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Update

Shipping Offshore

December 2022

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Shipping Offshore Update – Content

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Layout: HELENE S. LILLEBYE-TEIEN
Print: BODONI / 650 COPIES

Update December 2022 Shipping Offshore

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Dear friends and readers,

Global shipping and trade has been profoundly affected since the outbreak of war in Europe earlier this year, when Russia launched its egregious invasion of Ukraine on 24 February 2022.

One of the ways in which the global community has responded to Russia's actions has been to impose on Russia some of the most stringent and wide-ranging sanctions ever imposed on a single country. Many have been affected by the impact of these sanctions and in this Update, we look at some of the lessons learnt over recent months.

Readers can keep up to date with the latest sanctions by signing up to our Sanctions Alert emails. If you are not already signed up to receive them, you can do so on wr.no, where you can also read our previous alerts.

In this Update we also consider the 2023 revision of the Nordic Plan and the future of the Lloyd's Standard Form of Salvage Agreement, the Lloyd's Open Form (“**LOF**”) as well as looking at BIMCO's new flagship contract, Gencon 2022.

Sustainability is increasingly impacting the advice we provide to clients in many areas and in this Update we consider BIMCO's new suite of CII, EEXI and ETS time charter clauses, as well as ESG in the Chinese shipping industry. We also consider whether contracts for difference in shipping will be a catalyst for achieving a zero-emissions future in the shipping industry.

In these ever-changing times, we hope you find it an enjoyable, and informative read!

Herman Steen
Editor, partner and head of Wikborg Rein's Shipping Offshore Dispute Team, Oslo

Readers can keep up to date with the latest sanctions by signing up to our Sanctions Alert emails

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The 2023 revision of the Nordic Plan

The Nordic Marine Insurance Plan of 2013, version 2023, has recently been approved following negotiations between the Nordic shipowner associations and the Nordic Association of Marine Insurers.

The new 2023 version of the Nordic Marine Insurance Plan of 2013 (the Nordic Plan) will enter into force on 1 January 2023. The most comprehensive changes in the 2023 revision concern the loss of hire conditions. Other significant amendments have also been made, with regard to the claims leader's authority, the time limit for notification of casualties, the interest on the compensation, the choice of repair yard, and the conditions for total loss compensation when the vessel is struck by a war peril.

MAJOR AMENDMENTS OF CHAPTER 16 ON LOSS OF HIRE INSURANCE

Chapter 16 on loss of hire insurance has been revised on a number of points, and the Commentary to the chapter has for the most part been rewritten. Whilst some of the amendments aim simply to clarify certain basic concepts, there are also some substantive changes.

Loss of hire insurances cover the assured's loss of income due to the vessel being out of income-earning activity because of damage to the vessel or a similar event. Where the vessel is prevented from earning income due to other causes, for instance a failed market, this is not covered. Moreover, if a damaged vessel would have been unable to obtain employment even if it had not been damaged, there is no causation between the damage and the loss of employment, and the loss of time is therefore not covered by the loss of hire insurance.

The 2023 revision underlines the concept that the insurance covers the assured's loss. This means that it is not sufficient in order to trigger loss of hire coverage that the vessel is out of employment; this must in fact result in an income loss for the assured. If the income under the vessel's contract is maintained even when the vessel is not operating, e.g. in case of hire payment during agreed maintenance days, or in case a substitute vessel is used to maintain earnings, the assured does not sustain a loss and therefore there is no loss of hire cover. The revision of the Nordic Plan on this point entails a departure from the Agder Court of Appeal decision in the 2018 Hamburg Cruise case (LA-2018-35513).

On the other hand, if the assured incurs extraordinary expenses by employing a substitute vessel in order to maintain earnings, such extraordinary expenses may be allowable as extra costs incurred in order to avert or minimise loss, cf. Cl. 16-11. This is also contrary to the Hamburg Cruise judgement.

The Commentary also clarifies, with reference to the 2020 Agder Court of Appeal judgement in the Diana case (LA-2020-48298), that if an assured decides not to repair a vessel after a casualty, any loss of income after this point in time will not be considered a consequence of the damage. It will therefore not be recoverable under the loss of hire insurance.

The basic principle that loss of hire insurance does not provide cover in the event of a total loss is maintained, cf. Cl. 16-2. However, the decisive criterion is now whether the assured is entitled to total loss compensation under the actual hull conditions, compared to the previous wording that referred to a theoretical total loss assessment as per chapter 11 of the Nordic

> The most comprehensive changes in the 2023 revision concern the loss of hire conditions.

Plan or under the applicable hull conditions, subject to the latter having been accepted in writing by the loss of hire insurer.

The new Commentary to Cl. 16-4 contains more comprehensive explanations on how to calculate loss of time for vessels contracted on time charterparties, voyage charters and for unchartered vessels. Some examples regarding calculation of partial time lost have also been included.

Amendments have also been made to Cl. 16-9, choice of repair yard, Cl. 16-12, simultaneous repairs, and 16-15, liability of the insurer when the vessel is transferred to a new owner.

THE CLAIMS LEADER'S RIGHTS AND AUTHORITY TO ACT ON BEHALF OF THE CO-INSURERS

Amendments to chapter 7 and 9 clarify the claims leader's rights and authority to act on behalf of the co-insurers. The rationale is to strengthen the practical benefits of the Nordic claims leader system.

Cl. 7-1 and 9-2 have been amended to clarify that mortgagees only need to notify the claims leader about the mortgage in order to obtain the additional mortgagee rights set out in Cl. 7-2 to 7-4. It is also clarified in Cl. 7-1 that the claims leader is authorized to accept on behalf of the co-insurers that special requirements of the mortgagee be included in the insurance contract provided that the special requirements are within customary market practice.

INTEREST ON THE COMPENSATION SET TO US PRIME RATE

As LIBOR will be discontinued, the interest rate on the compensation shall from 2023 be based on the United States Prime Rate. As before, the Nordic Association of Marine Insurers (Cefor) will publish the applicable rate for each year on its web-site (https://cefor.no).

EXTENSION OF THE TIME-LIMIT FOR NOTIFICATION OF A CASUALTY

The time-limit for the assured's notification of a casualty in Cl. 5-23 has been extended from 6 to 12 months which is in accordance with the insurance contract acts in the Nordic countries.

CHOICE OF REPAIR YARD – FOCUS ON SUSTAINABILITY

The assured will from 2023 have the right to demand repairs to be effected at a yard which complies with the Environmental, Social and Governance (ESG) standards reasonably and usually required by the assured for scheduled dockings and repairs for the assured's own account.

