

CONSTRUCTION OF VESSELS

PANEL

STEWART F. PECK, MODERATOR
LUGENBUHL, WHEATON, PECK, RANKIN & HUBBARD
NEW ORLEANS, LOUISIANA

LARRY T. RIGDON
CHAIRMAN OF THE BOARD, TIDEWATER, INC.
HOUSTON, TEXAS

JOHN DANE, III, PH.D.
RETIRED PRESIDENT, GULF COAST SHIPYARD GROUP
GULFPORT, MISSISSIPPI

EDWARD "HANK" ARNOLD
BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ
NEW ORLEANS, LOUISIANA

TULANE ADMIRALTY INSTITUTE SHIPBUILDING PANEL

I. Shipbuilding Contract and Maritime Law

A. Maritime law is inapplicable to new construction

1. It is well established that construction of the vessel is not a maritime contract within the federal court's admiralty jurisdiction. *Chase Manhattan Fin. Servs., Inc. v. McMillian*, 896 F.2d 542, 562 (10th Cir. 1990).
2. This concept goes back centuries: "A contract made on land, to be performed on land" such as a shipping contract is not a maritime contract. *The Peoples' Ferry Co. of Boston v. Beers*, 61 U.S. 393, 401 (1958).
3. In *Cain v. Transocean Offshore USA, Inc.*, the Fifth Circuit held that ships under construction were not vessels. 518 F.3d 295, 300-03 (5th Cir. 2008). Vessels under construction are treated differently from completed vessels. *Id.* at 301.
4. Contracts for supplying materials and equipment in connection with new constructions are likewise non-maritime. *Owens-Illinois, Inc. v. United States District Court*, 648 F.2d. 970 (9th Cir. 1983).

B. Maritime Law is Applicable to Ship Repair and Ship Reconstruction.

1. Repair services give rise to necessities. *Federal Commercial Instruments and Maritime Lien Act*, 46 U.S.C. §313, 301 *et. seq.*
 - a. With respect to ship repairs, an owner must consent and there must be an authorized person approving the repairs in order to give rise to a claim for necessities. *Id.*
 - b. No lien arises from a subcontract with subcontractors; a shipyard is presumed to lack authority. *Crescent City Marine, Inc. v. N.V. Nunky*, 20 F.3d 665 (5th Cir. 1994); *A & B Electrical Industries, Inc. v. Common Masters, Inc.*, 1980 AMC 1795 (E.D. La. 1980).
 - c. There is an issue with respect to reconstruction of vessels as to whether the reconstructed vessel becomes new construction or whether it is a repair. See *Crimson Yacht v. Betty Lynn Two*, 603 F.2d 864 (11th Cir. 2010).
 1. It is not always easy to distinguish new construction from repairs. *The Jack-O-Lantern*, 298 U.S. 96 (1922).
 2. This determination is fact-based. No matter how large, a repair contract would come within maritime law.

C. Dead Ships

1. Vessels withdrawn from navigation and “mothballed” can lose vessel status. *Lozman v. City of Riviera Beach*, 133 S.Ct. 735, 750 (2013); *See generally*, GEORGE RUTHERGLEN, DEAD SHIPS, 30 Mar. & Com., 677 (1999).
2. A structure that otherwise has physical characteristics of a vessel may be so old that it is practically impossible to be involved with transportations and, therefore, is not considered a vessel. *Lozman*, 133 S.Ct., at 745.

D. Maritime liens cannot arise with respect to new constructions because vessel construction contracts are not maritime contracts. Therefore, breach of those contracts does not give rise to maritime liens. JOSHUA S. FORCE, 8 BENEDICT ON ADMIRALTY, Chap. VII §7.01(b) (2014). Even if a hull is launched and then outfitted, admiralty jurisdiction is not implicated, and no maritime liens would arise. *Id.*

1. A vessel being rebuilt using parts from the original vessel can be subject to maritime jurisdiction and maritime liens. *New Bedford Drydock Co. v. Purdy*, 258 U.S. 96, 100 (1922).
2. Once the ship is completed, launched, and capable for its use, then maritime jurisdiction attaches and maritime liens may arise. STEWART F. PECK AND DAVID B. SHARPE, WHAT IS A VESSEL? IMPLICATIONS FOR MARINE FINANCE, MARINE INSURANCE AND ADMIRALTY JURISDICTION, 89 TUL. L. REV. 1126 (2015).

