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ABBREVIATIONS

<i>BIMCO</i>	The Baltic International and Maritime Council
<i>CISG</i>	United Nations Convention on Contracts for the International Sale of Goods
<i>CMAC</i>	China Maritime Arbitration Commission
<i>CS</i>	Classification Society
<i>EU</i>	European Union
<i>GL certificate</i>	Germanischer Lloyd certificate
<i>IACS</i>	International Association of Classification Societies
<i>JSE</i>	Japan Shipping Exchange
<i>MOA</i>	Memorandum of Agreement
<i>MRA</i>	Misrepresentation Act
<i>Nipponsale</i>	Nippon Ship Sale Form
<i>NOR</i>	Notice of Readiness
<i>NSA</i>	Norwegian Shipbrokers' Association
<i>NSF</i>	Norwegian Sales Form
<i>NUS</i>	National University of Singapore
<i>S&P broker</i>	Sale & Purchase broker
<i>Saleform</i>	Norwegian Sales Form
<i>SGA</i>	Sale of Goods Act

<i>SSF</i>	Singapore Ship Sale Form
<i>SSGSA</i>	Sale and Supply of Goods and Services Act
<i>TOMAC</i>	Tokyo Maritime Arbitration Commission of JSE
<i>UCTA</i>	Unfair Contract Terms Act

Chapter 1 – Introduction

1.1 Background

New shipbuilding contracts and second-hand ship sale & purchase contracts are the two most common ways of acquiring ships. In respect of second-hand ship sale & purchase, two sale forms predominately are in used namely, Norwegian Ship Sale Form (NSF) and Nippon Ship Sale Form (Nipponsale). NSF was adopted by the Baltic and International Maritime Council (BIMCO) in 1956. It had been revised several times, in 1966, 1983, 1986/1987, 1993 and the most recent in 2012. NSF aims at addressing all pertinent issues in a typical ship transaction but still has some flaws¹ which virtually are not suitable for the business context. Also, NSF had always been cited as an absolute sale contract.²

Nowadays, NSF is not used widely in Asian place any longer, especially in Far East. For example, Saleform 1987 and 1993 are mainly used in ship business, but major users are located in western hemisphere. However, with the financial crisis, the Asian buyers prefer to apply Nipponsale. Furthermore, Nipponsale is used most frequently in Asia, which was originally issued by the Documentary Committee of the Japan Shipping Exchange (JSE) in December 1965 and gone through various amendments of which the most recent in Nipponsale 1999. Also, in broad terms the general content of Nipponsale has always been in many respects similar to NSF and some of the language is almost

¹ With movement of ship factory, NSF is not popular as decades ago in Asian place because it cannot meet Asian requirement or business tradition, which is also a reason why Nippon and SSF are popular recently. In some places of japan, Japanese sellers prefer to apply Nipponsale which are familiar to them even with a consequence of price was renegotiate to deduce.

² Legal ownership and possession shall pass to buyers simultaneously with payment of the price and release of any deposit. However, sometimes, the sellers may entitle to give buyers credits instead of whole price or part of price under the situation of the parties inserted clause which converted this absolute sale form to credit sale form.

identical. Recently, there is a new form called “Singapore Ship Sale Form” commissioned by Singapore Maritime Foundation and undertaken by the Centre for Maritime Studies, NUS. It is a modest attempt to present the shipping community with another standard sale form in Asian place. This new form provides latest practices on ship sale & purchase and incorporates provisions in line with the prevailing stringent maritime security and safety regimes. It also seeks to cater the specific needs of Asian shipping community. Additionally, balancing the interests of sellers and buyers is another characteristic of this form.³

Misrepresentation problems can happen in every ship sale & purchase form, this thesis aims at giving a deep analysis of misrepresentation under those second-hand ship sale & purchase forms. The misrepresentation in this thesis which normally is a wrong statement or a conduct and can be expressed by buyer or seller. For example, when a seller intends to hide information for keeping the price on an advantage stage, then it is a misrepresentation by conduct with intention. Another circumstance is that a third party may perform a negligent misrepresentation such as a CS could not write a decisive history in record. However, no matter how a misrepresentation performed in any case, it definitely leads economical loss to each other, so both parties in a sale & purchase contract would like to find a proper remedy in order to minimize the damages.

Misrepresentation often starts at acquiring knowledge of the ship process and checking process. An inspection often contains misrepresentation inside which may exist in different parts of inspection. Specifically, physical inspection is a crucial approach when a buyer wants to acquire the exact condition of the ship. Comparing with second-hand ship sale & purchase, the buyers in shipbuilding contract can endure less risk of

³ Ticy Veluvell Thomas, B.T.G Tan. (2010). Singapore Ship Sale Form: An Overview. *Centre for Maritime Studies Academic Paper Series, CMS-2010-2*, p. 1.

knowing what they will buy exactly.⁴ Admittedly, the buyers of a second-hand ship are enjoying the advantage of a relatively lower price and a short time between signed contract and new ship delivered. Indeed, it is extremely difficult to find out all precise conditions of the ship. Therefore, the inspection appears to be highly important for buyers. Nevertheless, inspection cannot make everything crystal-clear. It is far away to make buyers proved whole confidence on the statement about ship from sellers because a little misrepresentation would lead a devastating economical loss. Moreover, sellers definitely want the inspection's time and scope which are limited by expressing terms and prevents them from endless inspection. Furthermore, under most inspection situations, the ship is required to be empty and free of cargo, but still the buyer cannot check inside condition of gas container,⁵ the same as engine room which is regarded as the one of most difficult places for inspection and the defects often are latent.

Checking Classification Society record is another approach for knowing the ship. Almost every country has their own Classification Society (CS). Regardless their services have different qualities, still they all agree to an international standard. To achieve this agreement, these societies had been accepted as members of an organization known as the International Association of Classification Societies (IACS)⁶. Specifically, one of core services in CS is to issue the document which contains records

⁴ When buying a new ship and applying shipbuilding contract, the buyer will offer technical details and blue print to the shipping industry, those detailed specifications will be written in a long words contract, moreover, the purchaser has a supervision team on site who will be involved in all major decisions which may arise in the course of construction and there to be trails to determine the vessel's consumption and dead-weight capacity prior to delivery with provisions for adjustment of delivery installment if the contractual standards are not met.

⁵ Gas container even is theoretically clear, in practice, it is still dangerous to go inside due to the gas cannot completely wipe out in a short time.

⁶ IACS is a corporate body based in London which is recognized by the International Maritime Organization (IMO) the maritime arm of the United Nations; IACS enjoys observer status at IMO meetings. IACS possesses ninety percent of whole tonnages in the world now *See also* Institute of Chartered Shipbrokers publications, *SHIP SALE AND PURCHASE*, 2011/2012 Centenary Edition, Witherby Publishing Group Ltd. p. 27.

any recommendation, any notation and primary breakdown during the ship is registered in. Even though, it seems to be impossible to record every repairing history and ship condition within a document. Under some certain situations such as an evident appearance problem or urgent defect, seller should notify the buyer if it cannot be written in, but there is no such responsibility under recent legislation. Moreover, CS is not obligated to answer buyers' request because they have no contractual relationship, consequently, buyers are not able to start a trail based on a contract which was signed with the sellers even the dispute is about record. Therefore, the obligation of CS is still disputable and worthy to redefine.⁷

Besides that misrepresentation can happen in inspections which include physical inspection and document inspection, description often meets misrepresentation problem. As far as inspection, cl.4 and cl.6 in NSF stipulate inspection issue, the content of cl. 4 is written about pre-delivery inspections and record inspection, cl.6 spreads the scope of inspection and broads it to diver inspection, makes sure the details of the ship meet the requirement of buyers. However, those inspection clauses are not intact, the misrepresentation should be the largest threat to a successful transaction, then the remedy is very important. Assuming a buyer found out a misrepresentation in inspection, the most direct remedy is to rely on clauses in NSF. If a misrepresentation existed in description part, national law or international convention shall be applied in. When it referred to CS record,⁸ it is wise to discuss whether CS should own an obligation or not to buyer under no contractual relationship between CS and buyer.

⁷ Malcolm Strong, Paul Herring. (2010). *SALE OF SHIPS The Norwegian Saleform (2nd ed.)*. London: SWEET & MAXWELL. p. 5.

⁸ When a misrepresentation happens during inspection, most frequent situation is found details of a ship is not the same as the details from the sellers during an inspection. Also, normally when a buyer received the vessel then perform to check and find it out that some information is not correct compared with them during inspection which is misrepresentation in description. In terms of Classification Society record, under the circumstance of the

In this study, the misrepresentation analysis starts with cl.4 and 6 in NSF, then questionnaire the possible problems if a misrepresentation came out in relevant clauses and situations, then analyze them with comparative study among various forms mentioned above, to see how a difference will be if a same case applies with various forms. As mentioned above, national laws are involved in misrepresentation disputes, it is also interesting to compare a same situation among different jurisdictions. At last, this thesis can reach a result of getting suitable remedies or clauses to a specific misrepresentation question for sellers or buyers.

1.2 Scopes & Purpose of the Thesis

The purpose of this thesis is giving a detailed legal analysis of misrepresentation under the NSF provisions and similar clauses in other forms, which are stipulated about the general inspection⁹ and checking the Classification Society record. Also, a detailed legal analysis of misrepresentation under distinct national laws and conventions about descriptive issue would be given as well.

In this thesis, the core purpose is seeking the remedy for buyers how to protect self-benefit when they are confronted with misrepresentation problem. Besides the inspection which is arranged by the sellers, the description from the seller's statement or the Sale & Purchase broker (S&P broker) is counted as another important source for knowing the vessel. Unfortunately, the description by sellers is not bound by any clauses or rules, the sellers usually phrase the condition to the S&P brokers and the

Classification Society miss part information of the ship for some reasons, which legal reason can be based on if the buyers is willing to claim against the Classification Society.

⁹ Even in some circumstances, the ship can be ready for the inspection and the cargo should be free and empty as well, for certain reasons, the buyers still cannot inspect all the details of the ship he wish to purchase, one of this study is to make sure the buyers inspect more details of the ship and render them knowing what does he really buy.

S&P broker rephrase it to the potential buyer, under a situation of buyers have no ability to leave schedule to perform inspection, then the buyers have to determine individual transaction solely by the statement, clearly, this is not a way to reflect the principle of balance. As known, sellers may misrepresent the condition, indeed, some of them come with negligence, but there are possible chances to express with fraudulent intent, under this situations, not only the provision in Saleforms will be applied, but also both the civil law and criminal law. If there is a negligent misrepresentation, that would be disputable. In one hand, the buyer maybe require the transaction restore, otherwise claim the compensation which is not valid every time or the buyer may acquiesce the result after consideration or deduction of the price.

If a misrepresentation in the record renders the buyers suffer damages, this kind of misrepresentations mostly was made by uncompleted record. Due to the characteristic of hysteresis, the record cannot catch up every single detail of the ship all the time and there are different rules and various standard process in each society, so it is not hard to left some unknown knowledge and cause loss for buyers. Therefore, the problem is that assumed the repair conduct is so recent that the CS cannot type them in immediately, and this empty log leads the negligent or fraudulent misrepresentation to buyers, does the court support the buyers to claim against sellers? It is necessary to analyze the role of CS in transaction then define its clear obligations and the rights of society.

1.3 Research Methodology & Materials

The misrepresentation in NSF will be analyzed by common law and several cases; meanwhile, comparing NSF with other similar forms based on other jurisdictions such as Japanese law and Singapore law. However, this approach does not stand away with the uncertainties, because many matters relating to the jurisdiction over ships are dealt

with other unknown national rules, or by the use of imprecise language, for example, there is no official Chinese law translated version, so the only available resource is third-party resource.

When undertaking research belonging to the field of common law. There are various acts available. For example, The Misrepresentation Act (MRA) had been published decades ago. After codifications, it turns to be a part of Unfair Contract Terms Act (UCTA), which means, it is ripe enough to be adopted for similar questions. Moreover, English Law is significant to solve these problems for the sake of it is default applicable law which was provided by NSF for addressing the dispute in arbitration clause. Yet, the parties in contract have full freedom to edit the arbitration clause and the governing law. During this thesis, each case was analyzed by those national laws respectively, then an outcome can be summarized as a comparative result. Besides the national laws, parties can choose arbitration place and rule as well. It is interesting to compare different main arbitration courts and find out sundry result. This characteristic could provide buyers or sellers the convenience to seek for an arbitration place which is potentially beneficial to them.

In terms of case law, both English law and Singapore law are originated from case law, a judgment from a specific case would become a precedence for a later similar case. The only thing should be mentioned is that grasping the essence of a judgment and follow it, then found out the principle and spirit in the case. The text and mind of judgment is key to determining the normative value and applicability of the law, which is highly convenient for a researcher. Comparative research could be utilized, similar case should be analyzed by different forms and achieve different consequence.

In respect of international conventions, not too much conventions are applicable in the second-hand ship sale & purchase. However, it still depends on the definition of “goods” or other jurisdictions. Moreover, most every country has a consumer act or law which

is unclearly to be applied or denied. In certain countries, transaction of giant objects such as car and ship, legally are treated as *res immobilis*, in the event of this, those laws or rules relating to the goods cannot be applied.

1.4 Scheme of the Thesis

Following this introduction, Chapter two will stipulate the basic definition about cl.4 and cl.6 in the NSF and basic definition of CS, including the questions arising from them. Chapter three will talk about how the problems could be solved under NSF and some jurisdictions, certainly containing three parts of misrepresentation situations. Chapter four will give a comparative study among different standard forms. Later, Chapter five and Chapter six bring case study which by reference to some classical cases from different aspects and conclusion achieved, respectively.

Chapter 2 – interpretation of misrepresentation in inspection

More details about misrepresentation in inspection can be found in cl.4 and 6 of NSF. In an inspection, a misrepresentation normally is a statement which contains misleading information comparing with those information during negotiation. Before starting a discussion with misrepresentation in inspection, it is necessary to introduce those basic issues in inspection clauses.

2.1 Interpretation of Clause 4 in Norwegian Sale Form

Comparing with the revision 1993, the 2012 version has some slight difference. In line 37 of 1993 revision, quota “The sellers shall provide for inspection of the Vessel at/in”, but in line 58-59 of 2012 version, it said more precisely, quota “The seller shall make the Vessel available for inspection at/in within.” The choosing of words is more accurate in recent version. In later lines, rarely changes appears in Saleform, merely the consequence or the order of the language becomes more reasonable and correct.

Before 1993 revision had been published, the 1987 revision keeps being dominant place in ship sale and purchase business, and the difference between the 1993 revision and 1987 revision is much more than it in 93 and 2012. In 1993 revision, inspection clauses are easier to perform prior to the signature of MOA, and some variations have been noticed below;

Line 39: the language now used refers to the buyers causing “undue” delay which simply tracks the language in the preceding sentence.

Line 40: as noted above, the word “afloat” has been omitted.

Line 41: for some reason the reference is now to “deck and engine log books” rather than to “the vessel’s log books for engine and deck”.

Line 42: the word “afloat” is once again omitted.

Line 43: the reference is now to the sale becoming “outright and definite, subject only to the terms and conditions of this Agreement”.

Line 44: the buyers are now given 72 hours within which to provide written notice of acceptance and there is no reference to “telexed” notice.

Line 47: the deposit is now to be returned “with interest earned” and the reference is to release “to the buyers”.

Line 48: the language at the end has been amended to read “whereafter this Agreement shall be null and void” rather than “considered null and void”.¹⁰

In both 1993 revision and 2012 revision, cl. 4 has two alternatives for the buyers and sellers relating to the inspection, one of which should be deleted if both of them intend to sign a contract. In the event of fail to delete, cl. 4 (a) will be applied automatically. Admittedly, the parties in the contract can apply no inspection when the buyers and sellers cancelled or deleted whole alternatives. In that case, the transaction is solely subject to the terms and the conditions of the Saleform, and the contract shall be outright and definite after the parties signed.

