

SHIPSALE 22 - BIMCO's New Vessel Sale and Purchase Agreement

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PRACTICES Shipping Dispute Resolution, Ship Sale and Purchase, Ship Construction and Conversion, Shipping

BIMCO has launched SHIPSALE 22, the first solely BIMCO-produced standard form contract for the sale and purchase of vessels, which contract BIMCO describes as “*an innovative and comprehensive approach to sale and purchase agreements*”. This addition to the BIMCO suite of contracts has undergone extensive industry consultation, in which Haynes Boone participated (many of Haynes Boone’s comments being reflected in the final SHIPSALE 22). Whilst many of the terms of SHIPSALE 22 are immediately familiar to those experienced in contracting on the basis of the widely used Norwegian Shipbrokers’ Association’s SALEFORM 2012 (“NSF 2012”), SHIPSALE 22 adopts the BIMCO standard box format and incorporates both entirely new clauses as well as updated arrangements that are intended to be more closely aligned with current market practice. The mix of the familiar and the new within an overall structure that is intended to follow the chronology of a vessel sale and purchase transaction leads Haynes Boone to expect that SHIPSALE 22 will gain traction quickly within the vessel sale and purchase market.

We highlight some of the key features of SHIPSALE 22 below.

Layout

SHIPSALE 22 has a structure comprised of:

1. Part I: the usual BIMCO style box form (contains key information such as details of Parties (including any guarantors), Vessel, Purchase Price, earliest date for giving Notice of Readiness, Cancelling Date, Delivery place/range)
2. Part II: detailed clauses
3. Two annexes - Annex A: Delivery Documents and Annex B: Excluded Items

New provisions/clauses

Guarantors (Part I – Boxes 5 and 6 and signature blocks)

Part I Boxes 5 and 6 provide for, respectively, sellers’ and buyers’ guarantors, who are also now signatories to the MOA (along with a statement that, by its signature to the Agreement, the guarantor guarantees performance of (as the case may be) the sellers’ or buyers’ obligations in accordance with the agreement). By including reference to guarantee/guarantor, SHIPSALE 22 recognises that guarantee arrangements are a common aspect of vessel sale and purchase transactions (particularly as buyers and sellers are often structured as single vessel owning companies).

Subjects (Part I – Box 25, Part II – Clause 3)

It is common practice in the negotiation of vessel sale and purchase transactions for the parties to agree the terms of the contract, but still to require certain subjects to be satisfied before the parties

are contractually bound to complete the sale and purchase of the vessel (and failing such subjects being satisfied within a given deadline, for the contract to fall away). The incorporation in SHIPSALE 22 of a dedicated subjects clause at the start of its chronological structure demonstrates BIMCO's recognition of this common practice.

Sanctions (Part II – Clause 21) and Anti-Corruption (Part II – Clause 22)

Sanction and anti-corruption clauses have become common additions to vessel sale and purchase agreements and so the introduction of these (relatively short-form) clauses in SHIPSALE 22 is a welcome addition on topics of real importance. As sanctions and anti-corruption clauses are frequently drafted to fit with the internal compliance requirements of the parties, it is likely that the short-form clauses will be subject to revision during negotiations, however the recognition in SHIPSALE 22 that a breach of such arrangements would enable the non-breaching party to terminate the agreement is a useful inclusion.

Confidentiality (Part II – Clause 23)

The (again relatively short-form) confidentiality clause reflects an addition commonly required by parties and is therefore useful (including in its inclusion of a clear statement that that breach of the confidentiality obligation does not give rise to a right of termination).

BIMCO Electronic Signature Clause 2021 (Part II – Clause 27)

No doubt in recognition of how the sale and purchase market adapted to the COVID-19 pandemic and new ways of working, BIMCO has made express provision for SHIPSALE 22 to be signed electronically. This is a helpful addition.

Amendments/Updates to key sale and purchase agreement clauses

Virtual Closing (Part I – Box 19)

Also, following the new ways of working during the pandemic, SHIPSALE 22 makes express provision for the parties to state a physical closing location or to elect to close via an “electronic method”.

Deposit (Part I – Boxes 10 & 11, Part II – Clause 5)

SHIPSALE 22's reference to a Deposit Holding Agreement (rather than joint account arrangements) reflects common market practice (it is noted that there is no default Deposit % amount in the SHIPSALE 22, and therefore the Deposit % must be expressly stated – however the box style of SHIPSALE 22 means that it is unlikely the parties will fail to address this point).

Inclusion of a grace period of two Banking Days for a “Disruptive Banking Event” to address certain circumstances in which the lodging of the Deposit may be delayed reflects the anti-technicality arrangements buyers commonly include in vessel sale and purchase agreements so as to avoid banking system delays immediately triggering sellers' termination rights (with resulting damages claims).

Inspection (Part I – Box 8, Part II – Clause 6)

The inspection clause in SHIPSALE 22 (Part II, Clause 6) introduces a new, third option concerning buyers' inspection rights: the buyers may now elect to purchase a vessel without inspection. A

default position is not specified, so the parties should therefore ensure that Box 8 of Part I is completed.

Two other noteworthy provisions are that if the option is selected for the buyers have the right to inspect the vessel after the signing of the SHIPSALE 22, then (i) such inspection is not to include testing of the vessel's engines, machinery, equipment or systems (in contrast, under NSF 2012, the equivalent inspection right is specified to be "without opening up"); and (ii) buyers shall have five days after the completion of the inspection or the last day in the date range stated in Box 8 (whichever is earlier) to notify the sellers that the buyers accept (or do not accept) the vessel (rather than the 72 hours they had to do so under NSF 2012) before the Deposit, together with any interest earned, shall be released immediately to the buyers, after which the sale and purchase agreement becomes null and void.

Underwater Inspection/Dry-docking (Part I – Box 17, Part II – Clauses 8 and 9)

SHIPSALE 22 retains the buyers' ability to choose either an underwater inspection or dry-docking, with underwater inspection to apply if no selection is made, but usefully addresses underwater inspection and dry-docking in separate clauses.

If the buyers choose underwater inspection, SHIPSALE 22 has limited the scope for buyers to delay sellers in tendering Notice of Readiness by stating that buyers have an obligation to commence an underwater inspection within two days of the vessel being made available for inspection, failing which they are deemed to have waived their right to such inspection.

Concerning dry-dock inspections and in line with market practice, buyers are not entitled under SHIPSALE 22 to require the vessel's tail shaft to be drawn unless this is required by the classification society.

Sellers' and Buyers' Termination Rights (Part II – Clauses 18 and 19)

Compensation available to the parties is expressed in SHIPSALE 22 as being for their "direct losses and expenses plus interest" rather than for their "losses and for all expenses incurred together with interest", as was the case under buyers' default and sellers' default clauses in the NSF 2012, which was commonly amended.

Comment

SHIPSALE 22 introduces some useful new clauses and updates aligning this standard form MOA more closely with current market practice.

It is expected that SHIPSALE 22 will rapidly be adopted as the default starting point for the negotiation of vessel sale and purchase agreements. However, as a standardised form there will inevitably continue to be a need to make revisions to tailor the SHIPSALE 22 to the requirements of individual transactions. Haynes Boone has already put in place arrangements so that we are fully prepared to assist our clients (whether sellers or buyers) with vessel sale and purchase transactions using SHIPSALE 22.

For more information, please contact one of the lawyers listed below.