II. Financing New Vessel Construction

1. Vessel Status – Status of being a vessel does not arise until construction is completed.
2. During construction, state law UCC financing must be utilized because the Ship Mortgage Act does not apply until the construction becomes a vessel. 46 U.S.C. §31301-31343 (2012).
3. There are certain legal hazards in financing new vessels under construction.
4. At a minimum the owner should search the UCC records of the shipyard and have a UCC 3 filed releasing the hull under construction from any blanket lien. More complicated transactions may warrant an intercreditor agreement between the owner, the shipyard, the shipyard’s existing lender and the owner’s lender. Also, for longer term projects, owner may need a yard use agreement from any landlord of the shipyard to finish construction in the event of a bankruptcy or default by shipyard under any lease. (See XA2 below).
5. A ship mortgage can be filed prior to completion once the vessel becomes the subject of an application for documentation. Lending institutions financing ship construction cannot utilize the SMA throughout construction but must utilize state-

created mortgages or security interests under the Uniform Commercial Code (“UCC”).

6. A UCC security interest may be lost upon the structure becoming a documented vessel and once the vessel is finished and completed, the UCC may be primed by subsequent maritime liens or preferred ship mortgage liens. PECK AND SHARPE, 89 TUL. L. REV., at 1108-1112.
7. Therefore, it is incumbent upon a lender to monitor the vessels’ documentation to make sure the financial indebtedness is secured by the appropriate perfected security documents throughout the process.
8. This could become a real problem in insolvency situations where the security interest can be deemed invalid, imperfect, and subject to avoidance. *See* 11 U.S.C. §§362, 544, 547-548 (2012).
9. The best way for a lender to ensure that it is not caught in the switches in determining whether to use the UCC financing or utilizing ship mortgage is to obtain a letter from the shipyard acknowledging that it agrees not to document the vessel without notice to the lender.

III. Title

- A. Title to the structure is an important concept that must be addressed in a shipbuilding contract. Below is a standard provision as to title.

“Title to Work: COMPANY is to be the owner of the Vessel to be constructed pursuant to this Contract. Title to the hull shall vest in COMPANY as and when Work on such hull is performed to the extent that all Progress Payments or other payments pertaining to that portion of the Work have been made in accordance with the terms of Section 3.3 of this Contract. Title to all Goods and Components shall vest in COMPANY as and when delivered to the Shipyard or fabricated, respectively, and paid for in accordance with Section 3.3. However, with respect to the Vessel, there shall be no delivery of that Vessel to COMPANY, until the "Price and Payment" provisions of Article 3 of this Contract with respect to that Vessel are satisfied, subject to the provisions of Article 42 and Sections 30.1 through 30.8.”

- B. Examples of situations where lender is deemed imperfect or has its lien avoided under the Bankruptcy Code.

IV. Starting Point: Steps to be taken prior to entering into a ship construction contract for new construction.

- A. Vessel design. It is very important for the design and engineering to be undertaken and completed prior to entering into a shipbuilding contract.
 1. There are a number of horror stories when engineering has not been completed or has problems.

- B. Solicitation of bids.
 - 1. Generally, the Owner will send out a solicitation letter requesting bids from numerous shipyards.
 - 2. The bid package normally contains the engineering, specs and a form of contract.
- C. Due diligence and minimization of risks
 - 1. Due diligence on yard or owner
 - 2. Obtain financial statements from yard or owner
 - 3. Obtain affiliate guaranties
 - 4. Provide direct payment of subcontractors and vendors
 - 5. Lien waivers from subcontractors and vendors
- D. Owner know the yard you are dealing with. Yard know your customer.
- V. Important Provisions in the Shipbuilding Contract.
 - A. Attached as Exhibit A is a table of contents as to various provisions that generally may be found in the shipbuilding contract.
 - B. Contract Price and Payment: Structuring the payment of the contract price and schedule of work is encompassed in milestones and payment certificates.
 - 1. Payment structure – variations
 - 2. Progress Certificates
 - 3. Performance requirements
 - C. Quality of goods and workmanship
 - a. Warranty as to workmanship (see below)
 - b. Third-party warranties
 - c. Performance warranties
 - 1. Speed
 - 2. Weight
 - 3. Fuel consumption

4, Other performance standards

E. Change Orders

1. The fight over change orders
2. Documentation of change orders
3. Dispute resolution regarding change orders

F. Delivery Date

1. Extension of time
2. Force Majeure clauses
 - a. Red Letter Force Majeure
3. Regulatory changes (extend delivery date and change orders)
4. Liquidated damages for delay
 - a. Liquidated damage clauses benefit the yard.
 - b. Vessel owner must put a drop dead date in the shipbuilding contract or face real problems.
 1. Past examples of major problems
 2. Delivery incentive clauses

G. Materials, equipment and goods

1. Risk of loss: Who bears it?
2. Owner wants to mark and identify its equipment and materials and have them segregated.
3. Owner furnished equipment.
4. Contract pricing issues as to third party goods and equipment.