EXTENSION OF THE TIME-LIMIT TO ESTABLISH TOTAL LOSS IN WAR RISK INSURANCE

In war risk insurance, the time-limit to establish total loss in case of intervention by a foreign State power or capture of the vessel by pirates etc., has been extended from 6 to 12 months, cf. Cl. 15-11. •

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The future of Lloyd's Open Form

The Lloyd's Open Form survives – but its future remains uncertain.

At the Marine Insurance Nordics Conference held in Oslo in November of this year, the future of the Lloyd's Standard Form of Salvage Agreement, the Lloyd's Open Form ("**LOF**"), was the subject of a panel discussion.

The panel consisted of Andreas Øgrey, Global Head of Casualty and Major Claims at Skuld, Helga Grønlund Hodne, Senior Claims Handler and Adjuster at Norwegian Hull Club, Dave Wisse, Senior Commercial Manager at SMIT Salvage and Marcus Cave, Naval Architect at TMC Marine.

The discussion was moderated by Herman Steen.

Amongst the topics discussed were the ongoing Lloyd's review of the LOF and the International Group's report on the impact of delays in salvage contracting.

LLOYD'S REVIEW OF THE LOF

It was announced by Lloyd's last year that it was considering to close its Salvage Arbitration Branch, which could effectively be the end of the LOF, at least as we know it.

The Lloyd's Salvage Arbitration Branch administers the form and provides a framework within which the LOF arbitration process operates.

The main reason for the announcement by Lloyd's was the steady decline in the use of LOF in recent years

The Salvage Union and the insurers reacted quite strongly, expressing support for the continued use of the LOF. As a result, Lloyds rowed back on its announcement and has since said that it will continue to support the LOF.

There is now a Lloyd's working group which is considering the future of LOF. The commitment to the LOF seems to be there, but the question is what comes out of the review.

INTERNATIONAL GROUP'S REPORT ON THE IMPACT OF DELAYS IN SALVAGE CONTRACTING

Another topic which was discussed, was the report which the International Group has commissioned from the previous UK Secretary of State, Hugh Shaw, on the impact of delays in salvage contracting.

The main reason for the commissioning of this report was that the P&I clubs have been worried that delays in the contracting of salvage services, for example by negotiating a commercial contract instead of signing an LOF, in some cases might lead to an escalation of the situation and an increased risk to the crew, the environment and the vessel itself.

The report considered the dilemma that on the one hand the LOF is quick and easy to enter into, is flexible and avoids delays. It is often suitable in high risk, high urgency cases. Furthermore, generous LOF rewards ensures financing of the salvage industry.

On the other hand, owners and insurers are often reluctant to enter into an LOF unless it is necessary because the remuneration to be awarded will usually be substantially higher than under a commercial contract. Some have also taken the view that the LOF rewards have in some cases been too high, and that a commercial contract is better suited for low risk, low urgency cases.

The report has made several recommendations to the industry which includes increased transparency, training and cooperation between stakeholders, which were discussed by the panel. •

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The report made several recommendations to the industry

GENCON 2022
– BIMCO's new flagship contract

On 25 October 2022, BIMCO published an updated version of GENCON, the most widely used dry bulk voyage charter party form worldwide. BIMCO also took the opportunity to update the accompanying CONGENBILL.

The update coincided with the 100th anniversary of the first version of GENCON and was the first revision to the form since 1994.

As a result of both technological, regulatory and commercial developments, and new legal precedents, standard forms have been revised from time to time in order to stay current. Whilst such updates can sometimes be limited to addressing or clarifying fairly narrow points, the BIMCO drafting committee has, in this instance, approached the task with a more ambitious aim of developing the form to be a comprehensive bargain between owners and charterers, that should not require use of extensive additional rider clauses.

The result of that ambition is a much more extensive form that sets out the parties' obligation in more detail and, in many respects, using clearer language than before. Whilst it remains to be seen how quickly the new form will be adopted – or how popular BIMCO's box-ready commercial compromises will turn out to be – it is not too early to say that GENCON 2022 contains several improvements that should be welcomed by both owners and charterers.

OVERALL STRUCTURE

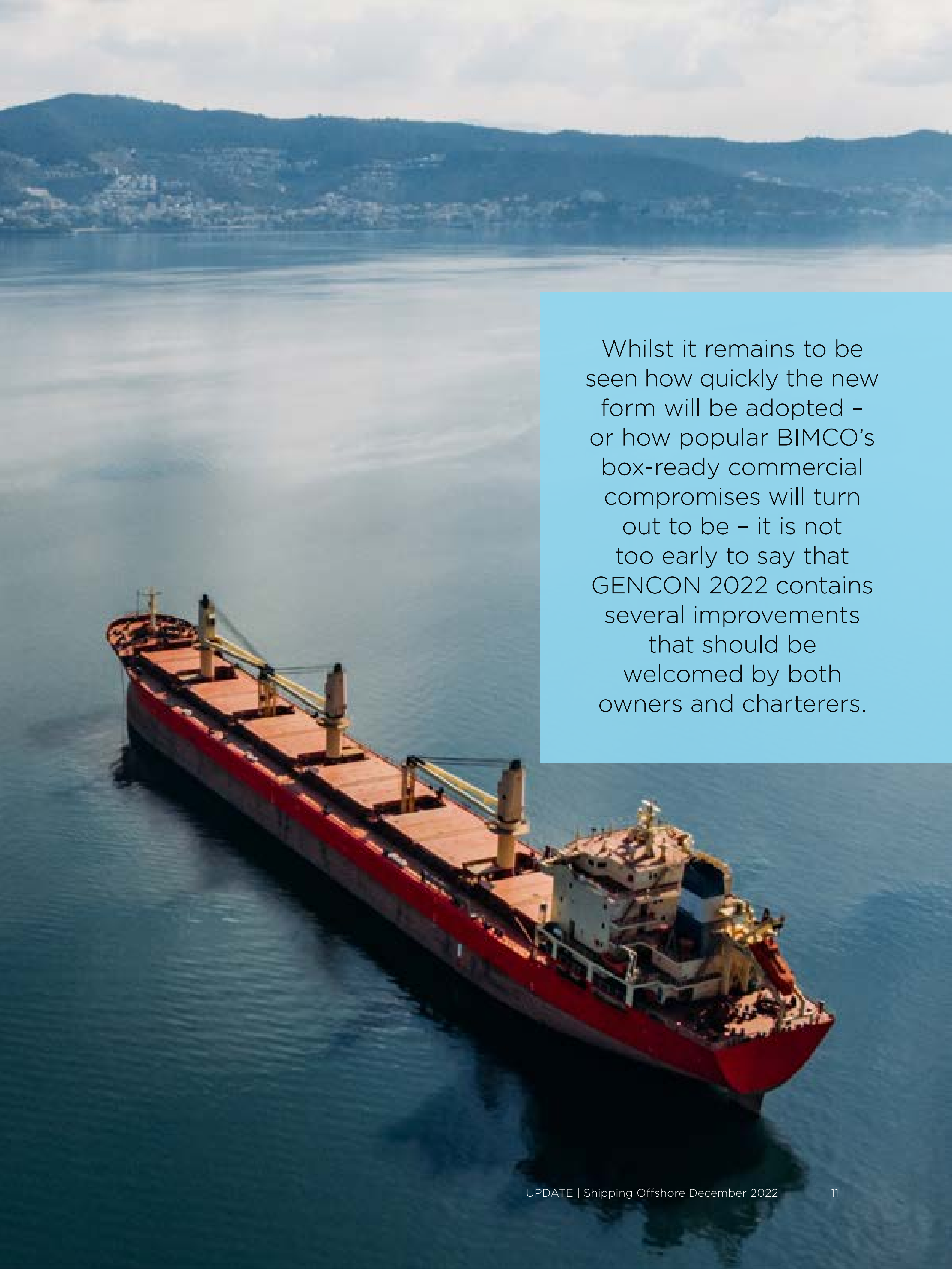
Users of GENCON 1994 will find the 2020 form familiar and easy to navigate, despite some significant changes and a near doubling in length. The form continues with the "boxes and clauses" format now characteristic of BIMCO standard forms. There has been limited reshuffling of the order of the clauses, and much of the familiar language from previous versions has been retained.

