licence being obtained. The court held that there was a continuing obligation on the defendants to obtain such a licence. The defendants' contention that they could only obtain a limited licence was rejected on the grounds that the defendants had failed to show that a full licence would not have been granted in time.

**2A–15** In the subsequent case of *Brauer & Co (Gt. Britain) Limited v James Clark (Brush Materials), Limited*[29] there was a contract for the sale of piassava (a woody fibre) which was subject to the granting of an export licence. It was held that the sellers had an obligation to show that they could not obtain such a licence despite taking reasonable steps. It was not enough for them merely to show that the contract had become more expensive although the court took the view that a different result might have been reached if the increase in expense had been very considerable. It may be commented that in cases on frustration, additional or unexpected expenditure has not usually been regarded as in itself sufficient to frustrate the contract.[30]

*Subject to board approval*

**2A–16** A provision making the contract "subject to board approval" (this may refer to either the Sellers' or the Buyers' board approval—or indeed both) may provide specifically that if approval has not been obtained by a specific date or time the contract will terminate without either party having any claim on the other—see the examples given in Ch.20. Such a provision is likely to be enforced in accordance with its terms on the basis that the parties have agreed a specific procedure in contemplation of the possibility of no approval being obtained.

The more difficult clause to interpret is one simply reading "subject to board approval" without imposition of a time limit or agreement that the agreement will terminate with defined consequences. If either the clause is extended by wording such as "which expected formality only" or a representation has been made that, for example, the relevant board is already well aware of the intended business and likely to approve it, the onus of proof will lie firmly on the party concerned to demonstrate why approval has not in the event been obtained despite earlier assurances without which the other party would probably not have accepted the "subject". If no such assurances have been given, then it may be that since board approval is, in contrast to external approvals such as licences, an internal matter which, except in the case of bad faith, should not be subject to challenge on the ground of non-diligent pursuit.

**2A–17** There is no case directly in point. However the case of *Astra Trust Ltd v Adams and Williams*[31] may be of analogous relevance. In that case there was an arrangement for purchase of a yacht "subject to a satisfactory survey". The buyers declined to proceed. The court held that there was no binding contract but (obiter) if there was a binding contract it was conditional on a survey satisfactory to the buyers. It was an implied term that the dissatisfaction must be bona fide which on the facts it was. In the absence of misleading representations and if the matter has been fully and properly submitted to the relevant board for decision in accordance with that company's

[29] [1952] 2 Lloyd's Rep. 147 CA.
[30] See for example *Tsakiroglou & Co Ltd v Noblee & Thorl GmbH* [1961] 1 Lloyd's Rep. 329 HL. See also *Bunge S.A. v. Kyla Shipping Company Limited (the Kyla)* [2012] EWHC 3522 (Comm).
[31] [1969] 1 Lloyd's Rep. 81. See also: *Varverakis v Compagnia de Navegacion Antico SA* (the *Merak*) [1976] 2 Lloyd's Rep. 250 and the *John S Darbyshire* [1977] 2 Lloyd's Rep. 457.



usual procedures, then it is submitted that "subject to board approval" means what it says—if it is not obtained within a reasonable time (if no time limit is stipulated), the contract fails. Reference should be made to the *Cheall* and *Gyllenhammar* cases mentioned in fn.33 below. Nevertheless, the matter cannot be regarded as settled and thus parties wishing to introduce such a "subject" will be well advised to include a time limit and define precisely the consequences if approval is not obtained (see Ch.20(C)).

**2A–18** The *Windschuegl* and *Brauer* cases referred to above reflected the same approach as in the earlier House of Lords case of *New Zealand Shipping Co Limited v Société des Ateliers et Chantiers de France.*[32] However, that decision has since been considered at some length in more recent decisions[33] as a result of which the principle in the New Zealand case that a party cannot be permitted to take advantage of his own wrong is now to be interpreted as one of construction only which can therefore be excluded by agreement between the parties. If this construction is adopted, the occurrence or non-occurrence of the contemplated event is the only determining factor, there being no obligation on either party to assist such occurrence. In such a case the contract may be held to have failed without any liability being owed by one party to the other. However perhaps unsurprisingly there is a presumption against a construction leading to this result.[34] In practice it seems unlikely that this construction will often apply in the case of a contract for a sale and purchase of second-hand tonnage.

*Options to purchase*

**2A–19** Options to purchase second-hand vessels are unusual except in the specialised contexts of finance leases and joint ventures using the medium of a time charter though over the last few years they have been increasingly seen in "standard" time charters. They should be distinguished from "en bloc" deals which are discussed in Ch.20(C), para.20C–08.

The question will often arise whether an option to purchase is sufficiently clearly defined as to be capable of creating a binding contract. In the case of a finance lease the matter will usually be clearly set out in that the amounts to be paid by the purchaser (lessee) will be defined as will the timing and method of exercise of the option. In the case of an option available to the charterer at the end of (or even during) a time charter this is less likely to be the case. Such clauses, on experience, may well be deficient in detail and thus incapable of creating a binding obligation on either party. At minimum such a clause would need to define the price to be paid or a formula by which it can be arrived at, the time within which the option is to be exercised and by which the ship is to be delivered and (usually by reference to a standard form such as the Saleform) what other terms are to apply. Thus taking a simple example a right of the time charterer to buy the ship at a "price to be agreed" would simply be an agreement to agree and not legally enforceable. On the other hand if sufficient detail is set out as to the terms on which the option can be exercised such terms amount to an offer which the purchaser

[32] [1919] A.C. 1 HL.
[33] Particularly *Cheall v Association of Professional Executive Clerical and Computer Staff* [1983] 2 A.C. 180 HL and *Gyllenhammar & Partners International Limited v Sour Brodogradevna Industrija* [1989] 2 Lloyd's Rep. 403.
[34] See *Cheall* (fn.32) at 189. Generally on this subject see *Chitty on Contracts*, edited by Beale, 31st edn (2012), paras 2–150 to 2–160 and Peel, *Treitel: The Law of Contract*, 13th edn (2011), para.2–110.

**Clause 9—Encumbrances**

**3–12** There is one notable alteration to this clause which rectifies what some practitioners felt was an unfortunate omission from the 1993 form: there is now a warranty that the Vessel at the time of delivery "is not subject to Port State or other administrative detentions".

See Ch.12.

**Clause 10—Taxes, fees and expenses**

**3–13** Minor changes only.

**Clause 11—Condition on delivery**

**3–14** The only significant change is to add an obligation on the Sellers to deliver free of cargo and free of stowaways.

See Ch.14.

**Clause 12—Name/markings**

**3–15** No change.

**Clause 13—Buyers' default**

**3–16** Minor changes only. See Ch.16.

**Clause 14—Sellers' default**

**3–17** The provision granting the Sellers three Banking Days to produce their documents after failure to give NoR or transfer the Vessel has been removed, as have the words "in every respect" corresponding with their deletion from cll.3 and 5.

See Ch.17.

**Clause 15—Buyers' representatives**

**3–18** Minor changes only.

**Clause 16—Law and arbitration**

**3–19** This clause follows previous practice by retaining the options of London or New York arbitration or any other venue the parties may choose. The English law reference is now to the Arbitration Act 1996 under LMAA (London Maritime Arbitrators' Association) terms, with a new provision that for cases where neither the claim nor any counterclaim exceeds US$100,000 the arbitration is to be conducted in accordance with the LMAA Small Claims Procedure.

The New York reference is as before to be under the rules of the Society of Maritime Arbitrators, Inc in accordance with Title 9 of the United States Code and the substantive law (not including the choice of law rules) of the State of New York. In cases where neither the claim nor any counterclaim exceeds the sum of US$100,000 the reference is to be conducted in accordance with the Society's Shortened Arbitration Procedure.