H. Precedence. The shipbuilding contract should have a provision resolving internal conflicts between the contract, the plans and the specifications.

VI. Insolvency – Owner or Yard

A. How to protect the owner in a potential shipyard insolvency situation.

B. Title to the structure during construction. *See* Section III, *supra*.

1. In negotiating shipbuilding construction contracts, owners in most instances require the shipyard to provide a security interest in favor of owner during construction against the hull, materials and equipment. Also, as set forth

above (See III A), there will be transfer of ownership to the extent of payment by the owner. JOSHUA S. FORCE, 8 BENEDICT ON ADMIRALTY, Chap. VII, § 7.01(b).

- C. The following is a typical provision regarding the grant of a security interest in favor of the Owner:

“Authority to Grant Security Interest. BUILDER hereby acknowledges that COMPANY holds title to, and hereby authorizes COMPANY to grant a security interest in favor of Secured Party in the Vessel, and in all work-in-progress, Goods and Components related thereto. to secure the financing of construction of the Vessel, and advances for payment of the Contract Price hereunder by Secured Party. BUILDER shall execute and cause to be executed any control agreements, acknowledgments of assignment or other documents and instruments as the Secured Party, in its sole discretion, deems necessary or desirable to evidence and perfect its liens and security interests in the foregoing property such that the Secured Party shall have a first priority lien on the Vessel, and in all work-in-progress, Goods and Components related thereto, except as would impair the Lien in favor of BUILDER provided in Section 10.5. BUILDER further authorizes COMPANY and Secured Party to file financing statements, in a form acceptable to BUILDER, describing the Vessel, and all work-in-progress, Goods and Components related thereto, and listing BUILDER as debtor, in any appropriate jurisdiction if deemed necessary by COMPANY or Secured Party to perfect the rights of COMPANY under this Section and Section 10.1.”

- D. The following is a typical provision in a contract where the builder is granted a lien and liens are released:

“10.5 BUILDER's Lien: Release of Liens. BUILDER shall have a Lien against the Work, the Vessel (while under construction), and all work-in-progress, Goods or Components related thereto, pursuant to Sections 713.60, 713.74, and 713.75 and any other applicable sections of the Florida Statutes as security to BUILDER for (a) Progress Payments then due with respect to the Vessel pursuant to Section 3.3; (b) payments then due for Goods procured by BUILDER and furnished or to be furnished to the Vessel; (c) costs incurred by BUILDER for Work performed with respect to the Vessel for which payment is not yet due under the terms of Section 3.3, to the extent that such Lien is a Permitted Lien as defined above. BUILDER hereby disclaims any additional Liens in its favor, whether consensual or arising by operation of Law. BUILDER hereby agrees that it will not permit any Subcontractor to claim or assert any Liens whatsoever against the Vessel, or any related Goods or Components thereof, and that

BUILDER shall cause all Liens against any Vessel, including Permitted Liens in favor of the BUILDER or BUILDER's lender(s) or secured party(s), to be released as provided at the time of Delivery of such Vessel, or at such earlier time as may be required under Section 3.9. BUILDER shall obtain a subordination from its secured lenders, if any, subordinating their security interests, if any, to the security interests to be granted in favor of COMPANY's secured lenders as more particular set forth hereinabove.”

VII. Warranty

A. Generally

1. A shipyard contract generally provides a one-year warranty as to its workmanship, with claim required to be made within one year.

2. Disputes regarding warranty provisions.

a. In *New York Trans Harbor, LLC v. Derecktor Shipyards Com.*, the New York Supreme Court, Kings County, interpreted warranties to wit: “warranty period is simply the time period which an action may accrue. “841 N.Y.S. 2d 821, 2007 WL 1532293. It is not effectively a 12 months’ time bar to warranty claims. In *Derecktor*, the court held that when notice is given as to a defect within the time specified in the applicable warranty provision, a cause of action accrues upon which the party then has four years to file a suit for breach of warranty pursuant to UCC 2:725. *Id.* at *8; *Dunnam v. General Motor Corp.*, 357 N.Y.S. 2d 668, 670 (1984).

