

ADVANTAGES AND CHALLENGES OF INTELLECTUAL PROPERTY RIGHTS RELATED TO THE SHIPBUILDING PROCESS¹

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The shipbuilding sector benefits greatly from the technological advances that engineers and shipyards attempt to introduce in vessels. Innovations normally come from the fields of industrial inventions, improvements in construction techniques and the design given to certain pieces of the ships. These developments may be protected through rights belonging to the intellectual property family.

However, this protection may turn into an obstacle to international maritime traffic if patent holders in a port State enforce their rights against a vessel that enters that port. To avoid these barriers, the Paris Convention for the Protection of Industrial Property established an exception to the patent right regarding components that are used solely to cover the needs of the vessel (Art. 5ter of the Convention). The exclusion was extended subsequently to industrial designs through European regulation.

Moreover, some improvements in vessels do not enter an Intellectual Property (IP) registry (through a patent or a design). Many times, they are kept secret by the shipbuilders. Some of these considerations have been crystallised in the most common international contracting forms regarding the construction of ships that we treat in the second part of this work.

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Thus, in the paper, we attempt to make a full analysis of the existing legal framework at an international, European and Spanish level, as well as of the most common forms used to shape the shipbuilding contract and process.

Keywords: *intellectual property rights; shipbuilding; Article 5ter CUP; contracting shipbuilding forms; designs; patents.*

1. PRELIMINARY IDEAS

The shipbuilding industry is a capital-intensive sector. In this respect, a fundamental characteristic of ships is their internal and external complexity. As the European Commission has stated, ships are the “largest moving man-made objects and their long life cycle, combined with a high level of operational autonomy in a hostile environment, makes them one of the most sophisticated capital goods”². Innovation in this field is therefore of great importance to help companies achieve a competitive position.

A precondition for the adequate protection of innovation is that competition in the shipping market is fair and that its infringements – such as the copying of designs or the unauthorised use of patents applied to ships – are detected and sanctioned. In this respect, from a legal point of view, one of the most debated issues in relation to the European shipbuilding industry is the protection of intellectual and industrial property rights as a necessary measure to ensure technological leadership: only by valuing and protecting these rights will the competitiveness of the sector be guaranteed at a global level.

From what has been said so far, it would be logical to think that in an environment of great technical complexity and exchange of information such as shipbuilding, the different economic operators involved would make use of the existing legal tools. However, this is not the case in the sector, where European companies for several reasons suffer the greatest impact of unfair practices without the possibility of effective defence.

Firstly, it should be borne in mind that the eternal confrontation between the protection of intellectual property and free competition, which the European Union has since its creation tried to balance, also occurs in the maritime sector.³

² Opinion of the European Economic and Social Committee on the “Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – LeaderSHIP 2015 – Defining the Future of the European Shipbuilding and Repair Industry – Competitiveness through Excellence” COM (2003) 717 final, p. 5.

³ In this respect, the LeaderSHIP 2020 document (LeaderSHIP 2020, The Sea, New Opportunities for the Future, Final Report, Brussels, February 2013) has insisted that one of the

Thus, an excessively severe system of protection of these rights that hinders normal commercial traffic is undesirable.

Another factor that works against the application of intellectual property rights (IPRs) – and more specifically, industrial ones – is that ships are made up of numerous objects and mechanisms that can fail during their lifetime. This requires constant maintenance and repair work, processes that could be partly hampered by the strict exercise of industrial property rights.

In addition, patents, which are the right to protect inventions, are ineffective in the shipbuilding sector due to the particular problem created by Art. 5ter (1) of the Paris Convention to which we refer in the next section. This provision, which, in the context of traditional ship registers, did not excessively deprive the patentee of the exercise of *ius prohibendi*, has become an obstacle in the current situation of open registers and registrations based on flags of convenience.

As a closing remark in this section, we must remember that the processes of ship design and construction are subject to many regulations related to safety, ecology, or load capacity, among others. These conditions may come from the shipping company that orders the ship or from European or international regulations such as ISO standards. These impositions exist from the initial stages of the contracting process in order to carry out the correct construction of the ship, considering that, in addition, there will be a supervisory activity by a classification society as an essential requirement for the ship to start sailing.

For all the above reasons and due to the dynamic context of shipbuilding, shipyards opt for industrial property rights that do not require formal registration, especially the protection of innovations through trade secrets and unregistered industrial designs.

The first part of this paper provides an insight into the conventions and laws that offer protection of the rights related to shipbuilding processes, together with their associated problems. Then, the second part will deal with the protection of IPRs provided by the main forms of ship construction contracts.

fundamental pillars for the shipbuilding sector is the improvement of market access and market conditions, and to this end it is necessary to promote a market that is free and open, p. 12.

2. EXISTING LEGAL FRAMEWORK

2.1. International Level: The Paris Convention

As we will see throughout this work, the Paris Convention for the Protection of Intellectual Property (hereinafter: the Convention⁴) represents a fundamental pillar for the interpretation of IPRs linked to maritime construction. In particular, the main regulation relating to patents in vessels is contained in Article 5ter (1) of the Convention, as introduced in 1925: “In any country of the Union the following shall not be considered as infringements of the rights of a patentee: the use on board vessels of other countries of the Union of devices forming the subject of his patent in the body of the vessel, in the machinery, tackle, gear and other accessories, when such vessels temporarily or accidentally enter the waters of the said country, provided that such devices are used there exclusively for the needs of the vessel”.

