

# BIMCO's Ship Sales Further Trading Clause 2023

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**PRACTICES** International, Shipping, Ship Sale and Purchase

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Following a meeting of the BIMCO Documentary Committee last month, a series of new clauses and revised versions of existing contracts have been approved<sup>1</sup>. This alert will focus on the introduction of the new "[Ship Sales Further Trading Clause 2023](#)"<sup>2</sup> (the "**Further Trading Clause**") and why it is important for a seller (particularly of older but not recycling tonnage) to consider including such a clause in their sale and purchase contracts.

## Overview of the Further Trading Clause

The Further Trading Clause is for use in a memorandum of agreement ("MOA") for sale and purchase of a vessel, such as BIMCO's SALEFORM and SHIPSALE standard form contracts. Clauses of this nature have increasingly been included in ship sale and purchase agreements for older vessels in recent years where a seller wishes to evidence that the vessel is not being sold for recycling (and therefore evidence that the sale is not being used as a step towards circumventing applicable vessel recycling regimes). The intended aim of the Further Trading Clause is to expressly "acknowledge and agree that [the MOA] is for the sale and purchase of the Vessel for continued trading by the Buyers." (as set out in sub-clause (a) of the Further Trading Clause).

## How the Further Trading Clause is intended to operate

On a mechanical level, the Further Trading Clause introduces multiple new expectations on the buyer (and by consequence, potential protections for the seller) which will be explored in detail below.

### Undertakings

*"(b) The Buyers undertake that, for the duration of a period of [insert number of months] commencing on the date when the Vessel is delivered by the Sellers to the Buyers under this Agreement ("Applicable Period"), the Buyers shall continue to trade the Vessel (which includes but is not limited to any anchoring, stationing, laying-up, repair or conversion of the Vessel) unless the Vessel is subject to an actual, constructive or compromised total loss.*

*(c) The Buyers further undertake that if, before or during the Applicable Period, the Buyers enter into an agreement to sell (or otherwise transfer ownership in) the Vessel to a new buyer/transferee ("Transferee"):*

*(i) such agreement shall include provisions, on substantially the same terms as are contained in subclauses (a) and (b) above in respect of the remaining period of the Applicable Period; and*

*(ii) the Buyers shall perform such due diligence as is necessary to be satisfied that the Transferee shall continue to trade the Vessel."*

The sub-clauses set out above contain the undertakings to be given by the Buyer. Sub-clause (b) requires the Buyer to give an undertaking that they will continue to trade the Vessel for a specified period after they take delivery (save for in instances of total loss) which is defined as the “Applicable Period”. The construction of the Further Trading Clause allows the Buyer and Seller to come to a commercial agreement as to the exact duration of the “Applicable Period” and will be subject to practical commercial considerations (such as whether the Buyer is prepared to commit to owning the vessel for the Applicable Period) as well as the length of period that the Seller considers appropriate to demonstrate a real continued trading intention. The BIMCO Documentary Committee were also careful to not unnecessarily restrict the Buyer to a post-contractual scenario wherein the Buyer would not be able to take the Vessel out of service and this is specifically addressed by allowing for “anchoring, stationing, laying-up, repair or conversion”.

Subclause (c) further reinforces the BIMCO Documentary Committee aim to not unduly restrict the Buyer whilst ensuring the Seller is adequately protected from liability if the Buyer enters an agreement to sell or otherwise transfer ownership in the Vessel to a new buyer or transferee before or during the agreed “Applicable Period. Sub-clause (c) sets out that should the Buyer re-sell the Vessel in the “Applicable Period”, any such agreement relating to the re-sale must also contain substantially similar provisions to those set out in subclause (a) and (b) for the remainder of the “Applicable Period” (which will be determined by how many months post-delivery the Buyer has already been trading the Vessel versus the remaining time left within the “Applicable Period”).

## Breach

*“(d) If the Buyers are in breach of one or more of the undertakings given in subclauses (b) and (c) above:*

*(i) the Buyers and the Sellers acknowledge that the actual damages that the Sellers would sustain from such breach would be difficult to ascertain, and consequently, the Buyers shall immediately pay upon demand to the Sellers, by way of liquidated damages and not as a penalty, the sum of [insert currency and amount] which the Sellers and the Buyers agree is a legitimate and fair estimate of the Sellers’ anticipated damages; or*

*(ii) the Buyers shall indemnify the Sellers and their affiliates and their respective directors, officers, employees, agents and representatives against all losses, expenses, fines, penalties, demands, liabilities, damages, claims and costs (which shall include legal fees) suffered or incurred by the Sellers and/or their affiliates and their respective directors, officers, employees, agents and representatives arising out of or in connection with such breach(es).*

*(e) The Buyers acknowledge that the financial compensation or indemnity as set out in subclauses (d) (i) and (ii) may not be a sufficient remedy for the Sellers and that the Sellers may seek injunctive or other equitable remedial relief from any competent court or tribunal.”*