See Ch.19.



**Clause 17—Notices**

**3–20** This new clause provides for all notices to be given in writing and thus marks a move towards greater formality. It remedies a surprising omission from earlier forms—which sometimes resulted in a homemade clause being inserted by the parties or for the matter to be left open in which case notices were often given via the brokers. Notices to be provided under the agreement are to be "in writing", a term defined in the preamble to mean "a letter handed over from the Sellers to the Buyers or vice versa, a registered letter, e-mail or telefax". The form provides for the insertion of contact details. However the clause is arguably deficient in that it does not state when notices are deemed to be received.

See Ch.20.

**Clause 18—Entire Agreement**

**3–21** An "Entire Agreement" clause is often included in commercial agreements but historically has not regularly been used in Saleform MOAs. The clause has three aims: (1) to supersede any previous agreements, whether written or oral; (2) to remove any right or remedy in respect of any statement, representation, assurance or warranty other than as expressly set out in the agreement (thus for example preventing claims by the Buyers based on alleged misrepresentations) and (3) to exclude the application of any terms implied into the agreement by any applicable statute or law, to the extent that such exclusion can legally be made.

The third point is of considerable importance in the light of the decision in the *Union Power*, which as noted in para 2B–20 above held that a standard 1993 Saleform does not exclude the application of the implied terms in s.14 of the Sale of Goods Act ("SGA") so that under the earlier form a condition will be implied that the Vessel is of "satisfactory quality". There may be some doubt whether cl.18 is legally effective to exclude the SGA implied terms in that it does not exclude "conditions"—the reference in the clause is only to "terms".

**Signature blocks**

**3–22** In contrast to earlier forms signature blocks are now included.

of the fact that the bank in question has not, within the period prescribed by the MOA for payment of the deposit, opened the joint account.

## UK money laundering law—The Terrorism Act 2000 and the Proceeds of Crime Act 2002

**5–15** The present UK anti money laundering regime derives from the Proceeds of Crime Act 2002 ("POCA") (as amended by the Serious Organised Crime and Police Act 2005) and the Money Laundering Regulations 2007. The thrust of the legislation is to combat money laundering by two broad strategies. The first is the creation of various criminal offences committed by being involved (as explained in more detail below) in a money laundering transaction. The second is by imposing on professionals and institutions operating in the "Regulated Sector" a raft of onerous requirements, including the undertaking of "know your client" due diligence procedures before a transaction gets under way, the provision of appropriate anti money laundering training to employees, and, importantly, the appointment of a "nominated officer", generally known as a Money Laundering Reporting Officer or MLRO. Further, a person has a positive obligation, on pain of criminal liability, to report the circumstances where he knows of or suspects money laundering activity, or has reasonable grounds for knowing of or suspecting money laundering, where the information came to him in the course of business in the Regulated Sector. The objective element means that an offence may be committed by a negligent failure to recognise warning signs.

**5–16** The Regulated Sector is defined in the Money Laundering Regulations 2007. While the definition embraces most professionals engaged in transactional work, it does not expressly include shipbrokers or their core activities. A shipbroker's first concern, therefore, will be with the primary money laundering offences, which are of general application, and the consequences for a transaction where money laundering is actually known or suspected.

Under POCA the primary money laundering offences are: the concealing, disguising, converting or transfer of "criminal property", or its removal from the United Kingdom (s.327); entering into or becoming "concerned in an arrangement" known or suspected to facilitate, by whatever means, the acquisition, retention, use or control of criminal property by or on behalf of another person (s.328); and the acquisition, use or possession of criminal property (s.329).[12]

The main risk to shipbrokers is likely to be that of becoming "concerned in an arrangement" contrary to s.328. While the Court of Appeal has indicated[13] that this phrase should be construed narrowly, as involving a single act at a single point in time (and not the steps preparatory to the arrangement), acting as agent or intermediary in a ship sale which is funded by criminal property, or in which criminal property passes, may well bring a broker within its ambit. As an essential element of this and the other primary offences is the existence of criminal property; an understanding of what constitutes "criminal property" is central.

[12] The Terrorism Act 2000 has parallel provisions creating a similar range of offences in relation to money or other property known, or which may reasonably be suspected, to be intended to be used for terrorist purposes.

[13] *Bowman v Fels* [2005] EWCA Civ 226.



The definition in POCA has two limbs. Property is criminal property if, first, it constitutes a person's benefit from criminal conduct, or represents, in whole or in part, directly or indirectly, such a benefit, and, secondly, the alleged offender—i.e., in the present context, the shipbroker —"knows or suspects" that it constitutes or represents such a benefit. In a commercial context, actual knowledge will be unusual, and the question which is most likely to arise is whether concerns which a broker might have about the bona fides of the transaction or the origin of the funds involved amount to "suspicion". This turns on the broker's subjective state of mind, and according to the Court of Appeal in *R. v Da Silva*[14] the test of suspicion is that a person "must think that there is a possibility, which is more than fanciful, that the relevant facts exist. A vague feeling of unease would not suffice".

**5–17** The significance of these offences for brokers is that they have the potential to stop a transaction in its tracks. If a broker comes to know or suspect that a transaction involves criminal property, then, if he has not yet done anything amounting to a primary offence (and is operating outside the Regulated Sector) he has a choice. Either he ceases to act on the transaction altogether. Or, in order to proceed, he must make a report of the circumstances giving rise to the knowledge or suspicion by way of "authorised disclosure", either to the Serious Organised Crime Agency (SOCA) direct or, if his organisation has one, his MLRO. Having made the report, he must then cease activity on the transaction (and not "tip off" those concerned) until he receives consent to proceed or, provided that consent to proceed has not been refused in the meantime (such refusal giving rise to a further 31-day moratorium) the lapse of seven clear working days from the date of the report. Thus the making of a report serves the purpose of providing intelligence to SOCA while exonerating the broker from criminal liability and (in many cases) enabling the transaction to proceed, albeit after a hiatus.[15]

In view of this it will often be desirable for shipbrokers to appoint a person of sufficient experience and standing as MLRO. The benefit of appointing an MLRO even if operating outside the Regulated Sector is that a report by an employee to his MLRO satisfies the employee's own reporting obligations: the responsibility is thereupon transferred to the MLRO to determine whether a report to SOCA (with the resultant standstill in activity) is required and if so, to make the report, or whether no report is required and activity may continue. Further, the adoption of "know your client" procedures, as undertaken by the Regulated Sector, should reduce the risk to shipbrokers of becoming involved in transactions intended to launder money. Finally, it would be prudent for shipbrokers to consider whether any ancillary activities which they may carry out fall within the scope of the Regulated Sector,[16] and to bear in mind the possibility that the Regulated Sector will be extended beyond its current confines.

A detailed treatment of the UK anti-money laundering regime is beyond the scope

[14] [2006] EWCA Crim 1654.

[15] If a broker (or anyone else) has already done something amounting to a primary offence he needs to make a report if criminal liability is to be avoided. The making of a report after the event will provide a defence provided that there is good reason for the failure to make disclosure before the act was committed, and the disclosure is made on the person's initiative and as soon as practicable for him to make it. It is also a defence if the person intended to make such a disclosure but had a reasonable excuse for not doing so.

[16] For example, if a shipbroker is regarded as "trading in goods", and he received €15,000 or more in cash (notes, coins or travellers' cheques) in relation to a transaction, this would bring him within the Regulated Sector as a "high value dealer".