SCOPE OF CONTRACT VOYAGE AND OWNERS' RESPONSIBILITIES

Clause 1 has received a helpful reformatting that makes it easier to read than before. There is also one significant change in that the existing obligation to commence the approach voyage "*as soon as [the vessel's] prior commitments have been completed*" is now subject to an exception if the vessel is "*prevented or hindered by events beyond the Owners' control*".

This is a helpful clarification that avoids the harshness of the rule in *Monroe Brothers Limited v Ryan* that the general exceptions cannot be relied upon before the approach voyage has commenced. As such, owners will not be in breach if they are prevented from immediately departing from the previous discharge port due to, for example, tug strikes or blockages.

On the face of it, the scope of the owners' responsibilities, as set out in Clause 2, have been significantly increased in the 2022 form. This clause had not materially changed since 1922 and pre-dated the Hague-Visby rules, which meant that the clause provided owners with protection against loss, damage or delay to the cargo, but did not specify protection given in other events such



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as accidents or financial liabilities outside of the carriage of goods. The uncertainties of risk allocation between owners and charterers often caused parties to replace the allocation with other standards, most commonly by incorporating the Hague-Visby Rules through a Clause Paramount.

In recognition of this, the new Clause 2 has been amended to reflect the benefits owners are afforded in the Hague-Visby Rules, including the important exceptions to carrier liability in Article 4.2 and the 12-month time bar on claims in respect of carried goods. Similarly, the requirement for owners to exercise due diligence to make the vessel seaworthy and to take care of the cargo has now been aligned with the Hague-Visby rules.

The new Clause 2 therefore avoids the need to include a Clause Paramount to ensure that the minimum requirements needed by P&I cover are met and also avoids the confusion on how to apply owners' Hague-Visby obligations to non-cargo carrying voyages. Given time, this is likely to prove to be a popular development that achieves the aims of the Clause Paramount with much more straightforward language.

CARGO

Clause 3 is a new clause which regulates all aspects related to cargo during a voyage. Since the last revision of GENCON in 1994, the shipping industry has evolved considerably with increasingly extensive cargo and vessel regulations, such as the IMSBS Code. The new Clause 3 aims to define and clarify the obligations between the parties in relation to risk and liability for damage to cargo during loading, carriage, stowage and discharge. Referencing specific types of cargo carried, such as bulk cargo, environmentally harmful cargo, or cargo not filling vessel holds completely, Clause 3 is a welcome clarification for parties transporting various types of cargo and clearly sets out responsibilities for charters and owners at various points in a voyage.

The 2022 form also includes a new Clause 5, which specifically refers to cargo fumigation and makes it clear that this is at charterers' risk and cost. Since the previous 1994 form made no specific reference to cargo fumigation at all, this new Clause should improve certainty for both parties when fumigation is required or desirable.

LAYTIME AND DEMURRAGE

The laytime provisions have been expanded significantly since the 1994 form. In the new 2022 form, laytime issues are divided into three sections – Clause 10 (Laytime), Clause 11 (Commencement of Laytime), and Clause 12 (The Running of Laytime). Laytime and demurrage disputes under GENCON have historically been centred around ambiguities in the more economical wording of GENCON 1994, and it is hoped that the more expansive wording will decrease the scope for time-consuming disputes between parties.

As a significant development, Clause 10 incorporates the BIMCO Laytime Definitions for Charter Parties 2013. This expands the definitions of relevant terms and allows the form to be expressed with short terms such as "working day" without the need for a separate definition to avoid ambiguity. A potentially significant consequence of this is that the BIMCO definition of demurrage is "*an agreed amount payable to the owner in respect of delay to the Vessel once the laytime has expired*". Accordingly, under GENCON 2022, demurrage would arguably not be the only remedy owners can claim if they have also suffered other losses consequent on the delay such as cargo claims, regardless of the outcome in the pending Supreme Court appeal in the *Eternal Bliss* case on the meaning of demurrage in charterparties that do not define the term.

Clause 11 deals with the commencement of laytime (subject to the early commencement of loading provisions in Clause 9(d)), which is often a contentious issue among owners and charterers. The new version simplified the question of when laytime commences by reference to the tender of a notice of readiness (NOR) and adopts detailed provisions in Clause 9 (Notice of Readiness) dealing with common issues regarding the timing for serving the NOR. The separation of these questions will arguably make it easier to determine when the laytime regime starts, however, BIMCO has also introduced new complexity by making the commencement of laytime dependant on whether laytime is expressed as SHINC (Sundays and Holidays Included) or SHEX (Sundays and Holidays Excepted) without providing for a default choice if this is not specified.

Clause 12 addresses issues associated with the running of laytime and time for completion of cargo documents and specifies special circumstances which will or will not be considered in the laytime. Clause 12(b), which states that charterers will be liable for delay in loading or discharging as a result of environmental or public health concerns, is the first in the GENCON form's history to refer directly to delay as a result of environmental issues.

STANDARD BIMCO LANGUAGE AND MISSED OPPORTUNITIES

GENCON 2022 also includes or incorporates eight BIMCO standard clauses, either for the first time or in an updated version: the Electronic Bills of Lading Clause 2014, the Himalaya Clause 2014, the Ice Clause 2005, the ISPS/MTSA Clause 2005, the Sanctions Clause 2020, VOYWAR 2013, the Piracy Clause 2013 and the Law and Arbitration Clause 2020.

