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Shipping Offshore

Update

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Beaching usually refers to the recycling of ships where the ship is deliberately run onto a beach, then broken up in the tidal zone.

Shipping Offshore Update – Content

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Dear friends and readers,

When we released our last Shipping Offshore Update back in December 2021, the COVID-19 pandemic was still the most immediate challenge affecting global trade.

Since then, whilst the worst effects of the pandemic, at least in Europe, seem to be on the wane, war broke out in Europe as Russia shockingly invaded Ukraine on 24 February 2022, causing a humanitarian crisis and changing the geopolitical landscape in ways that were unthinkable just a few months ago.

Global shipping and trade has been profoundly affected by the war in ways that, to some extent, still remain to be seen. Some have seen their businesses directly affected by the war itself, for example by ships being unable to leave or enter Ukrainian ports. Others have been impacted by the rapidly changing sanctions that have been imposed, most notably by the US, the EU and the UK.

As you may know, we are sending out Sanctions Alerts by e-mail when new sanctions are issued. If you are not already signed up to receive them, you can do so on wr.no and also read our latest alerts.

In this Update we will consider how the concepts of force majeure and frustration may impact contracts as a result of the Russian invasion as well as the application of BIMCO's war risks clauses. We also write about China's anti-sanction laws.

Furthermore, we touch on topics which are unrelated to the invasion, including BIMCO's new standard form sales agreement for second hand vessels, guarantees in shipbuilding projects, and offshore fish farming. We also write about environmental and sustainability issues, such as a possible treaty to limit plastic pollution originating from ships' cargoes and the continued attention on sustainable recycling of ships and many other topics.

We hope you find it an enjoyable, and informative read!

Herman Steen
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Global shipping and trade has been profoundly affected by the war in ways, that to some extent, still remain to be seen.

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Russia's invasion of Ukraine – force majeure and frustration

The English and Norwegian perspective

The invasion of Ukraine by Russia has caused untold human suffering, severe disruption to global trade and property damage. It has also led parties to closely examine contracts with a Russian connection to see if they can be suspended or terminated lawfully.

An option frequently considered in this context is whether a party is entitled to declare force majeure or frustration. We consider these concepts briefly below, in the context of the invasion, from an English and Norwegian law point of view.

THE ENGLISH LAW POSITION

Force majeure

The doctrine of "force majeure" ("**FM**") does not exist as a free-standing concept under English law. However, as a contractual term it is common. A substantial body of case law exists to demonstrate how the courts will deal with FM clauses.

Typically, FM clauses allow a party to suspend (and often, after a set period, cancel) their obligations under a contract provided that:

1. there is a supervening event over which they had no control and which could not reasonably have been foreseen at the time when the contract was made,
2. performance of their contractual obligations is prevented or delayed as a result, and
3. the party relying on the FM clause has taken all reasonable steps to prevent or mitigate the effects of the supervening event.

> The first order of business will always be to consult the text of the agreement.

Contracts often list examples of such FM events, typically war, invasion, blockade, government actions, sanctions, strikes, civil commotion, confiscation, insurrection, fire, explosion and cyberattacks. Several of these may come into play in the current situation.

Ultimately, the effects of a given FM clause, and whether this is 'triggered' by the invasion of Ukraine (or any other subsequent event), will depend on the factual circumstances of each case as well as the wording of the particular clause. However, there are general lessons which can be drawn from the English authorities.

FM clauses will always be construed against the party seeking to rely on them. It is therefore for that party to show that the FM event has fulfilled the necessary criteria.

In practice, this will ordinarily involve documenting the obstacles and demonstrating the causal link between the FM event and the operation of the FM clause (e.g. because performance of the contractual obligations by a party has been severely delayed), whilst showing that the FM event was not caused by that party.

In terms of assessing causation, Mr Justice Teare helpfully summarised the authorities in *Seadrill v Tullow* [2018] EWHC 1640:

"Questions of causation are sensitive to the legal context in which the question arises; see ENE Kos v Petroleo Brasileiro [2012] 2 AC 164 at paragraph 12 per Lord Sumption and at paragraph 76 per Lord Clarke. They are to be resolved by reference to common sense; see The Eurus [1998] 1 Lloyd's Reports 351 at p.361-2 per Staughton LJ and also ENE Kos v Petroleo Brasileiro at paragraph 74, where Lord Clarke approved a statement in an earlier case that causation was to be determined by a "broad common sense view of the whole position"."

In this case, the Court held that there were "two effective causes" of the defendant being unable to perform the contract – one was an FM event, the other one not. This meant (on the wording of that FM clause) that the defendant could not rely on the FM clause.

Frustration

Frustration, in contrast to FM, occurs by operation of law and without the need for a contractual provision. Per the House of Lords in *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 (at 729):

"frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do."

Sums paid under frustrated contracts are *prima facie* returnable to the payors under the Law Reform (Frustrated Contracts) Act 1943, with provision being made for the retention of sums incurred as expenses prior to the frustration of the contract.

Underpinning the exercise of the doctrine is the judicial view that courts should be reluctant to interject in commercial agreements. This is reflected by the fact that the doctrine of frustration will **not** apply if:

1. Performance of the contract has become more difficult or more expensive.

   This is not sufficient. Further performance must be impossible, illegal or (per *Davis* above) 'radically different' from what was contracted for.

   In *Fibrosa v Fairbairn* [1943] AC 32, the House of Lords held that the contract was frustrated once World War Two broke out, as performance of the contract (which involved export to German-occupied Poland) then became illegal. This followed the same principles as the High Court had applied in a charter context in *Re Badische Co Ltd* [1921] 2 Ch 331, which became illegal as 'intercourse with the enemy'.

2. The factual scenario is already dealt with in the contract.

   Per the Court of Appeal in *The "EUGENIA"* [1963] 2 LLR 381:

   "To see if the doctrine applies, you have first to construe the contract and see whether the parties have themselves

provided for the situation that has arisen. If they have provided for it, the contract must govern. There is no frustration. If they have not provided for it, then you have to compare the new situation with the situation for which they did provide. Then you must see how different it is. The fact that it has become more onerous or more expensive for one party than he thought is not sufficient to bring about a frustration. It must be more than merely more onerous or more expensive. It must be positively unjust to hold the parties bound."

It follows that where a particular factual event is covered by an FM clause (or similar), it is unlikely to amount to frustration.

Wrongful declarations

The primary risk of wrongfully declaring a contract terminated due to a force majeure event or frustration is that this will amount to an anticipatory repudiatory breach. This requires a party to evince an intention to no longer be bound by the terms of the contract in terms which a reasonable person in the position of the other party would consider to be "*clear and absolute*" in all the circumstances (per *The "PRO VICTOR"* [2010] 1 LLR 158).

THE POSITION UNDER NORWEGIAN LAW

The clear starting point under Norwegian law is also that contracts shall be performed in accordance with their terms.

However, when unexpected and extraordinary events like a war occur after a contract has been entered into, a party may be entitled to rely on several Norwegian legal doctrines in declaring termination, suspension or some other modification of the contract.

The fact that it has become more onerous or more expensive is not sufficient to bring about a frustration.

Force majeure

If there is an FM clause in a contract governed by Norwegian law, the position will be very similar to the position under English law. The first order of business will therefore always be to consult the text of the agreement.

However, under Norwegian law there is also a general doctrine of FM which may apply by operation of law. Under this doctrine, the debtor may be released from liability and excused from performing the contract if performance is prevented or delayed by an FM event. A traditional FM event is one that satisfies the three main requirements often found in FM clauses, namely:

1. an event outside the control of the parties which they could not reasonably have foreseen,
2. as a result of which performance was prevented or delayed, and
3. that the party relying on the FM clause has taken all reasonable steps to overcome the hindrances.

The sudden and unexpected outbreak of war is the classic example.

What constitutes an FM event will vary depending on the type of contract in question.

Sellers facing an exorbitant increase in the price of raw materials may successfully rely on the FM doctrine – in this context often referred to as "economic FM". However, like under English law, it is not sufficient that performance of the contract has become more difficult or more expensive. It is required that the price increase totally undermines the fundamental premises of the contract.

If the hindrance should reasonably have been foreseen or if contractual reservations should have been made, FM will not protect the debtor. The fact that an increasing number of restrictions and sanctions are implemented on shipping from a country at war may, in the circumstances be something which the seller of goods from that country should have taken into account when contracting.

Generally, the party hindered by an FM event must be required to give the other party notice thereof.

The specific consequences of FM vary based on the type of contract. In construction contracts, the construction period may for instance be extended. In sales contracts, the seller may be relieved from its duty to deliver the goods and to pay damages, but the buyer may nonetheless be entitled to withhold payment, claim a price reduction, or terminate the contract.

The doctrine of contractual assumptions

A separate, but related doctrine under Norwegian law is that of contractual assumptions. The assessment under this doctrine will however often overlap with the force majeure doctrine.