# CHAPTER 11

## CLAUSE 8—DOCUMENTATION

**11–01** Saleform 1993—Clause 8—reads:

**8. Documentation**

The place of closing:

In exchange for payment of the Purchase Price the Sellers shall furnish the Buyers with delivery documents, namely:

a) Legal Bill of Sale in a form recordable in . . . . . (the country in which the Buyers are to register the Vessel), warranting that the Vessel is free from all encumbrances, mortgages and maritime liens or any other debts or claims whatsoever, duly notarially attested and legalized by the consul of such country or other competent authority.

b) Current Certificate of Ownership issued by the competent authorities of the flag state of the Vessel.

c) Confirmation of Class issued within 72 hours prior to delivery.

d) Current Certificate issued by the competent authorities stating that the Vessel is free from registered encumbrances.

e) Certificate of Deletion of the Vessel from the Vessel's registry or other official evidence of deletion appropriate to the Vessel's registry at the time of delivery, or, in the event that the registry does not as a matter of practice issue such documentation immediately, a written undertaking by the Sellers to effect deletion from the Vessel's registry forthwith and furnish a Certificate or other official evidence of deletion to the Buyers promptly and latest within 4 (four) weeks after the Purchase Price has been paid and the Vessel has been delivered.

f) Any such additional documents as may reasonably be required by the competent authorities for the purpose of registering the Vessel, provided the Buyers notify the Sellers of any such documents as soon as possible after the date of this Agreement.

At the time of delivery the Buyers and Sellers shall sign and deliver to each other a Protocol of Delivery and Acceptance confirming the date and time of delivery of the Vessel from the Sellers to the Buyers.

At the time of delivery the Sellers shall hand to the Buyers the classification certificate(s) as well as all plans etc., which are on board the Vessel. Other certificates which are on board the Vessel shall also be handed over to the Buyers unless the Sellers are required to retain same, in which case the Buyers to have the right to take copies. Other technical documentation which may be in the Sellers' possession shall be promptly forwarded to the Buyers at their expense, if they so request. The Sellers may keep the Vessel's log books but the Buyers to have the right to take copies of same.



Clause 8 deals with the documentation required under the contract for the sale of a vessel.

Line 176 requires the place of closing to be inserted.

### Bill of Sale

**11–02** Lines 179–182 require the Sellers to produce a Legal Bill of Sale transferring title in the vessel to the Buyers. The "Bill of Sale" is the document by which title to a vessel is transferred. It operates as an "escrow" document—in other words it is effective on delivery to the Buyers or their representatives with intent to transfer title. For practical reasons (as discussed further below) it cannot usually be executed simultaneously with the closing of the transaction.[1]

Lines 87–88 require that the Bill of Sale includes the words "*free from all encumbrances, mortgages and maritime liens or any other debts or claims whatsoever*." This language does not precisely correspond with that in cl.9 (lines 208–209).

The effect of these words was discussed in both *Eximenco Handels AG v Partrederiet Oro Chief and Levantes Maritime Corporation* (the *Oro Chief*)[2] and *Kydon Compania Naviera SA v National Westminster Bank Ltd and Others* (the *Lena*).[3]

In the *Oro Chief*, (a case involving two buyers competing for the same vessel) the original buyers argued that because at the time of the intended delivery the vessel was encumbered by a mortgage (which the buyers knew was going to be discharged immediately after delivery) the Bill of Sale executed by the sellers was not a valid and truthful document in that on the intended delivery date the vessel would not have been free from encumbrances. The invalidity of the Bill of Sale was said to arise from matters of construction or implication.

However, Staughton J, whilst declining to lay down any general rule applicable to cases where the Norwegian Saleform was used, ruled that there was no term either express or implied that the Bill of Sale should truthfully state that at the moment of delivery the vessel was free from encumbrances, at any rate with respect to the mortgage registered against the vessel and which was known to the buyers. However Mance LJ (obiter) in *Rank Enterprises v Gerard* felt that the language of cl.8 did not clearly point either way though he was troubled by the idea that a seller might issue a Bill of Sale with the prescribed warranty knowing that there was an outstanding demand against the vessel.[4]

**11–03** In the *Lena* it was argued by the recipient of the Bill of Sale that the document should have certified that the vessel was "free from *all* encumbrances", whereas it was in fact only certified "free from encumbrances."

In response to this argument, Parker J decided that a vessel certified free of encumbrances was certified free of all encumbrances just as if it was certified not to be subject to any encumbrances whatsoever. There was, in his opinion, no need to follow the same strict wording as in relation to the description of the vessel. What

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[1] *Hooper v Gumm* (1867) L.R. 2 Ch App 282 at 290: "a ship is not like an ordinary personal chattel; it does not pass by delivery nor does possession of it prove title to it."
[2] [1983] 2 Lloyd's Rep. 509.
[3] [1981] 1 Lloyd's Rep. 68.
[4] [2000] 1 Lloyd's Rep. 403 CA and see discussion in Ch.12.

form of confirmation of class) which will need to be drawn specifically to the Sellers' attention.

This can be handled in practice either by amending the printed form or by the Buyers giving the Sellers a specific notice of particular requirements after signature of the MOA as contemplated by subcl.(xi) (though this refers to additional documents), or by using the well-worn practice of deleting all or most of cl.8 in the printed form and agreeing a separate list after signature of the MOA (as to which see para.2A–13 above).

## ADDITIONAL TOPICS RELATED TO CLAUSE 8

### (A) Covenants for title—full and limited title guarantee

**11–23** Under the Law of Property Act 1925 where a person conveyed "property" (defined in s.205 of the same Act to include any interest in personal as well as real property) as "beneficial owner" there were implied certain covenants for title. These covenants only applied where the conveyance was made for valuable consideration.

The Law of Property (Miscellaneous Provisions) Act of 1994 (which applies to dispositions of property made on or after 1 July 1995) implements recommendations made by the Law Commission and replaces those statutory covenants for title in the Law of Property Act. In doing so, the covenants have been made clearer and the guarantees which they provide have been strengthened so as to make them more enforceable irrespective of whether the disposition is made for valuable consideration.

The 1994 Act introduced two levels of covenant for title, "full title guarantee" and "limited title guarantee".

By making a disposition with full title guarantee the person making the disposition covenants that (i) he has the right to convey the property in the manner that he purports to; (ii) that he will do what he reasonably can to give the recipient such title as he has agreed to give and (iii) the property is free from all charges and encumbrances and rights lawfully exercised or capable of being exercised by third parties.

The only difference between a disposition by way of full title guarantee and a disposition by way of limited title guarantee relates to the covenant concerning freedom from encumbrances. In a disposition by way of limited title guarantee, the person making the disposition limits his covenant to encumbrances arising since the date of the last disposition for value. This imposes a liability not only for encumbrances created by the person making the disposition but also for any created by a predecessor for whom he could reasonably take responsibility.

Although perhaps not often seen in standard form MOA or Bills of Sale, the authors have nevertheless had experience of this wording being used. From a buyer's standpoint if this wording is to be used, the buyer should ensure that the seller agrees to sell the vessel with "full title guarantee". However, it would seem that the covenant relating to freedom from encumbrances may offer no more protection to a buyer than the indemnity contained within cl.9 of either Saleform 1993 or 2012.[21]

[21] See discussion at paras 12–08 to 12–09.



### (B) Various selling situations

*Sale by multiple companies/individuals*

**11–24** Historically, registered ownership of vessels has been divided into ownership of either shares in, or a percentage of, the vessel concerned.

Some ship registries (e.g. the British Registry) divide ownership of a vessel into shares and some registries operate on the basis of percentage ownership of vessels (e.g. Liberia). Depending on the registry concerned and whether it follows the British model, vessels may be divided into either 64 or 100 shares. Percentage ownership whether by a single owner or multiple owners will, obviously, always total 100 per cent.

In both instances, however, execution of Bills of Sale by multiple owners will follow the same principles.

If the sale is by "joint" owners (i.e. multiple owners all of whom own all of the shares or 100 per cent of the vessel jointly) then only one Bill of Sale will be executed by all of the owners together.