Whilst we expect that this expanded suite of clauses will be welcomed, it could be said that a better approach would have been to incorporate these clauses by reference and with wording to incorporate the latest version at all times. Having the full text set out may be better for readability, however it has the unfortunate effect of making forms fall behind developments sooner than may otherwise be the case. This can particularly be expected to be the case with the VOYWAR and Piracy Clauses which are due for an update already in 2023.

The suite of standard clauses also has some notable omissions, including the AIS Switch-Off Clause and the Infectious or Contagious Diseases Clause. Both these clauses have received significant attention lately, and it is surprising to see a form aiming to be comprehensive that does not address such issues.

BIMCO's decision not to include a slow steaming or virtual arrival clause also stands out as a missed opportunity. With the industry increasingly focused on finding ways to cut high fuel costs and improve on carbon-intensity, we would have expected a modern form to at least make some provision to encourage the parties to consider the perhaps most obvious way of doing so.

CONGENBILL

The CONGENBILL is designed to be used with GENCON, and Clause 19 of GENCON 2022 provides that Bills of Lading presented to the Master shall be "*no less favourable to the carrier than those of CONGENBILL 2022*".

The CONGENBILL has been kept more up-to-date than GENCON, and had revisions in 2007 and 2016. The amendments in the 2022 version are minor but represent clear improvements. Clause 1 now specifies that if the Charterparty date is blank, the incorporated Charterparty terms will be from the relevant voyage charterparty. Clause 9 now expressly incorporates the law and jurisdiction clause of that Charterparty and this is referenced on the front page.

Whilst none of these points change the position that already follows under English law, these clarifications should in theory reduce the frequency of jurisdictional conflicts as a result of different national rules and/or differing law and jurisdiction clauses in a chain of charterparties. •

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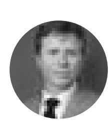

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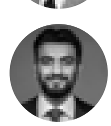

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Limitation of liability in light of the *MSC Flaminia (No.2)* case

The right to limit liability for claims is a cornerstone and unique feature of maritime law. Limitation issues are a particularly important consideration in the aftermath of large scale casualties as the ability to limit liability may significantly reduce the financial exposure for a party and its insurers.

The German-registered container vessel MSC Flaminia following an explosion onboard, sadly killing three crew member. The vessel had been on its way from Charleston, South Carolina towards Europe and was carrying 151 containers with flammable cleaning fluid among its cargo.

Photo Courtesay of Smit Salvage/German Central Command for Maritime Emergencies via Getty Images

The recent decision from the English High Court in *MSC Flaminia (No.2)*[1], provides useful guidance on which claims are and which are not capable of being subject to limitation.

FACTS

In *MSC Flaminia (No.2)*, Conti ("**Owners**") had chartered the 6750 TEU container ship "MSC Flaminia" ("**Vessel**") to MSC ("**Charterers**") on a long-term time charterparty ("**Charterparty**").

In July 2012, three tank containers laden with the chemical divinylbenzene ("**DVB**") were loaded onboard the Vessel in the United States for carriage to Europe. Unfortunately, between 1 and 14 July 2012, the DVB underwent "*auto-polymerisation*", which is a process involving many small unsaturated monomers combining to form one large polymer. This did not only impair the quality and value of the DVB, but also caused a build-up of heat and pressure inside the containers carrying it. On 14 July 2012, when the Vessel was in the middle of the Atlantic Ocean, some of the DVB escaped from the containers and formed an aerosol which ignited. This led to an explosion and a large fire in the Vessel's cargo hold. Overall, the Vessel and its cargo were extensively damaged and a large scale response to the casualty was required. Tragically, three members of the crew lost their lives in the initial explosion.

Cargo claims were commenced in the United States but the claims between Owners and Charterers were subject to London arbitration as per the terms of the Charterparty. Pursuant to awards of the London tribunal, Charterers were held liable to Owners in respect of the casualty and were ordered to pay damages of around US$ 200 million.

Charterers therefore commenced a limitation claim in the Admiralty Division of the English High Court to limit their liability under the 1976 Convention on Limitation of Liability for Maritime Claims ("**LLMC**")[2]. If the limitation claim had been successful, Charterers would have been able to limit their liability to around £28 million, based on the tonnage of the Vessel.

THE LAW

Under the LLMC[3], a "shipowner" (which for the purpose of the convention includes a charterer) can limit its liability for claims listed in Article 2.1 of the convention. The most common limitable claims are:

*"(a) claims in respect ... **loss of or damage to property** ... occurring on board or in direct connection with the operation of the ship or with salvage operations, and **consequential loss** resulting therefrom"*

However, in the *CMA Djakarta* case[4], which also concerned a large container ship fire, the English Court of Appeal held that Article 2.1(a) covers only claims in respect of loss of or damage to property *other than the ship* itself.

In light of that decision, Charterers of the Flaminia attempted to limit their liability to Owners under Article 2.1(a) of the LLMC on the basis that the damage to the ship was a "consequential loss" resulting from "loss of or damage to property" (the DVB) for the purpose of Article 2.1(a).

THE COURT'S DECISION

Ultimately, the English High Court held that Owners' claim against Charterers was a claim for damage to the ship and consequential losses arising from that damage. Owners' claim was not a claim for loss of or damage to property (other than the ship itself) or consequential losses resulting from the same. Under the LLMC 1976, and as per the *CMA Djakarta*, Owners' claim was

1 [2022] EWHC 2746 (Admlty)

2 As amended by the Amending Protocol of 1996

3 Which is given enacted under English Law by the Merchant Shipping Act 1976

4 [2004] EWCA Civ 114

Photo: Courtesy of German Central Command for Maritime Emergencies via Getty Images

Investigators and salvage teams prepare to board the German-registered container ship MSC Flaminia at Jade-Weser-Port on September 10, 2012 in Wilhelmshaven, Germany.

If a breach of the relevant charterparty can be established and damages are awarded arising from loss of or damage to their vessels, owners and their insurers can be more confident of making a substantial recovery without having to defend limitation actions

therefore ***not*** one which Charterers could limit their liability for.