Cl. 4 aims at dealing with the pre-delivery inspection or the inspection when delivered. When checking the records, it enables the buyers to ensure that the intended vessel is in a satisfactory condition as given age, trading history, etc. and those paramount information shall be taken into consideration of deciding a price. Sometimes, the buyers may suspect the ship was defective during delivering, then the buyers will be responsible to prove it. As mentioned, three alternatives are available for the buyer to inspect the vessel including no inspection, in practice more business people prefer to choose inspecting the ship prior to the signature unless there is special circumstances

¹⁰ Malcolm, *supra* at 82.

which the ship perhaps may be in an inaccessible port at a specific moment, and if the buyers insist on inspection process who may lose more benefits such as time and business chances.

If an inspection takes place after the contract signed, the sellers would like to establish a 10 percent deposit and be concerned as how quickly this will be if buyers decline the ship and ship should be released.¹¹

After an inspection, it is important to notice that cl. 4 gives the buyers a relatively free hand in deciding whether or not to accept the vessel. If the buyers decline the vessel, they should give reasonable causes to sellers in a reasonable time. It is simple question of fact as set out by Lord Denning in the *Merak*¹², quota;

“After the inspection, the buyers have to make their minds within 48 hours whether to accept or reject her. If they give notice accepting, they are bound. If the refuse, they are not bound.”

Indeed, inspection result is not only reason makes buyer decline the ship. Sometimes, unstable ship market is another reason. The price may come down when the contract is outright and definite comparing with the price when the contract was just signed, the buyer will conclude that they are entitled to refuse the ship and recover their deposit and accrued interest, but this is not an absolute right for the buyers. There are two strands of cases on the topic of the right to reject vessel after inspection, but no same result would reach because those qualifying words such as “material defect”, “satisfactory” or similar wording are not same in each circumstance. Therefore, sellers are willing to codify Saleform for preventing to leave too much possible reasons of

¹¹ *Ibid.* p. 80.

¹² *Varverakis v Compagnia de Navegacion Artico A.S. (the Merak)* [1976] 2 Lloyd’s Rep. 250 CA. *See also Albion Sugar Co Ltd v. William Tankers Ltd (the John S. Darbyshire)* [1977] 2 Lloyd’s Rep. 457, *Astra Trust v Adams and Williams* [1969] 1 Lloyd’s Rep. 81. For an example of a different procedure-reference to an expert post-contract for adjustment of the contract price-see *Bernhard Schulte GmbH & Co K. G.* [2004] EWHC 977.

rejecting a vessel to buyers. In *Docker v Hyams*¹³, the sellers sought to amend the printed terms of cl. 4(b) so as to tie buyers' right of refusal to those matters which are actually connected with their inspection of the ship and her record,¹⁴ the purchaser of a yacht was only entitled to give a notice of rejection if any "material defect" was found in the yacht or her machinery. In this case the materiality of the defect was a matter of objective assessment and the buyer cannot feel free to reject, and materiality assessment will be explained more specified in later Chapters.

To sum up, the cl. 4 in NSF 2012 entitled the buyers to inspect the ship with two procedures before delivering the ship. The first alternative clause is an outright sale, the buyers should inspect and accept the ship before a contract is concluded, which means, the transaction becomes outright and definite after the pre-inspection. This new clause just began from the NSF 1993, it is a bold and sensitive amendment since many sales are concluded on this basis.¹⁵ In the second alternative, three parts subject to the inspection are necessary to inspect, namely the classification record and superficial inspection of the ship without opening up and an inspection to the engine log book and deck. One thing need mention is the superficial inspection, the buyers normally nominate a place and time to inspect the ship, and the seller will be breach of the contract if they fail to arrange that as buyers nominated. Sometimes, the buyers are not familiar with specified ship, so buyers perhaps require more detailed inspection such as opening up and demonstration or testing of the ship's engines and machinery, even in

¹³ *Docker v Hyams* [1969] 1 Lloyd's Rep. 487 CA.

¹⁴ Iain Goldrein QC, Matt Hannaford, Paul Tuner. (2008). *SHIP SALE AND PURCHASE* (5th ed.). London: informa. p. 118. See also In *Docker v. Hyams (No. 1)* [1969] Lloyd's Rep. 487, a case involving a dispute under a yacht sale contract, buyers were of the honest, but mistaken, opinion that they had found a material defect in the yacht. The court decided that buyers were not entitled to serve notice of rejection because their contractual right to do so was conditional upon a material defect existing as a matter of objective fact.

¹⁵ *Ibid.* p. 117.

some cases a programme of specified sea trials is needed.¹⁶ Cl. 4 not only includes the rights for the buyers, but also limits the buyers by obligations such as in line 60-61, the buyers shall undertake the inspection without the undue delay and shall compensate all the losses thereby incurred. Moreover, the buyers shall give the notice of acceptations within the stipulated time. In the event of sellers fail to delivery vessel within notice period, the deposit and interest accrued shall be immediately released to the buyers and the contract shall be thereafter null and void.

2.2 Interpretation of Clause 6 in Norwegian Sale Form

Diver inspection is written in cl.6,¹⁷ this inspection normally will performs before the ship is delivered, and it renders the buyers locating in a bargaining position. Since second ship sale & purchase business is treated as a high cost transaction, so buyers will often seek to make a formal inspection immediately when ship was delivered in order to compare the condition of the ship when delivered and when performed inspection, aim at identifying any deterioration between these times except “fair wear and tear” provided in cl.11.¹⁸ For the sake of keeping balance during negotiation, they have seek to minimize the risk by a jointly appointed independent surveyor would carry on diver inspection. Therefore, this is a balanced result for both sides, the buyers can possess one more inspection to check the condition with an amendment of Saleform when the ship is delivered, in the other side, sellers can have an independent surveyor who will stay away from the disruption by the buyers. Albeit that the different alternatives for dry docking inspection have been retained, but the order of the

¹⁶ Iain Goldrein QC, *supra* at 117.

¹⁷ See appendix I or II.

¹⁸ Iain Goldrein QC, *supra* at 119.

alternatives had been changed in Saleform 2012 for sake of putting Saleform in practice more reasonably.

Diver inspection shall be only achieved if the facilities of a port can meet the requirements for performing it. In the event of the nominated port is not suitable for the diving inspection, Saleform 2012 revision adds a new clause which allows the cancelling date to extend by the additional time which is required for the positioning and repositioning of the vessel. Besides this re-positioning clause reflects the spirit of keeping balance, it arose some big problems as well, one of those questions is that the person who has ability to decide the conditions of port which are not suitable for diver drydocking inspection. According to a usual class rules, an underwater survey must be carried out at a location where was approved by the society. The surveyor must, before the survey begins, have sufficient and necessary consult with diver (or his superior) but no responsibility remains with him.¹⁹ As the normal physical inspection, diver inspection has time requirement as well. cl. 6(a) (i) has been amended so as to provide that buyers must exercise their right of requiring a diving inspection in a time limit of at least nine days prior to the intended delivery date. This seeks to ensure the sellers possess an enough time for giving a proper arrangement for the diving inspection. Also, buyers should make sure the notice of diver inspection being within the scope of time limit, otherwise deprived of their right to call for a diver's inspection.²⁰ In the event of the seller fail to arrange the drydocking work, they will probably be regarded as in a vital breach of contract because failure of arranging diver inspection is a substantial failure of performance a contract.²¹ Buyers have some remedies under that situation;

¹⁹ Malcolm Strong, *supra* at 105.

²⁰ Paul Herring, Anna Devereaux. (2012). *THE NORWEGIAN SALEFORM 2012 – AN OVERVIEW*. Retrieved February 14, 2013, from <http://incelaw.com/ourknowledge/publications/the-norwegian-saleform-2012%E2%80%93an-overview>.

²¹ Malcolm Strong, *supra* at 110.

firstly, the buyer can treat this non-performance as a breach of contract or a repudiation of the agreement, either, the buyers could reject the NOR on the basis of the vessel cannot be treated as physical ready for the delivery. In the terms of defects in record, cl.6(a) (ii) in Saleform 2012 provides if record had certain rectified defects before the next dry docking survey, the sellers are authorized to deliver the specified ship with those rectified defects without the deduction from the agreed price.²² In the meanwhile, the buyers will have no further right for claiming compensation to any defects and/or repairs.

Another thing need to mention is that this clause also sets out a mechanism for calculating the deduction from the purchase price if defects were found during diver inspection. The repair work is meant to be obtained by the parties from two reputable independent shipyards in the vicinity of the port of delivery within two banking days from the imposition of the condition/recommendation of class unless the parties agree otherwise. If one of the parties fails to obtain such a quote then the quote of the other party will be the sole basis of the estimate. Moreover, NOR cannot be tendered by sellers until such estimate quote having been established. This new theory could become a further disputable issue which is a subjective decision on whether a defect become a recommendation or not may be a significant effect for the buyers and sellers. Besides that, some practical problems could be arising from the two banking days for the parties to obtain their quotations.²³ Even though this calculating quote is beneficial to both parties, several shipyards do not yet agree upon providing a final quotation

²² The deduction of agreed price is calculated by the estimated direct cost of labour and materials for the purpose of carrying out the repairs conduct.

²³ Paul Herring, Anna Devereaux. (2012). *THE NORWEGIAN SALEFORM 2012 – AN OVERVIEW*. Retrieved February 14, 2013, from <http://incelaw.com/ourknowledge/publications/the-norwegian-saleform-2012%E2%80%93an-overview>.

without an all-round diving inspection, which may lead to obstacles in obtaining a quote, or inaccurate quotation information.²⁴

Non-grounding letter will be used when no diver inspection was chosen by buyers or it is not economical to perform a drydocking. General speaking, a non-grounding letter will use occasionally where the buyers are willing to rely on the good faith of the sellers on both drydocking and underwater inspection, meanwhile, sellers agree to produce a letter on closing confirming that vessel bottom has not been touched since last drydocking with the best of their knowledge and belief.²⁵

2.3 Interpretation of the Classification Society

This section is stipulated about more detailed issues on CS. CS is an independent commercial or charitable organizations staffed by marine surveyors who work with shipyards, shipowners, insurance companies and flag state authorities in matters relating to the construction, maintenance and repair of ships. One of the principal objectives of the classification system is to enhance the safety of life and property at sea by securing high technical standards of design, manufacture, construction and maintenance of mercantile and non-mercantile shipping.²⁶ Considering second-hand ship transaction, the checking systems are achieved by means of regular surveys by surveyors.

At respect of CS system, general speaking, the CS will issue a certificate to a ship and show a specified ship which is registered in that society and had stick to the society

²⁴ *Ibid.*

²⁵ Malcolm Strong, *supra* at 110.

²⁶ Iain Goldrein QC, *supra* at 41.

rules, thereafter, the surveyor in the society will inspect or survey that ship according to the rules and the schedule of each ship, making sure the ships are complying with CS rules. The most stringent of these surveyors are known as the hull and machinery special survey.²⁷ If a ship is registered as “in class”, which has two meanings: at first, this ship had been completed the last periodical survey, the CS which the ship entered was satisfied that the ship was in compliance with the applicable rules of the society; secondly, the ship was continuing in compliance with those rules, and the ship also should be equipped with proper maintenance and have enough capacity of barring accidents, further the ship will be remaining in compliance with such rules until the coming scheduled periodical survey.

Unfortunately, CS records are not always satisfied by buyers, the buyers definitely wish all the necessary information of the purchasing ship will be written in the records, including the break down record, maintenance history and repairing record etc., but the shipowner somehow has no ability to submit all the information. For example, a small defect normally would be corrected in a short time, then shipowner probably not submit it. As some potential buyers, they will largely rely on the information given by the CS because most buyers have realistic expectations about the true worth of classification records and they relied upon records as an accurate guide to the condition of the ship.²⁸ Except that CS cannot input every detail of the ship into the records, they still has no guarantee of proper maintenance or the question of seaworthy, even that ship is free of significant defect.

Suspension of class certainly is important to every registered vessels, and loss of class would influence economical value of the ship. Normally, CS has a rule about checking schedule and uses different length of time as a period, when shipowner fails to comply

²⁷ *Ibid.* p. 42.

²⁸ *Ibid.* p. 42.

with repair work or other recommendations issued by its CS, it should be treated as suspension of class. If the shipowner contravenes class rule, it may lose the membership requirement of CS, and sometimes, this situation should be regarded as withdrawal of class. Furthermore, an offending ship will keep its formal (or “paper”) class until the classification has been suspended or withdrawn according to an expressed decision.²⁹ Losing the certificate by CS leads very serious consequence in commercial aspect, not only the ship financing bank or organization needs the record as a security documentation, but also other business party use the record as an updated way to catch up with the information of the ship. Even though entering a society is not mandatory, still the shipowner or the financial relatives imply that they require the certificate issued by CS.

The significance of CS can be seen in the Saleform, the general examples of class-related matters will be stipulated below;

Recitals—the ship’s classification Society and class notation must be inserted.

Clause 4—the buyers must declare that they have already inspected the ship’s classification records (and are satisfied with them) or, alternatively, are given the right to inspect them on a mutually agreed future date. If buyers fail to notify sellers within 72 hours of the inspection that they are satisfied with the ship’s classification records, the contract is terminated.

Clause 6—this provides for certain defined underwater parts of the ship to be inspected (either in drydock or by a diver’s inspection) prior to delivery. Such inspections are to be carried out in accordance with classification Society rules and performed to the satisfaction of the classification Society. In respect of those parts of the ship which are to be inspected, the test applied is that nothing is discovered which would give rise to a condition or recommendation being made against the ship’s class record.

Clause 8—one of the documents sellers are required to deliver to buyers at closing is a Confirmation of Class certificate issued by the classification Society within 72 hours prior to the ship’s delivery. It also requires sellers to

²⁹ *Ibid.* p. 43.

hand over to buyers all the class certificates which are on board the ship at the time of delivery.

Clause 11—this provision is concerned with the ship's condition at delivery. One of the requirements is that the ship shall be delivered with her class maintained without condition or recommendation, free of average damage affecting the ship's class, and with her classification certificates which she had at the time she was inspected by the buyers valid and unextended without condition or recommendation.³⁰

There are also objective reasons which make records not covering all information as well. One of those reasons is that scope of the information is not very clear to define, firstly, some information was known to sellers but are not known to the society, for example, sellers may fail to report those information which can be too recent or had been positively concealed by shipowner, or class had failed to spot them during an inspection or survey; secondly, if defects are notified to class or spotted by class, but repaired before class made any entry in their records for the ship, these defects would be missed; thirdly, latent, in the sense that they are not yet apparent to sellers or class; last but not least, some information perhaps exists outside the scope of class, for example, those damages and defects in the living room or playground for the passenger are not covered under society service.³¹

Owing to no contractual relation between buyer and CS, so the buyer cannot claim compensation against CS. Contractual relationship only exist between the shipowner and CS unless the parties in Saleform apply the Contracts (Rights of Third Parties) Act 1999, otherwise the buyers cannot bring a claim against the CS for the negligence or breach of contract.³² Buyers seek the remedies for the position when CS caused damages to the buyers during the transaction. However, under English legislation, the

³⁰ *Ibid.* p. 45.

³¹ *Ibid.* p. 46.

³² *Ibid.* p. 47.

tort law impose an extra care duty to the CS. This care duty needs several requirements; first, buyers have the burden of proof to proving the duty of care does exist and proving the CS does breach of the care duty, then proving this careless conduct harmed the buyers' interest. Besides that, European Union after the *Erika*³³ in 1999, aims at harmonizing the financing liability regime of known organization in Euro, which means, if parties in a dispute all have European flag of states, the liable party by its negligent act or actively omission has unlimited compensation to the injured party. Until now, no similar case was bearing upon the second-hand ship sale and purchase, but without any doubt, the trend of harmonizing the CS liability into the big regime is true. Now a shift of judicial opinion on this point could see the courts more inclined to determine that a duty of care exists between the CS and third-party or buyers in second-hand ship transaction.³⁴

2.4 The problems arising from Clause 4 and Clause 6 in NSF

General speaking, a misrepresentation is basically an untrue statement of fact (not intention or opinion).³⁵ There are several special situations below, in which individuals shall determine an existence of misrepresentation carefully, firstly, silence will not count to as a misrepresentation, secondly, a statement which is partially correct and partially false, is misrepresentation as well, even the original statement is true but

³³ [2008] 2 LLP. 672.

