acceptance.

**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?

In general, under Polish law the suppliers or subcontractors cannot exercise a typical lien over the vessel. They can, however, seize the vessel if it is in the ownership of the builder for work or services or supplies performed on the builder's orders. The same can be said for the buyer, if he is the owner of the vessel and ordered the relevant services or supplies.

Polish law provides for an implied term in the shipbuilding contract, providing that at the time of delivery the vessel shall be free from all liens, charges and encumbrances.

**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?

Under Polish law a reservation of title by a subcontractor or supplier of materials and equipment does not survive affixing to or incorporation in the vessel under construction.

**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?

Polish law provides for the subcontractor's or manufacturer's warranty to be assigned to the buyer. Generally it is possible for the buyer to make a direct claim under the subcontractor's or manufacturer's warranty.

**35 Default of the builder**

Where a builder defaults in the performance of the contract, what remedies will be open to the buyer?

Generally, under Polish law, if the builder defaults in the performance of the contract, the remedies of the buyer would depend on the nature of the contract (see question 5) and its wording. In all cases, however, the buyer would in principle be entitled to a claim for damages (with some exceptions where liquidated damages have been agreed – see questions 26 and 27).

**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?

Specifically, Polish law provides that if the contract is made as a contract for constructing a specific thing and should the builder be performing the project in an inadequate manner or in a manner inconsistent with the contract, the buyer might request the builder to change the manner of the performance of the contract and give the builder an appropriate time limit for that purpose. If the time limit elapses to no avail, the buyer may rescind the contract or entrust another person with the correction or the further performance of construction, at the cost and risk of the builder.

Further, if the shipbuilding contract is made in the form of a sale of goods contract, then under Polish law the buyer may renounce the contract or demand a price reduction.

**37 Judicial proceedings or arbitration**

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

There are no institutions that are especially commonly agreed on by parties to decide disputes related to shipbuilding contracts.

**38 ADR/mediation**

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

The incorporation of ADR clauses in shipbuilding contracts under Polish law is rarely practised.

**39 Standard contract forms**

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

The Shipbuilders' Association of Japan or AWES standard forms are used in Poland as a starting point for drafting shipbuilding contracts.



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