The creation of the provision in 1925 was by no means accidental, but wholly influenced by two cases which occurred in the United Kingdom and the United States a few years earlier: *Caldwell v. Van Vlissingen*⁵ (1851) and *Brown v. Duchesne*⁶ (1856), involving the patent infringement of a vessel staying temporarily in the port of a foreign country. The first case was linked to a Dutch vessel staying temporarily in Great Britain and containing a screw propeller that was under the protection of a patent in the latter country. Van Vlissingen understood that the submission to British legislation was unnecessary due to the lack of relationship with this territory. However, the Court accepted the Caldwell arguments regarding the ownership of the patent. The case had an impact in legislation because after the case a new exception to this kind of submission to foreign legislation was introduced in the British Patents Act.

The second case concerned the French vessel *Duchesne*, which incorporated a gaff made in France and not subject to a patent right in that country. However, when travelling into the United States, the owner of a patent over the improved means of building that gaff alleged that his patent was infringed. The Court saw traces of legality in this petition by Brown but decided that US patents were not enforceable against foreign vessels lawfully harboured in US ports.⁷

⁴ The Convention was first adopted in 1883 but the current text is the one as amended on 28 September 1979.

⁵ *Caldwell v. Van Vlissingen* (1851), 68 Eng. Rep. 571 (Ch.) (UK).

⁶ *Brown v. Duchesne* (1856), 60 U.S. (19 How.) 183 (USA).

⁷ Anderson, J. J., Hiding Behind Nationality: The Temporary Presence Exception and Patent Infringement Avoidance, *Michigan Telecommunications and Technology Law Review*, vol. 15 (2008), no. 1, pp. 7-8.

The conclusion of both cases was that patents should not be used to hinder maritime traffic. It is relevant to note that, apart from many other similarities, in these cases, all reference to the nationality of the ship or efforts to determine the nationality were omitted in the attempt to solve the issue at hand. Subsequently, a clause like the one transcribed above was first introduced in the 1919 Air Navigation Convention and then transferred to the Paris Convention through Art. 5ter (1). This provision adopted the characteristics of reciprocity – insofar as it applies to the States signatory to the Convention – and the absence of any reference to the nationality of the vessel or efforts to determine its nationality. The clause is known as the Temporary Presence Exception.

We will now decompose the provision in its different conditions and make a brief reference to the legislative policy objectives behind it.

a) Requirements of the Provision

1. *The patent must relate to the hull of the vessel, machinery, gear, apparatus, and other accessories*

The first condition of the clause refers to the components to which the patents are applied. As we may see, the list established in Art. 5ter (1) is not exhaustive but all encompassing, since it includes the structure of the ship, its heavy machinery, tools and other “apparatus and accessories”. However, one item has been voluntarily excluded: the ship’s cargo.

Therefore, this first requirement does not practically limit the scope of Art. 5ter and does not provide much information on its application. We only know that the cargo could never be covered by this exception because it is not an integral part of the vessel.

2. *The means to which the patent relates must be used exclusively for the needs of the ship*

This second requirement is more specific but still contains considerable indeterminacy: what are we really to understand by “the needs of the vessel”?

In our opinion, this implies that all the items on the list referred to in the previous point must not be secondary, ornamental, or unnecessary, but indispensable for the ship to fulfil its purpose. Some authors have understood that, from a negative point of view, something may be considered necessary for the ship if its removal or withdrawal from the ship makes it unseaworthy.⁸

⁸ Mikaelson, R.; Harlfinger, P.; Roskilly, A. P., Patent Protection in the Marine Industry: International Legal Framework and Strategic Options, pre-print version, p. 5, <http://www.mikalsen.eu/papers/maritimelPprotection.pdf>.

3. *The vessel must temporarily or accidentally enter the waters of the country*

This last condition or requirement is linked to the period that the ship stays in the foreign port in which an infraction would take place if the exclusion did not apply. It is simpler to determine that a port entry is accidental because there is an identifiable cause that determines the entrance of the vessel into the foreign port – as opposed to a premeditated action. Examples of this cause range from the loss of cargo, a breakdown or a medical emergency on board, among other circumstances.

Regarding temporary stays in a port, some clarification was provided by the Hamburg District Court (*Landgericht*) in the *Rolltrailer* case, which considered a stay of up to one year in a foreign country (for a motor vehicle) to be temporary according to domestic law. The German Court established that to be qualified as permanent, a stay in a foreign port should be “of, at least, various months”.⁹

However, for the courts of other countries, the consideration of “temporary” has been made dependent on the purpose of the journey. In this sense, entries into port for the sole purpose of continuing an international trade route have been considered a temporary stay.¹⁰

b) Objectives of the Precept and Current Problems

The exception is the result of the concern of the courts and governments to see their ships subject to foreign legislation and procedures. This results in the loss of national sovereignty for countries, which is not well accepted in general and, particularly, in the maritime environment. In this respect, we should recall that the general principle is that the ship is a national good of its flag state, even during stays in foreign ports¹¹.

On the other hand, from a practical point of view, the absence of the exception would imply the need for a search over all those patents involved in the construction and operation of the ship and its registration. In this sense, when there is a finding of patents still in force, the potential user would have to apply for a licence or would need to search the necessary legal defence to cover that use in the ports where the ship intends to dock, and where the patent is registered.¹²

⁹ *Rolltrailer* (1973), Landgericht Hamburg, GRUR Int., Heft 12, 703.