³⁴ *Ibid.* p. 54.

³⁵ Malcolm Strong, *supra* at 19.

become to be false later unless it was corrected.³⁶ Considering the characteristic of misrepresentation, it can be divided into two parts which are non-fraudulent and fraudulent ones. Specifically, non-fraudulent will be divided into negligent and innocent ones, but the characteristics of misrepresentation are same. In terms of negligent ones, the most frequent using remedy against misrepresentation is to wait for the buyers' acquiesce on the consequence, or renegotiate with buyers upon the purchase price if the misrepresentation did affects the price of the ship. In the terms of fraudulent misrepresentation, two possible remedies may be utilized against fraudulent misrepresentation, one is compensation against damages or *Restitutio in integrum*. Since *Restitutio in integrum* renders a contract null and void and it is difficult to prove, but still a possible result. Most cases have various applicable remedies for buyers to choose against misrepresentation, so there is no definite relevant consequence or remedies for a same sort of misrepresentation.

Cl. 4 and cl. 6 are merely illustrated about inspection, but the possible questions under cl. 4 and cl. 6 are always unpredictable. Except of the rights and obligations mentioned in the Saleform, more attention will be spent on those potential questions. For instance, when the surveyors are inspecting on board, not only the surveyors or buyers were presenting, but also some sailors or relatives were working or living on board, such as chief, captain, and repair workers. Those people are familiar to the condition of the vessel, but the statement made by those people is not very wise to reply on. In legal view, the buyers could get the information about the vessel and make a relative judgment from those people, but if that statement is fraudulent or easy misunderstanding, can the buyers claim tort based on those words?³⁷ In other words, it is not clear whether the officer or superintendent has ostensible authority to bind the

³⁶ *Ibid.* p. 19.

³⁷ *See* Chapter 5.3.

seller to any statements they had been made to buyers. Similarly, it is uncertain that whether those statements should be regarded as a condition or not when surveyors have been given access to the ship to undertake an inspection.³⁸ Assuming that the buyers replied on some statements or suggestions made by independent organization which earn profits by giving advices, whether the buyer entitled to claim tort or fraud against the independent organization is worthy to discuss.

In terms of characteristic of a statement from the people on board, even if those words are all authorized, it is still disputable to decide those words are came as an opinion or a fact; if it is an opinion, buyers cannot believe it as a fact but only a suggestion, otherwise, it can be treated as an evidence when involving a trail or arbitration.

In the light of validity of those authorities on board, whether those authorities have right to affect the buyers' contractual right is another thing worthy to discuss. This problem often links to the contract law, it is a different situation if the people on board play as a service or not is a key job there. Therefore, if both parties are willing to declare the validity of those representation, it is quite necessary to express clearly the right of those people and obligations on board in Saleform.

Another discussion about the responsibility of CS, as previous section mentioned, declaration of relationship between buyers and CS is most dominant problem to solve. For example, if a local class surveyor raised a recommendation but shipowner immediately dealt with it, then no record will necessarily be created in the vessel's file with the CS. If so, the surveyor may pose a threat to "condition of Class" if the dealt matter would affect ship condition after ship was delivered.

³⁸ Malcolm Strong, *supra* at 32.

Chapter 3 – Problems solved under NSF

If buyers and sellers were applying NSF as a standard second-hand ship purchase & sale contract, then misrepresentation often appears in three parts which are inspection, condition of ship and classification society record respectively. Owing to lack of description in Saleform, it is very significant to make sure all the precise conditions have been made as large as possible. Similarly, a little misrepresentation also will lead a devastating influence in Saleform or record.

3.1 The Descriptive Problem

Normally, the description sentence in Saleform is very limited, which usually contains information of vessel's CS, shipbuilder and date of built, flag registration, call sign, tonnages and register number available to buyers. Besides descriptive requirement had stipulated in Saleform, SGA shall be implied in Saleform in which s.13 (1) will operate to imply a condition³⁹ into the sale contract that the ship must correspond to the description given to her in the contract. Subs. (1) provides as follow:

³⁹ Before start the discussion, the difference among the condition terms and warranty and intermediate terms should be discussed, especially the issue between condition terms and warranty. Sale of Goods Act (SGA) and Sale and Supply of Goods and Services Act (SSGSA) will be applied unless parties in contractual relation had expressly agree on excluding certain provisions or all of them. English law recognize various level of each terms in a contract, there is not all of them having equal importance. Normally speaking, a condition is a vital term of the contract, the non-performance of which may be treated by the innocent party as a substantial failure to perform the contract. A warranty is a term which is subsidiary to the main purpose of the contract and which is not so vital that a failure to do so will cause a damage claim against the wrongdoer. For example, section 13(1), 14(2) and 14(3) are treated as a condition which is fundamental aspect in a contract. In terms of intermediate terms will be selected outside the scope of condition and warranty, the way to distinguish between conditions, warranties and intermediate terms see the book mentioned below, generally, the order of identifying them is condition first, then warranty, last is intermediate terms. *See also* Iain Goldrein QC, *supra* at 78-82.

“Where there is a contract for the sale of goods by description, there is an implied term that the goods will correspond with the description”. (Note that the 1997 Act inserts the word “term” rather than “condition” but provides by Sch.2 that with certain exceptions “term” are “condition”.)

The importance of this provision is that the term was implied as a “condition” so that failure of doing so by the seller for delivering a ship complying with the description would potentially provide the buyer with a reason for refusing delivery or claim against sellers.⁴⁰ If the misdescription is so slight and still allowable for the buyers to reject the vessel then this circumstance should be extremely unfair. Therefore, this slight misdescription should only be regarded as a breach of warranty (s.15A (1) of the SGA).⁴¹ It is possible, to the extent of buyers’ knowledge of the ship as a result of such inspections, the sale may not be a qualified sale by implying a provision which is about description and the purpose in s. 13 of the SGA.⁴² However, if s. 13 did imply and sellers are charged as guilty when a serious misdescription of the ship was found, buyers would be entitled to require sellers to carry out whatever works are necessary to make the ship complied with the description given in the contract. Also if the ship completed fixing work lately, then buyers are still entitle to compensate sellers for the delay in delivery; or to ask sellers to cover buyers the cost for carrying out the necessary works and their loss of profits resulting from the ship was pending completion works. In other situations, if the misdescription is serious enough, it will be allowable to reject the ship, or to cancel the contract with compensation if sellers cannot remedy their breach within the contractual cancelling date.⁴³ Those situation possibly will not achieve all the time,

³⁹ Iain Goldrein QC, *supra* at 96.

⁴⁰ Malcolm Strong, *supra* at 31.

⁴¹ Iain Goldrein QC, *supra* at 96.

⁴² *Ibid.* p. 96.

⁴³ *Ibid.* p. 96.

so buyers should bring those spotted points during that inspection in court as evidence. However owing to estoppel,⁴⁴ the buyers cannot complain misdescription after acceptance of the ship. Therefore, these arguments led by SGA are a two-edge sword to both parties and are full of uncertain strength. In view of the risks outlined above, the sellers will sometimes expressly exclude the application of s.13 (and certain other parts of the SGA) by means of a type-added clause.⁴⁵ Meanwhile, the buyers would like to revise estoppel provision in the contract.

After all, the second-hand ship contracts is one kind of contracts which are made freely by both parties, and the sellers and buyers can choose to describe the nominated vessel with a simple way or a broad way. Nevertheless, the description always goes with conditions or/and warranties, of course they are different meanings and have distinct remedies. In terms of condition, there is an extreme case showing how the condition should be strictly stick to, in *Re Moore Co Ltd and Landauer & Co Ltd*⁴⁶ the buyer agreed to buy a quantity of canned fruit with agreed package way, but the goods were delivered with good quantity but without right package way. Nevertheless, the Court of Appeal held that the buyers were entitled to reject the whole consignment on the grounds that there had been a breach of s. 13. By similar case which is *Arcos Ltd v E.A. Ronaasen & Son*⁴⁷, it was stipulating about the word using in a contract, even though it

⁴⁴ Where the doctrine of promissory estoppel applies, a promise may be binding notwithstanding that is not supported by consideration. This doctrines applied where a party to a contract makes an unequivocal promise, whether by words or conduct, that he or she will not insist on his or her strict legal rights under the contract, and the other party acts, and thereby alters his or her position, in reliance on the promise. The party making the promise cannot seek to enforce those rights if it would be inequitable to do so, although such rights may be reasserted upon the promisor giving reasonable notice. The doctrine prevents the enforcement of existing rights. But does not create new causes of action.

⁴⁵ *Supra*. p. 97.

⁴⁶ [1921] 2 KB 519 CA.

⁴⁷ [1933] AC 470.

was found that the goods were “commercially within and merchantable under the contract specification” and also that they were “reasonably fit for the purpose for which they had been sold”, the House of Lords held that the buyers were entitled to reject the goods for breach of s.13. Quota from Lord Atkin:

“...A ton does not mean about a ton, or a yard about a yard. Still less when you descend to minute measurement does “1/2” mean “about 1/2”...

No doubt there may be microscopic deviations which businessmen and therefore lawyers will ignore...But apart from this...the conditions of the contract must be strictly performed.”

Clearly see, the s.13 of SGA is beneficial for buyers, historically, the court may seek to avoid the strict application of s.13. For instance, those deeming statements or particulars supplied are mere representations and not part of contract description.⁴⁸ There is an example case in which no reference was made in an actual memorandum of sale, in *T&J Harrison and Others v Knowles & Foster*⁴⁹, due to the description of capacity was found out differently from the capacity by the seller stated, the Court of Appeal in this particular case held that the statements about the ship’s capacities were merely representations.⁵⁰ There is another similar case which reflected same principle, namely *Reardon Smith Line Ltd v Hansen Tangen*⁵¹, in which shipbuilders contracted to build a vessel with a certain specification at yard No.351 at Osaka Zosen. Eventually, that vessel was built by a different yard with another shipbuilder to whom the claimants had subcontracted the work. It was held that the number of shipbuilding yard has no legal significance at all since they were of no substantial importance to the parties who should do not concern the building place of the ship

⁴⁸ Malcolm Strong, *supra* at 32.

⁴⁹ [1918] 1 KB 608 CA.

⁵⁰ *Supra*. p. 32.

⁵¹ [1976] 2 Lloyd’s Rep. 621 HL. *See also supra*. p. 33.

commercially. Conclusion is that even a contract stipulated a specified yard or other information, under law of that time, the result will be stable regardless of the number of yard. Nowadays a modern tendency of restricting application of compliance of s.13 may be found in case of *Ashington Piggeries Ltd and Another v Christopher Hill Limited*⁵² in which Lord Diplock said:

“It is open to the parties to use a description as broad or as narrow as they choose. But ultimately the test is whether the buyer could fairly and reasonably refuse to accept the physical goods proffered to him on the ground that their failure to correspond with what was said about them makes them goods of a different kind from those he had agreed to buy. The key to section.13 is identification”.

Therefore, absolute compliance with s.13 in SGA will extremely enlarge the buyers’ rights and put sellers in a very reluctant place, but s.15 gives a way to limit it. As Lord Diplock said that the key is identification, indeed, given a clear delimitation between serious misdescription and slight misdescription is the key to solve descriptive dispute. Under a consequence made by implication of SGA, a seller would like to limit the descriptive materials scope in order to escape liabilities, particular in a falling market, the buyer will latch on any misdescription on the basis of seeking a reduction of the price.⁵³

Besides, the s.13 and s.15 were applied in the contract, it is disputable as well to decide whether the s.14 applied, which was amended by the SSGA 1994⁵⁴ and in which it said about all the condition requirement of the goods, so the buyers can rely on those provisions to support his claimant. Because the s.14 is a strict regime of description, the sellers are not so willing to apply it. Recently, more doctrines were arose about

⁵² [1972] AC 441 HL.

⁵³ *Supra*. p. 33.

⁵⁴ See appendix IV

validity of s.14. In NSF, “as is” regime is used to describe the vessels, but implied term still should be applied unless expressing word of inconsistent of it, or as most doctrines said the “as is” regime is sufficient to reject implied terms in SGA from applying.⁵⁵ So far, no modern authority had made a decision whether s.14 should be applied or not, in *Lloyd Del Pacifico v Board of Trade*,⁵⁶ the court of appeal did not specifically decide that SGA could not apply to a contract for the sale of second-hand ship, it made findings which were inconsistent with such applications. Under the situation of cl.5 was applied, the buyer should take the ship with “all faults and errors of description”, then it is sufficient to decide that a language like this at least prevent the first part of s.14 from applying because cl.5 means the buyer will rely on the skill and knowledge from seller. Even s.55 (1) of SGA recognized that parties are free to decide to add or edit their own terms as “a right, duty or liability” by implication of law or express agreement or dealing between parties. Still s.55(2) provides an expressing term which does not reject SGA to be implied unless using expressing words which are inconsistent with it.

A second-hand tonnage could include millions information, and not all the information can be included in Saleform. From this point, lack of description information supports the point that the implied terms should be applied anyway. From a certain degree, the core reason to deny implication of the implied terms or not depends on how broad its definition is, Phillips J. in the *Morning Watch*⁵⁷, Steel J. in the *Brave Challenger*⁵⁸ as well as the Saskatchewan Court of Appeal in *MacLeod v Ens*⁵⁹, had defined the term

⁵⁵ Malcolm Strong, *supra* at 34.

⁵⁶ [1930] 36 LL.L. Rep.16.

⁵⁷ *Mariola Marine Corporation v Lloyd's Register of Shipping* [1990] 1 Lloyd's Rep. 547.

⁵⁸ *Indigo International Holdings Ltd and another v The Owners and/or Demise Charterers of the vessel "Brave Challenger"* [2003] EWHC 3154.

⁵⁹ [1983] 135 DLR 365.

“as is” in a very broad manner which, it is submitted, is sufficient to meet the requirement of an express agreement to reject the rights and liabilities which might be implied by the SGA.⁶⁰ Another thought as mentioned above is that the implied terms of SGA will definitely apply in Saleform unless there is an expressing exclusion of application of implied terms, this approach is inserted on the consideration for protection of consumers, but not all the buyers of second-hand tonnage can be treated as consumer. Further, some arguments prefer those applications of the implied terms as “satisfactory quality” and “fitness for purpose”, which usually involve a more technical methodology and objective assessment. Even under Saleform, the cl.11 does not mean that the s.14 cannot be implied because cl. 11 is “subject to the terms and conditions of this Agreement”, effect of which is to avoid more disputes by more unknown information but not to prevent the implied terms from applying.

The first starting point in coping with those arguments can be illustrated from the question of what is the essence to construct SGA when performing as a commercial contract. The case of *Christopher Hill Ltd v Ashington Piggeries*⁶¹, in that case Lord Diplock said:

“... the Act should not be construed so narrowly as to force on parties to contracts for the sale of goods promises and consequences different from what they must reasonably have intended”.

This approach was, repeated by Lord Steyn in the *Starsin*⁶² in effect, as follows:

“Legal policy favours the furtherance of international trade. Commercial men must be given the utmost liberty of contracting. They must be left to decide on the allocate (sic) of commercial risks.”

⁶⁰ Malcolm Strong, *supra* at 35.

⁶¹ [1972] AC 441 HL.

⁶² *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2004] 1 AC 715 at 750 HL.

At respect of substantial issue in cl. 11, it mentions that the vessel should be delivered and taken over as she was at the time of inspection, fair tear and wear expected, and the condition of the ship when it is delivered can affect the final price of the ship. Moreover, it stipulates the detail of the condition, such as free of recommendation and damage, and those words are meant to be just a special list of description not an exclusion of SGA. Furthermore, implication of SGA would not be an intention of the parties in some cases, who may be never aware of them, and the basic objection of the implication of SGA terms is that they are not set out or referred to in the agreement.⁶³ However if the implied terms were applied in the Saleform without both parties' awareness, it will broke balance of contract regardless of the buyers will treated as consumer or an experienced party in a trade.