If the sale is made by multiple owners who hold the shares "in common" (i.e. each owner holds a specific number of shares or a specific percentage of the vessel), then each owner will execute a separate Bill of Sale in respect of that proportion of the vessel owned by it. When executed the Bills of Sale should together amount to a sale of all of the shares (or 100 per cent) of the vessel.

It should be noted that only the registered owners of the shares will be the executors of the Bill(s) of Sale for the vessel.

*Sale where vessel is the subject of a lease*

**11–25** Where a vessel which is the subject of a lease is offered for sale, then the registered owner of the vessel, the "lessor" (i.e. the financial institution leasing out the vessel) will execute the Bill of Sale.

In such cases the "lessee" (i.e. the company leasing the vessel from the financial institution) will negotiate the sale of the vessel (with regard to any guidelines or requirements laid down by the lessor and subject to the lessor's ultimate consent and approval) although it will be the lessor's name that will appear as the owner of the vessel in any contract for sale and on the Bill of Sale and other delivery documents.

Depending on what is agreed between the lessor and the lessee, the lessor may grant the lessee a power of attorney in order to execute the Bill of Sale on its behalf or may undertake execution of any sale documents itself.

It should be noted that the lessor will usually not have been involved in the day to day operation of the vessel and therefore the lessor will obtain an indemnity from the lessee in relation to any warranties or undertakings (e.g. with regard to liens or encumbrances over the vessel) which the lessor is required to give to the purchaser under the contract for sale.

Where the vessel has been the subject of a finance lease, the mechanism to complete a sale may require the lessee to exercise a purchase option under the lease. In that case it is likely that the lessor will execute a Bill of Sale in favour of the end-buyer in order to avoid a double transfer and thus to reduce costs.

deterioration of the vessel between inspection and delivery unless as above the period between those two events is longer than usual and the evidence is particularly clear. There will be a strong evidential onus on the Buyers to show that the vessel as presented on delivery is not in the same condition as when inspected and that what has occurred cannot be deemed to be "fair wear and tear." Their task will not be made any easier if the pre-purchase inspection has been quite superficial (as sometimes happens) so that they will have difficulty in establishing with any certainty the precise condition of the vessel when inspected—particularly, given the example referred to above, the condition of the holds in a bulk carrier which the Sellers may have had good reasons for either not allowing the Buyers to inspect at all or alternatively not providing sufficient equipment in terms of staging, lighting, etc. as to enable them to form a clear view of their condition.

This wording (or the corresponding wording in the 1993 Saleform) is sometimes amended to provide for delivery ". . . substantially in the same condition as she is [was] at the time of inspection fair wear and tear excepted" (emphasis added). The interpretation of such wording is unclear but it appears to provide the Sellers with an additional degree of protection in that apart from the exception for wear and tear the Vessel does not have to correspond exactly with her condition on inspection provided that she is "substantially" in the same condition. So relatively minor matters will not put the Sellers in breach of this provision but where the line is to be drawn will be a matter of some doubt in many cases. As noted in paras 6–23 to 6–25 above pursuant to the decision in the *Aktion* clauses as to the condition of the Vessel on delivery are to be regarded as innominate so that minor divergences will not give the Buyers any right to reject delivery though subject to the "in every respect" wording in cll.3 and 5 of Saleform 1993: see discussion at para.6–21 above). Thus to that extent the addition of "substantially" changes nothing—the Buyers' remedy for a breach of the provision in the Saleforms as to delivery in the same condition as when inspected will in normal circumstances sound in damages only.

### Second paragraph

**14–16** The second paragraph of cl.11 (in Saleform 1993) begins with the proposition:

"However, the vessel shall be delivered with her class maintained without condition/recommendation"

Initial consideration must be given to the word "However" at the beginning of this paragraph. It has more than stylistic significance in that it indicates that the formula in the first paragraph (delivery in the same condition as when inspected) is qualified by what follows and thus reinforces the language "subject to the terms and conditions of this Agreement" in line 218. Were this not the case an absurd result might be reached if the vessel was not on delivery in the same condition as when inspected because, for example, the Sellers had become obliged between inspection and delivery to alter the condition of the vessel so as to comply with a class recommendation. In such a case the Vessel would presumably be presented for delivery in a better (but not the same) condition as when inspected.

The next point to notice about this wording is the use of the term "her class maintained" which refers no doubt to the Classification Society set out in line four of the



Form. If the Buyers change Class on delivery it would not be open to them to contend that merely because the vessel did not meet the requirements of the new Class Society, she had not been tendered for delivery in accordance with the wording.

**14–17** The generally accepted interpretation of the obligation to deliver in Class arising from the decisions in the *Buena Trader*[11] and the *Alfred Trigon*[12] is that this is a "paper obligation" only which can be satisfied by production of a certificate from the Class Society that the vessel maintains her Class provided of course that it does not make any reference to outstanding recommendations. In the *Buena Trader*, counsel acting for the Buyers at the original arbitration conceded that he could not mount a direct challenge to the Certificate of Maintenance of Class produced by the Sellers. He sought to attack the Certificate by asserting that a term should be implied that the Sellers would notify Lloyd's of any of the items of wear and tear which might affect Class. However, this attempt was unsuccessful since though the Class rules required such notification the expert evidence was that class did not enforce compliance. If it could be proved that a clean certificate of Class had been procured by fraud or some improper means, the Buyers would not be bound to accept it and could re-open the whole question of the vessel's Class position, but proof (to the high standard required) would be difficult if not impossible in most cases.

**14–18** The question of interpretation which arises is how the obligation to deliver with "her class maintained" stands with the proposition in lines 218–219 that the vessel shall be "delivered and taken over as she was at the time of inspection, fair wear and tear excepted." It seems clear that the two obligations are separate, not least because of the language "subject to the terms and conditions of this Agreement" in line 215. Given the principle of construction that effect must be given to all the wording used,[13] there seems little doubt that the obligation to deliver "with her class maintained" extends the obligation to deliver as is at the time of inspection but, on the other hand, does not in any way diminish that obligation. Therefore, on the one hand, the Sellers cannot say that the vessel has been tendered for delivery in the same condition as on inspection if there are outstanding recommendations, at least unless the printed text has been amended to provide that the Buyers will take over the vessel subject to those recommendations. Conversely, if the Sellers tender the vessel with class maintained without conditions/recommendation in circumstances where she is not, in other respects, in the same condition as at the time of inspection, they cannot claim to have fulfilled their obligations.

#### *"Without condition/recommendation"*

**14–19** Regarding the obligation to deliver "without condition/recommendation" the only reported case dealing with the issue "what constitutes a recommendation" is that of *K/S Stamar v Seabow Shipping Limited (the Andreas P)*.[14] In that case the contract was based on Saleform 1987 and provided that the vessel was to be

[11] *Compania de Navegacion Pohing SA v Sea Tanker Shipping (Pte) Ltd* [1978] 2 Lloyd's Rep. 325 CA. This decision is consistent with earlier authority such as *Kelman v Livanos* [1955] 1 Lloyd's Rep. 120 at 132, *French v Newgass* (1868) LR JCP 163 and *United Shipping v Assicurazioni Generali* (1929) 34 Ll.L. Rep. 323.

[12] *Piccinini v Partrederiet Trigon II (the Alfred Trigon)* [1978] 2 Lloyd's Rep. 333 CA.

[13] See *Chitty on Contracts*, edited by Beale, 31st edn (2012), paras 12–044 and Ch.12 generally.

[14] [1994] 2 Lloyd's Rep. 183.

2013 in *Samarenko - v - Dawn Hill House Limited*,[5] where Lewison LJ also quoted the words of Fox LJ in the *Blankenstein*:

> ". . . the provision as to the payment of the deposit . . . was in my view a fundamental term of the contract . . . a term that is so radical of a nature that the Defendant's failure to comply with it would entitle the Plaintiff to renounce further performance. . ."