A contract may wholly or partly be set aside if a fundamental assumption on which the contract was based is no longer present. The relevant promise to perform must have been provided under a certain assumption, this assumption must have been causal (motivating) for the promisor (in other words, an important assumption), and the assumption must be considered legally relevant.

If the conditions are fulfilled, the relevant obligation would be set aside or modified. In some cases, the doctrine has even provided a basis for increasing the contractual remuneration.

The doctrine may for example be relied on to excuse performance if, unexpectedly, it becomes significantly more dangerous to perform the contract – like sailing in waters where unrestricted submarine warfare is suddenly declared. Similarly, the Norwegian Maritime Code contains provisions that may excuse performance of charterparties due to war risks. Significant risks of economic retribution from third parties, that would have sweeping consequences for a seller's business – like being "blacklisted" by the British during the First World War – may also excuse performance.

Revision under the Norwegian Contracts Act section 36

A third possible legal basis is the Norwegian Contracts Act section 36, which provides that contractual terms that are considered "*unreasonable*" may be set aside or amended based on a broad consideration of all relevant circumstances.

It is important to stress, however, that the threshold for applying this provision is extraordinarily high in commercial contracts.

Situations where a contractual party has been exposed to a supervening and unexpected event which has caused the performance to be extraordinarily more onerous, may however in the circumstances entitle that party to rely on the Contracts Act section 36.

When assessing the criteria of "*unreasonability*" in light of the totality of the circumstances of each particular case, many of the same elements we have mentioned in connection with FM and contractual assumptions will be relevant.

In connection with long term contracts where there is an element of cooperation and cost-sharing, the courts may be more willing to adjust terms than in other types of contracts.

The same event may under Norwegian Law potentially trigger all of the three legal doctrines and there is no sharp distinction between them. They may all give grounds for contractual obligations being set aside or modified, but the Contracts Act section 36 provides a more flexible tool for potentially redrafting some of the contractual obligations.

Notwithstanding the above, the starting point under Norwegian law remains that contracts are binding and that contract revision under the three legal doctrines is only relevant in extraordinary situations.

Similar to the position under English law, a wrongful declaration that one is excused from performing the contract, may give rise to claims for breach of contract.

Regardless of whether a contract is subject to English or Norwegian law, these matters warrant very careful consideration of the circumstances in the particular case. •

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War and warlike operations in a TIME OF UNCERTAINTY

The outbreak of war can have serious consequences on charterparties of all kinds and it is therefore no surprise that the industry has developed several standard clauses to clarify the parties' obligations in such uncertain times.

In the modern era, war is rarely declared formally and solemnly in advance of hostilities, as it was for example by the British government in 1939.

Instead, with disinformation campaigns being a regular feature of foreign policy and the emergence, over the Cold War, of proxy states, affiliated militia and private military corporations, the lines between war and peace have perhaps never been more blurred. This trend has been brought into focus with the gradual invasion of the Ukraine by Russia, starting with the (initially covert) annexation of Crimea in 2014 and culminating in the full-scale invasion of the Ukrainian mainland in 2022.

However, despite being seemingly such a modern phenomenon, the situation is not without precedent. In *The Nailsea Meadow* ([1939] 2 KB 544) the English courts were asked to decide if a war had broken out involving Japan, and whether this was the trigger for a contractual cancellation clause as Japan had invaded China without there being a formal declaration of war or the nations terminating diplomatic relations.

In *The Nailsea Meadow*, common sense prevailed and extensive fighting between the armies of Japan and China was held to be sufficient to constitute "war" for the purpose of the cancellation clause. In Ukraine, the Russian invasion obviously falls within the definition of a "war" between Russia and the Ukraine on any reasonable view, but the tactics employed in the surrounding disinformation campaign (and in particular in the earlier invasion of Crimea) make it a useful time to reassess common war risks wording.

The most commonly used war clauses in the market are BIMCO's "war risks clause for time chartering 2013" ("CONWARTIME 2013") and the "war risks clause for voyage chartering 2013" ("VOYWAR 2013"). The definition of war risks is identical under the clauses:

"War Risks" shall include any actual, threatened or reported:

War, act of war, civil war or hostilities; revolution; rebellion; civil commotion; warlike operations; laying of mines; acts of piracy and/or violent robbery and/or capture/seizure (...) acts of terrorists; acts of hostility or malicious damage; blockades (whether imposed against all vessels or imposed selectively against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever), by any person, body, terrorist or political group, or the government of any state or territory whether recognised or not, which, in the reasonable judgement of the Master and/or the Owners, may be dangerous or may become dangerous to the Vessel, cargo, crew or other persons on board the Vessel."

There is no real question that the current invasion of Ukraine amounts to war or warlike operations.

War risks include acts of hostility or malicious damage by "bod[ies]", including "terrorist" and "political" groups. This would have included the irregular and often unidentified military personnel which took part in, for instance, the annexation of Crimea, and would include the authorities of the disputed regions of Ukraine under Russian occupation, such as Crimea.

The primary differences between the forms is set out in the BIMCO explanatory notes:

"In contrast to CONWARTIME, where a war risk may exist before or after a charter party has been concluded, VOYWAR focuses on the position before loading or after the voyage has commenced."

This reflects the difference between a time and a voyage charter – though the difference may become vanishingly small for a time charter trip. In particular, subclause (b) of VOYWAR 2013 allows owners to cancel the charter before loading has commenced, if owners or the master are satisfied that the performance of the contract will expose the vessel to war risks, in their reasonable judgement.

These rules remain open to be tested in the context of more asymmetric warfare in the future.

This gives owners flexibility to react to changing events.

The situation is different once cargo has been loaded, because at that point owners become bailees of the cargo and cargo interests become entitled to a bill of lading for the cargo under Article III Rule 3 of the Hague and Hague-Visby Rules. This is then covered by sub-clause (c) of the VOYWAR 2013 form.

Both VOYWAR 2013 and CONWARTIME 2013 rely on the "reasonable judgement" of the owners or the master in deciding whether the vessel, cargo, crew or others on board "may be" exposed to war risks. This highlights the difference between CONWARTIME 2013 and the previous CONWARTIME 1993 clause, as the former was amended following the controversial 2012 decision in *The Triton Lark* [2012] EWHC 70 (Comm), in which the High Court held that a "real likelihood" of danger was required. BIMCO's explanatory notes to the CONWARTIME 2013 form comment as follows.

"In order to remove potential uncertainty, the test for determining whether to proceed has been amended and is now based on whether an area is dangerous. The level of danger is likely to be high but a stated reference point removes the need for complex analysis of degree of risk and whether or not it is more or less likely to occur."

Care must be taken therefore when the old CONWARTIME 1993 clause applies. In that case, the *Triton Lark* test will continue to require a "real likelihood" of danger.

This underlines the bargain struck in the CONWARTIME 2013 clause: before the vessel has proceeded into the area, the test defers to the reasonable judgement of owners and the master. Once the vessel is already there, the clause does not mention the reasonable judgement test, but simply asks whether the area is dangerous or "may become dangerous".

The factors which will be relevant to owners and/or the master will depend on the circumstances of the individual case, and cannot be definitively listed. However, factors which should ordinarily be taken into account include:

1. The JWC (Joint War Committee) listed areas, which are areas where owners are required to notify underwriters of voyages. For instance, Ukrainian and Russian waters in the Black Sea and the Sea of Azov were included in the listed areas from 00:00 hours GMT 28 February 2022 during a period of rising tensions, and before the invasion of Ukraine proper began.
2. News reports, in particular involving attacks on marine traffic.
3. P&I club circulars and other warnings.
4. Input from maritime security agencies.

Similar considerations apply to other common charter forms dealing with war risks.

The BPVOY 4 form copies the definition of war risks from the BIMCO clauses, and includes provisions (in particular Clause 39.4) making it clear that where owners deviate to avoid war risks, the cost of bunkers and additional port charges will be for charterers' account (unusually for a voyage charter).

Separately, clause 35 of SHELLTIME 4 provides that:

"(a) The master shall not be required or bound to sign Bills of Lading for any place which in his or Owners' reasonable opinion is dangerous or impossible for the vessel to enter or reach owing to any blockade, war, hostilities, warlike operations, civil war, civil commotions or revolutions.

(b) If in the reasonable opinion of the master or Owners it becomes, for any of the reasons set out in Clause 35(a) or by the operation of international law, dangerous, impossible or prohibited for the vessel to reach or enter, or to load or discharge cargo at, any place to which the vessel has been ordered pursuant to this charter (a "place of peril"), then Charterers or their agents shall be immediately notified in writing or by radio messages, and Charterers shall thereupon have the right to order the cargo, or such part of it as may be affected, to be loaded or discharged, as the case may be, at any other place within the trading limits of this charter (provided such other place is not itself a place of peril). If any place of discharge is or becomes a place of peril, and no orders have been received from Charterers or their agents within 48 hours after dispatch of such messages, then Owners shall be at liberty to discharge the cargo or such part of it as may be affected at any place which they or the master may in their or his discretion select within the trading limits of this charter and such discharge shall be deemed to be due fulfilment of Owners' obligations of this charter so far as discharge is concerned."

