

# Environmentally Sound Ship Recycling through Contract Governance: The Limits of the RECYCLECON

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# STRUCTURE OF THIS PRESENTATION:

1. Dangers of Ship Recycling
2. International Instruments for EOL Vessels And Problem Of Cash Buying
3. Why Should The Seller Care?
4. Contracts used for Sale of Vessels for Dismantling and Recycling
5. Key Points on RECYCLECON
6. New Ways Of Construing Ship Recycling Agreements
7. Conclusions

# 1) DANGERS OF SHIP RECYCLING

The reason that ship-recycling practices are so harmful to humans and the surrounding environment is two-fold:

- 1) Environmental Risks: older vessels which are 'dumped' contain heavy metals, asbestos, heavy oils, polychlorinated biphenyl, polyaromatic hydrocarbons, organotins and glass wool, etc
- 2) Harm to Shipyard Workers: sheer physical risks involved for unskilled migrant workers with high rates of severe accidents and fatalities

Shipbreaking has been described as:

- a 'pollution haven' industry
- exploitative system of 'ecological unequal exchange'
- ILO: 'amongst the most dangerous occupations, with unacceptably high levels of fatalities, injuries and work-related diseases'



## 2) INTERNATIONAL INSTRUMENTS FOR EOL VESSELS:

**Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989, 22 March 1989, U.N.T.S. 126 (entered into force 5 May 1992):** prohibits the export of hazardous wastes for final disposal and recycling/recovery operations from countries listed in Annex VII of the Convention (Lichtenstein, EU and OECD member States) to non-Annex VII countries (all other Parties to the Convention).

**Hong Kong International Convention for The Safe And Environmentally Sound Recycling Of Ships, 2009 SR/CONF/45 (HK Convention):** provides regulations for the design, construction, operation and preparation of; the operation of ship recycling facilities in a safe and environmentally sound manner; certification and reporting requirements'.  
(not yet in force)

**EU Ship Recycling Regulation (EU SRR):** aims to enforce the substantive requirements of the HK Convention ahead of its time, whilst going beyond the HK Convention in respect of its standards and requirements.

## Basel Convention: Problem of Intention

‘Waste’ is defined in the Convention as, ‘substances or objects which are disposed of or are *intended to be* disposed of or are required to be disposed of by the provisions of national law’

### **Seatrade case:**

Application of the EU Waste Shipment Regulation.

Prosecution had to rely on email evidence to persuade the court that an intention to scrap the vessels had been made prior to their departure from Hamburg and therefore fell within the ambit of ‘waste’.

## Hong Kong Convention:

Adopted in May 2009 in response to the inadequacies of managing EOL vessels as 'waste'.

- Considers the early stages of ship design all the way to the ship recycling facility
- Inventory of Hazardous Materials (IHM) (green passport)
- Authorised Facility
- But not ratified
- Does not criminalise illegal traffic of waste



# Problem of Cash Buying Persists

**Cash Buying:** an intermediary allows the owner to dispense of these regulatory requirements by purchasing the ship 'as is, where is' or 'upon delivery'.

- In both cases, the original shipowner has fully formed an intention to dispose of the vessel yet can allege that the subsequent owner made the sole decision to scrap the vessel.
- If the cash buyer falls outside the scope of the HK Convention or the EU SSR, falls outside of regulatory control.
- A number of open registries or flags of convenience.



### 3) WHY SHOULD THE OWNER CARE?

A number of non-regulatory pressures:

- Reputational risk
- Finance implications: exclusion from capital sources
- 2018, the fund manager Norges Bank excluded four shipping companies from the Norwegian 'Government Pension Fund Global', representing the world's biggest sovereign wealth fund.
- Torts implications

Norway's Government Pension Fund Global's decision to blacklist four companies. The Fund's Ethics Council said the following:

*It must be considered common knowledge in the shipping sector, that the environmental and working conditions of beaching are very poor. That ships are still sent to be dismantled at the Chittagong beach in Bangladesh or on the beaches in Gadani in Pakistan is the consequence of an active choice, which the company that owned the ships has made to maximize its profit. There are better ways to scrap vessels available to the company, but they cost more'.*



# Expansion of a Duty of Care: English Torts

**Can a duty of care extend to predecessors in title?**

*Begum v Maran (UK) Ltd* [2021] 3 WLUK 162:

- Claimant's husband in this matter was killed whilst working at a Bangladeshi shipyard on a defunct oil tanker. She subsequently brought proceedings against the UK Company which was legally responsible for the tanker and its arrival in Bangladesh.
- The defendant, Maran (UK) Ltd (Maran) acted as an agent for the owner of the ship. The agency agreement also covered the sale of the vessel for the purposes of demolition. In 2017, Maran negotiated the sale of the vessel for demolition through an intermediary cash buyer.