¹⁰ This was the conclusion in the cases *Stena Rederi AB v. Irish Ferries Ltd.* (2003), RPC 36, UK Court of Appeal and *National Steel Car Ltd. v. Canadian Pacific Railway Ltd.* (2004), 357 F, 3d 1319 (US Federal Circuit).

¹¹ This was held, inter alia, in *Scumberger Logelco Inc. v. Coflexip SA* (2000), SA 861 at paragraph 865: “a vessel flying a South African flag is a South African vessel, even if its home port – or port of registry – is in another country”.

¹² Mikaelson, R. *et al.*, Patent Protection..., p. 4.

Therefore, the primary and direct objective of the exception is reducing the burden of carrying out a thorough search of patents relating to a ship, and the financial and time investments associated with it, while the secondary or indirect objective is the maintenance of peaceful international relations.

2.2. European Level

Following this discussion of the Paris Convention, we now refer to the European and Spanish regulation of patents, designs, and trade secrets, which are the industrial property instruments on which shipbuilding could best rely.

a) Patents

Some signatory countries of the Convention have transposed the Art. 5ter provision into their national legislation. This is the case of Spain, whose Patents Act includes in Art. 61.e) the limit to the patent right as follows: “The rights conferred by the patent do not extend: (...) To the use of the object of the patented invention on board ships of countries of the Paris Union for the protection of Industrial Property, in the body of the ship, in the machinery, in the gear, in the apparatus and in the remaining accessories, when these ships temporarily or accidentally enter Spanish waters, provided that the object of the invention is used exclusively for the needs of the ship”.¹³

We refer to the study carried out in the previous section in relation to the requirements and scope of the exception due to its close resemblance to Art. 5ter.

b) Industrial Designs

The industrial design of a ship is a feature of great importance for its proper functioning and safety, besides its impact on aesthetics. Therefore, it is crucial that at the design stage of the building process, new technologies can be implemented to the maximum extent possible, taking into consideration the whole life cycle of the ship.

Design, from the legal point of view, is an industrial property instrument that protects the external appearance of products because of the added benefit this represents for the object and for the creator’s effort involved in the process.

Currently, industrial design in Europe has two modalities of protection: registered and unregistered design. The former can be registered at the Spanish Industrial Property Office (OEPM, using the acronym in Spanish) or at the European Union Intellectual Property Office (EUIPO) and always has a duration of twenty-five years, since it is initially requested for five years and is subject to

¹³ Patents Act 24/2015, 24 July.

a maximum of five renewals for periods of the same duration. An unregistered design is only regulated at the European level – not at the national one – by the Industrial Design Regulation (hereinafter: IDR¹⁴) and is protected for three years from the time it is first made public on the market, in a way that it can become known.

It is necessary to highlight that the unregistered form of design is frequent in the field of maritime construction due to the great dynamism of the industry. In this sense, the act of communication to the public that triggers the right may, among other means, be the publication of photographs or the inclusion of the design in catalogues or internet pages.

In relation to industrial design, the Convention does not contain any limit or exception to the right similar to Art. 5ter, but the European Union considered that the provision could be analogically incorporated in this area. Proof of this is the Directive (hereinafter: IDD¹⁵) and the IDR, in which the exception was introduced. As we know, directives are not instruments that can be applied by countries as such. On the contrary, they must be transposed into internal regulations. This is not the case with regulations, which may be directly invoked by citizens before the courts. Therefore, we refer to the latter, which has included the limit regarding the design of ships in Art. 20.2: “In addition, the rights conferred by a Community design shall not be exercised in respect of:

- (a) the equipment on ships and aircraft registered in a third country when these temporarily enter the territory of the Community;
- (b) the importation in the Community of spare parts and accessories for the purpose of repairing such craft;
- (c) the execution of repairs on such craft”.

For its part, derived from the IDD, the Spanish Law on the Legal Protection of Industrial Design¹⁶ contains similar wording in its Art. 48, as an exception to the rights conferred by the registered design: “The rights conferred by the registered design shall not extend to: d) Equipment and repair work on ships and aircraft registered in another country when they temporarily enter Spain or the importation of spare parts and accessories intended for their repair”.

As we can observe, the limit in design is less specific since it refers to the equipment of the vessel as a whole, without making detailed reference to any

¹⁴ Council Regulation (EC) No 6/2002 of 12 December 2001 on Community Designs.

¹⁵ Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the Legal Protection of Designs.

¹⁶ Act on the Legal Protection of Industrial Design 20/2003, 7 July.

of its parts, unlike the patent provision. This seems to imply a wider scope of design. However, we must understand that cargo remains excluded because it does not belong to the ship.

Furthermore, the IDR does not require – and this seems to us to be a very important difference – that the designs should be used only for the needs of the ship, although this appears to be the true essence of the provision. A broad interpretation would make it possible to extend the exception to any kind of use of the design and to practically any element of the design, including purely accessory items.

To close this section, we would like to briefly compare these norms with the more specific ones in force in the USA: the 1998 Vessel Hull Design Protection Act (VHDPA¹⁷). It foresees the possibility of filing a specific form (D-VH) with illustrations or photographs of the design to obtain protection for ten years over the hull design. This application may take place in the two years following the presentation or publication of the design, and it is addressed to the Copyright Registry. Despite the title used and its systematisation in the Code, one should not be led to believe that this Act is part of the field of intellectual property, as it is understood in Spain. The protection is related to design and not to copyright.¹⁸ Furthermore, this right is incompatible with a patent right, arising from Title 35 of the US Code.