The definition in (a) is narrower than the definition of "War Risks" in CONWARTIME and VOYWAR, and does not include acts of "malicious damage" but still includes the broad term "hostilities" as well as "civil commotions".

As set out above, there is no real question that the current invasion of Ukraine amounts to war or warlike operations sufficient to trigger the standard war risks clauses.

However, these rules remain open to be tested in the context of more asymmetric warfare in the future, perhaps in a situation where the state-sponsored combatants are unidentified and the violence relatively contained (such as in the initial stages of the invasion of Crimea). In those cases, we expect the wording of these clauses to be tested before the courts, and if necessary (as with the CONWARTIME 2013 form) updated and adapted as necessary. •

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How to navigate China's anti-sanctions laws amidst the sanctions against Russia

The sweeping sanctions implemented against Russia give renewed relevance to the Chinese countermeasures to foreign companies with operations in China or doing business with Chinese counterparties. Companies should tread carefully to avoid falling foul of Chinese legislation.

Over the past few years, China has enacted a suite of laws and regulations aimed at protecting the interests of Chinese individuals and organisations, particularly from the effect of restrictions in non-Chinese legislation. The latest law within this framework is the "*Countering Foreign Sanctions Law*" (often referred to as the "*Anti-Sanctions Law*") which came into force on 10 June 2021.

The Anti-Sanctions Law builds upon other recent regulations, such as the "*Rules on Counteracting Unjustified Extra-Territorial Application of Foreign Legislation and Other Measures*" (the "**Rules**") issued on 9 January 2021. The Rules apply to situations where the extra-territorial application of non-Chinese legislation hinders Chinese individuals and organisations in their dealings with a person or organisation from a third state. The Anti-Sanctions Law targets restrictive measures against Chinese entities more broadly and expands the toolkit available to Chinese authorities to implement countermeasures.

THE ANTI-SANCTIONS LAW – AN OVERVIEW

While purported to be a defensive measure – similar in some ways to regulations such as the EU Blocking Statutes – the Anti-Sanctions Law goes beyond a mere blocking statute prohibiting compliance with certain foreign sanctions. Rather, the Anti-Sanctions Law introduces two principal protective measures by granting the relevant government department the authority to:

i. establish and conduct countermeasures corresponding to the discriminatory restrictive measures; and
ii. issue a counter list of individuals or organisations, and certain related parties such as an individual's spouse or a company's senior managers, involved in the implementation of such measures (the "**Counter List**").

Measures, including prohibition of entry and exit, confiscation and freezing of assets in China, and prohibition of transactions and other activities by the listed individual or organisation, may also be implemented against anyone put on the Counter List.

In addition to the countermeasures that may be implemented by governmental authorities, the Anti-Sanctions Law gives Chinese individuals and organisations a legal basis for action against any organisation or individual that assists in the implementation of discriminatory restrictive measures against them. The available remedy is to request an order to stop the infringement and claim compensation for *any* losses. Chinese law does not normally contain a right for indirect and/or consequential loss, meaning the wording in the Anti-Sanction Law indicates that it encompasses a wider scope than other Chinese laws.

In the context of sanctions against Russia and Russian entities, the application of the Anti-Sanctions Law in situations where sanctions against Russia have an indirect effect on Chinese individuals and organisations, is not yet settled law. Currently, China has only implemented the Counter List on July 2021, December 2021, and February 2022, and only related to measures by the US against China. However, it should be noted that the Anti-Sanctions Law is broadly worded and that we have yet to see any relevant enforcement or judicial interpretation under it. We therefore recommend to keep a close eye on the Chinese government's further enforcement or judicial interpretation of the Anti-Sanctions Law. Compliance should always remain a priority.

Chinese individuals and organisations now have a legal basis for action against any organisation or individual that assists in the implementation of discriminatory restrictive measures against them.

NEW AND EXISTING CONTRACTS

In many jurisdictions, including China, Norway, and England, a contractual basis is needed to terminate the contract or suspend performance due to sanctions. Absent a sufficiently robust sanctions clause, termination may, therefore, be a breach of contract that gives the counterparty a right to claim damages.

Notwithstanding the position under the relevant governing law, a party exercising a right under a sanctions clause that has been negotiated and agreed to by the parties is also less likely to be considered as implementing discriminatory restrictive measure under the Anti-Sanctions Law – although it can still be considered to breach the law. Therefore, it is usually prudent to include sanctions clauses where relevant in new contracts.

OTHER RELEVANT CHINESE REGULATIONS

While it is less likely that a breach of contract due to sanctions compliance would constitute a breach of Chinese administrative or criminal law, companies operating in China should be aware that other types of regulations may be relevant.

For new projects, the Chinese Anti-Monopoly Law may come into play if the foreign company abiding by sanctions is regarded as an operator holding a dominant market position. Refusing to transact with relevant counterparties without justified reasons may be regarded as abusing a dominant market position. Notably, what is considered a justified reason under the Anti-Monopoly Law is subject to the discretion of the relevant local authority.

Needless to say, if the Chinese government does not support such sanctions, abiding by them might not constitute a justified reason. A company abusing its dominant market position, may be ordered to cease its illegal activities, have any illegal earnings confiscated, and/or be fined between 1% to 10% of the previous year's sales revenue.

BEST COURSE OF ACTION

It is worth keeping in mind that, although performance of a contract may currently be illegal under applicable sanctions, even a sanctioned party is not stripped of their legal rights under a contract. For example, a sanctioned party may still bring a claim for wrongful termination even years from now, leaving companies exposed to legal liabilities if the sanctions are lifted.

Importantly, not all sanctions will require suspension of performance either. Debt prohibitions, for example, may in certain cases be handled through renegotiation of payment terms instead. Companies should therefore carefully review existing contracts and applicable sanctions before deciding on the best course of action. •

LIST OF CHINA'S KEY ANTI-SANCTIONS AND COUNTERMEASURES

Legal basis	Enforcement date
Foreign trade law	1 July 1994
Export control law	1 December 2020
Foreign Investment law	1 January 2021
Anti-foreign sanctions law	10 June 2021
Data security law	10 June 2021
Ministry of Commerce ("**MOFCOM**") Order no. 4: Provisions on the unreliable entity list	19 September 2020

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SHIPSALE 22 – a familiar form in a new guise

On 21 April 2022 BIMCO released SHIPSALE 22, its new standard contract for sale/purchase of vessels.

Whilst SHIPSALE 22 is clearly based on the familiar and widely used Saleform 2012 and uses much of the same wording, there are two important differences in layout to note. Firstly, BIMCO has implemented its well-known box format, with key contractual terms to be inserted in boxes (with clause references) on the first page of the contract rather than directly in the individual clauses. Secondly, BIMCO has re-arranged the order of the clauses to follow the chronology of a typical sale/purchase transaction. In addition to the layout changes, some revisions have been made to the existing wording to improve clarity and some new clauses have been included reflecting developments in commercial practice since the adoption of Saleform 2012. These changes are likely to be viewed as helpful improvements over Saleform 2012. A selection of noteworthy changes is set out below.

SUBJECTS

Saleform 2012 does not include a regulation of subjects to effectiveness (such as board approvals), and an additional clause is therefore frequently added. In SHIPSALE 22, a mechanism for subjects to effectiveness has been included as a new Clause 3, a sensible and welcome addition. Care is however needed when drafting the subjects to specify which party benefits from and is able to lift them.

PERFORMANCE GUARANTEES

It is not uncommon for the performance of one or both parties under a sale/purchase agreement to be guaranteed by another entity, particularly where the party is a single-purpose entity. In SHIPSALE 22, a set of boxes and signature fields have been included to make it simpler to document such performance guarantees.

DEPOSIT

SHIPSALE 22 (Clause 5) assumes, like Saleform 2012, that the buyers are to lodge a deposit as security for their obligations under the agreement. However, unlike under Saleform 2012, the size of the deposit and the identity of the deposit holder must both be explicitly agreed, and care should be taken that the relevant boxes are filled out. SHIPSALE 22 specifically states that the deposit holder agreement between the parties and the deposit holder must be entered into before the deposit is lodged, and an explicit mechanism has also been included to allow for extension of time if the deposit is delayed by certain disruptive banking events.

INSPECTION

Saleform 2012 allows the parties to choose between (a) outright sale, with inspection of the vessel and its classification records having occurred before contract signing; and (b) sale subject to pre-delivery inspection. SHIPSALE 22 Clause 6 introduces an additional alternative (c): outright sale with the

buyer waiving its right of inspection entirely, which may be practical in e.g. certain sale/leaseback transactions, sale between related parties or distressed asset sales. Unlike Saleform 2012, SHIPSALE 22 does not specify which mechanism applies if the parties do not make a selection, and care should be taken to ensure the relevant box is filled out.

Where alternative (b) is chosen, the buyer's right of inspection has been worded more narrowly than under Saleform 2012: rather than "without opening up", the inspection is under SHIPSALE 22 to occur "without testing of the Vessel's engines, machinery, equipment or systems". Furthermore, the buyers' deadline for acceptance or rejection of the vessel following inspection has been prolonged from 72 hours to five days.