3. Below is a typical warranty provision.

“Warranty Deficiencies and Remedies. BUILDER warrants to COMPANY that, subject to the provisions of Section 20.7, the Vessel (and all Work and Components incorporated therein), will be seaworthy, of good and sound quality and fit for their intended use as an offshore supply vessel as described in the Contract Documents, free from Warranty Deficiencies and constructed in strict conformance with the Contract Documents, all Legal Requirements and applicable Classification Society Rules, and all pertinent Governmental Approvals. Warranty Deficiencies shall mean (i) any breach of the warranty provided in the first sentence of this Section 22.1 or of the warranty concerning installation of Goods set forth in Section 22.5, (ii) any failure of the Vessel to comply or to perform in accordance with the Specifications and other Contract Documents, subject, however to the provisions of Section 20.7, or (iii) any deficiency, nonconformity, weakness, failure, imperfection, fault, inferiority or defect in the Work or Components forming a part of the Vessel. Without limiting the foregoing, the term Warranty Deficiencies shall

include any excessive vibrations not arising from the basic design found in the Guidance Drawings, noise or temperature levels beyond any tolerances established in the Specifications or by Legal Requirements or the rules of the Classification Society.

Notwithstanding any action or inaction by COMPANY or any pertinent Governmental Authority in connection with the Work, if at any time either during the performance of the Work or within the Warranty Period referred to below, there shall appear, arise, exist or occur any Warranty Deficiency, whether or not discovered during the performance of the Work, said Warranty Deficiency and the Vessel (and all Work and Components incorporated therein), or any part thereof, but however subject to the provisions of Section 20.7, shall be repaired or replaced or otherwise made good, at the BUILDER's expense, to the requirements of the Contract Documents, all Legal Requirements and applicable rules of the Classification Society, and all pertinent Governmental Approvals. If the Warranty Deficiency arises during the Warranty Period, at the discretion of COMPANY, any work required to be performed by the BUILDER pursuant to the provisions of this Article shall be carried out:

- (a) At the Shipyard or at another facility of BUILDER unless impractical; or
- (b) At the Vessel's home port; or
- (c) With the concurrence of COMPANY, while the Vessel is underway; or
- (d) If none of the foregoing options are available, at another shipyard.

BUILDER will not be liable to repair, or to replace any Vessel (or any Work or Components incorporated therein) affected by, a Warranty Deficiency (including but not limited to latent and hidden defects) discovered after Delivery of the affected Vessel, unless COMPANY notifies BUILDER, in writing, of the Warranty Deficiency within thirty (30) days after its discovery or within fifteen (15) days following the close of the Warranty Period (as adjusted pursuant to Section 22.7), whichever first occurs. Except as provided in Section 22.2 BUILDER shall be given an opportunity to inspect and correct the Warranty Deficiency or damage prior to repair of the Warranty Deficiency by COMPANY or other Persons. Whenever practical (taking into consideration the necessity of keeping the Vessel performing its usual service), BUILDER shall be given complete access to the Vessel and to all records of COMPANY relating thereto for the purpose of verifying the existence of the Warranty Deficiency and of determining BUILDER's obligation to correct it.”

B. Issue of negligent repair and warranty claim.

C. Disclaimer:

- 1. Yard will disclaim all other warranties.

2. Yard will assign warranties from third party vendors as to equipment and components.

D. Contracts generally have an exclusivity remedy section

E. Shipyard contracts will have a waiver of all consequential damages.

F. Beware of European shipyard contract warranty limitations. Example provision:

“THE TOTAL CUMULATIVE LIABILITY OF SELLER ARISING FROM OR RELATED TO THIS CONTRACT WHETHER THE CLAIMS ARE BASED IN CONTRACT, IN TORT (INCLUDING NEGLIGENCE OR STRICT LIABILITY), OR OTHERWISE, SHALL NOT EXCEED THE PRICE OF THE EQUIPMENT OR TECHNICAL ASSISTANCE ON WHICH SUCH LIABILITY IS BASED. THIS ARTICLE SHALL PREVAIL OVER ANY CONFLICTING OR INCONSISTENT PROVISIONS IN THIS CONTRACT.”