**16–16** Thus in the *Griffon*, Tomlinson LJ was able to say (in para.10):

> ". . . until the decision of this court in Samarenko . . . it would not have been clear that a failure to pay the deposit on time is, without more, repudiatory of the Buyers' obligations".

**16–17** Of course, the Seller will have to show (if he chooses not to wait for the expiry of the period) that the Buyers' conduct *is* repudiatory or renunciatory—that the Buyer has clearly demonstrated that he cannot or will not lodge the deposit on time—a time which by definition will not have arrived yet. In the *Anna Spiratou*, where the Sellers terminated for this reason before expiry of the window period, the Buyers conceded in the subsequent litigation that there had been a repudiation. So did the Buyers in the *Griffon*, though that case dealt with a cancellation under cl.13 after expiry of the period (though for good measure the Sellers alleged repudiation too).

**16–18** The second question is whether, if he terminates the contract before the expiry of the period for lodging it, a Seller will be able to claim the deposit as minimum following the decision in the *Griffon*. If he is able to show a repudiation (in the shape of a refusal to lodge the deposit) by the Buyer, then it is submitted that he will. He would not get it (the authors suggest) under the explicit contractual mechanism of cl.13, which deals with cancellations for failures to lodge the deposit "*as aforesaid*", i.e. by the end of the period agreed in cl.2. In the *Griffon* Tomlinson LJ said that the right to receive the deposit is " . . . unconditional, which was the analysis adopted by this court in the Blankenstein. . ." (para.13). And went on to talk (albeit in the cl.13 setting) about what he called

> ". . . the rights unconditionally acquired by the Sellers prior to termination survive the termination. Accordingly.. the Sellers retain the right to sue for the deposit as an agreed sum which they may simply recover in debt. Alternatively, the Sellers have an accrued right to sue for damages for breach of the obligation to pay the deposit, the measure of which is the amount of the deposit" (para.15).

**16–19** Tomlinson LJ's words should apply equally well to a proven repudiation and termination before expiry of the window period.

### Failure to pay the purchase money

**16–20** In the event that the Buyers, having paid the deposit, fail to pay the purchase money, the Sellers are entitled to cancel the contract and forfeit the deposit. The Sellers are entitled to claim for their losses and for any expenses to the extent that they are not covered by the deposit. The Sellers' right to forfeit the deposit is contractual and thus

[5] [2011] EWCA Cir 1445.



the entire amount of the deposit, plus interest, will be forfeited to the Sellers even if it is greater than the Sellers' actual loss (see the *Blankenstein*—at para.16–02, above).

### Buyers' default

**16–21** A buyer's default will usually (but not always) consist of a failure to make some kind of monetary payment; in the case of second-hand ships, this will be the deposit or the balance of the purchase money. It is also possible in theory for there to be a claim by the Sellers arising out of a failure to pay part of the purchase money on delivery. In the *Great Marine* (No.1),[6] the Buyers obtained an injunction prior to delivery preventing the Sellers from dealing with or disposing of the proceeds of sale except insofar as they exceeded US$400,000. The Sellers asserted a right to cancel because the Buyers had failed to pay part of the purchase price. Whilst the *Great Marine* (No.1) is an illustration of a case where the price was arguably not paid in full (though the court decided that it had in fact been), such cases are rare since the Sellers will not in practice agree to deliver the vessel until they have received the entire sale proceeds. The Sellers will have a right of lien (and resale) where property has passed to the Buyers but they have not paid the price.[7] Further there are now few circumstances in which the Buyers are likely to obtain in advance of delivery (and payment in full) an injunction over part of the sale proceeds—see Ch.23. In any case the only likely basis on which an injunction will be granted is that it is to take effect immediately after completion over a defined part of the price in the hands of the Sellers—in other words over funds which have become Sellers' property, after the price has been paid. This was the basis of the decision in the *Great Marine (No.1)*.

### Sellers' damages

**16–22** Under the second limb of cl.13 it may become necessary to look at what Sellers' losses would be in the event that Buyers wrongfully refuse to take delivery of the ship—i.e. they repudiate the contract either after the stage where the deposit has fallen due or where the purchase money is to be paid. The general rule in contract law is that damages should be assessed at the time the breach of contract occurs, with events that occur subsequent to the breach thought to be irrelevant.[8] The remedy of damages is essentially compensatory so its underlying purpose is to compensate the innocent party for the loss caused by the breach (so generally under English law the innocent party will not be entitled to claim exemplary or punitive damages, unlike some other jurisdictions). However, the deposit may be forfeited to the Sellers (where the purchase price has not been paid) even where the Sellers' actual loss is less than the deposit because the parties have expressely agreed that right in the contract (see para.16–05).

**16–23** The compensatory nature of damages was re-emphasised by the House of Lords in *Golden Strait Corporation v Nippon Yusen Kubishiki Kaisha* (the *Golden Victory*).[9]

[6] [1990] 2 Lloyd's Rep. 245.
[7] See the *Bineta* [1966] 2 Lloyd's Rep 419, discussed also in Ch.11.
[8] See Peel, *Treitel: The Law of Contract*, 13th edn (2011), para.20–072 to 20–074.
[9] [2007] 2 Lloyd's Rep. 164.

to consider mediation when the issues between them have sufficiently crystallised. Mediations are confidential so if no settlement is reached then the parties can embark on an arbitration (or continue with existing proceedings) without the arbitrators knowing about or being affected by any aspect of the mediation proceedings.

It is not uncommon for the parties to the contract to strike out the arbitration provisions in the Saleform and to replace them with a "tailor-made" clause providing for some other jurisdiction, very often the High Court of Justice in London. There are various reasons why parties choose to do this; one is the difficulty, following the coming into force of the 1996 Arbitration Act, of obtaining leave to appeal against arbitration awards, which has led to a dearth of reported cases on the Saleform. In the event that the parties choose High Court (or some other) jurisdiction they will need to provide expressly, in the interests of certainty, for the law which governs the contract. Ideally, where High Court jurisdiction is provided for, the parties should also set out in the MOA addresses (usually in London) of an agent for service of any legal process, thereby avoiding the need for an application to the English court for permission to serve High Court proceedings out of the jurisdiction where the defendant is a company registered outside the jurisdiction of the Court who can only be served with proceedings with the Court's permission. This process can be time consuming and expensive, and can be avoided by providing addresses for service in the MOA.

### Permission to appeal arbitration awards

**19–05** Starting substantive proceedings in the High Court should not be confused with appealing to the Court from an arbitration award. Arbitration proceedings commenced in England subject to the Arbitration Act 1996 will be subject to the conditions in that Act for challenges to awards. The Act limits rights of challenge much more severely than its predecessors—the 1950 and 1979 Acts. Permission to appeal (granted by a single judge of the High Court, usually on a paper application i.e. without hearing the parties) will usually be given only if the court decides that the arbitration tribunal's ruling is obviously wrong or the question is one of general public importance and the award is open at the least to serious doubt. The Arbitration Act 1996 also allows permission to be granted if the question raised by the appeal substantially affects the rights of the parties—but in practice this is nearly always the case, so permission (certainly in shipping cases) is usually given only in the two situations above. Nevertheless (see other chapters in this edition of this book) several awards have come through this filter process in recent years (the *Griffon*, the *Union Power* and the *Rewa* among them) which have allowed the High Courts and the Appellate Courts to rule conclusively on issues which have given rise to frequent disputes under Saleform 1993 where clear guidance has been needed and is to be welcomed.

### Saleform 2012

**16. Arbitration**

(a) *This Agreement shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this Agreement shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause.