We would not be surprised if SHIPSALE 22 is quickly picked up as a new standard form for sale/purchase agreement across the shipping/offshore sectors.

UNDERWATER INSPECTION OR DRYDOCK INSPECTION

Like Saleform 2012, SHIPSALE 22 (Clause 8 and 9) allows the parties to choose between (a) a right to underwater inspection of the vessel before delivery, with drydock inspection to follow in case of certain findings; and (b) a right to drydock inspection of the vessel before delivery. If no selection is made, SHIPSALE 22 (like Saleform 2012) provides that the option of an underwater inspection shall apply.

Where an underwater inspectio n is chosen, the requirement in Saleform 2012 that buyers declare latest nine days before the vessel's intended date of readiness for delivery whether they intend to carry out an underwater survey has been removed. Instead, SHIPSALE 22 provides that if the underwater inspection has not been initiated within two days after the vessel being made available for inspection, the buyers are deemed to have waived their right to underwater inspection.

If the vessel is drydocked, Saleform 2012 includes a right for the buyers to require the tailshaft to be drawn, even if this is not required by the vessel's classification society, with the costs apportioned depending on the findings. In SHIPSALE 22, this right of the buyers has been removed.

In cases where drydocking cannot be carried out at the port of delivery, the maximum extension of the cancellation date owing to the additional time caused by drydocking at an alternative location has been extended from 14 days in Saleform 2012 to 21 days in SHIPSALE 22.

ENCUMBRANCES

Like Saleform 2012, SHIPSALE 22 Clause 10 includes a warranty by the sellers that the vessel is delivered free of encumbrances. The wording has, however, been adjusted to explicitly cover any form of trading commitment as well as any form of arrest or restraint.

PAYMENTS

Saleform 2012 provides that the purchase price is to be paid "in full free of bank charges". In SHIPSALE 22 Clause 14, it has been made explicit that payment of the purchase price (along with other payments under the contract) is to be made free of any set off, deduction or withholding – and an express gross-up clause has been included.

DELIVERY DOCUMENTS AND CLOSING

The deadline for exchange of drafts has been tightened in SHIPSALE 22: Where Saleform 2012 provided that drafts of sellers' and buyers' delivery documents should be exchanged no later than nine days before the intended date of readiness for delivery, SHIPSALE 22 stipulates five days after the first delivery notice, which in the standard form is to be sent 20 days before the intended date of readiness. Furthermore, SHIPSALE 22 provides that the buyers must specify any additional documents their intended registry requires within two days of receipt of the sellers' earliest delivery notice, underscoring the importance of early contact with and pre-clearance of required documents with the intended registry.

SHIPSALE 22 Clause 16 outlines the closing procedure in somewhat more detail than Saleform 2012: Express reference is made to a documentary closing to take place after notice of readiness for delivery has been tendered by the sellers, and it is specified that the documentary closing may occur either remotely by electronic means or physically, with the parties to select a procedure in Box 19.

OTHER NEW CLAUSES

A few new clauses have also been included in SHIPSALE 22.

Firstly, warranties by both parties to comply with relevant legislation concerning sanctions and anti-corruption, and entitling the non-breaching party to terminate the agreement and claim damages, have been included in Clauses 21 and 22. Secondly, a confidentiality clause, with an express provision that the non-breaching party is not entitled to terminate the agreement, has been included in Clause 23. Thirdly, a new electronic signature clause has been included in Clause 27, expressly allowing for both the agreement itself and all other documents to be signed in connection with the agreement to be signed electronically.

Saleform 2012 is often amended to include such clauses, and their inclusion in SHIPSALE 22 will likely be viewed as a significant improvement.

SUMMARY

There are few substantive changes in SHIPSALE 22 compared to Saleform 2012 other than the layout changes, clarifications of wording, and updates to reflect recent commercial practice, but all of these are likely to be viewed as helpful improvements. Although Saleform 2012 is a widely used form and it often takes some time for a new form to be adopted, we would not be surprised if SHIPSALE 22 is quickly picked up as a new standard form for sale/purchase agreement across the shipping/offshore sectors. •

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BIMCO standard form REFUND GUARANTEE for shipbuilding contracts

Refund Guarantees secure repayment to the buyer of the pre-delivery instalments paid under a shipbuilding contract (an "SBC") in the event of termination of the SBC due to builder's default or insolvency or the total loss of the ship under construction. Having the benefit of a refund guarantee is therefore of key importance to the buyer under a shipbuilding contract.

Even though refund guarantees are vital in shipbuilding projects, a widely used universal form for refund guarantees has not yet been introduced. With the introduction of its standard refund guarantee form in 2021 (the "**BIMCO Refund Guarantee**"), BIMCO has sought to introduce a form that can be widely adopted and used in conjunction with both standard form and bespoke SBCs.

THE GENERAL NATURE OF THE BIMCO REFUND GUARANTEE

The drafting committee for the BIMCO Refund Guarantee consisted of members from the legal sector, as well as representatives from shipowners, shipyards and banking institutions. The aim with the new form was, in the words of the drafting committee's chairman Ian Gaunt, "*to strike a fair balance between the interests of shipbuilders, their bank, and shipowners*".

The BIMCO Refund Guarantee is, as is generally the case with refund guarantees, an on-demand primary security instrument, meaning that a claim under the guarantee is not contingent upon a claim first having been made against the builder. However, buyers should be aware that the BIMCO Refund Guarantee can arguably not be described as a "true" on-demand guarantee because the guarantor is not obliged to make payment under the guarantee if the amounts claimed are disputed and subject to legal proceedings. In that case the guarantor is only obliged to make payment 30 days after the dispute has been finally determined by the arbitration tribunal or court under the SBC. This is not unusual in the context of refund guarantees, but is an important feature of the BIMCO Refund Guarantee to be aware of.

PARTICULAR CLAUSES IN THE BIMCO REFUND GUARANTEE

The BIMCO Refund Guarantee is drafted to be effective from the date on which the builder has received payment of the first instalment under the SBC.

The guarantor's liability under the guarantee will automatically increase upon further instalments being received by the builder under the SBC. This avoids the need for separate refund guarantees to be issued for each subsequent instalment paid under the SBC. A maximum liability for the guarantor is however intended to be specified in the BIMCO Refund Guarantee and this should therefore be in an amount covering all instalments under the underlying SBC.

Pursuant to clause 4 of the BIMCO Refund Guarantee, the guarantee will remain in force until the first to occur of either (i) delivery of the vessel under the SBC, (ii) payment to the buyer by the builder or the refund guarantor of all sums guaranteed under the refund guarantee, or (iii) a specific date to be agreed and inserted in the refund guarantee on a case by case basis. In order not to defeat the purpose of the refund guarantee, it is essential to ensure that the specific date falls a sufficient number of days after the date on which the buyer would be entitled to terminate the SBC for delayed delivery. In this context, the buyer should carefully consider the SBCs allowances for extension of the delivery date for permissible delay and similar provisions.

The buyer should also ensure that the issuance of the refund guarantee is a condition precedent to payment of the first instalment under the relevant SBC and furthermore that the SBC requires the specified date in the refund guarantee to be extended if delivery of the vessel under the SBC has not occurred a certain time in advance of the original specified date.

The BIMCO Refund Guarantee states that it shall not be affected by any indulgence or delay allowed to the builder or any amendments to the SBC. However, where material changes are made to the SBC, such as changes to the delivery or termination date and the amount/number of the instalments, it is recommended to obtain legal advice before such changes are made to ensure they do not result in the guarantor becoming entitled to reject payment under the guarantee.

It is not unusual for refund guarantees to be assigned to the buyer's financiers and clause 8 of the BIMCO Refund Guarantee allows for the assignment of the guarantee to "*financiers who are financing the purchase price of the Vessel*" without the consent of the refund guarantor and to any other assignee (with the consent of the refund guarantor which shall not be unreasonably withheld).

Pursuant to Clause 9, the BIMCO Refund Guarantee is drafted so as to be governed by English law with the forum for disputes being either arbitration in London or the High Court of England and Wales. Having English law as the default option for the BIMCO Refund Guarantee is a sensible choice as the majority of SBCs between international parties are also governed by English law. If the governing law is changed, the buyer should obtain legal advice on local requirements that might need to be satisfied in order for the guarantee to be validly enforced. In any event it is advisable to verify (and potentially obtain a legal opinion on) the enforceability of the guarantee in the place of registration of the guarantor.

CONCLUSION

The introduction of the new BIMCO Refund Guarantee form is to be welcomed and could provide useful assistance to parties in the complex area of guarantees. It is however important to consider any specific guarantee in the context of the underlying SBC in order to ensure that the terms between the BIMCO Refund Guarantee and the relevant SBC are consistent. It is also advisable to consider any changes to the standard terms carefully and to seek local advice to ensure the enforceability of the guarantee against the guarantor. •

> The aim with the new form was "to strike a fair balance between the interests of shipbuilders, their bank, and shipowners."