The importance of applying SGA is that implying it or not always leads to a very unpredictable result. Both "Fitness of purpose" and "merchantable quality" are interpreted by statement and uncertainty of interpretation would represent a significant swing of the pendulum and it mostly is in favor of the buyers, also non-interpretation would potentially impose a very strict statutory regime which is intended to protect consumers.⁶⁴ Objectively speaking, there are sufficient points to support both sides, but the author personally supports those implied terms which should be applied and the words in Saleform cannot negative implication. Assuming that not all arbitrators agree upon the implication of SGA, then the arbitration may choose to abandon or not peruse when the case get involved with SGA, otherwise all arbitrators will address conflicts according to the implied terms.

⁶³ Malcolm Strong, *supra* at 37.

⁶⁴ Malcolm Strong, *supra* at 38. *See also* Halsbury's Statutes Service: Issue 61-Preliminary Note on Sale and Supply of Goods Act 1994.

In the event of implied terms applied, definition in s.14 is still a problem to discuss, under s.14 (2) (A), goods should be of “satisfactory quality” with a knowledge by a “reasonable person”. Therefore, a satisfactory quality will be determined based on individual’s knowledge of the specified field, and a more reasonable approach is to determine it based on a reasonable buyer. Since second-hand goods are a very special category, so a similar case of second-hand car can explain “satisfactory quality”. In *Bartlett v Sidney Marcus Ltd*⁶⁵, some defects have been found two months after taking over the car, and the compensation claim is failed, quote from Lord Denning;

“...the car was far from perfect. It required a good deal of work to be done...but so do many second cars. The buyer should realize that...defects may appear sooner or later...Even when the buyer buys from a dealer the most that he can require is that it should be reasonably fit for the purpose of being driven...”

Therefore, when judging a second-hand good whether meet the requirement of reasonable quality or not, it is necessary to take other factors into consideration such as price, using period, the same as a second-hand vessel. In terms of fitness of purpose, during a negotiation between buyers and sellers, it is not obvious that the buyers would disclose the purpose of the vessel or using this vessel for a nominated charterer, so sellers have no ability to make sure the vessel which is suitable for one nominated charterer. Apparently, the reasonable quality should be easier to prove than fitness of purpose, for example, second-hand car has merely one goal that is to delivery people to some destination, but a vessel may have various usages.

Thus even if the implied terms in the SGA are not “negatived” by standard Saleform clauses, their application in any given cases may be a matter of serious difficulty and do not give the buyers an easy alternative for formulating a claim under the Saleform.⁶⁶

⁶⁵ [1965] 1 WLR 1013.

⁶⁶ Malcolm Strong, *supra* at 41.

3.2 The Classification Society Record Problem

Record inspection normally happens in the head office of the CS, and a full record inspection contains whole information saved in CS, those data will be represented by some ways, such as CD-ROM or documentation and microfiche. Ultrasonic hull thickness⁶⁷ reports are also normally available if party specifically requested⁶⁸, however the neither record correspondence nor inspection memos is available for buyers or buyers' agency.

As mentioned earlier, the problem in record is when a very recent recommendation was dealt immediately without log recorded, and it is difficult to decide the belonging of responsibility. Malcolm Strong said it "The surveyor may threaten to impose a "Condition of class" if the matter in question is not immediately dealt with". Historically, a notification duty had been made in 1987 revision, but 93 revision deleted it, quota from Saleform 87 line 112-115;

"However, the vessel shall be delivered with present class free of recommendation. The sellers shall notify the Classification Society of any matters coming to their knowledge prior to delivery which upon being reported to the Classification Society would lead to the withdrawal of the vessel's class or to the imposition of a recommendation relating to her class."

A duty of notification can be seen from above clauses, this notification obligation only appears in 83 and 87 form, though some words had been added in Saleform 93 after deletion, quota from line 217-223;

⁶⁷ Det Norske Veritas. (2009). *Guide For Ultrasonic Thickness Measurements Of Ships Classed With Det Norske Veritas*. Retrieved June 6, 2013, from http://exchange.dnv.com/publishing/cn/GL_10.pdf.

⁶⁸ *Ibid.* p. 84.

“The Vessel with everything belonging to her shall be at the sellers' risk and expense until she is delivered to the buyers, but subject to the terms and conditions of this Agreement she shall be delivered and taken over as she was at the time of inspection, fair wear and tear excepted. However, the Vessel shall be delivered with her class maintained without condition/recommendation*, free of average damage affecting the Vessel's class, and with her classification certificates and national certificates, as well as all other certificates the Vessel had at the time of inspection, valid and unextended without condition/recommendation* by Class or the relevant authorities at the time of delivery.”

Assuming that the buyers were applying 93 revision Saleform, in the event of defect was found in record, the buyers may notice this suspected recommendation to CS and sellers, nevertheless, the CS usually does nothing on this issue, because the CS merely gives a response to their clients as sellers, but not the third parties as buyers.⁶⁹ If so, buyers would have to determine whether the damage amounted to average damage which would result in a defective condition or recommendation. If they can conclude that the damage virtually does amount to “average damage affecting class”, buyers could decide to reject sellers’ tender of the ship relying on the terms in Saleform 93.

In event of 87 revision was applying, which is always an easy-trouble dispute. Normally saying, the sellers believe that only the serious problems which can directly lead to change the conditions or nearly impose a recommendation, and contrary view is that the sellers have to notify every single issue to CS after inspection or negotiation. If sellers failed to notify them, sellers would face the risk of compensation when the vessel was found to have an imposed recommendation. Therefore, a neutral solution should come out as when a possible imposed recommendation was found by the sellers after the inspection, the sellers are supposed to discuss with surveyor in CS. If the recommendation was dealt with immediately without any threat to buyers’ profits and

⁶⁹ Iain Goldrein QC, *supra* at 169. See also Chapter 3 in same book “For commentary on the role and duties of Classification Societies”.

both buyers and sellers are satisfied with the result, then no disputes would arise. Clearly sellers cannot notify something which they are unaware of, so there is a tendency for buyers that buyers should submit to sellers a list of matters which are considered to affect class prior to delivery so that sellers are not confronted with a defense due to lack of knowledge.⁷⁰ But those questions do not exist in the most updated Saleform.

And a proper time for notification also is problem. The sellers only have obligation to notify those matters after the signing the contract, but not before, even if this matter may be serious enough to withdrawal of the ship's class, but buyers disagree that, quota from Iain Goldrein;

“The class reporting requirement was put into clause 11 of NSF' 83 to plug the gap exposed in *The Buena Trader* by making the sellers' reporting obligation under Sale-form co-extensive with sellers' reporting obligation under the rules of their classification Society;

In this case, the sellers' obligation under the applicable class rules was to inform the classification Society of matters affecting the ship's class whenever such matters came to their knowledge; and

It followed that the sellers' obligation under clause 11 of the sale contract was to notify their classification Society before delivery of all matters affecting class, whether such matters came to sellers' knowledge before or after the date of the sale contract.”

The Lords prefer the arguments brought by buyers. Lord MacKay L.C. observed that while the buyers' construction of cl.11 produced a commercially sensible result, the sellers' interpretation of the clause could produce startling consequence.⁷¹ One of reasons is that after a survey, the sellers theoretically have a fixed period approximately five or six years to conceal the defects which were found in last survey and pursued to

⁷⁰ *Ibid.* p. 170. *See also* Chapter 5.3 referring in a case permanent repair turns to temporary repair.

⁷¹ *Ibid.* p. 171.

make a sale contract. At the end, House of Lords allows the buyers to appeal sellers who are obligated to reveal any matters coming to their knowledge regardless of the time when is before or after the contract signed. Moreover, the sellers are not responsible for informing CS about the all the matters had already been told. This notification obligation has limitations, for example, the CS can ignore the requirement from the buyers until the buyer becomes a new shipowner and only if the same CS is retained. The methodology of notification can be seen in *The World Horizon*⁷² from Lloyd L.J.;

“The obligation to notify means what it says. It is an obligation to report, inform, or make known. It is no part of the seller’s obligation to call for a survey of the items in question. Nor is he obliged to express a view as to their condition. That is the task of the surveyor. The seller’s obligation is to draw the surveyor’s attention to the items.”

Nevertheless, notification obligation had been removed in 93 Saleform, “as is” delivery rule will be applied instead. From a certain degree, some thoughts believe that this gives the sellers more burden for keeping vessel in satisfied condition. As the ship should be free of average damage which are affecting the ship’s class when sellers’ give NOR and when ship is delivered to buyers, the ship is also required with a clean record.⁷³ Not always the seller will find all the defects on his ship, the hidden defects will be sellers’ weakness if the buyers claim against sellers by 93 revision under the situation of hidden defect appeared, then the sellers have to fail in judgment, so the sellers are willing to negotiate with buyers to delete or modify this new term in Saleform. By contrast, the buyers are reluctant to delete this one for relieving sellers from such a duty in their contractual relationship.

⁷² *Taramar Shipping Corporation v. Young Navigation Corporation, The World Horizon* [1993] 2 Lloyd’s Rep. 56 at 58 (C.A.) (although note that the comments of the Court of Appeal on this issue were expressed obiter) *See also Ibid.* p. 172.

⁷³ *Ibid.* p. 172.

Still, buyers conclude that the removal of sellers' notification duty and the inclusion of the average damage requirement do not amount to an even balanced trade-off.⁷⁴ Buyers are free to contact sellers to restate cl.11 in 93 revision. On the other hand, sellers would like to limit their liabilities under the older provision and limit their notification duty only to matters which are arising after the sale contract was made.⁷⁵

3.3 The Misrepresentation Problem

Before starting with this discussion, the applicable law should be mentioned at first place, both Misrepresentation Act (MRA) and Unfair Contract Terms Act 1977 (UCTA) are applied in misrepresentation case of second-hand tonnage sale & purchase under English law.⁷⁶

Generally, a misrepresentation is difficult to prove because in some cases sellers had been made unqualified statements to the buyers, but buyers will not realize it unless those figures would be tested later, for example the vessel's real speed or derrick capacity only can be known after a sea trial. In the light of descriptive information, after 93 revision of Saleform, the condition of delivered vessel was illustrated depends upon the "as is" basis. Further, a large part of descriptive information often is presented when the S&P broker negotiate with their buyers in the first place, and to be honest, those words from S&P broker are not bound by law or any rules, and they all are expressed

⁷⁴ *Ibid.* p. 173.

⁷⁵ *Ibid.* p. 173.

⁷⁶ The original s.3 of the MRA was amended by s. 8 of the Unfair Contract Terms Act 1977. MRA from the length aspect, it is a really short one, and section 2 and 3 are connected to our case.

with good faith and without guarantee⁷⁷. Furthermore, under English Law, there is no good faith in normal contract, it normally requires utmost good faith contract in insurance law. Therefore, the buyers feel hard to put all the reliance. Such qualifications are probably not unreasonable if it can be presumed that the parties have equal bargaining power and they can be interpreted as an indication to the buyers that buyers should not rely on them.⁷⁸

One of the most important issues is the legality of the statement by those people on board. Those statements normally are oral without any documentation protection. For some lack experience buyers, who may believe those words and determine how to proceed the transaction. An advice for parties in contract for escaping this dilemma is to identify clearly the person who is authorized to state the condition of vessel or has right to proceed the contract even has enough influence control on ship sale and purchase during or before the pre-inspection.

Misrepresentation can be divided into two categories non-fraudulent and fraudulent ones and both of them should meet several requirements. Firstly, the misrepresentation should be established by conduct,⁷⁹ but silence during a negotiation is not one kind of misrepresentation. Even using “with all faults” definition, it still cannot help the sellers avoid the liability of concealing known defects, which is reflected in *Schneider v Heath*,⁸⁰ but can avoid the liability in the respect of latent defects.

⁷⁷ Good faith is an objective assessment, it is trade custom that the parties of a contract should express intention or stipulate the good with good willing. In a second-hand ship purchase & sale, a broker shall make any statement without fraudulent intention. But, the information which was given to broker sometimes was not correct and this cannot blame the broker. So the broker shall make a contract with good faith but no guarantee.

⁷⁸ *Smith v Eric S. Bush* [1990] 1 AC 831.

⁷⁹ Silence cannot be treated as a way to give representation, when the situation is half correct information and half misleading information which cannot count to misrepresentation.

⁸⁰ [1813] 170 ER 1462 and (1813) Camp 506. *See also OAO Northern Shipping Co v Remolcadores de Marin SL* [2007] EWHC 1821 (Comm) in which an award was remitted by the court to an arbitration tribunal for further

“...if the seller was guilty of any positive fraud in the sale, these words [“with all faults”] will not protect him ... it appears that means were taken fraudulently to conceal the defect in the ship’s bottom.”

Secondly, the misrepresentation must be an inducement to a contract, which means a misrepresentation should contain the characteristic of “materiality”⁸¹. Therefore, a misrepresentation must be material enough in contract and possessing full meaning. In *Pan Atlantic Insurance Co. Limited and another v PineTop Insurance Co. Limited*,⁸² the Lords believes that a misrepresentation must meet these two requirements.

In terms of remedies, rescission is applicable remedy in sale of goods, which means the one party can refuse to perform further contract and recover the money or other efforts refund. However, rescission has limitations, from Malcolm Strong who named five limitations for rescission in general sale of goods,⁸³ but it is slightly irrelevant to rescission in Saleform because normally only compensation for damages could be potential and available.

Assuming that the buyers can prove that contract was induced by a misrepresentation, a situation of which usually happened after the ship delivered. Buyers are so eager to check the new acquired vessel, and if the defects which all went against cl.11 in Saleform and were found by an inspection, they will seek grounds to support them to claim against sellers. Moreover, *restitution in integrum* as a remedy is likely the most

consideration of a finding that production of an incorrect GL certificate by the sellers did not amount to a representation.

⁸¹ A misrepresentation must be material, in the sense it should be relating to the matters which would influence a reasonable person’s decision whether or not into a contract. If a representation is ambiguous and may be interpreted into two ways, one is false, other one is true, this is not misrepresentation unless representor intended to lead buyers into a false way.

⁸² [1994] 2 Lloyds Rep. 427 HL.

⁸³ Malcolm Strong, *supra* at 21.

attractive one to buyers,⁸⁴ but even from MRA, it seems to be impossible. In a ship sale and purchase contract, there are a number of financing third party involved, especially, mortgagee or lien holder, and self-evidencing work is extremely hard to prove,⁸⁵ so a wise remedy is claiming damage compensation instead of *restitution in integrum*.

Considering a fraudulent misrepresentation, the suffering party is not only entitled to stopping the performance, but also to claim compensation for the deceit.⁸⁶ By contrast, in a negligent misrepresentation, entitlement to recover the cost for performing contract is available,⁸⁷ but claiming a compensation against wrongdoer is unlikely to arise, except that wrongdoer can prove that misrepresentation was made by good faith, or there are enough knowledge support those words are coming like a true one at the expressing time.⁸⁸ The kind of misrepresentation will be defined as non-fraudulent misrepresentation when it was made carelessly or without having reasonable grounds to believe, and it is important to notice that the innocent party only need to prove the other party to the contract was guilty of a misrepresentation.⁸⁹ Also, a shift in burden of proof is necessary for the other party who have to prove that the statement at that time was reasonably true. Even in an innocent misrepresentation, the innocent party is entitled to claim rescission, but normally the court or the arbitrators are preferred to award damages in lieu of rescission.

⁸⁴ More remedies are discussed under Chapter 5.

⁸⁵ *Richard Hughes v Vail Blyth Clewley (the Siben)* [1994] 1 Lloyd's Rep. 420 (Jersey CA) for an example of a case where the court was not persuaded that *restitutio* was impossible.