All said, although it is interesting to count on a specific vessel design regulation, we do not believe that Europe needs a similar model because the global defence of design does not leave ships behind. On the contrary, it has a special provision regarding vessels.

c) Trade Secrets and Non-Disclosure Agreements (NDA)

In the maritime sector, construction techniques, materials and processes can be developed as part of innovation and constant improvement work carried out by shipyards. This dynamism, together with the lack of incentives to register a patent due to the clause of Art. 5ter of the Convention, results in the protection of innovation mainly through trade secrets.

At the international level, there is no special provision in the Convention on secrets, but it exists in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement¹⁹). This text refers to the protection

¹⁷ The Vessel Hull Design Protection Act is part of the Digital Millennium Copyright Act (DMCA) that added chapter 13 to the United States Code.

¹⁸ The USA Government offers information in this respect at the following links: <https://www.copyright.gov/vessels/> and <https://www.copyright.gov/reports/vhdpa-report.pdf>.

¹⁹ The TRIPS Agreement is an international legal agreement between all the member nations of the World Trade Organization (WTO). It establishes minimum standards for the regulation by national governments of different forms of Intellectual Property (IP) as applied to

of undisclosed information in Art. 39, making, however, slight reference to the Convention. This mention of an international instrument is needed in the present stage of the work – we have not forgotten that in this section of the paper we are treating the European level – since Art. 39 is the base of the European and Spanish legislation of trade secrets:

“1. In the course of ensuring effective protection against unfair competition as provided in Art. 10bis of the Paris Convention (1967), Members shall protect undisclosed information in accordance with paragraph 2 and data submitted to governments or governmental agencies in accordance with paragraph 3.

2. Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information:

- (a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
- (b) has commercial value because it is secret; and
- (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

3. Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use.”

For its part, the European Union has recently regulated business secrecy by means of the Directive on the protection of undisclosed know-how and business information.²⁰ In this text, Art. 2 defines what is meant by trade secret, and its wording is practically identical to Art. 39 of the TRIPS Agreement.²¹

nationals of other WTO member nations. TRIPS was negotiated at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) between 1989 and 1990.

²⁰ Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016.

²¹ Art. 2: “For the purposes of this Directive, the following definitions apply:
(1) ‘trade secret’ means information which meets all the following requirements:
(a) it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

The Spanish provision of the Law on Trade Secrets (hereinafter: LSE, using its Spanish acronym²²) derived from the Directive is Art. 1, which contains very similar wording to that of the European instrument, with the specific provision that secret information or knowledge may be of a technological, scientific, industrial, commercial, organisational, or financial nature.

The ontological feature of secrecy identifies with the quality of being unknown, which means an absence of public disclosure²³ (a). On the other hand, points (b) and (c) have been considered two fundamental requirements of the information. The first is of an objective nature insofar as it represents the economic interest that the secret has for the company that knows it. Some authors have stressed the importance of precisely establishing such interest. In this sense, the value of secrets will be greater as the possession of the secret gives the undertaking a major advantage over its competitors.²⁴

In relation to subparagraph c), its subjective or objective nature raises greater doubts. It had been understood that an externally recognisable manifestation of will on the part of the holder of the secret regarding the desire not to disclose that information was necessary, which implies certain subjectivity. However, the text of the TRIPS Agreement has “objectified” this action and specified it in the adoption of reasonable measures to keep the information secret.

Of particular relevance among these reasonable measures are the non-disclosure agreements (NDA) and clauses in both commercial and employment contracts. These identify sensitive information and establish confidentiality obligations for the parties.

However, the complication may come from the fact that in some cases there will be no express confidentiality agreement because we are dealing with a more informal – e.g., verbal – process of will formation. In such a situation, contractual liability arising from infractions of the duty of secrecy could only be the result of the generic duty of good faith of Arts. 7.1 and 1258 of the Spanish Civil Code.²⁵

(b) it has commercial value because it is secret;

(c) it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret”.

²² Act on Trade Secrets 1/2019, 20 February.

²³ Gómez Segade, J. A., *El secreto industrial (Know-how)*, Tecnos, Madrid, 1974, p. 188. In this line, Callmann has established that the “secret has value only because it is secret and keeps this value insofar as it remains unknown” (Callmann, R., *The Law of Unfair Competition, Trademarks and Monopolies*, Callaghan Publishing, Mundelein, Illinois, 1968, p. 387).

²⁴ Gómez Segade, J. A., *El secreto industrial... op. cit.*, pp. 246-247.

²⁵ Art. 7.1 CC: “Rights shall be exercised in accordance with the requirements of good faith”. Art. 1258 CC: “Contracts are concluded by mere consent, and are henceforth binding, not

d) Other Legal Tools Related to Shipbuilding

In this final part of this section, we will refer to other less used ways of protecting innovation related to shipbuilding.