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NEW TECHNOLOGIES IN AQUACULTURE

New technology in aquaculture is enabling offshore farming and the increased use of closed cages. New regulations may trigger significant investments in the years to come, resulting in an increased demand for new building and supply services.

Photo: Nordlaks

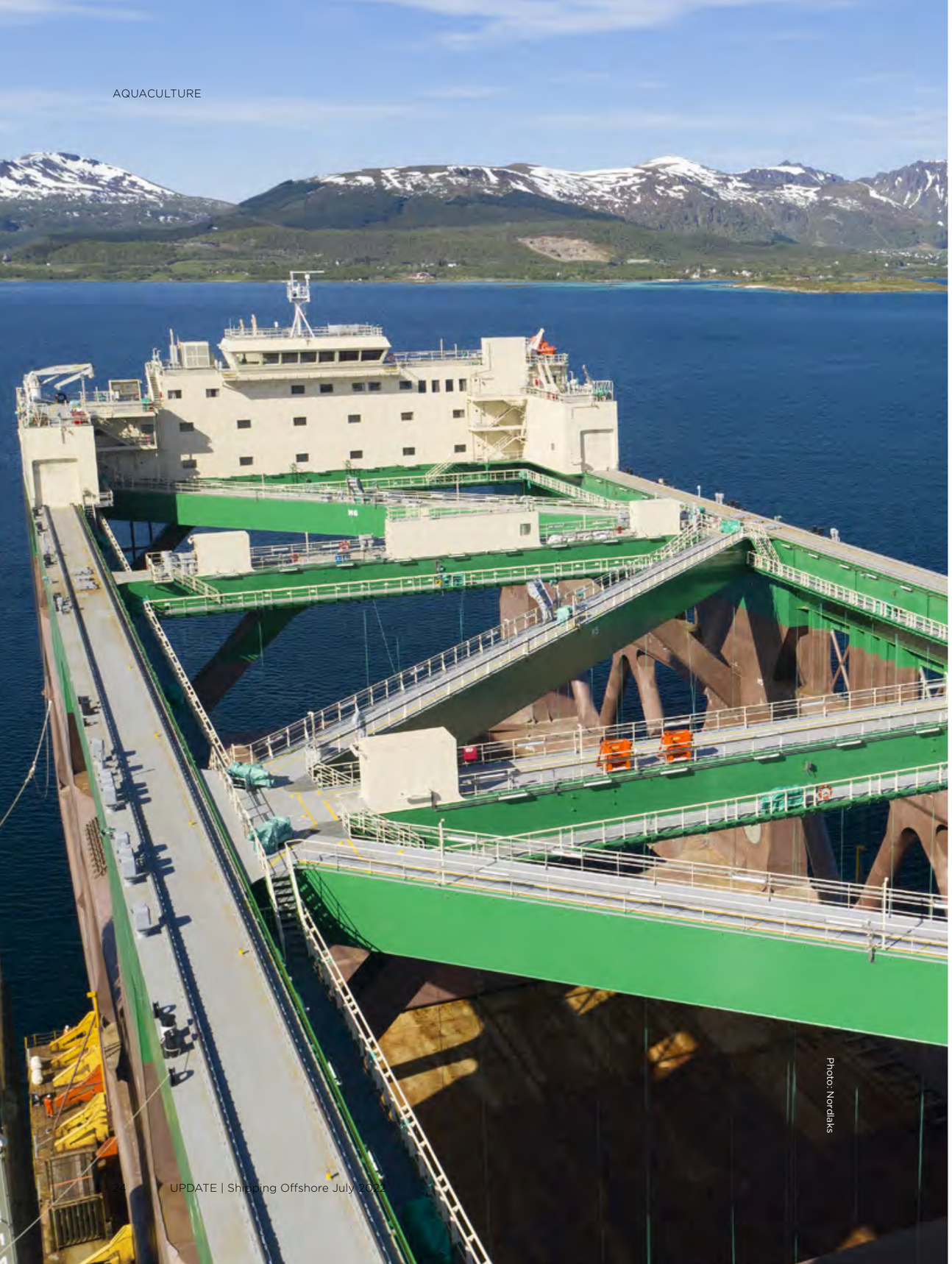

Photo: Nordlaks

Fish farming in Norway has traditionally been executed in open net cages in sheltered fjords. However, the last 10 years has seen tremendous development in alternative production methods and significant changes in regulation. These changes have led to environmental footprint becoming the premiss for industry growth, and consequently causing a reduction of production capacity in certain geographical areas. In addition, the restrictions on industry growth, combined with the introduction of new permit regimes, have led to an increased demand for innovative technology and new production methods.

DEVELOPMENT OF NEW TECHNOLOGY

The Norwegian Government has stated an intention to quintuple production volumes of farmed fish by 2050. However, this production increase is dependent on the development of technology that resolves existing environmental issues (sea lice, escape of fish, discharge of organic waste) and renders it possible to farm fish in more remote areas where the impact on the environmental footprint is less significant. As production growth is contingent upon new technological developments, which are more environmentally sustainable, the government is introducing new permit regimes with incentives to develop technology.

One of these regimes, "development licenses", was introduced in 2015 followed by a regime on production zones and regulation of production capacity based on the industry's impact on wild salmon due to sea lice levels.

The production technology, which is still under development through "development licenses", is very different from the traditional commercialised equipment used in traditional fish farming. In addition to different variations of closed cages and the use of Recirculatory Aquaculture Systems (RAS) for production in the fjords, there are several projects to develop the production technology for exposed and offshore sites, making fish farming possible in new areas further away from the coast.

KNOWLEDGE-SHARING ACROSS INDUSTRIES

The development of technology for exposed and offshore production has been based on known technology from the shipping and oil and gas sectors. As there are many similarities between the production methods within these industries, we will see an increase in demand for suppliers and facilitators across the industry sectors, who possess the know-how related to the implementation and use of these new technologies.

As an example, the company Nordlaks has developed a ship-like construction facility named "Jostein Albert" that is stationed 5 kilometres off the coast. The construction is some 385 meters long, 60 meters wide, and has the production capacity of 10 000 tons of salmon. Jostein Albert was built by CIMC Raffles' shipyards in Yantai and Haiyang (China) in 2018 and transported to Norway by the world's largest freight vessel, the Dockwise Vanguard. The production involves ship-to-ship operations and Nordlaks has acquired the world's first LNG-hybrid well-boat for this purpose. The well-boat, MS "Bjørg Pauline", was built at Tersan Shipyard in Turkey and delivered in 2021. This project is a good example of the utilisation of technology and knowledge-sharing across industries and frontiers. We expect to see more of these international projects/ parterships in the future.

The technology developed from the 2015 project, serves as a driving factor for the development of new permit regimes for offshore fish farming.

PROPOSALS FOR NEW PERMIT REGIMES

Increased focus on sea lice issues and available areas for traditional fish farming has led the industry and the government to find new ways to increase the production of salmon, trout and rainbow trout. The Norwegian Government has proposed two new permit regimes for fish farming in closed systems and offshore fish farming.

The first is a new proposal for environmental technology licenses for closed fish farming businesses, whereby the Ministry of Trade, Industry and Fisheries might issue 20 new licenses each year for closed farming. The proposal requires farmers to avoid sea lice and to clean the water waste to reduce pollution. This may entail designing and building new closed fish farms on a large scale which will likely boost the yard industry and related services in the future. However, the Ministry recently put the proposal on ice for at least another year.

The second proposal is an even larger milestone with the establishment of new offshore farming

Photo: Nordaks

If putting a regulatory regime in place takes too long, we run the risk that other jurisdictions will use the opportunity to attract investments first. It is therefore crucial that regulators keep up the pace.

licenses and an industry development off the coast of Norway. The government proposed a new legislative framework for offshore farming that includes the general regulations for identifications, consequence evaluations and allocation of licenses. This proposal was recently under public consultation with an additional public consultation to be held later for individual allocation rounds. New offshore farming operations will of course bring about a large demand for yard and shipping services. Hopefully the seafood industry – which is Norway's second largest export industry – will contribute to a new golden age for the supply industry, including well-boats and services.

Developing a regulatory framework for future salmon production will be key for Norway's ambitions as a leading seafood producer. However, if putting a regulatory regime in place takes too long, we run the risk that other jurisdictions will use the opportunity to attract investments first. It is therefore crucial that regulators keep up the pace.

Wikborg Rein are closely following the proposals for new permit regimes and we are also assisting several fish farming companies with written submissions in the public consultation. •

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Join our Annual Shipping Offshore Seminar Series

In our annual seminar series we bring together industry players to discuss current market trends and legal issues in the shipping, offshore and ocean industries. We are delighted to announce the dates for our 2022 series. More details will come in August:

STAVANGER
20 September
8.30am to 11am (CEST)

OSLO
22 September
8.30am ti 11am (CEST)

BERGEN
21 September
8.30am to 11am (CEST)

LONDON
20 September
9am to 10.30am (BST)

Scan the QR code and save a spot for your preferred event

Report on the safety of cruise traffic in Norwegian waters

In the spring of 2019, the cruise vessel “Viking Sky” suffered engine failure and almost grounded. Nearly three years later, a Norwegian Official Report (NOU 2022: 1) on how to reduce the risk of casualties within the cruise sector has been published.