⁸⁶ Iain Goldrein QC, *supra* at 63.

⁸⁷ *Ibid.* p. 63.

⁸⁸ [1978] 1 Lloyd's Rep. 334 CA. *Howard Marine & Dredging Co Ltd v Ogden & Sons (Excavations) Ltd*.

⁸⁹ Iain Goldrein QC, *supra* at 63.

Another available solution for misrepresentation should be highlighted is Entire Agreement in Saleform. This entire agreement is belong to additional clause, from line 400-409, cl. 18 said below;

“The written terms of this Agreement comprise the entire agreement between the buyers and the sellers in relation to the sale and purchase of the Vessel and supersede all previous agreements whether oral or written between the Parties in relation thereto.

Each of the Parties acknowledges that in entering into this Agreement it has not relied on and shall have no right or remedy in respect of any statement, representation, assurance or warranty (whether or not made negligently) other than as is expressly set out in this Agreement.

Any terms implied into this Agreement by any applicable statute or law are hereby excluded to the extent that such exclusion can legally be made. Nothing in this clause shall limit or exclude any liability for fraud.”

This clause was designed to state that the agreement contains the entire understanding of the parties relating to the subject matter and no statement was made prior to or on the date of the agreement can vary or modify its terms,⁹⁰ another deeper meaning of this clause is to restrict validity of further additional clauses in the Saleform, and those new clauses only turn to be valid through signatory authorization, but still this entire agreement cannot exclude the fraud liability. Furthermore, the entire agreement cannot exclude the fraudulent misrepresentation.

In exclusion of liability, there are two kinds of the terms for excluding the liability regime. One kind can interoperate as a clause in contract and the other kind cannot be one term of contract. All this exclusion regimes are originated from *Thomas Witter Ltd. v. TBP Industries Ltd*,⁹¹ the judge in this case clearly commented and observed that the innocent party even with knowledge of exclusion of liability, must agree on at least one

⁹⁰ Malcolm Strong, *supra* at 223.

⁹¹ [1996] 2 All ER 573.

available remedy, and exclusion regime must be complying with s.3 of MRA. Following *Thomas Witter*, if the exclusion provision in Saleform was assumed big enough for exclude the liability for fraud, then this exclusion should be treated as all void, so those exclusion liability content must be made clearly for excluding some liabilities.

In terms of provisions for excluding liability for pre-contractual representations which normally do not incorporate as terms of a contract, it is really important to name all the liabilities which are determined to be escaped. In the cases of *Grimstead v. McGarrigan*⁹² and *Watford Electronics Limited v. Sanderson CFL Ltd*⁹³, the court stated that a non-reliance clause shall operate by estoppel, and a non-reliance provision will be enforceable against the counterparty if the representee actually knew that the counterparty was relying on pre-contractual representations,⁹⁴ in the event of the sellers were aware of the buyers who only rely upon those statements from sellers, so the non-reliance provision cannot help sellers avoiding liability for inaccurate information.

Exclusion provision has its owned general principle; firstly, this provision aims at providing freedom and balance between parties in contract and should be applied strictly and restrictively. If there was an interpretation conflict between parties, this whole provision is null. Further, it is better for sellers to negotiate a result with buyers who should have fully understanding of the exclusion or limitation provisions. Moreover, it is usual for exclusion provisions to state that they will not operate to exclude or restrict liability for death or personal injury resulting from negligence, breach of the condition which was implied by section 12 of the SGA or fraud, because there is a risk that if a liability for any of these matters was excluded, then the whole

⁹² [1998-99] Info TLR 384.

⁹³ [2001] 1 All ER (Comm) 696.

⁹⁴ Iain Goldrein QC, *supra* at 237.

exclusion provision could fail.⁹⁵ Nevertheless, even some parts of exclusion provision were extremely unreasonable then become void, but rest of them are still valid. Reminder for the buyers is to critics this provision very carefully, to make sure that exclusion will not derogate the buyers' profits under the purpose for sellers exclude or limit the liability.

⁹⁵ *Ibid.* p. 239.

Chapter 4 – Problems solved under other forms

In this thesis, three standard forms would be used to give a comparative study. There is no such a same result because even those three forms do have several common places, for example, both Singapore law and English law originated from case law, so some specific problems would have same solutions under two legislation. Still they have different parts, for instance, due to different user location and no case law in Japanese legislation, the misrepresentation under Nipponsale would another approach to analyze. However, the misrepresentation under case law and Chinese legislation is the emphasis in this chapter.

4.1 Under Nipponsale 1999

Nipponsale has some progressive steps, such as the structure of Nipponsale form is fresh outline, using the box structure⁹⁶. In terms of applicable law, there is no box to specify the applicable law of the agreement, and accordingly, the place of signing agreement may have a certain effect on determining the applicable law in the view of Horei.⁹⁷

Nipponsale form has a different time schedule about the inspection compared with the inspection of NSF. The inspection in cl.4 in NSF is requested by buyers who offer an

⁹⁶ SSF are using box format as well, but NSF dose not.

⁹⁷ Article 3-34 of Horei are treated as conflict of law in Japan, there is no expressly applicable law in Nipponsale form, so the courts or the arbitrators intend to know the real intend of each party in Nipponsale form. And even the place of agreement is not located in Japan, the Japanese arbitrators may decide the applicable law is Japanese law after all.

option to inspect after contract signed, but in Nipponsale it is allowable for buyers who will have these inspections and accept the class record before the agreement was signed.

In terms of the underwater inspection, Nipponsale form stipulates two arrangements from buyers and sellers, respectively in cl.6 (b) and 6(d), in sub (b). The buyers shall arrange the diver's inspection at all his risk and expense, which is approved by CS. However, in sub (d), the sellers shall arrange it with CS to carry out an inspection. Some tension had been caused between these two clauses because both buyers and sellers are having part responsibility in arrangement of diver inspection,⁹⁸ and the reason why the sellers arrange the inspection partially is that buyers is impossible to contact CS due to no contractual relationship between them, nevertheless all the meaning of this clause should be understood as the buyers shall arrange all parts of the diver's inspection, only the communication job with CS is arranged by sellers. Both forms are similar on the other content, even it is fair enough to say that Nipponsale form completely revised cl.6 from NSF 93 revision.⁹⁹ Some slight differences exist as well, such as in Nipponsale form, the underwater delimitation line is used as summer load-line, by contrast, NSF amended this to "deepest load-line", and according to most doctrines said that deepest load-line is more proper. However, there is a conflict between clause 6(b) and clause 6(c), in which it gives buyers the right to "arrange" for a diver's inspection, and clause 6(c) states that sellers shall "arrange with the Classification Society" to carry out such an inspection,¹⁰⁰ so it should remove inconsistency by reasonable amendment to avoid further dispute.

At the respect of cancelling date clause, if the defect was found which affected the class, then the sellers are obligated to fix the defect in a period of not extending thirty days.

⁹⁸ Malcolm Strong, *supra* at 298.

⁹⁹ Iain Goldrein QC, *supra* at 137.

¹⁰⁰ *Ibid.* p. 137.

Also if the repair work cannot success in thirty days, then the buyers have the right to cancel the agreement. Moreover, JSE supports that if it is obvious that the repair work cannot be finished in thirty days, the buyer is entitled to cancel the agreement without waiting for completed thirty days lapse.

The other problem is about the interference, in Nipponsale, the buyers are not entitled to disturb the ship's operation and normal schedule, also the buyers have to notice the sellers for such an inspection in a nominated period. Therefore, the situation is delicate where the buyers have to notice sellers for inspection in a sufficient time without interference to the sellers, and there is an obligation for sellers to give an available opportunity to let the buyers requiring an inspection. Cost clause is same as NSF, all the cost of a diver's inspection will be taken by buyers unless found out defects which are affecting the ship's class, so in which cases sellers shall bear the cost of the inspection.

In respect of description of the goods, Nipponsale differs from NSF 87, there is no "as is" basis, cl.5 (a) said;

The sellers shall deliver the Vessel to the buyers in substantially the same condition as when the Vessel was inspected by the buyers at the place stated in Box 9, fair wear and tear expected, but free from outstanding recommendations and average damage affecting her present class and with all her class, national and international trading certificates clean and valid at the time of delivery.

A more disputable clause is cl.5 (b), something is more disputable, an exclusion liability clause which indicates below;

Upon the Vessel being delivered to and accepted by the buyers in accordance with this Agreement the sellers shall have no liability whatsoever for any fault or deficiency in their description of the Vessel or for any defects in the Vessel or for any defects in the Vessel regardless of whether such defect was apparent or latent at the time of delivery.

This clause reminds the buyers to amend it clearly, and the definition of apparent or latent should be important. Purpose of the cl.5 (b) is to amplify the latter half of clause 9 of the 1993 Saleform, and this means to deny the application of Art.570 of Japan Civil Code, which provides that;

“If any latent defect exists in the object of a sale, and the buyers are unaware thereof, the buyers may rescind the contract if the object of the contract cannot be attained thereby, in other cases, the buyers may demand only compensation of damage.”

However, the sellers have to hold the burden of proof, proving that the defect did not exist when buyer given an inspection. When a buyer cannot inspect some defects which are already known to seller, the sellers still cannot escape the liability of any defect or deficiency was found, it can be seen from the Civil Code of Japan, which provides:

“Even where the sellers have made a special stipulation that they are not liable for defects in the object of the sale, the sellers cannot be relieved of the liability in respect of any fact of which he was aware and nevertheless failed to disclose...”

Similarly, it is interesting that determining the exclusive word is whether sufficient or not to deny the application of SGA in NSF, but in Nipponsale, it is same important that determining the words deny the application of Civil Code of Japan or not. Still, some shipping lawyers have strongly argued that the sellers cannot exempt themselves from liability for defects which were hidden or not discoverable on the buyers’ superficial inspection despite the “as is” provision.¹⁰¹ In *Frontier*, if the sellers knew of the latent defects and did not disclose such defects to the buyers before delivery, then the sellers should be responsible for damages caused by such defects under Japanese law regardless of the buyers had discovered the defects only after delivery. Indeed, the sellers are obligated to compensate the defects, but sometimes, if the buyers take part of responsibility for defects which were not found before delivery due to the buyers and

¹⁰¹ Malcolm Strong, *supra* at 303.

sellers are contributory negligence under Japanese law, the buyers as well pay half responsibility on a specific issue. On an advice which was received according to the view of Hiratsuka & Co, this provision will not relive sellers' liability from such fault or deficiency which sellers failed to disclose it.¹⁰² Still, if the defect is enough serious, the buyers are entitled to rescind the agreement, similar to NSF, while the defect is less serious the remedy for buyers is damage claimant. In terms of arbitration clause, the form provides that disputes shall be submitted to arbitration by TOMAC in accordance with its own rules and any amendments thereto,¹⁰³ and there is no such a provision that excludes the application of Japanese law. Normally, in a case, the arbitrators is required to try to find the intention on applicable law of two parties if the contract is silent on this issue. Furthermore, the arbitration panel is likely to find that the parties intend Japanese Law to apply if Tokyo arbitration agreed.¹⁰⁴

In respect of misrepresentation act under Japanese law, there is no misrepresentation remedy for individuals, but remedies within authorizations and organizations according to Act against Unjustifiable Premiums and Misleading Representations¹⁰⁵ such as hearing is one of remedies. However, referring to the obligation or remedy for individuals in second-hand tonnage sale and purchase case, the Consumer Contract Act

¹⁰² See Article.572 of the Japanese Civil Code.

¹⁰³ <http://www.jseinc.org> for more detail including the Arbitration Law (Law no.138 of 2003) see also Malcolm Strong, Paul Herring. (2010). *SALE OF SHIPS The Norwegian Saleform* (2nd ed.). London: SWEET & MAXWELL. p. 300.

¹⁰⁴ From record of Messrs Hiratsuka & Co, the number of Japanese Court precedents and arbitration awards on sale and purchase of ships is limited, many disputes are settled down rather than arbitrated, none of them is related to interpretation of words so far, usually, the interpretation in Nipponsale is interpreted under English Law, but no implied requirement is any wording problem going along with English Law in Japan.

¹⁰⁵ Fair Trade Commission. (2005). *Act against Unjustifiable Premiums and Misleading Representations*. Retrieved March 13, 2013, from <http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=02&dn=1&x=73&y=9&co=01&ky=act+against+unjustifiable+premiums+and+misleading+representations&page=1>.

shall be applied,¹⁰⁶ in which Chapter II, s.1 stipulates that those misrepresentations have rescission remedy, a consumer may rescind the manifestation of his/her intention to offer or accept a Consumer Contract if either of the actions listed in Article 4 (1) (i) or (ii),

- (i) Misrepresentation as to Important Matter: Mistaken belief that said misrepresentation is true; or
- (ii) Providing conclusive evaluations of future prices, amounts of money that a Consumer should receive in the future and other uncertain items subject to future change with respect to goods, rights, services and other matters that are to be the subject of a Consumer Contract: Mistaken belief that the content of said conclusive evaluations in certain.

Therefore, misrepresentation either in inspections or condition of vessel can be addressed by Contract Consumer Act in Japanese law. One thing should be mentioned is that remedy against misrepresentation shall be only limited to important matters which are defined in art. 4 (4), a general concept is that important matter has capacity affect a consumer's decision, Article 4 (4) (i) and (ii) provides that;

- (i) Quality, purpose of use and other details of the objects of a Consumer Contract, such as goods, rights and services; and
- (ii) Price and other conditions of a transaction involving the objects of a Consumer Contract, such as goods, rights and services.

And all the claim cannot be asserted against a third party without such knowledge.

¹⁰⁶ In Nipponsale form, two parties as two individuals but not governmental organizations, not as Act against Unjustifiable Premiums and Misleading Representations which only aims at dealing with issues relating to public business, such as some general production price. Therefore, Japanese jurisdiction is not sufficient as English law which has a specified act regarding to ship sale & purchase. In consumer Contract Act, pre-condition problem is can this act be applied, in Chapter I, article 2, said "The term "Consumer" as used in this Act mean an individual (however, the same shall not apply in cases where said individual becomes a party to a contract as a business enterprise or for the purpose of a business enterprise)" which enables two parties in Nipponsale to treated as consumers in Nipponsale form.

4.2 Under Singapore Ship Sale Form

Most content of SSF is originated from NSF, and cl.3 in SSF offers two inspection alternatives for parties to choose. In this thesis, application of implied terms had been discussed,¹⁰⁷ and in SSF, quota “...The sale shall become definite and outright, subject only to the terms and conditions of this agreement...”, nevertheless, those words cannot prevent implied terms applying.

Condition on delivery also uses the same sentence in cl.3, which is “subject to the terms of this agreement”, the sellers are obligated to deliver the vessel in substantially same condition as the vessel was at time of inspection. One more difference in SSF comparing with NSF is, SSF clearly expresses requirement of cargo space, that all cargo spaces shall be clean and free of any cargo, subject only to immovable residues. Furthermore, if the condition of vessel is serious enough to affect buyers’ ability to trade the vessel, then the buyer can reject the vessel, otherwise, the buyer can only claim damage against seller.

In pre-delivery divers inspection clause, if a defect was found and needs an immediate repair which was approved by CS, the sellers are obligated to repair those defects without delay prior to delivery, but there is no obligation for CS writing this history into record. For the reason of increasing certainty, SSF decides that CS is only one entity which can determine whether any underwater damage constitutes a condition of

¹⁰⁷ See Chapter 3 section 1. If the words in any ship sale and purchase form is sufficient to prevent from implied terms in SGA applied, then any descriptive issue will be only subject to the terms and conditions of that agreement. The author supports the implied terms should be applied in any circumstance.

class and such determination shall be final and binding to each party. Same as NSF, SSF also has an entire agreement¹⁰⁸ clause.