The Admiralty Judge, Mr Justice Andrew Baker, considered that for Charterers to succeed they would need to show that the *CMA Djakarta* was wrongly decided and that was not an argument available to it in the High Court. However, even if it was possible to consider that argument, he would reject it for the following reason:

The Admiralty Judge considered that Article 2 of the LLMC 1976 was concerned with "*claims categorisation*" and not with the more complex matter of factual causation. During the hearing, the Charterers accepted that if cargo is damaged or lost because of damage to the ship, a claim by that cargo owner is not a claim in respect of "*damage to the ship*". Accordingly, by the same logic, if the ship is damaged or lost because of damage to the cargo, a claim by the shipowner is not a claim in respect of "*damage to cargo*". In other words, as per the Admiralty Judge:

"The causal contribution of cargo damage in the damage to the ship does not turn a claim for damaging the ship into a cargo claim"

In setting out his decision, the Admiralty Judge also gave helpful guidance on the meaning of "consequential loss" in Article 2.1(a), and whether a charterer can ever limit its liability to an owner under Article 2.1 or *vice versa*.

With respect to the meaning of "consequential loss", the Admiralty Judge opined that "consequential loss" is not limited to losses caused to the owner of the property but is instead wider and covers losses suffered by a party other than the owner (or party entitled to possession) of the property lost or damaged.

As for whether an owner or charterer can ever limit its liability to the other under Article 2.1, the Admiralty Judge held that they can, although they would need to own property onboard the vessel other than the vessel itself. In this respect, the Admiralty Judge provided examples such as a charterer's ownership of cargo onboard, an owner owning some of the containers being carried, or either party owning the vessel's bunkers.

COMMENT

Despite the importance that limitation issues play in the aftermath of a large casualty, decisions relating to limitation of liability are rare. Indeed, as noted by the Admiralty Judge, this was the first judgment since the early 2000s in which an English court has had to consider a claim by a charterer that it is entitled to limit its liability to an owner under the LLMC for anything other than cargo claims.

Ultimately, this decision should provide comfort to owners and insurers of vessels that are involved in large and destructive casualties. In such casualties, the owners' losses will often far exceed the limit of liability. The decision in *MSC Flaminia (No.2)* means that, if a breach of the relevant charterparty can be established and damages are awarded arising from loss of or damage to their vessels, owners and their insurers can be more confident of making a substantial recovery without having to defend limitation actions. •

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THE YEAR OF SANCTIONS – some lessons learnt

The massive and unprecedented sanctions imposed against Russia have required significant efforts to manage the risks and impact of sanctions, particularly in view of creative attempts to circumvent by some parties. In this article we explain why you should update your sanctions clause, and how to ensure that it is fit for purpose.

Sanctions have been imposed against Russia since the invasion of Crimea in 2014. However, the full scale invasion of Ukraine in February 2022 has led to unprecedented sanctions being imposed by various authorities, not only in those jurisdictions most commonly associated with setting the agenda on sanctions. Tools never used before are now being applied for the first time. International trade is becoming increasingly difficult and cumbersome, particularly in areas such as energy, transport and commodities.

Violations of sanctions can lead to a wide array of adverse consequences, including civil and in some cases criminal liability: vessels being sanctioned, seized or delayed, or termination of credit facilities or key services such as insurance. The list of trading restrictions seems ever expanding. Needless to say, many operators have a rather low risk appetite when it comes to sanctions, but on the other hand, losing key business streams or ending up in legal disputes by adopting an unnecessarily restrictive approach is also undesirable.

RISK-BASED TRIGGERS ARE PREFERABLE

Sanctions clauses are essentially specialised 'change of circumstances' clauses, in the same family as force majeure, hardship, change in laws, and price revision clauses. Their purpose is to provide a framework for the parties to respond to certain events. As such, they tend to have two main components – a trigger telling you when the clause applies, and an operative part providing for the consequences, usually suspension and/or termination of the contract, but more nuanced provisions can also be used in certain cases.

The trigger will typically include a list of events, such as the designation of a party or its owner on a sanctions list, and/or a more general provision triggering the clause if performance of the contract would lead to a breach of sanctions (for example, the import of a prohibited commodity).The latter provision, i.e., sanctions events which do not amount to designation of a party, can be particularly important. Sanctions do not always fit into pre-defined categories, and in our experience a carefully worded trigger provision can be invaluable to avoid disputes.

In a dispute, a court or tribunal will start by analysing the applicable sanctions laws and jurisdiction, and then make a decision as to whether the clause applies to the relevant factual matrix (or if there is an 'at law' rule to follow), based on the preponderance of the evidence available. These cases frequently present evidential difficulties. For example, it may not be possible to establish whether one person should be 'deemed' to control another for sanctions purposes, because such an arrangement will likely have been put in place secretively and with a view to circumvention (as we note below). More generally, it can be difficult to obtain materials from certain closed corporate registries to evidence ownership, or it may be necessary to seek expert guidance as to whether certain products fall within the scope of what is prohibited under trading restrictions.

In simplified terms, the court or tribunal will assess whether it is more likely than not that a trigger event took place, and the natural interpretation of the clause governing the parties' response to that trigger. If it is found that the relevant activity does not breach sanctions, or there

A possible way out may be a change of control provision within the sanctions clause.

is an appropriate contractual remedy that ought to have been adopted, then a terminating or suspending party may themselves be at risk of being in breach of contract. Our experience is that most corporations would rather risk a breach of contract than a violation of sanctions if forced to take a choice in this respect, given the potential severity of consequences of a sanctions violation.

A good contractual solution, particularly for longer-term contracts or those that may be exposed to geopolitical risk, is a risk-based trigger, rather than a trigger requiring an actual sanctions violation. In our experience, proving that performance of an activity "exposes" a party to "risk of sanctions violation" or even "may/could" breach sanctions, is significantly simpler than proving that performance actually *breaches* sanctions. It would in such cases usually be reasonable to act based on an independent legal opinion indicating the relevant risk, even if the position is not wholly certain.

DESIGNATIONS

Many of the sanctions directed against the Russian Federation after the full-scale invasion of Ukraine have targeted wealthy individuals said to be close to and/or to have benefitted from President Putin's kleptocratic regime, also known as oligarchs. The US Treasury Department in 2018 published a list of 114 senior political figures close to Putin and 96 oligarchs with a net worth of USD 1 billion or more. Many of these oligarchs have been sanctioned by various authorities since February 2022 or earlier.

Sanctions against oligarchs typically take the form of asset freezes, which in respect of EU and UK sanctions means that all funds and economic resources belonging to, owned, controlled or held by the designated individuals (directly or indirectly) must be frozen. Further, no benefit should be provided to designated individuals, directly or indirectly. These provisions are drafted and interpreted widely. This effectively prohibits trade with both the designated individual, and any companies which they control or have majority ownership in.

US sanctions rather clinically focus on ownership under the so-called "OFAC 50% rule". Under EU and UK legislation it is also relevant whether the individual may be deemed to control the relevant entity, a test which is highly fact based and can potentially apply in cases with minority ownership by the designated individual. In the UK, we must also consider if there are reasonable grounds to suspect that a party is owned or controlled by a designated individual, which adds an additional layer of subjectivity to an already complex assessment.