VIII. Insurance issues and shipyard construction contracts

A. Builder’s risk insurance

B. Case law regarding builder’s risk insurance:

1. *Trinity Industries, Inc. v. Insurance Company of North America*, 16 F.2d, 267 (5th Cir. 1990). Here, there was a six hull contract. There was a warranty of workmanlike performance and the builder carried builder’s risk. There was a twist in the hull. The yard knew about the twist but did not disclose it to the owner. The owner made a complaint and tendered the vessel for repair. Halter refused to repair it and thought that the twist was within the building tolerances. The owner filed for arbitration and argued that twist rendered the hull worthless. The arbitration panel thought the twist did not significantly affect the performance, but the twist did exceed shipbuilding standards and the applicable tolerance. The owner was awarded \$200,000.00 plus attorneys’ fees and all arbitration fees. Many months later, Halter made a claim to INA under its builder’s risk policy. Halter sued INA on its builder’s risk claim. The trial court ruled that the arbitration award fell within provisions of the policy. The builder’s risk policy provided insurance against

“all risks and physical loss for damage to the subject matter herein insured.” Halter argued that it was an all risk policy. On appeal, Judge Wisdom of the 5th Circuit had trouble with the notion that the builder’s risk policy would cover costs incurred by the policy holder for faulty workmanship. The court ruled that the parties did not intend the builder’s risk policy to cover the cost of mistakes in construction. The court noted that there were cases involving defective workmanship as a covered risk but those cases dealt with an accident caused by the defective workmanship. Here, however, the defective workmanship did not lead to an accident.

a. All risk policies are intended to cover accidents resulting from defective design or workmanship not cover the cost of repairing the defect itself.

b. Halter also waited two years to make the claim. The court ruled against Halter and did not see how in this instance there was some physical loss or damage.

2. In *Bender Shipbuilding and Repair Company v. Brasileiro*, 874 F.2d, 1551 (11th Cir. 1989). A storm caused late delivery. Bender had to pay liquidated damages to Todd Shipyard. The court said builder’s risk did not cover that risk. *See also, Fireman’s Fund Insurance Company v. Sneed Shipyard*, 803 F.Supp 530 (E.D. La. 2011).

3. Arbitration of the M/V Ulysses – July 4th fire at Trinity Yacht and denial of coverage by their builder risk insurer. Outcome of arbitration – owner won.

C. Example of a simple insurance provision.

INSURANCE:

During the term of this Agreement, and until the **HULL** is delivered, **SHIPYARD** shall obtain and maintain at its sole expense (except Builder’s Risk which shall be for the account of **OWNER**):

(1) Workman’s Compensation and Employers Liability Insurance in amounts required by State Workman’s Compensation Statutes. The policies shall name **OWNER** as an additional insured, contain a waiver of subrogation in favor of **OWNER** and shall have Jones Act, United States Longshoremen and Harbor Workers Compensation Act endorsements.

(2) Comprehensive General Liability Insurance in respect to property damage and death or bodily injury to an amount up to \$5,000,000 for each accident naming **OWNER** as an additional assured, with a waiver of subrogation.

(3) Full form Marine Builder's Risk policy (including Hull and P&I) fully insuring the **HULL**, all materials, equipment (excluding **OWNER** furnished equipment unless agreed to in writing) and components thereof in an amount agreed to in writing by **OWNER** and **SHIPYARD** the premiums for which shall be for the account of **OWNER**. **OWNER** shall be named as a loss payee. In the event of damage or loss to the **HULL** other than actual loss or constructive total loss (as defined in the Builder's Risk policy), **SHIPYARD** shall proceed promptly to replace or repair such damage or loss and restore the **HULL** to its condition prior to such damage or loss, and the proceeds received from the insurance policy shall be payable to **SHIPYARD** to compensate it for such damages or replacement. In the event of damage or loss to a **HULL** constituting an actual total loss or constructive total loss, **SHIPYARD** shall not be required to reconstruct the **HULL**, and the proceeds of the insurance policies and any salvage or scrap value of the **HULL** shall be first disbursed to **OWNER** to reimburse **OWNER** for the Initial Payment. Any remaining amounts shall be payable to **SHIPYARD**.

A certified copy of the aforesaid policies shall be furnished to **OWNER** for the inspection and approval of **OWNER** and shall provide a 30 day notice of cancellation by the insurer to **OWNER**."