Photo: Reva Frisnes

Although the cruise industry brings considerable benefits to Norwegian society and businesses, it also gives cause for safety concerns. The cruise industry is highly competitive, with several prominent actors operating globally, and the cruise ships calling at Norwegian ports keep getting larger every year. In 2019, approximately 26% of the global cruise vessel fleet made at least one voyage to Norway.

The substantial risks relating to the cruise industry were exemplified by the "Viking Sky" incident, which was handled by Wikborg Rein's Emergency Response Team. The vessel, carrying around 1400 passengers and crew, suffered engine failure in rough seas off the west coast of Norway. Facing onshore wind and high waves, the vessel came precariously close to grounding. Several hundred passengers were evacuated by helicopters in one of the largest ever rescue operations, with a number of hospitalisations following the incident.

A majority of the Cruise Committee also proposed that cruise vessels sailing within Svalbard's territorial waters should not be allowed to carry more than around 500–750 people.

IDENTIFYING THE MAIN SAFETY ISSUES RELATED TO CRUISE TRAFFIC

The "Viking Sky" incident generated widespread media attention, instigating a debate about the risks within the cruise industry. Shortly after the incident, the government decided to commission a Norwegian Official Report, involving various stakeholders identifying the main safety issues relating to cruise traffic and recommending mitigating measures.

The Cruise Committee, which is the colloquial reference to the committee involved in preparing the Norwegian Official Report, presented its 66 recommendations on 23 February 2022. As a starting point, and from a practical point of view, it was considered impossible to scale the public emergency response system so that it could readily handle a casualty involving thousands of passengers. The report therefore focused on how to reduce the risk of these major accidents in the first place.

Although the Cruise Committee did not rank its recommendations, it noted that measures which reduce the probability of accidents were the most cost-efficient, and that such measures should accommodate the entire industry. Moreover, the Cruise Committee aimed to balance safety concerns with the cruise industry's need for stable and viable operating conditions.

Some of the key proposals contained within the Norwegian Official Report are commented on below.

BOTH HIGH-LEVEL AND SPECIFIC PROPOSALS

Several "high level" proposals were put forward, including establishing formalised cooperation between relevant public authorities and the cruise industry. The Norwegian government was also urged to draw up a holistic national plan for the entire industry, including an assessment of whether the Norwegian public authorities are appropriately organised to handle maritime casualties involving cruise vessels.

Various concrete measures were also suggested. One of the most restrictive proposals was that cruise vessels over 150 metres in length could become subject to sailing restrictions during certain time periods, weather conditions or in certain waters.

INTERNATIONAL REGULATIONS

The Cruise Committee also recommended that Norway should take a leading role in improving international safety regulations in the industry, including within the International Maritime Organization.

The Cruise Committee considered that this could be achieved by advocating the requirement of specific improvements for all larger passenger vessels, including as regards propulsion systems. It was also suggested that the Norwegian government could consider providing incentives to shipowners that utilised vessels with improved propulsion systems.

Other proposals included that all cruise ships should be required to carry towing equipment, that the functions and targets of rescue operations should be covered by the International Convention for the Safety of Life at Sea (SOLAS), that the preliminary guidelines in the Polar Code regarding rescue equipment should be made mandatory, and that an international standard for calculating the maximum expected rescue time should be established.

INFORMATION AND COMMUNICATION

The Cruise Committee made several recommendations relating to access to information and communication, such as a proposals to provide daily ice maps and improve navigational charts. Many of these proposals were directed at public authorities.

Various proposals were also aimed at making the information and communication processes more efficient. The relevant public authorities were urged to prioritise automation of monitoring and reporting processes, and it was recommended that all official information relevant to the cruise industry be published on one platform. It was also suggested that technological solutions for passenger and evacuee lists be considered.

Moreover, the Cruise Committee recommended placing more onerous requirements on shipowners. For instance, it was suggested that cruise vessels immediately report changes which could influence the vessels' operative ability or automatic positioning reporting. Removing the remaining limited exemptions to the requirement that all passenger vessels are required to have functioning AIS onboard was also suggested.

SVALBARD AND THE ARCTIC

There were several proposals relating to Svalbard and the Arctic, such as a proposal requiring bridge and engine crew to undergo basic training based on the Polar Code. A majority of the Cruise Committee also proposed that cruise vessels sailing within Svalbard's territorial waters should not be allowed to carry more than around 500–750 people, however, a minority of the Committee dissented on this question.

ASSESSMENT AND REFLECTIONS

The 164 page report was handed over to the Norwegian Minister of Justice and Public Security, who sent the report on public hearing with a deadline on 15 September 2022 for submitting comments. Whilst implementation will come at a cost to stakeholders, several of the Cruise Committee's proposals appear well suited to reducing the risk of significant casualties and loss of life in the future. Industry players would therefore be well advised to keep an eye out for regulatory changes. •

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Progress towards a TREATY ON PLASTIC POLLUTION

In March of this year, the United Nations passed an historic resolution which may result in a legally binding treaty to combat plastic pollution in the oceans.

The resolution was adopted at the fifth session of the UN Environment Assembly (UNEA-5) held in Nairobi. Representatives from 175 nations agreed to launch negotiations on a legally binding agreement to combat plastic pollution which should be ready by 2024.

The resolution establishes an Intergovernmental Negotiating Committee which will begin its work in 2022. The aim is to present a legally binding instrument which should address the full lifecycle of plastics from production to disposal, the design of reusable and recyclable products and materials, and the need for international collaboration.

The aim is to present a legally binding instrument by 2024.

AN INCREASING PROBLEM

Plastic production has increased vastly over the last 70 years, from 2 million tonnes in 1950 to 348 million tonnes in 2017. With an expected further increase in plastic production in the coming years, the negative impact of plastic pollution on the environment is substantial and increasing.

The president of the UNEA-5, Norwegian Minister of Climate and Environment Espen Barth Eide, said that plastic pollution had grown into an epidemic and that the resolution reached in Nairobi was putting the world officially on track for a cure.

POLLUTION OF THE MARINE ENVIRONMENT

In addition to the impact on human health and air pollution, plastic pollution also has a strong negative impact on the marine environment. An estimated 11 million tonnes of plastic waste flow annually into the world's oceans – an amount which may triple by 2040. This is impacting more than 800 marine and costal species that are affected through ingestion, entanglement and other dangers.

In recent times, there have been several incidents where plastic pellets lost from ships have polluted coastlines. Authorities have often referred to the risk of microplastic pollution when requiring shipowners and insurers to remove shipwrecks. It will be interesting to see what impact a potential plastic treaty will have on the shipping industry. •

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In February 2020, more than 13 tonnes of plastic pellets ended up in the sea between Germany and Denmark during transport, resulting in numerous findings on Norwegian beaches.

Photo: Stig Pardoas, Kystverket

Status on China's offshore wind power development

Mainland China has become the largest offshore wind market in the world. An overall industry chain has been established which encompasses complete offshore wind installation and operation, as well as maintenance and spare parts manufacturing, presenting an attractive market for both domestic and foreign companies.

Photo: MinYang Smart Energy

China's installed offshore wind capacity grew phenomenally in 2021, increasing by 12.7 GW according to statistical data by World Forum Offshore Wind ("**WFO**"). The result is that China's total capacity now stands at around 19.7 GW and China has become the world's largest offshore wind market by far with almost the same installed capacity as the UK and Germany combined. One of the key drivers for the recent increase in the number of installations is the expiration of the favorable feed-in tariff for projects which were grid connected by the end of 2021. China's State Power Investment Corp's ("**SPIC**") project in Jiangsu Province is one example of a project that was grid connected in the final quarter of 2021, which at 800 MW is the project with the biggest capacity in China so far.

CHINA'S OFFSHORE WIND INDUSTRY TODAY

Broadly speaking, the offshore wind industry can be divided into three segments:

1. upstream: production of materials and manufacturing of specially designed equipment and spare parts;
2. midstream: offshore wind and cable installation; and
3. downstream: operation and maintenance of offshore wind projects.

The upstream industry involves an enormous amount of competitors both in China and internationally. Looking at the offshore wind installation business, however, a large share of the market is dominated by several front-runners such as Shanghai Electric Group, Ming Yang Smart Energy and Goldwind, with the top five companies holding 73% of the installed capacity in 2020. Internationally, Shanghai Electric Group is the second biggest player with 23.1% of the market share, followed closely by Siemens Gamesa with 24.3%. Ming Yang Smart Energy and Envision Group were respectively ranked as 4th and 5th with more than 10% of the market share. In the cable market, the top EU producers with leading technology, such as Nexans, Prysmian and ABB, still have high market shares. However, some Chinese companies are fast-growing and already have established technology for 220 kW and 500 kW submarine cables. Finally, focusing on the downstream industry, most of the offshore wind projects in China are owned and operated by state-owned companies such as GD Power Development, SPIC and CGTR.