- The owner of the vessel then proceeded to sell the vessel 'as is'.
- In the MoA, the intermediary cash buyer agreed that the sale would be for **demolition purposes only** and that it would only sell the vessel to a 'ship breaker's yard that is competent and will perform the demolition and recycling of the vessel in an environmentally sound manner and in accordance with good health and safety working practices'.
- Cash buyer took delivery of the vessel which was then reflagged from Greece to Palau and the vessel's name was changed. After the conclusion of the sale, Maran no longer had control over the vessel or any involvement with the sale of the vessel to the shipbreaking yard. The vessel left Singapore on 22nd September 2017 and was beached at Chattogram on 30th September.

- Claimant argued that the Defendant owed a duty of care to the deceased.
- Defendant applied for summary judgment to dismiss this claim on the matter of a duty of care.
- However, the High court found it was arguable that Maran is liable for the actions of third parties such as the shipyard and its management, on the basis that it created the **source of danger**; therefore falling within the exception of the rule that the law does not impose liability on a person for harm caused to another due the interventions of a third party. Therefore application for summary judgment was dismissed.
- The Court of Appeal unanimously agreed with the High Court that the case can proceed to a trial of the substantive issues in the English courts against an English shipbroker, as the case presents triable issues of breach of a duty of care.

## 4. CONTRACTS USED FOR SALE OF VESSELS FOR DISMANTLING AND RECYCLING:



### RECYCLECON

STANDARD CONTRACT FOR THE SALE OF VESSELS  
FOR GREEN RECYCLING PART I

1. Place and Date of Contract (Cl. 1):		
2. Sellers/Place of business (state full style and address) (Cl. 1)	3. Buyers/Place of business (state full style and address) (Cl. 1)	4. Ship Recycling Facility (state full style and address) (Cl. 1)
5. Name of Vessel (Cl. 1, 6(b))	6. Type of Vessel (Cl. 1, 6(b))	7. Year and place built (Cl. 1, 6(b))
8. Flag (Cl. 1, 6(b))	9. Place of registry (Cl. 1, 6(b))	10. IMO number (Cl. 1, 6(b))
11. Light Displacement Tonnage (state metric or long tons) (Cl. 1, 8(a)) (a) Lightweight (b) Deductions (c) Contractual Weight ((a)-(b))	12. Purchase Price in figures and letters (state both lump sum price and the equivalent price per ton Contractual Weight)(Cl. 3) (a) Lump sum price (b) Equivalent price per ton Contractual Weight	
13. Deposit (Cl. 4. 5)	14. Sellers' bank (state name and place and bank account	

RECYCLECON and its predecessor, DEMOLISHCON, are often though not invariably used when vessels are sold for scrap.

# RECYCLECON

- Standardised document for the sale of vessels for recycling a vessel in 'a safe and environmentally sound manner consistent with the international and national law and relevant guidelines'.
- Recycling only; it does not cover previous trading arrangements prior to the vessel being recycled.
- Clause 17, Clause 18 can bind buyers to the HK Convention by making reference to green passport and authorised ship recycling facilities.



# Environmental benefits of the RECYCLECON:

From an English law perspective on classification of terms:

- Although the RECYCLECON cannot account for every possible situation, it does effectively place **sustainability** at the core of parties' intention – thus unequivocally stating sustainable recycling goes 'to the root of the contract'.
- For the buyer to not recycle the vessel in a *safe and environmentally sound manner* deprives the seller of 'substantially of the whole benefit' which would be obtained under the RECYCLECON.
- Environmental intention of the parties tantamount to a **condition**.
- Result = repudiatory breach
- However, practical problems arise with available remedies.

## i) Buyer needs to anticipate the breach

The seller has one of two options if a buyer fails to recycle the vessel in a sustainable manner (i.e. breaching clauses which 'go to the heart of the contract'):

1. Accept the buyer's breach and claim loss suffered *as a result* of the buyer's breach (issues of proving loss, 'account of profits not available in English law').
2. Affirm the contract and seek an order for specific performance ordering the buyer to recycle the Vessel as agreed and sue for damages stemming from the delay (what if the vessel has already been scrapped??).

**Anticipatory Breach:** If Buyer 'by words or conduct, evinces an intention not to perform, or expressly declares that he is or will be unable to perform his obligations under the contract in some essential respect'. But some confusion in the case law as to how this applies and the trap of early termination.