A typical response by companies which have designated individuals as managers or shareholders, is to have the designated individuals resign from relevant positions, and divest themselves of their direct or indirect shareholding positions (to below 50%). While this is done legitimately in some cases, these arrangements can involve attempts to disguise continuing control, for example by (i) ownership through trusts or frontmen, (ii) ownership located in jurisdictions with limited transparency as regards beneficial ownership, and/or (iii) unknown or circular ownership. These have been a rather common method since oligarchs first became targets of US and EU sanctions after Russia's 2014 invasion of Crimea.

For the counterparty, the challenge is that control may be exercised through other mechanisms than management positions and ownership. New managers and owners may have informal links to the sanctioned individuals, and the new owners' finance arrangements may ultimately leave control with the former owner. Like in the case of the sanctions clause trigger, the counterparty may end up in an evidentiary dilemma. It is in our experience very difficult to prove your suspicions of hidden means of control. While it is possible, it will often involve a very deep dive into publicly available sources and require assistance from local investigators and experts. On the other hand, sanctions authorities (such as the UK) may require you to suspend trade if you have cause to suspect that the sanctioned individual remains in control.

CHANGE OF CONTROL

For parties who need to manage the risk of future designations within their counterparty (starting from an assumption that the trade and counterparty is presently not sanctioned), one solution is a 'change of control' provision within the sanctions clause. It may also be helpful to add such provisions elsewhere, including with respect to credit support providers or other entities expected to perform activities under the contract. Change of control clauses are common in contracts where the ownership and/or control of your counterparty is essential, and allow a party to terminate the contract in case of a change in control of the other party. (Corporate lawyers will recall searching for such clauses in due diligence with some trepidation!).

In a sanctions clause, the change of control can work in two ways. Firstly, it can be used within a sanctions clause to solve the above evidentiary dilemma – where there is any divestment or change in ownership reported, that can be relied on – rather than seeking to ascertain the full facts of the new ownership or any subjective control issues. This enables termination or suspension based solely on the purported divestment. Secondly, an analogous provision can be used to enable termination or suspension unless there is a change in control, change in management or novation of the contract. That may be appropriate where there is a crucial long-term supply to be maintained, which can lawfully be continued if the involvement of designated persons is removed. There are still risks in this scenario that would need to be considered on a case by case basis, i.e., there may be apparent compliance with the designated person retaining informal control.

WHAT ELSE?

In any consideration of a sanctions clause or of general sanctions risk, it is necessary to consider whether a general clause is sufficient, or whether a more bespoke provision needs to be put in place. Particular industries will also carry their own particular risks (and in some cases have their own standards to work from). For example, industries which involve multiple deal participants or which may operate in more opaque jurisdictions (such as shipping, offshore drilling, and international trade), will usually require greater due diligence. It can be helpful in such cases to place a higher burden on the counterparty in terms of representations and warranties as to their own compliance/reporting, and not rely solely on a trigger becoming apparent.

In addition to updating your sanctions clause, you may want to use the momentum to update your sanctions compliance programme. A fundamental element in this regard is to conduct a sanctions risk assessment that considers the specific risks of your business, including clients, products, services and geographic locations. Mapping and assessing risks – also looking forward – may be particularly useful now in light of the tense world situation, not only due to Russia's war, but also tensions in China and Iran.

Our sanctions team can help with practical compliance programmes, drafting effective sanctions clauses, and managing sanctions disputes. Please get in touch if you would like further information or assistance. •

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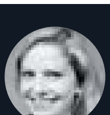
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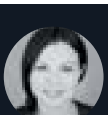
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Transfer of employee information outside of China under PIPL and the new Draft Standard Contract

The Cyberspace Administration of China has issued a draft standard contract for cross-border transfers of personal information out of China which will, if adopted, constitute a valid transfer mechanism under the Chinese Personal Information Protection Law. Both the transferring entity and the overseas recipient must still be aware of additional data protection requirements related to cross-border transfers, including reporting requirements.

The Chinese Personal Information Protection Law ("**PIPL**") was enacted on 1 November 2021 and is sometimes referred to as China's equivalent to the General Data Protection Regulation ("**GDPR**"). It is China's first and most comprehensive act of legislation on the processing of personal information.

PIPL applies to all processing activities of personal information of individuals that is carried out by entities within the territory of China. Amongst the numerous obligations and compliance requirements imposed on personal information processors, PIPL has, in particular, strict rules on cross-border transfer of personal information, and aims to put an end to or at least control the large flow of information from China to the rest of the world.

Whilst PIPL does not define cross-border transfers of personal information, the industry practice has been to approach this question by applying a broad interpretation.

The overseas recipient is also required to comply with Chinese data protection requirements

By way of example, cross-border transfers are deemed to include any situation where a Chinese entity stores personal information, such as employee information and business contacts, on servers located outside China or otherwise makes personal information available to overseas recipients, such as a parent company or group affiliate.

TRANSFER MECHANISMS FOR CROSS-BORDER TRANSFER AND A NEW DRAFT STANDARD CONTRACT

For a cross-border transfer of personal information to be compliant with PIPL, the transfer must be "necessary". This means that the Chinese entity intending to transfer personal information must assess the necessity of the transfer, typically by reference to a business need. In addition, the transferring entity must also conduct a personal information protection impact assessment ("**PIPIA**") prior to the transfer. The PIPIA must include assessments on the lawfulness, legitimacy and necessity of the processing, impact on personal rights and interests and level of risk and security protection measures implemented. The PIPIA and a record of processing must be retained for at least three years.

Furthermore, the transfer must be subject to a transfer mechanism, which is either (i) a completed security assessment organized by the Cyberspace Administration of China ("**CAC**"), (ii) a certification for personal information protection issued by a professional institution recognized by the CAC, or (iii) a standard contract provided by the CAC to establish the rights and obligations of the transferring entity (within China) and the overseas recipient.

In practice, the third alternative – the standard contract – is perceived as the most efficient and cost saving option for companies which will not be transferring critical data and which will only transfer personal information of less than 100,000 people or sensitive personal information of less than 10,000 people on an annual basis.

For this purpose, the CAC issued a draft standard contract on 30 June 2022 ("**Draft Standard Contract**"). The Draft Standard Contract also includes proposals related to filing, requiring the Chinese transferring entity to file both the standard contract and the completed PIPIA with the provincial CIA. The time limit for public comments to the Draft Standard Contract expired on 29 July 2022, and if the proposal is approved, all local transferring entities in China must use the approved standard contract and comply with the corresponding filing requirements.