Firstly, copyright may play an important role as it protects all “(...) original literary, artistic, or scientific creations expressed by any means or medium, tangible or intangible, currently known or that will be invented in the future”.²⁶ After this general delimitation, a complete but non-exhaustive list is contained in the Copyright Act. From that list, we highlight those creations that have a closer connection to shipbuilding:

- “f) Projects, plans, models and designs of architectural and engineering works,
- g) Graphics, maps, and designs related to topography, geography and, in general, to science,
- i) Computer programs”.²⁷

This right has the advantage of being very durable: the entire life of the author and seventy years after his or her death; another advantage is that it lacks bureaucratic formalities, since its registration in an IP office is entirely optional for the creators. Furthermore, the protection originates at the same moment the idea “leaves the mind” of its author and is materialised in some way. We believe that copyright could help especially in the initial phases of vessel design, protecting those first drawings and plans that take shape progressively during the building process.

In this aspect, the Provincial Court of Pontevedra has determined that the planimetry regarding the construction of a ship may be considered an original work in the sense of copyright legislation. The court examined the similarity of designs, drawings, and pictures of two different companies linked by a worker, considering also expert opinions to conclude that plagiarism had taken place.²⁸

only to the performance of what has been expressly agreed, but also to all the consequences which, according to their nature, are in accordance with good faith, usage and the law”. This legislation is the Royal Decree of 24 July 1889 publishing the Civil Code. In this point, Lanzarotti, V.; Manzini, R., *Intellectual Property Protection Mechanisms in Collaborative New Product Development*, *R&D Management*, vol. 46 (2016), no. S2, pp. 585 and 589.

²⁶ Art. 10.1 of the Royal Legislative Decree 1/1996, 12 April 1996, approving the revised text of the Intellectual Property Law, regularising, clarifying, and harmonising the legal provisions in force on the matter.

²⁷ *Idem*.

²⁸ This is very interesting case law from the appellate court of Pontevedra (region of Galicia, Spain), judgment SAP PO 259/2015 (ECLI:ES:APPO:2015:259) of 16 February 2015 (rapporteur Jacinto José Pérez Benítez).

Another interesting line of defence is related to unfair competition legislation that allows actions to be taken against certain infractions, such as the copying of a commercial strategy or element to which a holder is entitled, when it is not possible to obtain an exclusive right over them. For example, under this legislation – harmonised at the European level – holders may fight against the systematic imitation of their business or professional initiatives by a competitor when such a strategy seeks as its main purpose to prevent or hinder the consolidation of the other party in the market and when it exceeds the natural market response. Only in such cases may the action be tackled by this legislation.²⁹

Finally, we would like to comment on a recent guideline proposed by the European Commission about the exchange of information. This institution, undoubtedly taking note of the clause in Art. 5ter and its subsequent incorporation into other supranational and national regulations, has pointed out that the legal framework should be revised. In the meantime, the European Commission believes that the communication of knowledge between companies in the sector through joint databases would be possible and convenient. Such initiatives have the advantage that participants can freely exchange information, under the premises of confidentiality of the members and reciprocity within the group. An example of this is the European Waterborne TP platform, which brings together members from business, academia, and shipbuilding associations in different projects, including innovation and knowledge transfer.³⁰

3. PROTECTION OF INTELLECTUAL PROPERTY IN SHIPBUILDING CONTRACTS

In this second part of the paper, we would like to analyse the main shipbuilding contracts used between the parties involved in this process and their treatment of the issues of intellectual property rights that may arise.

It is important to keep in mind that there are two characteristic elements regarding shipbuilding contracts, present both in the common law and civil law systems. The first is the minimum regulation of such contracts in “public”

²⁹ Art. 11.3 of the Unfair Competition Act (in UK this corresponds to passing-off): “Systematic imitation of a competitor’s business or professional services and initiatives shall also be considered unfair when such a strategy is directly aimed at preventing or hindering the competitor’s assertion on the market and goes beyond what, according to the circumstances, may be considered a natural market response”. This Spanish legislation is Law 3/1991, 10 January.

³⁰ LeaderSHIP 2015, p. 17. Regarding Waterborne, its website may provide further information, <https://www.waterborne.eu/projects>.

legislation. By this we mean that the parties do not have detailed rules that constitute a sufficient basis for creating a contract. For example, in Spain there are very few precepts related to the shipbuilding contract in the Maritime Navigation Law: only 9 articles. However, there is a little more legal support in the Civil Code if we consider that the nature of this contract would identify with the works contract. In the UK, the regulation is also merely indicative and not mandatory for the parties, although the vessel as a “finished product” would be included in the general category of products for the Sales of Good Act.³¹

The second element is typical in the field of maritime law, and it is also connected to the first characteristic. Due to the freedom to contract, operators use international standard forms, adapting them to the needs of their clients (which become tailor-made contracts). This results in the form serving only as a fundamental pillar, but the final contract is quite different from the universal standard. This is not without problems of interpretation.³²

The most used forms around the world are:

- NEWBUILDCON from the Danish organisation BIMCO;
- SAJ (Ship Builders’ Association of Japan Form);
- CMAC (China Maritime Arbitration Commission Standard Newbuilding Contract);
- AWES (Association of European Shipbuilders and Ship Repairers); and,
- Norwegian Standard Shipbuilding Form (NSF SHIP 2000³³).

³¹ Where there are differences, they lie in the legal nature of the contract. For most of the doctrine in Spain, we would be dealing with a works contract as opposed to a sales contract. It is considered that what is characteristic of the shipbuilding contract is the technical and work performance provided by the builder (shipyard) as opposed to the characteristic performance of the sales contract, which would be the delivery and the warranties. In Spain, Arroyo is of this opinion, as we can see in Arroyo Martínez, I.; Rueda Martínez, J. A., *Comentarios a la Ley 14/2014, de 24 de julio, de Navegación Marítima*, Aranzadi, Cizur Menor, 2016, p. 459. For their part, Gabaldón García and Ruiz Soroa add that, when the object of the contract is expendable things (such as standardised ships), the principal trait of the contract is delivery and its warranties, so we would have a sales contract (Gabaldón García, J. L.; Ruiz Soroa, J., *Manual de derecho de la navegación marítima*, Marcial Pons, Madrid, 2006, p. 291).