Under Singapore legislation, when a dispute was referring to description of goods, CISG will be applied if both parties were from an international contract and all came from signatory states of CISG.¹⁰⁹ Since Singapore is a signatory state, CISG had been implied into Singapore legislation. Furthermore, section II, art. 35 and 36 of CISG dealt with descriptive dispute,¹¹⁰ as provided in CISG, the sellers are obligated to deliver the goods which are compliance with the quantity, quality and description required by the contract, also contained or packaged in the manner required by the contract. Similar as given in SGA, CISG also has provisions about requirement on quality and purpose;

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(a) are fit for the purposes for which goods of the same description would ordinarily be used;

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the

¹⁰⁸ See Chapter 2 and 3, entire agreement clause is a relatively new clause which aims at making sure parties will not bothering with adding more clauses under a situation of one party will not be aware of. Even if it is necessary to add more clauses, this need signatory process from two parties.

¹⁰⁹ In addition to those expressly agreed terms, the court may sometimes imply terms into contract, generally saying, those implying terms cannot contradict any expressing terms in contract. Where a term is implied to fill a gap in the contract so as to give effect to the presumed intention of the parties, the term is implied in fact and depends upon a consideration of the language of the contract as well as surrounding circumstances. A term will be implied only if both parties are intended its inclusion in contract. The fact that it reasonable to include the term is not sufficient for the implication, as courts will not re-write the contract for the parties. The terms may be implied because for public policy consideration or required statutorily. Former example of implied terms can be seen from SGA applied from a statutory viewpoint, but latter example of implied terms is hard to find under Singapore legislation, but as far as English law, the English court implied definition of contractual relationship.

¹¹⁰ Singapore legislation mostly originate from common law, and SGA will be applied in descriptive dispute as well, but CISG will apply in the questions of two parties who are all belong to signatory states of CISG. Also, due to an analyze of SGA already had been given in previous chapter, so here, CISG will be discussed.

circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment;

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

Moreover, the sellers are still liable for any lack of conformity which exist when the risk passes to the buyer or this lack becomes apparent after that time. Also, if any lack of conformity appears within the period of guarantee, the sellers are still liable.

In terms of misrepresentation issue, Contract Law in Singapore will be applicable which mostly came from common law.¹¹¹ Unlike her neighbor Malaysia and Brunei, Singapore had no attempt to codify the contract law, and most current rules are originated from judge-made rule which will be codified into legal statutes in some circumstances. However, in present Singapore, MRA from common law will be applied into misrepresentation issue as discussed in last chapter.¹¹²

¹¹¹ Many of these statutes are English in origin. To begin with, 13 English commercial statutes have been incorporated as part of the Statutes of Republic of Singapore by virtue s 4 of the Application of English Law Act. These are listed in Part II of the first Schedule of this Act. Other statutes, e.g. the Contracts (Rights of Third Parties) are modelled upon English statutes. There are still some statutes are based upon other sources, e.g. the Consumer Protection (Fair Trading) Act which is modelled largely from fair trading legislation enacted in Alberta and Saskatchewan. However, the court in Singapore still pursuit MRA, award damages in substitution for the right to rescind.

¹¹² See Chapter 3.3.

4.3 Under ShangHai Ship Sale Form

Second-hand tonnage sale and purchase contract still has not a uniform form in China, but China Maritime Arbitration Commission (CMAC)¹¹³ suggests a sample of sale form which consists with only a MOA like boxes in SSF. In cl.6 of inspection, it only provides that the buyers should inspect the ship under arrangement by sellers and accept condition of a specified vessel. However, no diver/drydocking inspection is stipulated in ShangHai Ship Sale Form, but it is allowable to parties insert such a clause.

In terms of applicable law, both Civil Law and Contract Law are applicable in this case, and the Contract Law is more specific relating to misrepresentation in contract, so the Civil Law will apply in those scope which is not covered by Contract Law. However, most provisions in Civil Law already have been covered by Contract Law. According to Contract Law, if a contract is involved to international sale, then the applicable law should be the most connected law¹¹⁴ or agreed law or the place of vessel law¹¹⁵.

In the misrepresentation question, besides that the parties in contract have freedom to edit terms and clauses, Contract Law stipulates some situations which make the contract absolutely void,¹¹⁶ and the remedy for misrepresentation depends upon each

¹¹³ The China Maritime Arbitration Commission (CMAC) is the organization that operates independently and impartially to resolve maritime, logistic disputes and other contractual or non-contractual disputes in order to protect the legitimate rights and interests of the parties and promote the development of the international and domestic economy, inter alia, trade and logistics. The CMAC was founded in 1959 and has its headquarters in Beijing and established its Shanghai sub commission and five liaison offices in Guangzhou, Dalian, Tianjin, Ningbo and Qingdao. These offices facilitate the parties' arbitrations in these regions. Over the past decades, the CMAC has settled over 1,000 maritime affairs and commercial arbitration cases. *Also see*, CMAC official website, retrieved from <http://www.cmac-sh.org/en/home.asp>.

¹¹⁴ See Appendix IV.

¹¹⁵ See Article. 88 in Civil Law.

¹¹⁶ See Appendix IV.

circumstance. Nevertheless, Contract Law gives a list of situations which are connected to damage compensation in cl.42¹¹⁷. It is that one party shall be liable for compensating the injured party once it meets one of requirements below; firstly, if party negotiated with fake faith under the pretext of concluding a contract, then expressing party is liable. Secondly, if a party was intentionally concealing a material fact¹¹⁸ related to the conclusion of the contract or supplying false information, the party is liable. Lastly, if there is any other conduct which may violate the principle of good faith in cl.54,¹¹⁹ then either of parties in contract has right to change or void contract thorough approval by court or arbitration who may determine that whether the contract was made by serious misunderstanding¹²⁰ or under an apparent unfair situation.

If a misrepresentation causes a misdescription, then it is necessary to stipulate it under contract law. A misdescription means that there are partial description content which cannot be agreed in both parties. According to cl.62 in Contract Law or cl.88 in Civil Law, if there is no definite illustration of the goods, then the national standard or industry standards would apply into determination of whether it is qualified or not. This provision is similar to the implied obligation in SGA, and its purpose is to offer a standard when no definite descriptive words reached.

¹¹⁷ See Appendix IV.

¹¹⁸ Unlike the misrepresentation under English law, the damage compensation merely points to intentionally misrepresentation, not innocent nor negligent misrepresentation.

¹¹⁹ See Appendix IV.

¹²⁰ This misrepresentation can be an innocent one or negligent one, if there is serious misunderstanding in a contract which buyer may rely on, then one party can claim rescission. Therefore, only less serious misrepresentation can be rescinded, and sufficient serious misrepresentation merely has damage compensation, which only can contradict the way in English law.

Civil law should be applied in those misrepresentation which is involved with third party. These situations normally are CS or ostensible statement. According to Article.66 of Civil law¹²¹, which provides that;

The principal shall bear civil liability for an act performed by an actor with no power of agency, beyond the scope of his power of agency or after his power of agency has expired, only if he recognizes the act retroactively. If the act is not so recognized, the performer shall bear civil liability for it. If a principal is aware that a civil act is being executed in his name but fails to repudiate it, his consent shall be deemed to have been given.

Therefore, in the light of misrepresentation made by CS surveyor, who should be regarded as an agency of CS. From buyer's viewpoint, any conducts or statements made by surveyor relating to the vessel shall be included in the scope of authorization. So the buyer reasonably believes that all the statements from surveyor were authorized, any damages led by surveyor should be compensated. It is another situation that statements were made by stuff on board, who should not be compensated under China Civil Law. The reason is that those statements from stuff on board were made without knowledge of sellers and according to Civil Law, the sellers shall not pay for the damages due to unknown situation.

¹²¹ Peking University Legal English Website. (2013). *General Principles of the Civil Law of the People's Republic of China*. Retrieved May 9, 2013, from <http://www.lawinfochina.com/display.aspx?id=1165&lib=law#>.

Chapter 5 – Cases Studies

In this Chapter, author will use some cases which had applied with different sale & purchase forms and jurisdictions during second-hand tonnage transaction in order to give a comparative study. Each case has its own key point in different parts of a sale & purchase form in order to illustrate misrepresentation itself and remedy in different processes.

5.1 Misrepresentation in inspection

In *OAQ Northern Shipping v Remolcadores de Marin*¹²², buyer found total engine power with a serious irregularity as Germanischer Lloyd certificate (GL certificate) issued and which was offered by sellers before pre-purchase inspection, the representation would have been false as the actual power of engine was “some 956kW”, which is 25 per cent lower than the figure stated in the GL certificate. Except for problems upon procedures, it takes time to determine misrepresentation, firstly it should make sure representation valid, then it should decide whether representation is belong

¹²² [2007] Vol.2 Part 6, LLP, 302 (QUEEN’S BENCH DIVISION). By an agreement dated 21 June 2005 the claimant buyers agreed to purchase an ice classed tug from the defender sellers. This agreement was made by NSF 1993 with additions and amendments. The buyer in this case claim this contract is induced by misrepresentation as total engine power rating of the vessel’s engine, in that buyers’ representative had been shown a Germanischer Lloyd certificate of class dated 28 June 2001 which provide: “Total Rated Power... 1,265kw”. This dispute was referred to arbitration. Not only misrepresentation is disputable in this case, also the buyer assert tribunal shall comply with Section 33 given by Arbitration Act 1996 which is the tribunal shall act fair and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent and adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined. Further, the tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the existence of all other powers conferred on it. Besides misrepresentation issue in this case, our procedure issue will not be discussed in this section.

to false and connection between it and damage, last thing is remedy or result against misrepresentation.

At beginning, the tribunal held that the buyer was failed because that was not a representation in which engine power equals to 1,265 kW and concluded that sellers had represented that the GL certificate was not “true”, but merely it was “authentic”.

Further statement by Mr. Gloster J;

Assuming that is representation, five requirements should be met and seller is liable for misrepresentation, (i) the fact should be clear that actual engine power was 956 kW compared with representing 1,265 kW; (ii) this representation should induce to the contract and no evidence support it in this case; (iii) whilst the sellers in fact believed the 1,265kW figure to be true, they had not shown reasonable grounds for holding this belief; (iv) the right to damage for misrepresentation shall not be excluded by MOA, nor waived by the buyers; (v) the representation should make damage for buyer.

Nevertheless, the buyer was proceeding to claim that representation had been a recognized issue between two parties,¹²³ and any decision by court would be treated as void. However, the seller has further counter-claimants, who thought “as is” basis can exclude liability of misrepresentation in this case, also believed that first inspection was completely done by buyer who has full obligation to find all the defects. Other thing is that burden of proof should be belong to buyers. So, here exists a conflict, the “as is” basis is whether or not sufficient to exclude seller’s obligation to guarantee vessel’s particular. The court held that the seller is liable for those defects once buyer can prove that true engine power was not the figure presented in GL certificate.

¹²³ Here, the “representation” issue was one of the “essential building blocks” of the tribunal’s decision. Counsel for buyer had proceeded on the assumption that the point was no longer in issue (if it ever had been), and therefore did not need to be addressed. As Mr. Wilson has stated, the tribunal did not invite submissions on the representation issue. This was not simply a case of a tribunal drawing a further inference on an issue which the parties had otherwise had the opportunity to address. Later, it may be surprising that tribunal received written submissions after the hearing as to which of the GL certificate and GA plan were relied upon (if either), but again did not invite submission on its intended “no representation” point.

There must be a serious damage caused by misrepresentation. In this case, the irregularity was clearly serious, even silence cannot count to misrepresentation but implied conduct in this case indeed was a way of representation.¹²⁴ Further the seller offered the GL certificate to buyer which means the seller has a belief on figure in GL certificate, and it is a representation.

Conclusion by court is that the tribunal would have assessed quantum based on the cost of making these upgrades when it is available to upgrade engine meeting the precedent standard, rather than based on the price gap between two market times.¹²⁵

If misrepresentation was found during inspection, it has some key points to solve. The buyer only can possess right against damage for misrepresentation under situation of buyer's right is not excluded in MOA or waived by buyer himself. Then buyer hold the burden of proof upon that representation is mistaken or not.

After determining misrepresentation exists or not, and which cannot be included in contract or MOA but only decide by different circumstances, then it comes to remedy, in *QUEEN'S BENCH DIVISION*,¹²⁶ the result may be slightly different subject to other arbitration act, which means, choosing of arbitration clause also can make a different result. In light of application of Saleform, NSF 93 is applied in this case with addition and amendments in which content cannot be revealed in the case, and the figure of total engine power was proved by a certificate when performing an inspection and appeared to be distinguished later, so the contract is not outright and definite due to misleading

¹²⁴ See also *Geest plc v Fyffes* [1999] 1 AA ER (Comm) 672 at page 683. Implied representation are assessed objectively from the viewpoint of the reasonable representee.

¹²⁵ Even though two satisfactory ways are available for choosing for buyer, one is upgrade and other one is compensation for the price gap considering all factors in. however, the court merely decide upgrade way because all clauses in Arbitration Act aim at being to eliminate technical and unmeritorious challenges and promote finality of dispute resolution. Clearly see, if this case appealed in other arbitration place, this resolution could be distinguished.

¹²⁶ [2007] Vol.2 Part 6, LLP, 302 (*QUEEN'S BENCH DIVISION*).

information in that inspection. Also NSF 2012 does not has too much details in the requirement of a certificate, but seller shall be liable for offering a valid and true document¹²⁷ and held to be liable for suffering loss. In Nipponsale, there is only one clause left for underwater inspection, but still the contract becomes outright and definite once buyer accepts the vessel in accordance with this agreement.¹²⁸ Compared with two second-hand ship sale forms discussed above, SSF has more detail stipulation in cl.3-inspection,¹²⁹ regardless of choosing words is changed seller still should offer valid and true document and be liable for the damages.

5.2 Misrepresentation in descriptive issue

As far as *The Troll Park*¹³⁰, a misrepresentation was appearing in descriptive issues and was meaning crucial to each party. Remedy for misrepresentation in description is

¹²⁷ In Clause 4 of NSF, the seller shall put engine log available for examining by buyer, without any doubt, the implied requirement is the seller should guarantee this log is true and valid.

¹²⁸ The seller shall not have obligation for following defect or latent at time of delivery when the vessel was inspected same in accordance with this agreement. Conversely, the seller are still responsible if the vessel is not same according to agreement.

¹²⁹ The buyer shall take physical inspection of the vessel, physical inspection of the vessel is to mean only inspection of the vessel physically including taking photographs without opening up of the Vessel and without cost to the sellers. The physical inspection to include inspection of Vessel's classification society records, continuous synopsis record, maintenance records, deck and engine books and available ballast space. *See also* MEMORANDUM OF AGREEMENT Singapore Ship Sale Form [SSF 2011] Line 47-50.

¹³⁰ [1988] 2 LLP C.A. 423. The basic facts are very simple. Under a memorandum of agreement dated Oct. 22, 1984 there was a sale of vessel *Troll Park* by the respondent to the appeal. The memorandum of agreement was on the standard Norwegian ship-brokers' form with various amendments and completions. That form is used widely at that time, not only Norwegian but in many other places. The dispute between the parties is whether the sellers were in breach of the warranty that the vessel was built in January, 1971. The appellant buyers contend that she had been built by some date in December, 1970. Both the arbitrator and the Judge have rejected that contention. This case is solely around definition of "built" of description.

always a serious problem due to some remedies has a great influence such as a rescission. In *Goldsmith v. Rodger*¹³¹, the fact of defects was existing on the keel in which information had been confirmed as false, but no fraudulent misrepresentation referred. Before starting discussion of remedy against representation, there are other requirements which have to meet and to be a misrepresentation in that contract, one is so important in our case which is induction, Lord Donovan found that statement did induce that contract.

Further, normally the wrong representee is the seller but in this special case the one is the prospective buyer. However no difference should be mentioned between these two situations.

After contract had been executed, then the seller sued buyer, and the last argument in Lord comment is about whether an executed contract is allowable to rescind. Lord Donovan said;

There are old cases which suggest that once a contract is executed, the remedy of rescission is no longer available. It had been pointed out in the textbooks that most of those cases could have been decided on another ground. In fact, some were; so that statement therein as to the effect of execution are *obiter*; and in any event there are later cases where Judges have doubted the correctness of the rule, but have been able to decide the case before them on other grounds.