SPECIFIC CONSENT FROM THE INDIVIDUAL

In addition to a transfer mechanism, PIPL requires the transferring entity to obtain a specific personal consent from the individual prior to any cross-border transfer of personal information. PIPL also requires that such personal consent is a voluntary and explicit indication of intent given on a fully informed basis.

Furthermore, the individual has the right to withdraw the consent at any time, and the personal information processor must provide the individual with an easy method for withdrawing the consent.

INFORMATION TO THE INDIVIDUAL PRIOR TO THE TRANSFER (PRIVACY NOTICE)

PIPL also requires that the Chinese entity provides the individual with information about the transfer, including the name and contact information of the overseas recipient, the purpose and method of the processing, and the type of personal information involved. The individual must also be informed of how they can exercise their rights under PIPL against the overseas recipient.

Such information on the processing of personal information is usually prepared in the form of a privacy notice and included as part of the employee handbook or similar internal regulation.

FACTS

The Standard Contract entered into between the Chinese transferring entity and the overseas recipient, together with a specific personal consent accompanied with a privacy notice, will constitute a legitimate basis for cross-border transfer.

ADDITIONAL REQUIREMENTS FOR OVERSEAS RECIPIENTS OF PERSONAL INFORMATION

In addition to the requirements on the transferring entity, it is important to be aware that the overseas recipient is also required to comply with Chinese data protection requirements.

Firstly, PIPL has an extraterritorial scope, and an entity *outside* China processing personal information about individuals *within* China can be deemed a personal information processor if the purpose of the processing activity is to provide a product or service to the individual or assess their behaviour.

PIPL requires that any personal information processors located *outside* the territory of China (i) establish a local representative in China, for example by appointing a legal entity or nominating a person responsible for personal information protection-related affairs, and (ii) submit the name of the representative and their contact information to the Chinese authorities.

Detailed guidelines regulating what is the requirement for a legal entity or person to be appointed as representative are however not yet issued by the relevant Chinese authorities.

Secondly, the overseas recipient may be subject to local data protection laws. For example, if the overseas recipient is established within Norway or another EU/EEA country, transfers of personal information from China to the EU/EEA may trigger the rules under the GDPR.

The GDPR applies to controllers (and processors) established within the EU/EEA regardless of whether the data subjects are located within or outside the EU/EEA, i.e. an overseas recipient within the EU/EEA will be deemed a data controller when receiving personal data about data subjects in China. The obligations of a data controller under the GDPR include having a valid legal basis for processing and informing the data subjects (such as data subjects in China, whose personal data is being transferred to the EU/EEA) about the relevant processing of their personal data in accordance with the GDPR. When it comes to transfers of personal data related to employees, it may be problematic to use consent as a legal basis for receiving personal data under the GDPR. Furthermore, businesses should follow the basic principles relating to processing of personal data underlying the GDPR, including data minimization and purpose limitation. •

> The CAC issued a draft standard contract on 30 June 2022

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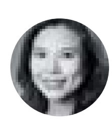

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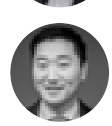

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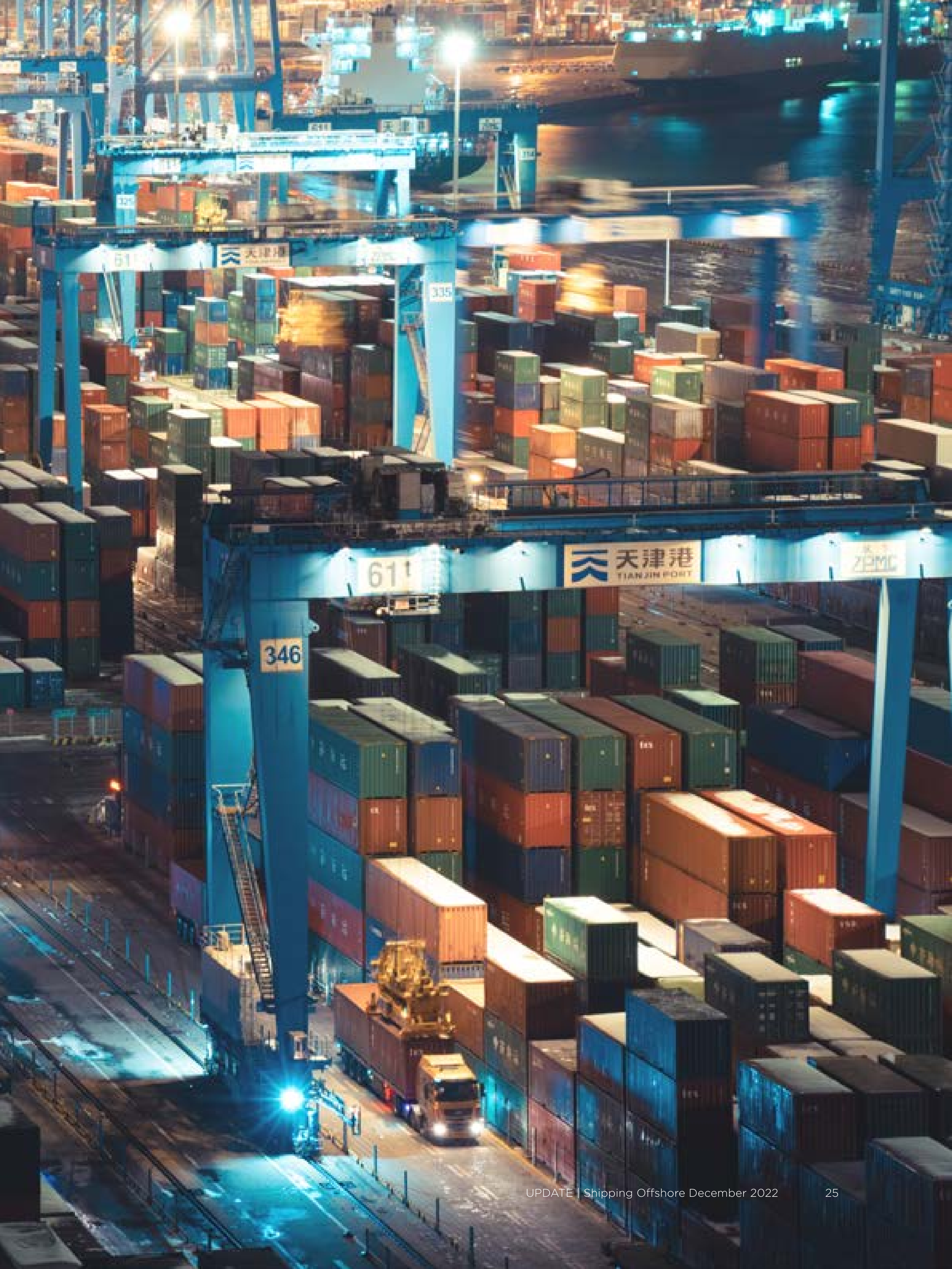
ESG and the Chinese Shipping Industry

ESG has been developing for decades internationally, in particular in the West, but has not been as well known in mainland China until more recently. Now, however, ESG is increasingly seen as a political priority aligned with the goal of "common prosperity" and therefore firmly on the agenda of large Chinese companies. This includes many shipping companies, where it is also expected that China's push within green shipping will lead to more mandatory ESG obligations being introduced.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ESG, or "Environmental, Social and Governance", is a comprehensive set of metrics used to measure performance and risk within environmental protection, social responsibility and company governance. In essence, ESG is meant to reflect non-financial risks and opportunities inherent to a company's day to day activities, and is also increasingly relied upon by investors when making investment decisions.

