

In April 2022, the Baltic and International Maritime Council (BIMCO) released the SHIPSALE 22, its own ship sale and purchase agreement and the latest iteration in a line of highly successful SALEFORMS that have been widely adopted by the market for second-hand ship sale and purchase.

BIMCO has adopted the backbone of the SHIPSALE 22's well-known predecessor, the NORWEGIAN SALEFORM 2012 (NSF 2012). However, there are key changes that make the SHIPSALE 22 a more user-friendly document following wide consultation and certain market developments, which is likely to assist in streamlining its negotiation.

A copy of the SHIPSALE 22 can be downloaded from [BIMCO's website](#). We explore below some of the highlights, starting with the changes that are most likely to make negotiation of the form and closing the deal more efficient.

Format

A clear starting point is the format:

- The SHIPSALE 22 adopts BIMCO's easy-to-use box format in Part I, setting out the key details of the transaction in a quick and easily digestible format. These are then followed by the substantive clauses of the agreement in Part II.
- The list of delivery documents is now appended at Annex A, instead of in the middle of the contract (as was the case in the NSF 2012). The delivery document list is now more likely to be amended in the annex, and not by way of a separate addendum, which had become common practice and the centre of negotiations. The parties also have the option to append a pre-agreed form protocol of delivery and acceptance.
- Similarly, the "excluded items list" is now appended at Annex B, as opposed to in the middle of the contract. This had become common practice.
- The SHIPSALE 22 attempts to follow the chronological progression of the transaction between Clauses 2 (Sale and Purchase) and 17 (Post Delivery Obligations).

These seemingly simple changes are aiming to make the SHIPSALE 22 a more user-friendly document, aiding negotiation.

Electronic Transactions

Following the rise of remote working during the COVID-19 pandemic, there have been two important changes:

- Documentary closing is now expressly stipulated to take place "either remotely by electronic means or at the location stated" (clause 16(a)).
- BIMCO's Electronic Signature Clause 2021 has also been included, and promotes the use of electronic signatures for signing both the agreement itself and all other documents (clause 27). Sale transactions in the past have been hampered by the practice of requiring hard copy signed documents. A key point to bear in mind is whether ship registries will accept electronic bills of sale for registration purposes and there is a carve-out for this (among other documents) at clause 27(c). It is important to follow any requirements of the parties' respective jurisdictions, the vessel's flag state and any physical paper requirements for legalisation.

These amendments reflect the increasingly standard practice of remote closings and electronic documents.

Deposit

The updated deposit provisions (Clause 5) reflect the fact that it is now market practice to engage a third party to hold the deposit and that the third party requires a deposit holding agreement. There are two particularly useful additions in this respect:

- Clause 5(d), which clarifies that the obligation to transfer the deposit monies is not imposed until, *inter alia* (i) the deposit holding agreement has been signed and the deposit holder has confirmed it is ready to receive funds; and (ii) the SHIPSALE 22 has been signed, and its subjects lifted. The combination of using a deposit holding agreement and the wording of the NSF 2012 (i) previously left some ambiguity around when the deposit should be transferred and whether the deposit holding agreement needed to be signed; and (ii) did not reflect market practice on a fundamental point: how the money is to be held. This often led to amendments.
- There is now a built-in two banking days grace period for transfer of the deposit, should the transfer not take place because of a "Disruptive Banking Event" (clause 5(e)). This includes a "review by the Deposit Holder's bank (or any correspondent bank)", which is an increasingly common occurrence in light of heightened awareness surrounding money laundering and sanctions in recent years.

Sanctions, Anti-Corruption and Confidentiality

Boilerplate clauses have also been included to bring the saleform into line with modern drafting practice, such as:

- An increasing focus on sanctions and anti-corruption has prompted the addition of a sanctions warranty clause (clause 21) and an anti-corruption warranty clause (clause 22) to comply with relevant legislation and entitling the non-breaching party to terminate the agreement and claim damages for breach. These were becoming increasingly frequent inclusions in addenda to the NSF 2012.
- Confidentiality provisions have been added at Clause 23.

These clauses were frequently inserted (and much negotiated) into addenda to the NSF 2012, so, again, these additions should help speed up negotiations, assuming they are adopted.

However, it may well be that these provisions are not adopted, as many companies now have their own bespoke sanctions and anti-corruption clauses, drafted to protect their specific interests, which they must include in their contracts as part of company policy.

The "Entire Agreement" clause (clause 25) remains in a similar form, having been previously updated in the NSF 2012 to exclude statutory terms implied under the Sale of Goods Act 1979 following the decision in *The "Union Power"* [2012] EWHC 3537.