The arbitration shall be conducted in accordance with the London Maritime Arbitrators Association (LMAA) Terms current at the time when the arbitration proceedings are commenced.

The reference shall be to three arbitrators. A party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other party requiring the other party to appoint its own arbitrator within fourteen (14) calendar days of that notice and stating that it will appoint its arbitrator as sole arbitrator unless the other party appoints its own arbitrator and gives notice that it has done so within the fourteen (14) days specified. If the other party does not appoint its own arbitrator and give notice that it has done so within the fourteen (14) days specified, the party referring a dispute to arbitration may, without the requirement of any further prior notice to the other party, appoint its arbitrator as sole arbitrator and shall advise the other party accordingly. The award of a sole arbitrator shall be binding on both Parties as if the sole arbitrator had been appointed by agreement.

In cases where neither the claim nor any counterclaim exceeds the sum of US$100,000 the arbitration shall be conducted in accordance with the LMAA Small Claims Procedure current at the time when the arbitration proceedings are commenced.

(b) *This Agreement shall be governed by and construed in accordance with Title 9 of the United States Code and the substantive law (not including the choice of law rules) of the State of New York and any dispute arising out of or in connection with this Agreement shall be referred to three (3) persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them shall be final, and for the purposes of enforcing any award, judgment may be entered on an award by any court of competent jurisdiction. The proceedings shall be conducted in accordance with the rules of the Society of Maritime Arbitrators, Inc.

In cases where neither the claim nor any counterclaim exceeds the sum of US$ 100,000 the arbitration shall be conducted in accordance with the Shortened Arbitration Procedure of the Society of Maritime Arbitrators, Inc.

(c) This Agreement shall be governed by and construed in accordance with the laws of _____ (state place) and any dispute arising out of or in connection with this Agreement shall be referred to arbitration at _____ (state place), subject to the procedures applicable there.

* 16a), 16b) and 16c) are alternatives; delete whichever is not applicable. In the absence of deletions, alternative 16(a) shall apply.



**19–06** The wording of the law and jurisdiction clause has been updated. It retains the basic choice between English law and London arbitration or New York law and New York arbitration—or any other law and jurisdiction which the parties may agree. But it refers explicitly to the Arbitration Act 1996 and provides that arbitrations will be conducted in accordance with the current rules of the London Maritime Arbitrators' Association. This last point gives added clarity. It means that if they agree the framework of the LMAA Rules then the parties will have a framework for all aspects of a modern commercial arbitration—basic timetables, requirements for service of submissions and documents, powers to the arbitrators for making rulings on important issues like security for costs.

Sellers may keep the Vessel's log books but the Buyers have the right to take copies of same. As regards the possible entitlement of the Buyers to the Sellers' electronic documentation see para.11–18 above.

*Non-blacklist*

**20C–22** The Sellers shall confirm to the Buyers in writing at the time of delivery that to the best of their knowledge and belief, the Vessel has not traded with/to Israel and that she is not blacklisted by the Arab Boycott League, nor boycotted by any other country or labour organisation such as the ITF.

*Nomination*

**20C–23** Any company nominated by the Buyers as the purchaser of the Vessel hereunder shall be nominated by notice in writing to the Sellers within ten (10) working days of the date of this Agreement. It is hereby expressly agreed by the Buyers that in the event that a nominee is to be the purchaser of the Vessel, the Buyers shall remain responsible for the obligations of the nominated purchaser under this Agreement and the nomination notice in writing to the Sellers shall also include a signed confirmation to this effect.

**Subjects**

*Buyers' Board approval*

**20C–24** This Agreement is subject to the approval of the Board of Directors of the Buyers for the purchase of the Vessel which approval may be given by latest [ ] hours (London time) on [ ] 201[ ]. In the event that Buyers fail to obtain Board approval by the time stated then this Agreement shall terminate (save for Clause [ ], Confidentiality, which shall remain in full force and effect) and neither party shall have any claim of whatsoever nature against the other.

**Sellers' Board approval**

**20C–25** This Agreement is subject to the approval of the Board of Directors of the Sellers for the sale of the Vessel which approval may be given by latest [ ] hours (London time) on [ ] 201[ ]. In the event that Sellers fail to obtain Board approval by the time stated then this Agreement shall terminate (save for Clause [ ], Confidentiality, which shall remain in full force and effect) and neither party shall have any claim of whatsoever nature against the other and the Deposit together with any accrued interest shall be returned to the Buyers.

*En Bloc Clause*

**20C–26** The total price for the Vessels shall be United States Dollars [ ] (US$[ ]) ("the Purchase Price").



For the purposes of this Agreement the individual values of each Vessel are as follows:

| | | | |
|---|---|---|---|
| "[ | ]" | US$[ | ] (USD) [ ]) |
| "[ | ]" | US$[ | ] (USD) [ ]) |
| "[ | ]" | US$[ | ] (USD) [ ]) |
| "[ | ]" | US$[ | ] (USD) [ ]) |
| "[ | ]" | US$[ | ] (USD) [ ]) |
| "[ | ]" | US$[ | ] (USD) [ ]) |

(i) Should any of the Vessels become a total or constructive total loss before delivery the remaining Vessels shall be delivered to the Buyers in accordance with this Agreement and the Purchase Price shall be reduced by the value of the Vessel(s) concerned as set out above and the deposit shall be applied towards payment for the remaining Vessels on Closing and this Agreement shall continue in full force and effect in respect of the remaining Vessels.

(ii) Should any Vessel (which for the purpose of this Clause means one Vessel or more than one Vessel but not all of the Vessels) suffer a loss other than a total loss prior to delivery the Sellers shall notify the Buyers thereof immediately and the Sellers shall be entitled to effect such repairs prior to delivery of the Vessel(s) so as to place it/them in the same but no better physical condition and/or classification status as at the time of inspection by the Buyers (fair wear and tear excepted) and without claim by the Buyers against the Sellers. If the repairs which are required to be carried out to the Vessel or Vessels concerned are likely to be completed within sixty (60) days of the expected time of delivery, the delivery date shall be postponed without claim by the Buyers to the Sellers. If the repairs are likely to, or exceed sixty (60) days in the opinion of that Vessel's classification society, the Sellers shall immediately notify the Buyers and the Buyers shall be entitled forthwith to elect, by written notice to the Sellers, either (x) to pay the full amount of the Purchase Price and take delivery of the remaining Vessels but postpone taking title and physical delivery of that Vessel until the necessary repairs have been completed by the Sellers in which case the Vessel shall be delivered by Sellers to Buyers forthwith on completion of such repairs and without additional payment, or (y) to take delivery of that Vessel at the same time as the other Vessels subject to any reduction in the Purchase Price as may be agreed between the Sellers and the Buyers in respect of the cost of repairs to the Vessel concerned.