## Injunctions are available:

*Priyanka Shipping Limited v Glory Bulk Carriers PTE Limited (“Priyanka”) [2019] EWHC 2804 (Comm)*

The buyer completely failed to recycle the vessel and instead used it for further fixtures, stating that it would potentially trade the vessel in the future. The Buyers had purchased the vessel under a Memorandum of Agreement, which specifically stated:

- ‘19. The vessel is sold for the ***purpose of demolition only*** and the Buyers hereby guarantee that they will not trade the Vessel further nor sell the vessel to a third party for any purpose other than demolition and will, on completion of demolition, furnish to the Sellers a certificate stating that the vessel has been totally demolished’ (similar to a DEMOLISHCON or RECYCLECON provision)

- In this case we did not have a repudiatory breach, clause 19 included a 'negative covenant', and a failure to demolish the Vessel was not investigated as a substantial or serious failure perform.
- The seller sought an injunction. The Court found that the granting of an injunction would not be 'unconscionable or oppressive', the buyer has simply made a bad bargain which does not relieve it from Clause 19.

BUT in a recycling context, an injunction will only work if the Seller obtains *prior* knowledge of the Buyer's breach, the Seller needs to *anticipate* the breach.

# Damages?

*Priyanka* illustrated that point that **damages could not be claimed** in lieu of an injunction, as the injunction was granted to prevent future breaches. Therefore the damages claim could only arise from previous breaches of the MoA.

**Issues of foreseeability:** are losses in contemplation at the time of contracting

**Loss of a chance approach:** the contractual damages afforded to a claimant are not for a loss of opportunity to trade profitably in a general sense – there must be an identifiable third party as a person or entity who is ‘together with the claimant, for practical purposes, a unity or is so closely connected or associated with the claimant as to justify the third party's hypothetical conduct being judged on balance of probabilities’.

## 5. KEY POINTS ON RECYCLECON:

1. RECYCLECON forms (or contractual forms with equal purpose and inclusion of environmental clauses) are useful in establishing that a repudiatory breach has occurred in the event of unsustainable recycling practices.
2. Where a Seller wishes to enforce the contract, it can seek an Order of Specific Performance. However, this would be dependent on quick action following immediate information of the past breach or evincing of a future breach.
3. Where a Seller accepts the buyer's repudiation, damages are only available when the loss results from the breach.

4. Even if the Sale Agreement does not place safe and environmentally sound recycling 'at its core', then the Seller can still enforce a negative covenant by way of injunction. Damages will only be available where actual loss is shown. Injunctions to prevent unsafe practices going ahead are also dependant prior knowledge of the buyer's intention to breach the contract.
5. Negotiating damages will not be available as the seller has no longer has any interest or valuable asset – i.e. the seller no longer owns the vessel.
6. If the seller 'loses' an opportunity due the buyer's breach, it must establish a strong causal link such as an existing relationship with an identifiable third party.



## 6. NEW WAYS OF CONSTRUING SHIP RECYCLING CONTRACTS

**Possible solutions, although not in English law, premised on freedom of contract:**

### 1. Doctrine of Assurance:

Accepted by the American Uniform Commercial Code (“UCC”) § 2-609):

*When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.*

## 2. Moral Clauses:

Generally used in brand endorsement deals to provide corporations with express and unfettered termination rights to cancel a contract where the endorser acts in such a way that is deemed socially reprehensible by the corporation.

## 3. Reversion in Title Clauses (“rescuing the vessel”)

- *‘a reversion of title to the vessel;*
- *a right to take a charter and/or loan of the vessel for the purposes of scrapping/recycling it; or*
- *the right to appoint a different decommissioning contractor to scrap/recycle the vessel on the Contractor’s behalf, with an obligation on the Contractor to do all such things as to facilitate such work, including the transfer of title in the vessel to the new contractor.’*

## 4. Green Damages

- Liquidated damages clauses
- Can account for a quantification of damages to Seller's reputation
- English courts have retained their jurisdiction to oversee such clauses
- The amount stated must pursue a legitimate interest, cannot be punitive in nature

## 7. CONCLUSIONS

- Contract law may be able to supplement regulatory regimes in efforts to control cash buyers
- Sellers are increasingly pressured by the international business community and the consumer to choose authorised yards and adhere to best practices
- Therefore controlling the behaviour of the cash buyer, where used for purposes of commercial efficiency, is paramount
- The RECYCLECON and principles of English contract law do not currently afford tight enough control over the Buyers actions, nor do they afford adequate remedy where a Seller's reputation is tarnished and opportunities lost
- Creativity in contractual drafting is needed, provided that new terms will be enforced by judicial bodies
- The inclusion of such new terms can be justified by an overarching Sustainable Development mandate and the promotion of worker's rights

An aerial photograph of London, England, with a semi-transparent red overlay. The London Eye is visible in the center-left, and the River Thames flows through the city. Various skyscrapers and urban buildings are scattered across the landscape.

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