THE FAVORABLE POLICIES STIMULATING THE OFFSHORE WIND INDUSTRY IN CHINA

Having declared a goal of carbon neutrality by 2060, China's carbon dioxide emissions per unit of GDP will have to drop by more than 65% compared to 2005 levels. To achieve this, renewable energy will have to reach approximately 25% of primary energy consumption. The target for total installed wind and solar power capacity is over 1.2 billion kilowatts by 2030. China is now in the middle of a transformation of its energy structure and offshore wind is playing a key part of this transformation; it is expected that large development projects will be presented to the international market in the coming decades, providing many opportunities.

The preferential feed-in tariff is one of the key policies directly stimulating the market. Under regulations published by the National Development and Report Commission of China (the "**NDRC**") in 2019, the feed-in tariff for all projects approved by 2018 and grid-connected between 2019 to 2021 was 0.85 CNY per kW. This is a preferential price compared to other energy sources, including coal, hydroelectric, nuclear and natural gas. A guidance price system has been established for projects approved after 1 July 2019, replacing the previous standard price system, with the feed-in tariff for new projects established through market competition. In this way, China is on a road to imitating industry-leading countries such as the UK and Germany by continuously improving the competition regime through the feed-in tariff system, reducing costs and adding value rather than relying on public subsidies.

OPPORTUNITIES FOR INTERNATIONAL PLAYERS IN THE CHINESE MARKET

Looking at the offshore wind industry in China today, most of the foreign companies and capital are involved in the upstream industry, for example by providing specialized equipment and proprietary technology for projects. However, some international companies have made important progress into the Chinese market through cooperation with PRC state-owned companies. One such example is the French EDF which cooperated with CHN Energy in Jiangsu Dongtai on a 500,000 kW project in 2019. A joint development relationship between Equinor and SPIC was also set-up in 2019 for cooperation on offshore wind projects in both China and Europe, potentially expanding collaboration between the two companies.

Despite these opportunities, and the more comprehensive Foreign Investment Law implemented in 2020, many leading international companies still choose to wait and assess the ongoing developments, due to perceived legal and policy risks in China.

We do, however, expect to see an increase in cooperation between Chinese and international companies in future projects within the sector. As important industry players, Chinese state-owned companies have more influence on the formulation of the applicable regulations, and the feed-in tariff policies formulated by NDRC are aimed at safeguarding a "reasonable reward" for state-owned companies. In light of this, cooperation with Chinese state-owned companies may be considered a more prudent way of entering the Chinese market for international companies. Of course, it remains crucial for international companies to fully assess project viability for each specific project, with comprehensive due diligence from both a legal and a commercial perspective always being advisable before entering the market. •

The target for total installed wind and solar power capacity is over 1.2 billion kilowatts by 2030.

China's offshore wind capacity grew phenomenally in 2021, with about 12.7 GW of newly installed capacity.

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“Harrier”

– the first beaching case heard by Norwegian courts ends with a six month prison sentence for the shipowner

In a recent decision, the Norwegian Supreme Court refused to hear an appeal from a Norwegian shipowner over the Court of Appeal’s decision, which upheld the District Court’s conviction and sentencing of the shipowner to six months in prison for participating in an attempt to illegally export the barge carrier “Harrier” from Norway for demolition at Gadani, Pakistan.

Beaching usually refers to the recycling of ships where the ship is deliberately run onto a beach, then broken up in the tidal zone.

It makes little difference whether the shipowner sells the vessel to a scrapper at Gadani or to a cash buyer and then assists with exporting and scrapping.

The shipowner had been convicted in the District Court for violating the Norwegian Pollution Act's provisions on the export of waste, which incorporates the EU Waste Shipment Regulation (No. 1013/2006), a regulation based on the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.

The Court of Appeal found that it was clear that the "Harrier" (ex "Tide Carrier", ex "Eide Carrier") was going to be beached in Gadani, Pakistan following its sale to an intermediate cash buyer, and that the shipowner's assistance to the cash buyer in preparing the vessel for departure resulted in significant time and cost savings in connection with the export of the ship from Norway.

The ship was arrested in February 2017 following engine breakdown off the Norwegian West Coast, necessitating salvage assistance. Even though the vessel had documents indicating it was going to a repair yard in Dubai, the Court of Appeal found this to be a cover story to conceal the real destination, being a beach in Gadani, Pakistan.

Beaching usually refers to the recycling of ships where the ship is deliberately run onto a beach, then broken up in the tidal zone, where no fixed facilities are used for collecting and handling hazardous and polluting waste. The work is often done by manual labour without due regard to the health and safety of the workers.

The Court of Appeal stated that it makes little difference whether the shipowner himself sells the vessel to the scrapper at the beach in Gadani or whether he sells the vessel to a cash buyer and assists with export and scrapping. This means that the punishment for selling to a cash buyer and assisting in the illegal export may give rise to a similar prison sentence as if the shipowner had exported the vessel himself.

Two of the Court of Appeal's seven judges dissented on the question of guilt and found that it had not been proven beyond a reasonable doubt that the shipowner had sufficiently participated in the facilitation of the export.

The shipowner appealed the decision to the Supreme Court, which did not grant leave to appeal, and therefore the Court of Appeal's decision is final.

The case illustrates the importance of complying with waste shipment and recycling regulations when ships and offshore assets are to be disposed of.

Whilst several beaching cases have reached other European courts in recent years, this is the first one of its kind to be heard in Norway.

Norwegian authorities have stated that it views beaching in South Asia as a significant environmental problem, which Norway – as a major shipping nation – has an obligation to fight. •

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The most important updates in

GREEN SHIPPING

– July 2022

In this recurring segment, we provide a high level overview of the most important regulatory updates in green shipping, intended as a quick guide to stay updated.

EU EMISSIONS TRADING SCHEME (EU ETS)

Since the EU ETS proposal was introduced as part of EUs "Fit For 55" regulatory package on 14 July 2021, the proposal has been reviewed by the European Parliament's Special Rapporteur, MEP Peter Liese. His draft report, published on 14 January 2022, includes several amendments which make the EU ETS more ambitious. The Parliament in plenary supported these positions and further enhanced the ambition on 22 June 2022. For instance, Parliament proposed to push forward the date when vessels have to surrender allowances for 100% of their emissions (from 2026 to 2024), and the geographical scope of the EU ETS is extended to 100 % of emissions on voyages with an international leg by 2027 (subject to certain exemptions). The EU Council was expected to review Parliament's proposal in August 2022.

EXISTING ENERGY EFFICIENCY DESIGN INDEX (EEXI)/ CARBON INTENSITY INDICATOR (CII)

Ever since the EEXI and CII regulations were adopted by the IMO on 17 June 2021, stakeholders have prepared for the regulations to come into effect. Over the last six months, these arrangements have intensified. For instance, several companies have started to provide services to review and ensure compliance, and many shipowners and manufacturers have entered into corporate partnerships to inter alia improve the energy efficiency of their engines. Notably, BIMCO released a novel "EEXI Transition Clause for Time Charter Parties 2021" on 7 December 2021, with similar a CII Clause expected in July 2022. The International Maritime Organization's Marine Environment Protection Committee also adopted technical guidelines for the two regulations during their 78th meeting in June 2022.