Subjects Clause

The addition of a "subjects clause" (clause 3) is a novel attempt to address the complexities that can be created by parties stating that the agreement's effectiveness is subject to certain specified conditions being satisfied – for example, that the agreement is "subject to Sellers' board approval, to be lifted within 10 days".

In this example, arguments can arise over, for example, whether board approval has been given (and, therefore, the subjects lifted) within the 10-day period if the Sellers have not expressly communicated that it has been. Clause 3(c) (i) now provides that the contract is "null and void" should the relevant specified subject(s) not be lifted (i.e. satisfied) within the specified time stated in Box 25. The wording must be clear as to which party is responsible for satisfying the requirement and which party can confirm satisfaction.

Registry Documents, Copies and Drafts

Under the NSF 2012, the Buyers could require the Sellers to provide any documents required for the registration of the ship at the Buyers' chosen registry provided the Buyers notified the Sellers of such documents "as soon as possible after the date of this Agreement". That was always an ambiguous long-stop that favoured Buyers. In the SHIPSALE 22, the Buyers must request such documents "no later than ... two (2) days after the Buyers' receipt of the Sellers' earliest delivery notice under Clause 11 (Delivery Notices)". This will likely be a welcome addition for Sellers.

Prior to delivery, the parties must now produce copies and drafts of their delivery documents no later than five days after the earliest delivery notice (Clause 15(a)). This change provides more certainty. The NSF 2012 contains a default provision that copies and drafts be provided nine days prior to the vessel's intended date of readiness, which can be a moving target.

Closing and Payment

A new "Delivery" clause (clause 16) spells out in greater detail the vessel and document delivery obligations, which may reduce the need for a closing memorandum in some more straightforward transactions. The delivery clause is not prescriptive on the usual practice of tabling documents, likely in light of varying closing practices across different markets and the increasing trend towards remote closings.

The payment clause now includes a requirement to pay without "deduction, set-off or withholding" (clause 14(b)) and a tax "gross up" provision, which applies in the event of any tax deduction or withholding required by law (clause 14(c)).

Title

The addition of a specific provision addressing the passing of title in the vessel to the Buyers (clause 2(d)) is a long overdue clarification.

Guarantor

The SHIPSALE 22 provides for both a Buyers' and a Sellers' guarantor in Part I. This addition is aimed at addressing the common practice of guaranteeing the performance of a SPV buying or selling company. Most commonly, a company associated with the buying SPV provides a guarantee to guarantee the buying obligations of a newly established purchasing company with no assets.

Encumbrances Warranty

The scope of the encumbrances clause has been widened in a new "Condition of Vessel on Delivery" regime (clause 10(d)-(e)). At the time of delivery, the Sellers now warrant that the vessel is free from "contracts of employment and other trading commitments" in addition to "charters"; and free from "arrest" or "restraint" in addition to "detentions". The encumbrances warranty is another example of a clause that was frequently amended to bolster the provisions of the NSF 2012. The new provisions may also be amended, but are less prone to negotiation surrounding an extended list of possible encumbrances.

Inspection

The regimes for both (i) “pre-acceptance” inspection (clause 6); and (ii) the underwater “pre-delivery” inspection (clauses 8 and 9) are set out in a clearer format, and contain some notable changes, including, *inter alia*:

- A new option for the Buyers to accept the vessel without inspection (Clause 6(c)), which could be helpful for related parties sales or distressed asset sales.
- The scope of the “pre-acceptance” inspection has been clarified at clause 6(b) to exclude “testing of the Vessel’s engines, machinery, equipment or systems”; which may concern some Buyers and be subject to amendment.
- The Buyers’ obligation to serve notice of acceptance following inspection has been extended from 72 hours to five days, which will be a welcome addition for Buyers.
- The Buyers’ right to remove the tail shaft at their option, cost and expense in the event of dry-docking has been removed, perhaps due to infrequent use of this provision.

It is important to make a selection, as SHIPSALE 22 does not specify which mechanism applies if the parties do not make a selection.

Summary

The SHIPSALE 22 is a practical attempt at addressing some of the matters that were leading to increased negotiation under the NSF 2012 and does so in a format that is more user-friendly.

While it cannot address all problems, such as bespoke sanctions clauses, the scope of the inspection regime required by the parties and the negotiation of delivery documents, the SHIPSALE 22 is a good starting point for negotiation for the second-hand ship sale market taking into account market developments over the past few years.

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