³² Vasani, A., *Shipbuilding Disputes: Influence of Industry Norms on Law and Contracts*, Unpublished Doctoral Thesis, City, University of London, 2018. Available at <https://openaccess.city.ac.uk/id/eprint/21138/>; Lorenzón, F.; Campàs Velasco, A., *Shipbuilding, Sale, Finance and Registration*, in Baatz, Y. (ed.), *Maritime Law*, Informa Law, London, 2014, p. 67.

³³ Meland, Ø, *Shipbuilding Contracts, A Commentary Based on SHIP 2000*, Universitetsforlaget, Oslo, 2019.

The regulation of intellectual property protection in these forms is done in a more or less detailed way according to the chosen form. From a first reading and quick comparison of these forms, we can infer the existence of “conflict of interests” between the shipbuilders (shipyards) and their customers.

We are of the opinion that to draw some relevant conclusions from the analysis of the forms, we should try to answer three relevant questions: (1) what is protected in the contract and who is protected by it; (2) what measures are envisaged by these forms to deal with the violation of the said rights; (3) and what is the level of confidentiality imposed on the parties by them?

3.1. The Objective Scope of Protection

First of all, it must be pointed out that in all these forms a specific clause exists that, under different names, regulates the protection of certain aspects of intellectual property rights linked to the construction process. However, the scope (and extent) of this clause varies quite considerably.

There are contracts which literally seem to limit such protection to the patent field (SAJ and CMAC forms) and provide for a specific regime on the ownership of property rights over the plans and the designs of the vessel. Other contracts are limited to “patent rights” (NSF SHIP2000 form and AWES), although we understand that this expression should be broadly interpreted, as may be deduced from Art. 14 of the AWES form. In our opinion, the expression includes copyright, trademarks, and patents. Finally, in a more practical approach, other contracts extend the scope of protection to all IPRs related to the construction of the ship – “copyright, trademark, patent or similar rights” (NEWBUILDCON³⁴). Whatever the choice, to define the protected IPRs in this type of contract we must systematically interpret the contract.

In this sense, the forms themselves make a delimitation from two perspectives. On the one hand, it is necessary to consider the discipline of the design of the ship contained in such forms. On the other hand, there are clauses that regulate the eventual defect liability derived from the improper design of the ship (as in Art. III CMAC; Art. 12 NSF SHIP2000; and Art. IV SAJ). Therefore, the protection will necessarily be restricted to the IPR used in the construction of the ship, the installation of components and/or equipment in it, and those rights that affect the design itself. On the other hand, these contracts deal abundantly

³⁴ However, as mentioned above, it is common practice for these clauses to be drafted broadly, taking into account the client’s needs and extending the object of protection to any “trade secrets or other intellectual property rights” (see Section 11 of the SAJ form).

with the topic of liability. In general, the shipyards will not be responsible for any infringement of IPRs on materials, equipment or plans provided by the customer (called either the Purchaser or Buyer). This question is specifically treated in some forms.³⁵

3.2. The Person Protected by the Form

As a rule, the person protected by the specific clauses of the forms is the owner of the intellectual property rights that are exploited during the construction of the ship. In this respect, the most usual operation of construction is as follows: the shipyard (builder) designs the plans of the vessel and provides the materials and the equipment for its construction (which, if necessary, it will purchase from suppliers³⁶). In this case, the shipyard will be the holder of certain copyrights (among others, design authorisations included in the plans as addenda to the contract). Furthermore, the shipyard will become the holder or licensee with the right to use any patents or utility models on the equipment installed on the ship. In conclusion, the shipyard is usually the first person protected by this regulation.

However, at this point, we must evaluate another case. Regarding design, for example, it may happen that the buyer assigns the design to a different company from the shipyard (Design Company) and such a company transfers its right of exploitation or use to the client to be, in turn, conferred to the shipyard (Art. I, 1.4 SAJ and 1.e) AWES).

Having said that, we must mention a nuance in terms of copyright – or any other right that may exist specifically linked to the design. This is the fact that some forms contain an express attribution of rights to the party that has drawn up such a design.³⁷ This right includes the drawings but also the working documents, technical descriptions, calculations, and other data relating to the design and construction of the ship. This attribution of rights is complemented by the following measures: the appropriate duty of confidentiality, the necessary written consent to transfer such information, and, very important, limitation of the right to exploit such rights. This last issue is a consequence of the fact that such

³⁵ A different issue will be the responsibility for defects of the ship built by the shipyard with materials provided by the buyer. In such cases, even if there is supervision of the construction process by the classification society, such responsibility will exist but the shipyard will be relieved.

³⁶ The builder may also subcontract the design process to another company. See Art. 3 CMAC.

³⁷ This clause may be found in SAJ, Art. XVI. 2, and in NEWBUILDCON, Section 40 a).

consent will not be required when the transmission of such information is necessary “for usual operation, repair and maintenance of the vessel”.