Normally, an executed case depends on the process of contract was decided by how this contract executed, and in this case, the fact is that vessel is not under possession of

¹³¹ There is a misrepresentation made by purchaser during a negotiation with seller, when prospective buyer moved forward to inspect the nominated ship and found some defects on the keel, then give a counter-offer to seller, Mr. Rodger naturally assumed that the boat had been taken out of the water and the keel examined, it being common ground that unless you do that, you cannot examine the keel. Mr. Rodger accepted the counter-offer, and confirmed by a telegram. But on a same day, Mr. Rodger sent rejection by a telegram due to he had checked with a friend, that vessel had not been pulled out of water for inspection. The defense was home-drawn by Mr. Rodger himself, and it alleged that the contract was obtained by "gross misrepresentation", for which the legal remedy would be rescission.

buyer. Even though Mr. Wheatley preferred to rely on provisions of s. 18 of SGA, more popular doctrine is to rely on intention of two parties.

In conclusion, any party in contract is entitled to rescind contract, but the result is different due to reason and circumstance. In the event of it is possible to restore everything before established a contract without affecting third party profits, it may allow to rescind, if not, it is better to claim damages compensation in lieu of rescission.

5.3 Misrepresentation in Classification Society

There is a general question which can happen in all misrepresentation issues, that it is an ostensible authority makes with a statement which is untrue and buyers did not have reasonable ground to believe that it was true, can those ostensible authorities be held liable under MRA? In *The Skopas*¹³², MRA was deeply discussed about scope of liable persons in s. 1, 2 and 3.¹³³ Mr. Justice Mustill held that if a representation was induced into a contract, representee must play as a principal party, which can be reflected in s.2 (3), which contemplates that credit will be given between the recoveries under sub-ss. (1) and (2), and those liable people in MRA is the same person.

In s.2 (2), rescission is available for misrepresentation which only can be available to a party in contract, so with the same meaning, the persons in s.2 (1) must be read as including the principal.

¹³² [1983] 1 QB 431, LLP. The plaintiffs claim that they were misled into making the purchase by incorrect representation about the passing of a special survey in the comparatively recent past, and about maintenance and repair said to have been performed on behalf of the sellers.

¹³³ See appendix V.

Some debate still exist around s.2 (1), there is still a room to create a liability for third party such as agent when reading s.2 (1). From Mr. Mustill's point, MRA aims at addressing misrepresentation problem which exists in a contract only between two parties. So the purpose of MRA should be taken into consideration, it provides that;

The purpose of Act was to fill a gap which existed, or was believed to existed, in the remedies of one contracting party for an innocent by the other. But there is no such a gap in the case of agent. What purpose would there be in creating an entirely new absolute liability, independent of proof that the representee fell within the scope of a duty of care, simply because the representor happened to be an agent, concerned in the making of a contract, but not himself a party to it?

Therefore, the words of s. 2 (1) must be read as only extending to the principal, but no further extension.

In respect of liability of CS, CS was known as a non-profit organization, whose purpose is to promote the improvement and development of various matters relating to ships, safety of ship and safety of property at sea. In *The Nicholas H*¹³⁴ which is a current standard case, a substantial issue was discussed about two requirements which have to be achieved if making CS liable for the loss, first, it has to possess a certain degree of proximity, secondly is to consider whether it is "fair, just and reasonable".

¹³⁴ [1995] 2 HL 299 LLP. Feb. 20, 1986 *Nicholas H* was in the course of a loaded voyage from South American to Italy when a crack appeared in the vessel's hull. On Feb. 22 she anchored off San Juan, Puerto Rico, where further cracks developed. On Feb. 25 Mr. J. Ducat, a non-exclusive surveyor employed by Nippon Kaiji Kyokai ("N.K.K") was called in by master, at the instigation of the United States Coastguards. He recommended permanent repair, for which, as it happened, facilities were available locally. However, the master choose to reload the cargo and made a temporary repair which also approved by Mr. Ducat. Later, the vessel was proceeding forward to intended destination, all the cargo lost due to temporary repair cracked. This dispute in this case whether CS is held to be liable for this loss or not. Another thing should mention is that, indeed, this is a case involving an economical damage by loss of cargo not a direct case relating to second-hand tonnage transaction, but here the cargo is lost as benefits loss directly by misrepresentation, and when a secondhand tonnage as being a cargo, of course, secondhand tonnage transaction is applicable and relevant.

The fact is that Mr. Ducat was called in by master, which is not familiar by cargo owner. Besides that the foreseeability of physical damage can be proved, it is still necessary to establish a close relationship between the parties, or degree of proximity¹³⁵ in order to establish a duty of care. Clearly, in this case, the degree of proximity is sufficient enough, at the first place, Mr. Ducat as a professional surveyor inspected ship's condition with a comment that there must be a permanent repair then it is allowable to continue its journey. No doubt about it, Mr. Ducat cannot force master to follow it or not, but he is able to make the vessel not leaving unless it is fixed with a permanent repair. By contrast, Mr. Ducat was agreed to continue transporting under only a temporary repair was made. As a result, all the cargo is lost due to temporary repair cracked. From a common sense, there is indeed a certain degree of proximity which is very close in our case. So, first standard that degree of proximity does existed must be fulfilled if claimant is willing to sue CS.

Another consideration is "fair, just and reasonable". It must be achieved if intended to impose a duty of care, and this standard cannot go against public policy. In fact, the primary care of duty is laid on ship owner under a contract of carriage, so there is no need to impose another such a duty to society, which can be confirmed by Lord Justice Saville;

...The balance of rights and duties between the principal parties (cargo-owners and shipowners) has been settled on an internationally acceptable basis and I can see no justice or good reason for adding to or altering this by imposing on the society a like duty to that owed by the shipowners, but without any of the checks and balances which exist in the present regime.

Since intricate regime in Hague Rules is subject to almost charter-party contract by a paramount clause, but there is no such a clause to indemnity third party in Hague Rules.

¹³⁵ Opposite argument exist because it is worthy to worry about if imposing duty on classification society, it may lead a floodgate. On the contrary, the proximity test will act as an adequate safeguard against any such extravagant consequences.

Moreover, nothing in Hague Rules stipulated about “fair, just and reasonable”, it is fair to hold that Mr. Ducat and his employers should be liable to cargo for their assumed negligence.

Normally, a misrepresentation which was made by surveyor from society contains the element of tort or other elements. In this case, the shipowner owns primary obligation for misrepresentation, but no reasons support that this primary duty can militate a duty of care for Mr. Ducat. The House rejected an approach that putting law of tort to a supplementary level,¹³⁶ instead, law of tort is a general law, and parties only can edit dispute clauses which is not covered by scope of law of tort.

It was pointed out that society is charitable non-profit making organization, promoting the collective welfare and fulfilling a public, and should not be liable, but remedies in the law of tort are not discretionary. A similar example is the hospital which also has same characteristic, still they are subject to the same common duty of care under the Occupier’s Liability Acts, 1957 and 1984 as betting shops or brothels.

In *Nicholas H*¹³⁷, it is cargo owner who suffers the loss instead of shipowner in second-hand ship business, the factors which defined CS guilty can be slightly changed in case of Saleform situation. Besides degree of proximity and “fair, just and reasonable”, other factors also should be taken into consideration as well. As in *Nicholas H*¹³⁸, more six factors are discussed in the report,¹³⁹ namely (a) did the surveyors’ carelessness cause direct physical loss? This factor has a same importance in Saleform, assuming that after new shipowner bought a second-hand vessel, then vessel is sunk by some misstatement

¹³⁶ This is re-affirmed in *Henderson v Merrett Syndicate Ltd.*, (sub nom. *The Lloyd’s Litigation*) [1994] 2 Lloyd’s Rep. 468 at p. 497; [1994] 3 W.L.R. 761 at p.787, per Lord Goff of Chieveley.

¹³⁷ See above.

¹³⁸ [1995] 2 HL 299 LLP.

¹³⁹ [1995] 2 HL 313-314 LLP.

from surveyor. Theoretically, the surveyor did have a direct connection to the loss. (b) Reliance. The injured party must put reliance on recommendation which were made by surveyors, similarly, this misrepresentation must be induced into contract. (c) The connection of the contract between the society and the shipowner. This is a factual issue and normally saying, most shipowners will register their ships into a society, which definitely made some influence in business. (d) The connection of the contract between the cargo owner and the shipowner, which is not existing in second-hand business. (e) The position and role of particular society, as in *Nicholas H*¹⁴⁰, N.N.K as an involved society, in whose instrument as mentioned is to promote the improvement and development of various matters relating to ships. And those words in instrument will be treated as an evidence to impose a duty of care to society. (f) Public policy at some point will be a bar to impose a duty of care for society.

Eventually, in *Nicholas H*¹⁴¹, Lord Lloyd of Berwick reject the primary way in which Counsel and concludes that;

“I conclude that the recognition of a duty would be unfair, unjust and unreasonable as against the shipowners who would ultimately have to bear the cost of holding classification societies liable, such consequence being at variance with the bargain between shipowners and cargo-owners based on an internationally agreed contractual structure. It would also be unfair, unjust and unreasonable towards classification societies, notably because they act for the collective welfare and unlike shipowners they would not have the benefit of any limitation provisions. Looking at the matter from the point of view of cargo-owners, the existing system provides them with the protection of the Hague Rules or Hague-Visby Rules. But that protection is limited under such Rules and by tonnage limitation provisions. Under the existing system any shortfall is readily insurable. In my judgment the lesser injustice is done by not recognizing a duty of care. It follows that I would reject the primary way in which Counsel for the cargo-owners put this case.”

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

Regardless of different results between first judgment and second judgment, an examination on duty of care comes out as a standard to impose liability to society. Therefore, it is possible to render society liable for damage which was led by misrepresentation once it passes examination without any public policy against it.

Chapter 6 – Conclusion

Misrepresentation in contract at least will cause economical damage, then injured party would seek to compensate against wrong doer, but the limitation is that rescission is available only if it is serious enough. Nevertheless, defining a misrepresentation still have several obstacles before performing a remedy.

When a misrepresentation appeared in inspection, normally, it was led by seller who may represent a detail negligently or non-negligently. Beside those theoretical factors mentioned above, the lapse of time is very crucial to determine a misstatement refundable. Admittedly, both NSF and Nipponsale are sophisticated enough to define a reasonable figure of time, and in order to avoid sellers hold ultimate liability, it is common place to nominate a specified time point after when neither of parties can claim against each other. In terms of other forms, SSF as a new born sale form, it inherits most classical context from NSF, are updating with new context which can fit regional requirement for Asian place. Moreover, from case law viewpoint, both SSF and NSF have case law resource, and most case law in Singapore comes from English case law, so the result are similar under these two jurisdictions. As far as ShangHai form, there is no case law in China, but the wrong doer shall be liable for the damages according to China Contract Law. Since ShangHai form is a new born Saleform, therefore, it needs a long way to complete as NSF and Nipponsale.

Those remedies for misrepresentation are differed from each case. Under a situation of seller made a misrepresentation to buyer, and the buyer was induced by it into contract then damages happened directly linked to misrepresentation. If this misrepresentation was made by negligence or innocent, it is possible to continue the contract if buyer acquiesce it or renegotiate with seller about price. Besides that, assuming that it is possible to restore, the court or arbitrators would agree on rescinding a contract or the contract would be terminated by mutual consent. In the event of a misrepresentation

was made by fraudulent intention, once the fact is confirmed as so, the buyer would like to seek a more protective remedy against seller, and with a high possibility, the buyer prefer to choose *Restitutio in integrum*. Once again, if the court thought rescission is not economical or impossible, they would hold to support damage compensation in lieu of rescission. Therefore, there is no definite remedy against misrepresentation.

In respect of misrepresentation was found during descriptive issue, and information about vessel's detail in saleforms is so limited which most comes from words made by shipbrokers or seller itself. Further, descriptive issue is not like inspection misrepresentation which can determine almost every detail in sale form, in contrast, misrepresentation in descriptive issue has to be addressed largely rely on national law or conventions. First problem is whether an ostensible statement such as servant on board or agency is liable for misrepresentation,¹⁴² from the case study, those people are not liable for misrepresentation under NSF and SSF due to definition of person or relative individuals are not including those people under interpretation of MRA but only extending to the parties in contract. If under Chinese Contract Law applied, those relative individuals shall be liable if there is no clear authorization permit. Except that, if those people really commit a fraud crime or break other basic laws, on which the author cannot see any reason for exclusion of liability on criminal law. In NSF and SSF, all the misrepresentation disputes will be referring to MRA in which s.1 and 2 clearly illustrates the resolutions. Under Singapore legislation, CISG imposes an implied obligation to the seller who will offer the vessel and which must meet implied requirement written in CISG. On this implied requirement, English law has another diversion which is under NSF, "as is" basis is a sufficient wording preventing implied obligation for sellers, yet some opponents thought it is beneficial for business environment if inserting those implied requirement in SGA into contract. Assuming

¹⁴² See Chapter 5.3.

that under Chinese Contract Law, if there is conflict about descriptive issue or misrepresentation conflict on description, the court is obligated to use national standard or industry standard determine the vessel is whether qualified. In terms of Japanese law which is default applicable law under Nippon Sale, there is a special act aims at addressing misrepresentation problem but which is only connected to dispute among enterprises or organizations, when it comes to misrepresentation dispute between individuals, Japanese Contract Act or Japanese Civil Code will be applied, still they cannot cover all different situations but it is still stipulating some limitations of rescission. As far as Chinese legislation for remedies, similar as Japanese Contract Act, it stipulates a list of restriction and possible circumstances for rescission, however Chinese Contract Law is easier to handle because this act adapt a list illustration way, by which a provision names a list of possible situations to rescind contract, another provision names a list of applying restrictions, so this illustration way decreases the uncertainty of applying act.

As misrepresentation in society in case law countries such British and Singapore, if the public policy is not standing against imposing a duty of care to CS, then more requirement shall be met for imposing a duty of care which is "fair, just and reasonable" regime. Fairness is to make sure this duty is necessary to exist or it is close enough between misrepresentation and damage, normally, a direct connection is the first one of all factors, a misrepresentation made by surveyor should cause damage in a short period or with a very close connection. Moreover, fairness aspect also contains a broader consideration such as most people thought that once imposing a duty to CS, it would lead a floodgate to sue CS for claiming compensation not only in executed contracts, but also in future contracts. However this theory already had been testified that it would not lead a floodgate because the "fair, just and reasonable" regime is strict enough to prevent such a tragedy. For justice aspect, Hague Rules nearly covers all remedies for cargo owner and ship owner, it is not just if left misrepresentation made by CS in an

empty field because Hague Rules cannot efficiently protect CS. After all, the shipowner still shall have a primary obligation for taking care of cargo on board instead of CS. At the respect in second-hand ship transactions, the seller shall have primary obligation for keeping nominated vessel fitting requirement. Indeed, the CS cannot control seller's decision if he is insisting on selling a ship which is slightly defective or with a recommendation, but still the surveyor has a right to not offering a clear recommendation and notice it to seller and buyer. So, from this viewpoint, the CS surveyor cannot be excluded all liability for making prospective buyer buying a defective ship. In other hand, when misrepresentation in civil law countries such as China and Japan, according to China Contract Law, surveyor shall be liable for damages made by misrepresentation because buyer have sufficient grounds to believe all the statements from surveyors are true and valid, also if a surveyor has no ability to afford those compensation, then the CS should pay the rest compensation.

Conclusion is that under case law, reasonable factors should be taken into consideration in each case, even in *Nicholas H*¹⁴³, the court thought indemnifying either party is one unfair way to solve misrepresentation problem, but take more considerations into account, and it is better to judge CS is not liable, by contrast, if under China Contract Law, the CS or the surveyor is guilty once there is close connection between damages and misrepresentation. Therefore, the CS is possible to convict to be liable in both common law and civil law, only it pass the examination of "fair, just and reasonable" without obstacle from public policy, as well as during second-hand vessel transaction.