Subclauses (d) and (e) outline the position if the Buyer breaches one of the undertakings set out in subclause (b) or (c) and are drafted in such a way that the Buyer and Seller are required to choose whether to provide in their sale and purchase agreement for liquidated damages or an indemnity from the Buyer to the Seller relative to the loss suffered by the Seller. The default position is the indemnity set out in sub-clause (d)(ii), however the parties can choose liquidated damages by specifying the amount of such damages (which should reflect commercial factors and legal advice). Subclause (e) operates to further broaden the scope of recourse for the Seller under the breach

provision and allows the Seller to seek injunctive or other equitable remedies (typically specific performance) where the relief provided by subclause (d) is not adequate.

## Confidentiality

*“(f) Notwithstanding any provision in this Agreement to the contrary, the Sellers shall be entitled, following a breach by the Buyers of one or more of the undertakings given in subclauses (b) and (c) above, to disclose the existence and content of this Clause and the nature of the Buyers’ breach.”*

Finally, subclause (f) provides a carve out from any existing confidentiality provisions within the sale and purchase agreement. In the instance of a breach of the undertakings by the Buyer in subclause (b) or (c), the Seller will be entitled to disclose the content of the Further Trading Clause and to detail the nature of the Buyer’s breach. The BIMCO Documentary Committee considered that subclause (f) is likely to play an important role in dissuading buyers from breaching the Further Trading Clause, particularly in instances where a Buyer seeks to immediately re-sell a vessel to a ship breaker. The process of ship breaking has long been marred by a history of environmental and health and safety issues and sellers of vessels are often tainted by the buyer’s actions where that buyer subsequently sells the vessel for ship breaking even though the seller no longer has a proprietary interest in the vessel. This has historically carried a high degree of both reputational and financial risk for the seller. Subclause (f) of the Further Trading Clause is therefore likely to play an important role in providing a mechanism of disclosure for the Seller, as well as being a potential deterrent for Buyer’s breach.

## **Practical Considerations**

In our view, the Further Trading Clause provides some (albeit, in practice, limited) protection to a seller from the risk of liability arising from a buyer disposing of a vessel for recycling when this was not the seller’s intended destiny for the vessel. The clause is therefore a useful starting point for considering how to address such risks in sale and purchase agreements.

In adopting this clause, a seller must be alert to the type of entity that it is selling to, particularly if the buyer is a single purpose vehicle (“**SPV**”) set up for the sole purpose of owning the vessel and holding no other assets. In such circumstances, it may also be prudent to require provision of a guarantee in favour of the seller from the buyer’s parent company (or other entity of substance) in respect of the buyer’s obligations under the clause, so that if the vessel is disposed in breach of the clause, there remains an entity of substance against which the seller may bring an action.

In addition, there are potential limitations with the reach of the injunctive relief in sub clause (e). The injunctive relief under the Further Trading Clause can be enforced against the original buyer but it is considered unlikely that the resale arrangements will include any provision affording the seller a right of injunctive relief against the buyer under the resale. Therefore, in situations where the vessel has been resold, the original seller will have little scope for securing an injunction under subclause (e).

Sellers should also ensure that the Further Trading Clause is not treated as a substitute to carrying out thorough due diligence on the buyer before disposing of the vessel. Whilst the clause offers a seller a degree of protection, the onus remains on the seller to conduct due diligence in an effective and timely manner to identify any potential issues before binding itself under the MOA. Additionally, incorporation of the Further Trading Clause will only be one step in the process of evidencing the parties actual intent in relation to the purpose of the transaction (e.g. purchase price, delivery

condition and delivery range requirements all may be viewed by relevant authorities as evidencing, notwithstanding the further trading clause, a contrary/ circumvention of recycling regulations intent of the parties).

Where this does not happen, and the buyer sells the vessel on for recycling, the consequences for the seller will depend on where the vessel is registered or operating and may include breach of the EU Ship Recycling Regulation 2013, EU Waste Shipment Regulations 2006, the Basel Convention on the Control of Transboundary Movements for Hazardous Wastes and their Disposal and related Basel Ban Amendment and the Hong Kong Convention (when it comes into force in 2025) as discussed in more detail in our previous alert: [Hong Kong Convention: an important step forward in ship recycling](#).

If the intention of the parties is to sell the vessel for recycling, then it would be more appropriate for the parties to enter into a contract specifically addressing the recycling intention and obligations of the parties rather than a traditional vessel sale and purchase MOA.

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<sup>1</sup> Further details of the contracts and clauses adopted at this meeting can be found on the [BIMCO website](#).

<sup>2</sup> The standard clause together with the Explanatory Notes published by BIMCO can be found on their website at [https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/ship\\_sales\\_further\\_trading\\_clause](https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/ship_sales_further_trading_clause)