*Transfer of charter*

**20C–27** The Vessel is sold subject to a time charter to [name of charterer] for [ ] years from [date] with [an] option[s] for [a] further [ ] years extension. The Buyers have been provided with a true and complete copy of the said charter. Delivery of the Vessel under this agreement is conditional on the consent of the charterer to the sale of the Vessel to the Buyers which consent is under the terms of the charter not to be unreasonably withheld. Sellers undertake to use their best endeavours to obtain the charterers' consent to the sale and to enter into a novation agreement with the Sellers and the Buyers in a form to be mutually agreed. If the charterer nevertheless withholds its consent to the sale of the Vessel and/or refuses to enter into a novation

hazardous which are typically found on ships, it seems difficult to mount an argument against its application to ships.[6]

2. For a time the NGO pursued the topic of "pre-cleaning" based on an interpretation of the Basel Convention. According to this interpretation a ship being exported from an OECD country to a non-OECD country should be pre-cleaned by removing all hazardous materials. On a strict interpretation this would even include removing all paint from the hull of the ship quite apart from removing all asbestos and all cables. Unsurprisingly this presents serious practical problems in that the ship if pre-cleaned of all materials deemed hazardous would be unsafe to proceed under her own power (e.g. without asbestos insulation she would be likely to catch fire) and thus would need to be towed to the recycling yard. Where actions have been taken against ships (such as the *Global Spirit* referred to above) it has usually been as a result of pressure on the relevant administration by the NGO which more recently has concentrated on the beaching issue. There is however some reference to pre-cleaning in the Hong Kong Convention (see below).
3. In 2001 an "Industry Code of Practice on Ship Recycling" was adopted.[7] This aims to encourage best practice from the shipowners' viewpoint whilst recognising that ultimately responsibility for conditions and practices in breaking yards must rest with the countries in which they are situated. Owners should among other things identify and record (and also minimise) hazardous materials on board, especially asbestos, and present the ship gas-free and ready for hot work. Shipbuilders are expected to provide a "green passport" for new ships. Of particular relevance for present purposes, shipowners contracting to sell their vessels are encouraged to consider the working practices and facilities in the intended recycling yard together with the benefits of towing the vessel to the yard fully cleaned and free of oil and other residues, the practicality of pre-cleaning and the provision of advice regarding any hazardous materials remaining on board.
4. In 2002 the Technical Working Group of the Basel Convention adopted Guidelines for the "Environmentally Sound Management of the Full and Partial Dismantling of Ships". These were adopted as part of the Code of Practice referred to above later in the same year.
5. Inevitably the IMO became involved in this topic and adopted guidelines in 2003 based on those adopted under the Basel Convention and by the ILO as well as the Industry Code of Practice. Provision is made for such guidelines to be facilitated by a "Green Passport" which should contain information as to hazardous materials used in the ship's construction and will accompany the ship throughout its life and be eventually delivered by the last owner to the recycling yard.
6. A new International Convention for "the Safe and Environmentally Sound Recycling of Ships" has been adopted by the IMO at a diplomatic conference held in Hong Kong in May 2009. It will enter into force 24 months after the date on which 15 states representing 40 per cent of world merchant

[6] See M. Tsimplis, 'The Hong Kong Convention on the Recycling of Ships' 2010 L.M.C.L.Q. 2, at pp.310–1.
[7] This was the brainchild of a number of shipping organisations. See *http://www.marisec.org* [Accessed 1 October 2015].



shipping gross tonnage have either signed it without reservation or deposited instruments of ratification. There is an additional requirement that the maximum annual ship recycling volume of the ratifying states must during the previous 10 years have constituted not less than three per cent of their combined merchant shipping tonnage. The new convention seeks to address all issues concerning ship recycling including both hazardous substances on board ships and the working and environmental conditions at ship recycling locations around the world. Thus the emphasis is different from that of the Basel Convention in that it aims to create a regime which will monitor the presence of hazardous materials used in construction or on board throughout the ship's lifetime. The Convention requires ships to have an "IHM" (Inventory of Hazardous Materials—i.e. a "green passport") stipulating the materials present in the ship's structure, systems and equipment which may be hazardous to the environment. This will eventually be required for all ships over 500 grt. For the moment such a document is voluntary but will become compulsory for newbuildings over the next few years. The classification societies will be involved in advising on and administering this scheme.

The Convention also aims to provide a certification regime for the recycling facilities and their suitability for the ship in question. In contrast to the Basel Convention which places the primary obligation to control export of waste on the country of export of the ship the IMO Convention places the obligation to control the shipment or use of hazardous materials on the flag state subject to powers for port states to check a ship's certification.[8]

The major recycling country (India) is reportedly sceptical about some aspects of the IMO Convention—for example that as drafted it does not prohibit owners from sending tankers for recycling without first cleaning and gas-freeing the cargo tanks. In terms of pre-cleaning the Convention refers to the obligation of owners to minimise the amount of hazardous waste remaining on board but does not require mandatory removal of asbestos and other materials—presumably for the safety reasons referred to above. There is also the issue of the practice of beaching ships for recycling which is widely used in the Indian sub-continent but disapproved of by the IMO though not excluded in the latest draft of the Convention adopted in Hong Kong in May 2009. So far only three countries have ratified the Convention. Thus whether and when this new convention is likely to enter into force is not yet clear.

7. European Regulation. The potential delays in the Hong Kong Convention ("HKC") coming into force led to the European Union adopting the European Regulation on ship recycling ("ER") in December 2013, providing for the safe and environmentally sound recycling of European flag ships and, at a future date, the carriage on board all ships visiting European ports of an inventory of hazardous materials ("IHM"). The end result is that the ER is in many respects similar to the HKC. In common with the HKC the "Cash Buyer" (see

[8] Generally see International Maritime Organisation at *http://www.imo.org* [Accessed 1 October 2015] and for a detailed review of the Convention see M. Tsimplis (above) at pp.305–346.

for dockyards in Japan. The Buyers cancelled the contract and claimed (i) return of the sum of Yen 9,600,000 and (ii) payment of liquidated damages in the sum of Yen 4,600,000 as provided in the contract. The arbitrators held that the Sellers should return the sum of Yen 9,600,000 to the Buyers. However they dismissed the Buyers' claim for liquidated damages on the grounds that (a) the Sellers had properly exercised due diligence to find an available dockyard; (b) the Buyers were fully aware of the seasonal difficulty of finding a dockyard and (c) there was no urgent need for the Buyers to take delivery of the ship by 20 December 1992.

C. In a recent arbitration case the cancellation of a contract was disputed. In this case, the Japanese Sellers and the Korean Buyers negotiated the terms of the contract based on the sellers' form. All terms were agreed between the parties except for the purchase price. On 21 February 2012 the Buyers sent an email to the Sellers to offer US$9.8 million as a firm offer of the purchase price. On 22 February the Sellers offered US$10 million. The Buyers however sent an email to insist on US$9.8 million to say Repeat Buyers last at 18.03 of the same day. At 20.55 the same day the Sellers sent a message to the Buyers that "Sellers thank you buyers last counter and they accepted Buyers last". Thereafter the Sellers requested 10 per cent deposit under the terms of the recap. The Buyers refused to pay the 10 per cent deposit arguing that the contract was not formed between the parties. The Japanese tribunal concluded that the contract was duly formed and that the Buyers should pay US$9.8 million to the Sellers under the contract.

## Clause by clause comparison of Nipponsale 1993 and 1999 with Saleform 1993 from an English law viewpoint

**27–08** In broad terms, the general content of the Nipponsale Form has always been in many respects similar to the Saleform and, indeed, some of the language is almost identical. In the late Eighties, the two forms became somewhat out of step in that, as noted earlier, the Saleforms were altered to some extent in favour of the buyer, whereas the Nipponsale remained very much a Sellers' form. This commentary should be read subject to the points on Japanese law set out in para.27–03 above and the commentary on Nipponsale 1999 in para.27–04 above.

Both Nipponsale 1993 and Nipponsale 1999 contain clauses submitting disputes to arbitration in Tokyo (see below), but neither form has an express choice of law clause. However it has been assumed that the governing law of the Nipponsale is Japanese.

The clause numbering and headings used below follow those used in Nipponsale 1999. In the 1993 Form the clause numbering is the same but headings are sometimes slightly different—different earlier headings are shown in square brackets after the 1999 headings.

### General

**27–09** The layout of Nipponsale 1999 represents a radical departure from the more traditional layout of both Saleform 1993 and Nipponsale 1993, adopting instead the



"box and column" style, which those familiar with shipping documentation will associate more readily with the various Bimco charter forms. The authors understand that whilst the "box and column" form is quite often used it is usual to delete substantial sections and to use additional clauses.