D. Example of a simple indemnity provision.

"INDEMNITY AGAINST CLAIMS:

For any claim that arises prior to Delivery, **SHIPYARD** shall indemnify, defend and save **OWNER** harmless from any and all liability, expenses, costs, damages, attorneys' fees, and/or losses arising out of injuries to or death of persons or loss or damage to property of any kind arising out of the performance of this Agreement unless caused by **OWNER**. This provision does not apply to employees or invitees of **OWNER**."

For any claim that arises prior to Delivery, **SHIPYARD** shall indemnify and save **OWNER** harmless from any and all liability, expenses, costs and attorney's fees as a result of any claims made by other parties for labor furnished or materials supplied in connection with the work performed hereunder, unless the labor and/or materials are furnished by **OWNER**.

SHIPYARD shall observe all applicable laws and regulations during construction. For any claim that arises prior to Delivery, **SHIPYARD** shall indemnify and save **OWNER** harmless from any and all liability, expenses (including attorneys' fees), costs, damages and/or losses of any kind resulting from the failure of **SHIPYARD** to do so.

IX. Bonding

- A. An owner can require a shipyard to provide a bond to cover liens by suppliers and laborers under state law. Payment bond to pay such claims.
- B. The shipyard can require an owner to provide a payment bond.
- C. Issues and risks regarding bonding.
- D. Who pays for the bond?

X. Default by Owner

- A. A critical provision in a shipbuilding contract.
 - 1. Remedies of Owner in the event of shipyard default and financial difficulties.
 - 2. Below is a standard default provision that provides the Owner protections to either terminate the contract or enter the yard and finish the work or to take the vessel out of the yard to another facility:

“If either party hereto shall be adjudicated bankrupt or an order appointing a receiver of it or of the major part of its property shall be made, or an order shall be made approving a petition or answer seeking its reorganization under the Federal Bankruptcy Act, as amended, or should either party institute or have instituted against it (and not dismissed within 120 days) proceedings in bankruptcy or apply for or consent to the appointment of a receiver of itself or of its property, or shall make an assignment for the benefit of its creditors, or shall submit in writing its inability to pay its debts generally as they become due, for the purpose of seeking a reorganization under the Federal bankruptcy laws or otherwise, then in any one or more of such events, the other party to this Contract shall have the option to immediately terminate this Contract by giving written notice. Any termination of this Contract made pursuant to the provisions of this paragraph shall not relieve the party receiving such notice from

any accrued obligations hereunder due and owing at the date of such termination, to include materials, product and labor costs incurred.

In the event of a default by Purchaser that continues for thirty (30) days following Builder's notice to Purchaser of such default, including but not limited to a failure of timely payment of an invoice under Article IV hereunder, Builder may, at its option, (i) suspend performance until all delinquencies and defaults are cured and adequate assurance of performance by Purchaser is given to Builder or (ii) terminate this Contract and seek all damages and remedies available at law or equity. In the event of a suspension of performance by Builder due to default by Purchaser, such suspension shall automatically extend the Delivery Date for the Vessel for a corresponding period of time and Purchaser shall pay all costs and damages associated with such suspension

In the event of a default by Builder that continues for thirty (30) days following Purchaser's notice to Builder of such default, Purchaser may, at its option, (i) suspend performance until all delinquencies and defaults are cured and adequate assurance of performance by Builder is given to Purchaser, (ii) terminate this Contract and seek all damages and remedies available at law or equity, or (iii) terminate and exercise Purchaser's right of completion or sale as set forth in the next paragraph.

In the event that Purchaser exercises its rights to terminate this Contract following a default by Builder, purchaser, its nominee or construction financing institution, may, but shall not be obligated to, take over the Work, including without limitation the Vessel and all of the Work in progress (including all Goods and Components) and Builder's contracts with any Subcontractors, and either (a) complete the performance of the Contract or (b) sell all or any portion of the Vessel and the Work (including all Goods and Components) in its current stage of completion or following . completion (after commercially reasonable preparation for such sale). If Purchaser elects to complete the performance of the Project, Purchaser shall be entitled to do so in Builder's Shipyard, at no additional cost to Purchaser, or at Purchaser's option, move the Vessel and the Work in progress (including Goods and Components) to another location for completion. In either case, Builder shall provide complete access to the portions of its yard where the Vessel is being built during reasonable business hours and cooperate with and provide reasonable assistance to the Purchaser. All third parties brought into the yard shall meet Builder's established insurance and indemnity requirements. If Purchaser elects to sell the Vessel and Work in progress (including Goods and Components), Purchaser shall be entitled to leave the Vessel and such Work in the Shipyard for a period not to exceed one hundred eighty (180) days while it pursues the sale, in which case Builder agrees to permit