¹⁴³ *Supra, Nicholas H.*

Appendices

APPENDIX I – Clause 4 & 6 in NSF 1993

4. Inspections

a)* The buyers have inspected and accepted the Vessel's classification records. The buyers have also inspected the Vessel at / in on and have accepted the Vessel following this inspection and the sale is outright and definite, subject only to the terms and conditions of this Agreement.

b) The buyers shall have the right to inspect the Vessel's classification records and declare whether same are accepted or not within

The sellers shall provide for inspection of the vessel at / in

The buyers shall undertake the inspection without undue delay to the vessel. Should the buyers cause such delay they shall compensate the sellers for the losses thereby incurred. The buyers shall inspect the Vessel without opening up and without cost to the sellers. During the inspection, the Vessel's deck and engine log books shall be made available for examination by the buyer's. If the vessel is accepted after such inspection, the sale shall become outright and definite, subject only to the terms and conditions of this Agreement, provided the sellers receive written notice from the buyers within 72 hours after completion of such inspection. Should notice of acceptance of the Vessel's classification records and of the Vessel not be received by the sellers as aforesaid, the deposit together with interest earned shall be released immediately to the buyers, whereafter this contract shall be null and void.

* 4a) and 4B) are alternatives; delete whichever is not applicable. In the absence of deletions, alternative 4a) to apply.

6. Drydocking/Divers inspection

a)** The sellers shall place the vessel in dry dock at the port of delivery for inspection by the Classification Society of the Vessel's underwater parts below the deepest load line, the extent of the inspection being in accordance with the Classification Society's rules. If the rudder, propeller, or bottom or other underwater parts below the deepest load line are found broken, damaged, or defective, so as to affect the Vessel's class, such defects shall be made good at the seller's expense to the satisfaction of the Classification Society without condition / recommendation.

b)** (i) The Vessel is to be delivered without dry docking. However the buyers shall have the right at their expense to arrange for an underwater inspection by a diver approved by the Classification Society prior to delivery of the Vessel. The sellers shall at their cost make the Vessel available for such inspection. The extent of the inspection and the conditions under which it is performed shall be to the satisfaction of the Classification Society. If the conditions at the port of delivery are unsuitable for such inspection, the seller's shall make the Vessel available at a suitable alternative place near to the delivery port.

(ii) If the rudder, propeller, bottom, other underwater parts below the deepest load Line are found broken, damaged or defective so as to affect the Vessel's class, then unless repairs can be carried out to the satisfaction of the Classification Society, the seller's shall arrange for the Vessel to be drydocked at their expense for inspection by the Classification Society of the Vessel's underwater parts below the deepest load line, the extent of the inspection being in accordance with the Classification Society's rules. If the rudder, propeller, bottom or other underwater parts below the deepest load line are found damaged or defective so as to affect the vessel's class such defects shall be made good by the sellers at their expense to the satisfaction of the Classification Society

without condition/recommendation*. In such event the seller's are to pay for the cost of the underwater inspection and the Classification Society's attendance.

(iii) If the Vessel is to be drydocked pursuant to Clause 6B) (ii) and no suitable drydocking facilities are available at the port of delivery, the sellers shall take the Vessel to a port where suitable drydocking facilities are available, whether within or outside the delivery range as per Clause 5b) which shall, for the purpose of this clause, become the new port of delivery. In such event the cancelling date provided or in Clause 5 b shall be extended by the additional time required for the drydocking and extra steaming, but limited to a maximum of 14 running days.

c) If the Vessel is drydocked pursuant to Clause 6 a) or 6 b) above

(i) The Classification Society may require survey of the tailshaft system, the extent of the survey being to the satisfaction of the Classification surveyor. If such survey is not required by the Classification Society, the buyers shall have the right to require the tailshaft to be drawn and surveyed by the Classification Society, the extent of the survey being in accordance with the Classification Society rules for tailshaft survey and consistent with the current stage of the Vessel's survey cycle. The buyers shall declare whether they require the tailshaft to be drawn and surveyed not later than by the completion of the inspection by the Classification Society. The drawing and refitting of the tail shaft shall be arranged by the sellers. Should any parts of the tailshaft system be condemned or found defective so as to affect the Vessel's class, those parts shall be renewed or made good at the seller's expense to the satisfaction of the Classification Society without condition / recommendation.

(ii) the expense relating to the survey of the tailshaft system shall be borne by the buyers unless the Classification Society requires such survey to be carried out, in which case the sellers shall pay these expenses. The sellers shall also pay the expenses if the buyers

require the survey and parts of the system are condemned or found defective or broken so as to affect the Vessel's class*.

(iii) the expense in connection with putting the Vessel in and taking her out of drydock, including the drydock dues and the Classification Society's fees shall be paid by the sellers if the Classification Society issues any condition/ recommendation* as a result of the survey or if it requires survey of the tailshaft system. In all other cases the buyers shall pay the aforesaid expenses, dues and fees.

(iv) the buyer's representative shall have the right to be present in the drydock, but without interfering with the work or decisions of the Classification Surveyor.

(v) the buyers shall have the right to have the underwater parts of the Vessel cleaned and painted at their risk and expense without interfering with the sellers' or the Classification surveyors work, if any, and without affecting the Vessel's timely delivery, If, however, the buyer' work in drydock is still in progress when the sellers have completed the work which the sellers are required to do, the additional docking time needed to complete the buyers' work shall be for the buyers' risk and expense. In the event that the buyers' work requires such additional time, the sellers may upon completion of the seller's work tender Notice of Readiness for delivery in accordance with Clause 3, whether the Vessel is in drydock or not and irrespective of Clause 5 b). Notes, if any, in the surveyor's report which are accepted by the Classification Society without condition / recommendation are not to be taken into account.6 a) and 6 b) are alternatives; delete whichever is not applicable. In the absence of deletions, alternative 6 a) to apply.

APPENDIX II – Clause 4 & 6 in NSF 2012

4. Inspection

(a)*The buyers have inspected and accepted the Vessel's classification records. The buyers have also inspected the Vessel at/in (state place) on (state date) and have accepted the Vessel following this inspection and the sale is outright and definite, subject only to the terms and conditions of this Agreement.

(b)*The buyers shall have the right to inspect the Vessel's classification records and declare whether same are accepted or not within (state date/period).

The seller shall make the Vessel available for inspection at/in (state place/range) within (state date/period).

The buyers shall undertake the inspection without undue delay to the Vessel. Should the buyers cause under delay they shall compensate the sellers for the losses thereby incurred.

The buyers shall inspect the Vessel without opening up and without cost to the sellers.

During the inspection, the Vessel's deck and engine log books shall be made available for examination by the buyers.

The Sale shall become outright and definite, subject only to the terms and conditions of this Agreement, provides that the sellers receive written notice of acceptance of the Vessel from the buyers within seventy-two (72) hours after completion of such inspection or after the date/last day of the period stated in Line 59, whichever is earlier.

Should the buyers fail to undertake the inspection as scheduled and/or of the Vessel's classification records and/or of the Vessel not be received by the sellers as aforesaid,

the Deposit together with interest earned if any, shall be released immediately to the buyers, whereafter this Agreement shall be null and void.

*4(a) and 4(b) are alternatives; delete whichever is not applicable. In the absence of deletions, alternative 4(a) shall apply.

6. Diver Inspection/Drydocking

(a)*

(i) The buyers shall have the option at their cost and expense to arrange for an underwater inspection by a diver approved by the Classification Society prior to the delivery of the Vessel. Such option shall be declared latest nine (9) days prior to the Vessel's intended date of readiness for delivery as notified by the sellers pursuant to Clause 5(b) of this Agreement. The sellers shall at their cost and expense make the Vessel available for such inspection. This inspection shall be carried out without undue delay and in the presence of a Classification Society surveyor arranged for by the sellers and paid for by the buyers. The buyers' representative(s) shall have the right to be present at the diver's inspection as observer(s) only without interfering with the work or decisions of the Classification Society surveyor. The extent of the inspection and the conditions under which it is performed shall be to the satisfaction of the Classification Society. If the conditions at the place of delivery are unsuitable for such inspection, the sellers shall at their cost and expense make the Vessel available at a suitable alternative place near to the delivery port, in which event the Cancelling Date shall be extended by the additional time required for such positioning and the subsequent re-positioning. The sellers may not tender Notice of Readiness prior to completion of the underwater inspection... (ii)... (iii)... In such event the cancelling Date shall be extended by the additional time required for the drydocking and extra steaming, but limited to a maximum of fourteen (14) days.

(b)* The sellers shall place the Vessel in drydock at the port of delivery for inspection by the Classification Society of the Vessel's underwater parts below the deepest load line, the extent of the inspection being in accordance with the Classification Society's rules... The sellers shall also pay for these costs and expense if parts of the tailshaft system are condemned or found defective or broken so as to affect the Vessel's class. In all cases, the buyers shall pay the aforesaid costs and expenses, dues and fees.

(c) If the Vessel is drydocked pursuant to Clause 6(a) (ii) or 6(b) above:

(i) The Classification Society may require survey of the tailshaft system, the extent of the survey being to the satisfaction of the Classification Society surveyor... (ii)... (iii)...

(iv) The buyers shall have the right to have the underwater parts of the Vessel cleaned and painted at their risk, cost and expense without interfering with the sellers' or the Classification Society surveyor's work, if any, and without affecting the Vessel's timely delivery... the buyers shall be obliged to take delivery in accordance with Clause 3 (Payment), whether the Vessel is in drydock or not.

*6(a) and 6(b) are alternatives; delete whichever is not applicable. In the absence of deletions, alternative 6(a) shall apply.

**Notes or memoranda, if any, in the surveyor's report which are accepted by the Classification Society without condition/recommendation are not to be taken into account.

APPENDIX III – Section 14 of Sale of Goods Act 1979

Provision 14 - Implied terms about quality or fitness.

Except as provided by this section and section 15 below and subject to any other enactment, there is no implied about the quality or fitness for any particular purpose of goods supplied under a contract of sale.

(2) Where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality.

(2A) For the purposes of this Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.

(2B) For the purposes of this Act, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods—

(a) fitness for all the purposes for which goods of the kind in question are commonly supplied,

(b) appearance and finish,

(c) freedom from minor defects,

(d) safety, and

(e) durability.

(2C) The term implied by subsection (2) above does not extend to any matter making the quality of goods unsatisfactory—

(a) which is specifically drawn to the buyer's attention before the contract is made,

(b) where the buyer examines the goods before the contract is made, which that examination ought to reveal, or

(c) in the case of a contract for sale by sample, which would have been apparent on a reasonable examination of the sample...

(3) Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known—

(a) to the seller, or

(b) where the purchase price or part of it is payable by instalments and the goods were previously sold by a credit-broker to the seller, to that credit-broker, any particular purpose for which the goods are being bought, there is an implied that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the seller or credit-broker.

6) As regards England and Wales and Northern Ireland, the terms implied by subsections (2) and (3) above are conditions.

APPENDIX IV – Several Articles in Chinese Contract Law

Article 42 Pre-contract Liabilities

Where in the course of concluding a contract, a party engaged in any of the following conducts, thereby causing loss to the other party, it shall be liable for damages:

- (i) negotiating in bad faith under the pretext of concluding a contract;
- (ii) intentionally concealing a material fact relating to the conclusion of the contract or supplying false information;
- (iii) any other conduct which violates the principle of good faith.

Article 52 Invalidating Circumstances:

A contract is invalid in any of the following circumstances :

- (i) One party induced conclusion of the contract through fraud or duress, thereby harming the interests of the state;
- (ii) The parties colluded in bad faith, thereby harming the interests of the state, the collective or any third party;
- (iii) The parties intended to conceal an illegal purpose under the guise of a legitimate transaction;
- (iv) The contract harms public interests;
- (v) The contract violates a mandatory provision of any law or administrative regulation.

Article 53 Invalidity of Certain Exculpatory Provisions

The following exculpatory provisions in a contract are invalid:

- (i) excluding one party's liability for personal injury caused to the other party;
- (ii) excluding one party's liability for property loss caused to the other party by its intentional misconduct or gross negligence.

Article 54 Contract Subject to Amendment or Cancellation

Either of the parties may petition the People's Court or an arbitration institution for amendment or cancellation of a contract if:

- (i) the contract was concluded due to a material mistake;
- (ii) the contract was grossly unconscionable at the time of its conclusion.

If a party induced the other party to enter into a contract against its true intention by fraud or duress, or by taking advantage of the other party's hardship, the aggrieved party is entitled to petition the People's Court or an arbitration institution for amendment or cancellation of the contract.

Where a party petitions for amendment of the contract, the People's Court or arbitration institution may not cancel the contract instead.

Article 55 Extinguishment of Cancellation Right

A party's cancellation right is extinguished in any of the following circumstances:

- (i) It fails to exercise the cancellation right within one year, commencing on the date when the party knew or should have known the cause for the cancellation;
- (ii) Upon becoming aware of the cause for cancellation, it waives the cancellation right by express statement or by conduct.

Article 56 Effect of Invalidation or Cancellation; Partial Invalidation or Cancellation

An invalid or canceled contract is not legally binding *ab initio*. Where a contract is partially invalid, and the validity of the remaining provisions thereof is not affected as a result, the remaining provisions are nevertheless valid.

Article 62 Gap Filling

Where a relevant term of the contract was not clearly prescribed, and cannot be determined in accordance with Article 61 hereof, one of the following provisions applies:

- (i) If quality requirement was not clearly prescribed, performance shall be in accordance with the state standard or industry standard; absent any state or industry standard, performance shall be in accordance with the customary standard or any particular standard consistent with the purpose of the contract;
- (ii) If price or remuneration was not clearly prescribed, performance shall be in accordance with the prevailing market price at the place of performance at the time the contract was concluded, and if adoption of a price mandated by the government or based on government issued pricing guidelines is required by law, such requirement applies;
- (iii) Where the place of performance was not clearly prescribed, if the obligation is payment of money, performance shall be at the place where the payee is located; if the obligation is delivery of immovable property, performance shall be at the place where the immovable property is located; for any other subject matter, performance shall be at the place where the obligor is located;
- (iv) If the time of performance was not clearly prescribed, the obligor may perform, and the obligee may require performance, at any time, provided that the other party shall be given the time required for preparation;

- (v) If the method of performance was not clearly prescribed, performance shall be rendered in a manner which is conducive to realizing the purpose of the contract;
- (vi) If the party responsible for the expenses of performance was not clearly prescribed, the obligor shall bear the expenses.

Article 126 Choice of Law in Foreign-related Contracts; Contracts Subject to Mandatory Application of Chinese Law

Parties to a foreign related contract may select the applicable law for resolution of a contractual dispute, except otherwise provided by law. Where parties to the foreign related contract failed to select the applicable law, the contract shall be governed by the law of the country with the closest connection thereto.

For a Sino-foreign Equity Joint Venture Enterprise Contract, Sino-foreign Cooperative Joint Venture Contract, or a Contract for Sino-foreign Joint Exploration and Development of Natural Resources which is performed within the territory of the People's Republic of China, the law of the People's Republic of China applies.

APPENDIX V – Section 2 & 3 of Misrepresentation Act

2. Damages for misrepresentation.

(1) Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made the facts represented were true.

(2) Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescinded, the court or arbitrator may declare the contract subsisting and award damages in lieu of rescission, if of opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party.

(3) Damages may be awarded against a person under subsection (2) of this section whether or not he is liable to damages under subsection (1) thereof, but where he is so liable any award under the said subsection (2) shall be taken into account in assessing his liability under the said subsection (1).

3. Avoidance of provision excluding liability for misrepresentation.

If a contract contains a term which would exclude or restrict—

(a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or

(b) any remedy available to another party to the contract by reason of such a misrepresentation, that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in section 11(1) of the Unfair Contract Terms Act 1977; and it is for those claiming that the term satisfies that requirement to show that it does.

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