Both the Nipponsale 1993 and the Nipponsale 1999 consist of 15 clauses, compared to the Saleform's 16. The later Nipponsale Form is considerably longer than the 1993 Form and of similar length to Saleform 1993.

### Description of the vessel, Definitions and the Nipponsale 1999 boxes

**27–10** As above the use of the box format follows a well-trodden path but the possibly inconvenient result is that there are extensive references to the various boxes in the body of text on the second and third pages so that frequent reference back is required.

Whilst the required particulars describing the vessel in the Nipponsale 1993 are more extensive than those required to be inserted in the Saleform 1993, the Nipponsale 1999 goes even further and includes a requirement for the summer deadweight tonnage to be entered. If the particulars are inaccurate cl.5(b) of the 1999 Form provides (see below) that:

"Upon the Vessel being delivered to and accepted by the Buyers . . . the Sellers shall have no liability. . .for any fault or deficiency in their description. . .regardless of whether such defect was apparent or latent at the time of delivery."

However, on advice received from Hiratsuka & Co, this provision will not be effective to relieve the Sellers from liability if they were aware of such fault or deficiency and failed to disclose it (art.572 of the Japanese Civil Code). Whether the inaccuracy may entitle the Buyers to rescind the contract will depend on how serious is the fault or deficiency—if the object of the contract cannot be attained the Buyers can rescind—in less serious cases they will be able to claim damages. If the inaccurate description becomes apparent before delivery, the Buyers will be entitled to rescind the contract if its object cannot be obtained even if the Sellers were unaware of the inaccuracy. If the breach is less serious the Buyers will be able to claim damages.

Unlike the Saleform 1993, neither of the Nipponsale Forms include a specific Definitions section. Nipponsale 1999 includes within the body of the document a limited number of definitions hitherto missing from the 1993 version, e.g. "Banking Days" though these are not exhaustive and as discussed below may, in some instances, prove confusing.

### 1. Purchase Price

**27–11** All three documents deal in these clauses with the amount of the purchase price, the deposit payable and how payment of the balance of the purchase price is to be effected.

In cl.1 of Nipponsale 1999, "Purchase Price" is defined, which is a useful addition as it allows reference elsewhere in the document to the "balance of the Purchase Price", when describing that part of the consideration excluding the deposit. Neither Saleform 1993 nor Nipponsale 1993 include this definition.

tendered, caused by failure by the Sellers to provide the documents required by Clause 8 and/or to deliver the Vessel as provided in Clause 9. The burden of proving any loss and expense, additional or otherwise, shall be on the Buyers. The burden of proving that the failure was caused by matters outside of the Sellers' reasonable control shall be on the Sellers.

**28–25** By cl.5(b), the Sellers are obliged to have all of the delivery documentation ready (with certain exceptions as discussed above) before giving Notice of Actual Readiness for delivery. The Buyers' right to cancel is not made subject to the three days' grace given to the Sellers for completing the delivery documentation which is found in NSF93 and Nipponsale (though not in NSF12).

Whilst a failure to have documentation ready prior to serving Notice of Actual Readiness may be treated as invalidating the Notice, it is difficult to see how the Buyers would be able to prove this. There is no requirement to provide evidence that all documents are ready when giving the Notice. In practice this would probably only become an issue if it later became apparent that the Sellers had not had the documentation ready at the time and could not produce it on closing.

Also, cl.8 only requires copies to be exchanged "to the extent possible" (line 213) and then copies of executed versions in strict conformity with the drafts to be circulated three days prior to delivery (line 215). However, if drafts have not been circulated, because, according to the Sellers, they were prevented from doing so by matters outside their reasonable control, then they would not have to circulate executed versions prior to giving Notice. If this is correct then there would seem to be no way in which Buyers could claim that the Notice of Actual Readiness was invalid because they had not seen certain documents prior to the Notice being issued.

The only way to ensure certainty would be to refer specifically to all documents which have to be provided in copy executed form prior to the Notice of Actual Readiness rather than to such documentation in only general terms.

There is a significant difference between the SSF's cl.13(d) and the Sellers' default provision in NSF93. Under NSF93, where the Sellers fail to give Notice of Readiness by the Cancelling Date or are not able to provide the delivery documents required, the NSF93 places the burden on the Buyers to prove that such failure has arisen from the Sellers' negligence. The SSF, on the other hand, places the burden on the Sellers to show that the failure was caused by matters outside their reasonable control.

14. Buyers' Representatives

**28–26** The Buyers are entitled to place two representatives on board the Vessel after signing a letter of indemnity in Sellers usual form, for the purpose of familiarization and as observers at their expense and risk after this Agreement has been signed by both parties and the Deposit has been lodged. The Buyers' Representatives are to remain onboard until delivery under the Master's control, but are to be allowed access to the Vessel's main spaces, machinery and equipment without interference to the Vessel or her operations.

Unlike NSF93, there is no express provision that Buyers' representatives on board the vessel are there at Buyers' "sole risk and expense" though there is in NSF12. Sellers should therefore be careful to pass such risk and expense to Buyers successfully by carefully wording the letter of indemnity (to be signed by the Buyers).

The scope of Buyers' representatives' familiarisation with the vessel is set out in lines 268–270 but is always subject to the Master's control.



15. Arbitration & Governing Law

i)* This Agreement and any guarantee contained herein shall be governed by and construed in accordance with Singapore/ English* Law and any and all disputes arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore Chamber of Maritime Arbitration for the time being in force at the commencement of the arbitration.

ii)* This Agreement and any guarantee contained herein shall be governed by and construed in accordance with ..... ..... Law and any and all disputes arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in ... .....in accordance with the .....Rules for the time being in force at the commencement of the arbitration.

* *15(i) and (ii) are alternatives; delete whichever is not applicable. In the absence of deletions, alternative 15 (i) and Singapore law shall apply to the exclusion of any other law. In the absence of selection by the parties as to the applicable law, seat of arbitration and arbitration rules under alternative 15 (ii); Singapore law shall apply to the exclusion of any other law, Singapore shall be the seat of arbitration and the arbitration rules of the Singapore Chamber of Maritime Arbitration shall apply.*

**28–27** It is unsurprising that cl.15(i) gives parties the option of agreeing Singapore law or English law—in that order.

Since one of the main motivations for the SSF is to give a boost to Singapore arbitration, it is logical for its proponents to encourage parties to agree Singapore law. The roots of Singapore's legal system can be traced back to the English legal system though Singapore law has evolved over the years. Singapore has inherited the English common law tradition and thus enjoys the attendant benefits of stability, certainty and internationalisation inherent in the British system (particularly in the commercial sphere). The application of English law Act states that the common law of England (including the principles and rules of equity), so far as it was part of the law of Singapore before 12 November 1993, shall continue to be part of the law of Singapore, subject to modifications as circumstances dictate. The sovereign state of Singapore has, of course, made some departures from English common law since gaining its independence in 1965.

In providing the option to agree English law as the governing law, the SSF recognises that parties may nevertheless be more familiar with English law, having chosen it to govern their sale and purchase transactions for many years. There is a much larger body of English case law than Singapore case law on the sale and purchase of second-hand vessels.

Clause 15(i) provides that any disputes are to be submitted to arbitration in Singapore in accordance with the Rules of the Singapore Chamber of Maritime Arbitration ("SCMA"). The SCMA was reconstituted in May 2009 and since then a number of arbitrations have commenced under its auspices.

Naturally, there will be parties who will still prefer to agree other governing law or arbitral institution's rules and this freedom is given to the parties in cl.15(ii).

16. Confidentiality Clause

**28–28** Both Parties agree in good faith to keep the terms and conditions of this Agreement private and confidential except as required by law. In the event the sale or details thereof become known or reported in the market neither the Sellers nor the Buyers shall have the right to withdraw from the sale or fail to fulfill all their obligations under this Agreement.