On the other hand, it is also very common for the buyer to provide certain technological equipment subject to patents. If this is the case, the buyer must have a licence to use it. If he or she does not have this licence, the owner of the infringed right may address the shipyard. For this reason, it should be pointed out in the contract that the obligation not to infringe intellectual property rights is mutual and its infringement involves indemnifying the other party (be it the shipyard or the buyer). We may see this specification in some forms, such as in the NEWBUILDCON.³⁸

Finally, the contractual protection granted indirectly affects third parties because such a contract between the shipyard and the buyer does not imply the transfer of any patent or trademark rights or copyright in the equipment covered by the agreement. All such rights, including the design of the vessel, are expressly reserved for the true and lawful owners thereof (Art. XVI.1, III SAJ; Art. 14.II AWES; or Art. XXIX (lines 8-10) CMAC).

3.3. The Measures of Protection that the Forms Confer

At this point, we must distinguish between those forms that provide an express warranty and compensation in the event of infringement of intellectual property rights from others that only provide the latter possibility in such cases.

Firstly, in some forms, protection is configured as an express warranty given by the constructor (or by both parties in the contract, as in NEWBUILDCON) from a double point of view:

- a) the ship will be built without infringing the patent rights – as seems to be established in Art. XVI SAJ, Art. XXIX CMAC – or, more broadly, without infringing IPR – as mentioned in the NEWBUILDCON form, and
- b) the ship will be delivered free of this type of claims.³⁹

³⁸ On this topic, see Art. 40 b) NEWBUILDCON and Curtis, S., *The Law of Shipbuilding Contracts*, Informa Law, London, 2012, p. 255.

³⁹ This is part of the regime governing encumbrances. There is a warranty of title which means that the transferor ensures that the object (the ship in our case) is his sole property and that there are no third parties that claim to have a right to possess it. We may see these obligations both in the NSF and AWES form that refer to the ship as “free of rights in rem and any debts”. In Spain, the regime governing encumbrances is regulated in the Civil Code, Arts. 1257 and 1475.

In addition, all contracts provide for express indemnity after the transfer of the ownership of the vessel to the buyer. The builder must indemnify for any infringement of patent rights or other IP rights.

In these circumstances, the most common case is to find a violation of the intellectual property rights made by the shipyard, which usually involves a claim, or an action of any nature held by a third party, which is the owner of such infringed rights against the buyer.

Regarding this, we would like to make three important points. The forms specifically provide that the compensation will cover “the cost of such claims” (NEWBUILDCON), “of any claim and expense of whatever kind” (NSF SHIP2000) or “of claims of patent infringement of any nature or kind, including costs and expenses” (SAJ and CMAC). In sum, given the broad wording of the forms, we understand that this compensation would cover direct damages and indirect damages – even admitting the difficulty of specifying these terms and their diverse meaning in common law systems.

Besides, when a maritime lawyer adapts this form to the needs of the client, usually he or she should consider other issues. For example, it would be convenient to establish that the builder is the party that will take on the expenses and adopt the measures resulting from a possible arrest (or any other encumbrance) of the ship because of such claims.⁴⁰ Another useful provision is to consider, for

⁴⁰ This possibility has been studied by Pajković analysing the legal framework at an international level and taking into consideration Art. 5ter of the Paris Convention. For the author, “an eventual ship arrest with respect to a claim arising out of an IP infringement would be possible without significant limitations with respect to most forms of IPRs, except for patents and industrial designs for which special restrictions apply”. However, the practicality of the measure remains debatable due, among other reasons, to the financial burden that falls on the applicant of the measure (the IPR holder) until the end of the procedure. See Pajković, M., *The Possibility of Applying the Ship Arrest Measure in Case of Intellectual Property Infringement*, *Naše more*, vol. 67 (2020), no. 2, pp. 161-162. Regarding this possibility in Spain, we can turn to the Act on Maritime Navigation (Law 14/2014, 24 July) in different points:

- a) Firstly, the Act contains a reference to the International Convention on Maritime Liens and Mortgages 1993 (Art. 122) but allows other “privileged credits” if this type of credits is recognised by law (Art. 124).
- b) Besides this, the same Act contains a specific provision about certain type of credits (called in Spanish *refaccionarios* – investment credits or loans for fixed assets) directly linked with the construction/repair of the ship (Art. 138). In our opinion, the claim that emanates from IP infringement could be catalogued as credit *refaccionario*.
- c) Finally, Art. 139 prescribes the right of retention in favour of the creditors to secure their claims arising from construction, repair or reconstruction of a ship. Such claims are recognised pursuant to Civil Law.

example, that the builder must take any measure necessary to restore the free use and enjoyment of the ship or any part included in it, replacing, if necessary, the equipment that infringes IP rights with some other that does not infringe these rights.

Finally, we would like to note that the forms we have analysed expressly provide for compensation of any costs of the process as “liquidated damages”.

3.4. Duty of Confidentiality Between the Parties

A final point relates to the usual confidentiality (non-disclosure) agreement linked to the shipbuilding process. This would be an agreement binding both parties, whereby they undertake not to disclose certain technical information relating to the design and construction of the ship. However, not all forms deal with this important issue and, among those that do, the topic is regulated in very different ways. That said, regardless of the solution adopted, we understand that within the broad concept of “technical information” any data of a secret nature would be covered, even if, *de facto*, it is not set out in any document.