prospective buyers access to the Shipyard at reasonable times to inspect the Vessel and such Work, or at Purchaser's option, Purchaser may remove the Vessels and the Work in progress (including Goods and Components) to another location for sale. If Purchaser completes the Vessel and the unpaid balance of the Contract Price exceeds the expense of finishing all of the Vessel and all of the Work in progress, only such excess shall be paid to Builder. If the reasonable cost of completing the Vessel and all of the Work in progress, less any savings accompanied by such default, exceeds the unpaid balance of the Contract Price, Builder shall pay such excess to Purchaser. Builder shall not be entitled to any farther payments from Purchaser. If Purchaser sells the Vessel or partially completed Work (including Goods and Components), the sale proceeds shall be paid to Purchaser to the extent of the cost of Purchaser-furnished equipment and materials included in the sale, any payments by Purchaser to Builder for the Vessel, and Purchaser's expenses of sale and damages recoverable hereunder, with any excess proceeds paid to Builder.

Upon notification of Purchaser, Builder shall (i) if feasible, promptly undertake, at its sole cost, to place the Vessel and Work in progress in a suitable condition for transportation to another location, (ii) assist Purchaser in the removal of all Vessel and Work completed as of the date of termination of the Contract from the Shipyard, (iii) allow Purchaser or Purchaser's Representative, and other contractors, continuing access to the Shipyard for a period of one hundred and eighty (180) days following such termination and discontinuance in order to continue the Work.

In the event of termination by Purchaser, Purchaser may require Builder promptly to assign and/or deliver to Purchaser all or any (a) bids or proposals, (b) subcontracts, purchase orders or other agreements with subcontractors or Vendors, (c) Production Documents, (d) Goods, Components, tools and equipment (to the extent paid for by Purchaser), (e) appliances, (f) rental agreements, and (g) any other commitments which Purchaser, in its sole discretion, chooses to take by assignment, and in the case of assignments hereunder, Builder shall promptly execute and deliver to Purchaser written assignments of same.

The failure of either party to exercise any rights conferred upon it under any provision of this Contract with respect to any breach or default shall constitute neither a waiver of its rights under any other provision of the Contract with respect to such breach or default, nor a waiver of its rights under the same or any other provision of this Contract with respect to any other breach or default.

The remedies for default available under this Article are in addition to, and not in lieu of, all other remedies available at law or in equity and shall survive the termination of this Contract.”

XI. Dispute Resolution

- A. Arbitration
- B. Court litigation
- C. Governance provisions – what state law governs.

XII. Bankruptcy and shipbuilding contracts

A. Bankrupt shipyard

- 1. Shipbuilding contracts are executory contracts. 11 U.S.C § 365(a).
- 2. Assumption or rejection of contract.
- 3. Time to assume or reject
- 4. Yard must abide by the contract post-bankruptcy until assumes or rejects.
- 5. Recoupment issues.
- 6. Stay order 11 U.S.C. §362.
- 7. Owner must continue to pay but may recoup as to liens asserted. *Matter of Holford*, 896 F.2d 176, 178 (5th Cir. 1990).

B. Bankrupt owner

- 1. Shipbuilding contract is in executory contract 11 U.S.C § 365(a)
- 2. Requirement to make payments under the contract Post-Petition until owner assumes or rejects. *Id.*
- 3. Termination of contract prior to bankruptcy filing and effect.

C. Security interest and financing issues regarding the shipyard contract in the bankruptcy context.

- 1. Assumption or rejection of the contract
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XIII. Problems with state liens in shipyard construction

- A. Liens that prime UCC filings.
- B. Particular state liens that prime UCC security interests.

1. *First Maryland Lease Corp. v. M/V Golden Egret*, 764 F.2d 749 (11th Cir. 1985) (Alabama watercraft lien found to prime UCC in connection with ship construction).
2. Lien waivers and effectiveness. *Shaw Contractors v. ICF Kaiser Engineers*, 395 F.3d 533 (5th Cir. 2004) (waiver of lien by subcontractor not effective where contractor breached contract).

EXHIBIT A

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PREAMBLE

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