	Regulation[1]	Essence of regulation	Scope (technical)	Scope (geographical)	Implementation date	Next steps
Technical Requirements	**Existing Energy Efficiency Design Index (EEXI)**	Existing vessels must, through a one-time certification, comply with a minimum energy efficiency level set by the IMO.	Certain vessel types over 400 GT (including bulk carriers, general cargo ships, tankers, ro-ro ships and containerships).	Worldwide	Legislation effective from 1 November 2022, compliance required from 1 January 2023.	1 January 2023: Compliance is required.
	Ballast Water Management Convention (BWM Convention)	To prevent foreign organisms entering other ecosystems, vessels must implement a ballast water and sediments management plan, hold a ballast water record book, and use an approved ballast water treatment system.	Applies to all vessels as a starting point, but not necessarily to vessels solely operating within one jurisdiction.	Worldwide	8 September 2017	1 June 2022: Amendments concerning inter alia testing of ballast water management systems and the form of the International Ballast Water Management Certificate.
	Energy Efficiency Design Index (EEDI)	New vessels are required to satisfy a minimum energy efficiency level per tonne mile for different vessel type and size segments. The required efficiency level is tightened every five years, next in 2025.	New or majorly converted vessels over 400 GT.	Worldwide	1 January 2013	1 January 2025: Phase 3 requiring increased energy efficiency to initiate.
Operational Requirements	**FuelEU Maritime**	Vessels must use an onshore power supply or zero-emission technology in ports, and adhere to increasingly stringent limitations on the carbon intensity of fuels/energy used on board.	Certain types of commercial vessels over 5000 GT	All voyages between ports in the EU and at berth in the EU, and 50% of GHG intensity of onboard energy used during voyages which start or end at an EU port.	Proposed implementation date 1 January 2025, with stricter requirements every five years	• 11 July 2022: EU Parliament's Transport Committee to vote on the proposal • September 2022: EU Parliament Plenary vote • 1 January 2025: Proposed implementation.
	Carbon Intensity Indicator (CII)	The annual CO_2 emissions arising from a vessel's operation will get an operational carbon intensity rating from A to E, with vessels rated D for three consecutive years, or E, having to submit a corrective plan.	Certain vessel types over 5000 GT (including bulk carriers, general cargo ships, tankers, ro-ro ships and containerships).	Worldwide	Legislation effective from 1 November 2022, compliance required from 1 January 2023 (more stringent rating thresholds towards 2030).	1 January 2023: Compliance is required.
	IMO 2020	Vessels may only use fuels with a maximum sulphur content of 0.5%, by either using low-sulphur fuel or implementing cleaning exhaust systems approved by the flag state of the vessel.	All vessels	Worldwide, with stricter requirements within emission control areas.	1 January 2020	
	Ship Energy Efficiency Management Plan (SEEMP)	The ship operator must establish a ship specific plan to attain improved energy efficiency. In case of vessels of 5000 GT or above, the SEEMP shall also include a description of the methodology used to collect emissions data.	Vessels over 400 GT	Worldwide	1 January 2013	1 January 2023: Shipowners must implement and verify a SEEMP Part III (Ship Operational Carbon Intensity Plan related to CII).
Commercial Incentives	**EU Emissions Trading Scheme (EU ETS)**	Shipping companies must surrender allowances for emissions from shipping under the EU's "cap and trade" emissions trading system.	Vessels of 5000 GT or above (extended to vessels of 400 GT or above from 1 January 2027).	100 % of emissions between EU ports and within the EU, 50 % of emissions from international voyages to or from the EU (extended to 100 % from 1 January 2027).	Proposed implementation date 1 January 2024	• Second half of 2022: Final text expected • 1 January 2024: Proposed implementation
	EU Taxonomy	The EU Taxonomy for sustainable activities is a classification system established to which investments are environmentally sustainable, in the context of the European Green Deal.	Reporting obligations for large companies that fall under the scope of the NFRD (large public-interest companies with more than 500 employees), and financial market participants.	Companies based in Europe, or operating as a European legal entity.	12 July 2020, the first of the disclosure obligations was applicable from 1 January 2022.	• Spring 2022: technical screening criteria for the remaining four environmental objectives and developing the social, neutral and brown taxonomy • Including nuclear energy and natural gas. The European Parliament and Council have four months to formulate objections to the Commission's suggestion, two additional months if deemed necessary.
	Poseidon Principles	A global framework establishing a common baseline to quantitatively assess and disclose to what extent financial institutions' lending shipping portfolios are in line with adopted climate goals.	Banks and lenders	Worldwide	18 June 2019	

[1] The table includes a high level summary of some of the most influential and important regulations related to Green Shipping, but is not exhaustive

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Swedish Club annual breakfast seminar

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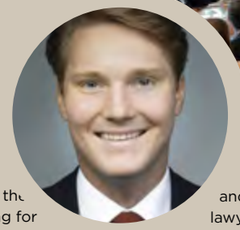
Tine E. Vigmostad

Shippingforum



Oskar Otterstrøm

Sanctions targeting Russia and the impact in shipping

Senior Lawyer Tine Vigmostad (above) from Wikborg Rein's Compliance and Crisis Management Team held two talks in March regarding sanctions targeting Russia and the impact it has on shipping. One at the Shippingforum meeting together with SEB and one at the Swedish Club breakfast seminar at this annual event.

The talk at the Shippingforum meeting was held together with Ole Hvalbye from SEB who talked abou the impact of the conflict on the European and global gas market. Several of our lawyers also attended the seminar, which was the first Shippingforum event after the lifting of the pandemic restrictions. The general meeting for 2022 was also held, where the new board of Shippingforum was elected. Associate Oskar Otterstrøm (right) succeeded Herman Steen on the board, ensuring Wikborg Rein's continued presence.

Tine also talked at the Swedish Club's annual breakfast seminar. Wikborg Rein was – as usual – the only external speaker at the event, which was held for the first time since the beginning of the pandemic two years ago. The Club's members, brokers and service providers, as well as several of our lawyers, attended the seminar.

International sanctions and export control legislation is far-reaching, highly complex and rapidly changing. Our Trade Compliance & Sanctions Team has practical and comprehensive experience to help our clients navigate the most challenging issues within trade compliance. We provide advice to large and small companies in all sectors, and assist them in assessing and responding to both Norwegian and international sanctions and export restrictions.

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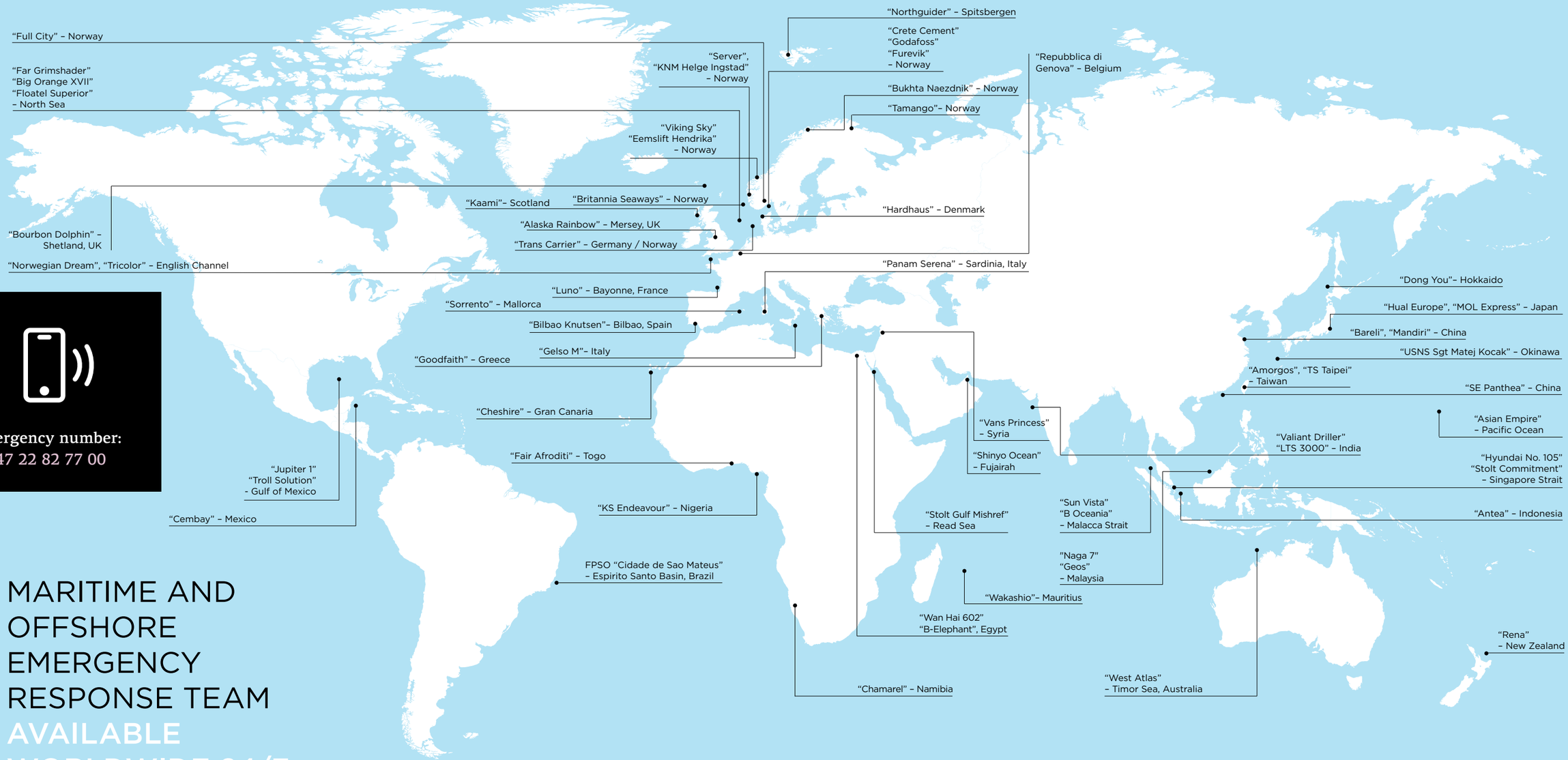

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MARITIME AND OFFSHORE EMERGENCY RESPONSE TEAM AVAILABLE WORLDWIDE 24/7

Members of our Maritime and Offshore Emergency Response Team have extensive experience in handling the practical and legal issues associated with casualties and maritime emergencies. Our team, led by Morten Lund Mathisen, assists insurers and owners in connection with a wide range of incidents.

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