Once the subject matter of the confidentiality agreement has been defined, the forms stipulate that such information may not be disclosed to third parties without the written consent of the other party. Such consent is not required for the transmission of such information to third parties where it is necessary for the operation, repair, or maintenance of the ship, or in cases where the need to know these data is presented to subsequent owners of the ship. This would include, for example, classification societies, which, as is well known, audit practically the entire shipbuilding process.

It is also necessary to mention another possible exception to the above-mentioned written consent. This would consist of cases where the shipyard must transmit the aforementioned information based on a legal obligation. In the field of design, for example, this information is collected based on the so-called IMO Goal-based Standards (GBS), and it must be provided – via the Ship Construction File system – by the shipbuilders of such ships to classification societies, to the flag state, and to customers.

4. CONCLUSIONS

As we have studied, shipbuilding is a process characterised by its great length, cost and innovation. Its developments take place mainly in the fields of technology, aesthetics and safety. In this context, it would be logical to try to preserve the novelties as far as possible. In line with this, the existing legal framework grants, in general and *a priori*, protection to the different elements involved through patents, industrial designs, copyright and unfair competition enforcement.

However, we have found that, in practice, there are certain problems – not minor – related to formal rights. The first is the exception included both in patent and design legislations that exclude infringement of the innovations incorporated in a vessel – not in the cargo – when it arrives in a foreign port due to accidental causes or for a limited period of time. This clearly disincentives the registration of rights of this kind or, at least, poses many doubts regarding the countries to which that registration is more convenient.

The second problem is the fact that the registration procedures take a great amount of time, require professional advice and are bureaucratic to the extent that they are public and take into account the opposition presented by holders of similar rights. It is true that copyright and unregistered designs do not face these problems but, on the other hand, they are less known.

The above reasons support the view that one of the best legal tools to preserve innovation in shipbuilding would be non-disclosure agreements (NDA) and clauses. In this way, the activities of research and product development would be kept secret – in the sense of not being divulged – just as the holders of potential IP rights know that, although not having exclusive rights, they can acquire legal protection. It should be borne in mind that there is an important requirement for parties seeking to benefit from this legislation: it is crucial to take all the necessary objective measures to keep the relevant information secret.

The protection of these rights may also be provided by private shipbuilding contracts. The rules of such contracts are minimal and dispositive. For this reason, the parties often use international standard forms that are gradually adapted to their needs.

The forms regulate the protection of the aforementioned rights by determining the object of protection, the person protected, and the specific measures of protection. They also prescribe the duty of confidentiality during the construction process.

In relation to the protected object, the conclusion is that the interpretation of the contract has to be done jointly in order to determine properly how far the

protection extends. Together with the specific clause citing the protected rights, other clauses regulating the design of the ship or liability arising from defects in such a design will have to be assessed.

Regarding who is protected by these forms, it should be pointed out that in addition to the express mention of the shipyard and the “buyer” or client, there are other persons who may be protected in the event of infringement of intellectual property rights. Some examples are the design company or, indirectly, the holders of patents for the technological equipment installed during the construction of the vessel.

Finally, depending on the form chosen, the specific measures of protection are regulated in more or less detail. They are contemplated as a contractual guarantee that the ship has been built without infringement of intellectual property rights and that it is delivered free of any claims for that reason. The consequences of a breach of such a warranty are also detailed in the forms. As a final remark, we conclude that the duty of confidentiality inherent in these contracts is qualified by the legal obligation to transmit certain data related to design to the classification societies.

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Sažetak:

PREDNOSTI I IZAZOVI PRAVA INTELEKTUALNOG VLASNIŠTVA U VEZI S PROCESOM BRODOGRADNJE

Sektor brodogradnje ima velike koristi od tehnološkog napretka koji inženjeri i brodogradilišta pokušavaju uvesti kad je riječ o plovnim objektima. Inovacije obično dolaze iz područja industrijskih izuma, poboljšanja tehnika gradnje i dizajna određenih dijelova brodova. Ove inovacije mogu biti zaštićene pravima intelektualnog vlasništva.

Međutim, pravna se zaštita može pretvoriti u prepreku međunarodnom pomorskom prometu ako nositelji patenta u državi luke provode svoja prava protiv broda koji ulazi u tu luku. Kako bi se izbjegle ove prepreke, Pariška konvencija za zaštitu industrijskog vlasništva utvrdila je iznimku od patentnog prava kad je riječ o komponentama koje se koriste isključivo za potrebe brodova (čl. 5ter Konvencije). Izuzetak je naknadno proširen na industrijski dizajn putem prava EU-a.

Štoviše, neka poboljšanja na brodovima ne ulaze u registar intelektualnog vlasništva (putem patenta ili dizajna). Često ih brodograditelji drže u tajnosti. Neka od ovih razmatranja iskristalizirala su se u najčešćim međunarodnim ugovornim obrascima vezanim uz gradnju brodova koje obrađujemo u drugom dijelu ovog rada.

Stoga, u radu nastojimo iznijeti cjelovitu analizu postojećeg pravnog okvira na međunarodnoj i europskoj razini te na razini španjolskog nacionalnog prava, kao i najčešćih ugovornih obrazaca koji se koriste za oblikovanje ugovora u sklopu procesa brodogradnje.

Ključne riječi: *pravo intelektualnog vlasništva; brodogradnja; članak 5ter Pariške konvencije za zaštitu industrijskog vlasništva; standardni obrasci ugovora o gradnji broda; industrijski dizajn; patent.*