ESG DEVELOPMENT IN CHINA

A turning point for ESG awareness in China came in May 2018 when Morgan Stanley Capital International (MSCI) partially included China large-cap A-shares in the MSCI Emerging Markets Index. Inclusion on the MSCI index imposed ESG reporting requirements on many of China's A-shares listed companies.

Heightened attention has also been placed on ESG by Chinese regulators after President Xi in September 2020 announced at the 75^{th} session of the General Assembly of the United Nations, China's aim to hit carbon emission peak by 2030 and achieve carbon neutrality by 2060. Following President Xi's announcement, the secretary general of the Chinese state-owned Assets Supervision and Administration Commission stated in his opening speech at the China ESG Forum held on 18 July 2021, that the State Council has put ESG implementation on the top of its *to-do* list to improve Chinese enterprises' social responsibility performance. Additionally, China's first ESG disclosure guidelines, "The Guidance for Enterprise ESG Disclosure", issued by China Enterprise Reform and Development Society, a think tank backed by the State Council of China, came into effect on 1 June 2022.

Notwithstanding the above developments, none of the ESG guidelines or requirements are mandatory to mainland Chinese enterprises under Chinese law as of today.

> The State Council has put ESG implementation on the top of its to-do list to improve Chinese enterprises' social responsibility performance

ESG AND CHINA'S SHIPPING INDUSTRY

The Chinese shipping industry has given increased attention to ESG recently, as illustrated by one of the key topics, "How to view the shipping industry from an ESG perspective", discussed at this year's World Maritime Merchants Forum. It is also apparent that several giant state-owned shipping companies that are pioneers in implementing ESG reporting in the Chinese shipping industry, such as China Merchants Energy Shipping Co., Ltd. (a China A-shares listed company), have already started to introduce reporting on ESG factors and efforts in their annual reports.

In these ESG reports, already available to the public, it can be noted that Chinese shipping companies have commenced substantial work in de-carbonisation, emission reduction and application of new sources of energy.

This is mainly driven by the International Maritime Organization's (IMO) commitment to decarbonise global shipping with the aim to "*reduce CO2 emissions per transport work, as an average across international shipping, by at least 40 % by 2030, pursuing efforts towards 70 % by 2050, compared to 2008*". As China is a member state of the IMO, the mandatory measures are applicable to all Chinese shipping enterprises. In addition, China's newly set domestic carbon neutrality goals, along with the international ship financing institutes' green financing frameworks, have been important in driving this trend.

China has been on a fast track in promoting green shipping in recent years and a broader application of ESG will undoubtedly play a key role in such development. A cleaner environment is one of the areas of priority under China's long-term goal of "common prosperity". Implementation of "common prosperity" has already lead to regulatory reforms and crackdowns on several sectors, including private education and technology. Given the key role shipping will have to play in the transition to a more sustainable economy, it is likely that also this sector will be subject to substantial regulatory shifts. With pressure from these conventions and plans, it is expected that Chinese regulators will accelerate their policy implementation to expedite shipping companies' volunteer disclosure of ESG information in the near future, and introduce more mandatory obligations going forward.

Beyond the shipping industry it is clear that the 2030/2060 decarbonisation targets will remain at the top of the agenda and that we will see a wider push towards reaching these goals. In particular, ESG disclosure is an area where we may see further implementation guidelines and mandatory requirements materialise first.

Seeing the increased importance of ESG to areas such as sustainable financing and investments, as well as the mandatory reporting and due diligence requirements implemented in many jurisdictions, including the EU, we expect that ESG will play an increasingly important part also within China. It is inevitable that Chinese ESG policies will eventually be integrated into the international frameworks, and Chinese regulators will also likely study and learn from existing ESG standards and guidelines. However, as can already be seen from the new "Guidance for Enterprise ESG Disclosure", new legislation is certain to be tailored to Chinese needs and ambitions. Companies operating in China would therefore be well advised to keep an eye on not only the international developments, but also on developing requirements under Chinese law in order to stay up to date on this rapidly evolving compliance topic. •

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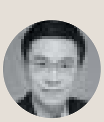

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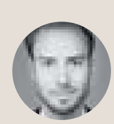

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BIMCO completes its suite of CII, EEXI and ETS time charter clauses

BIMCO has recently published three new clauses which seek to balance Owners' and Charterers' respective interests under time charters in relation to the obligations imposed by the CII, EEXI and EU ETS.

A new wave of environmental regulations will hit international shipping in the coming months. The IMO's Carbon Intensity Indicator (CII) and the Energy Efficiency Existing Ship Index (EEXI) regulations will apply from 1 January 2024. Moreover, the EU is set to include maritime emissions in its emissions trading system, although the exact scope and timing remains uncertain.

All three regulations will impact the relationship between Charterers and Owners. BIMCO has therefore introduced three new clauses which aim to assist parties in existing and future time charters, by allocating the responsibility and costs for ensuring compliance. In this article, we will take a closer look at these clauses.

EEXI TRANSITION CLAUSE

The EEXI is a one-time requirement to improve the energy efficiency of an existing ship's design. If covered by the scope of the regulation, the relevant ship will be ascribed an "attained EEXI". This will demonstrate the ship's energy efficiency, compared to a baseline. The attained EEXI is then compared to a "required EEXI" for that particular ship type. If the attained EEXI is less efficient than the required EEXI, Owners will need to take steps to ensure compliance.

On 7 December 2021, BIMCO published its EEXI Transition Clause for Time Charter Parties. The clause stipulates that it is Owners' responsibility to ensure that any required "EEXI Modifications" are completed prior to the vessel's next annual, intermediate or renewal survey, whichever comes first after 1 January 2023. "EEXI Modifications" are defined therein as any physical or technical modifications required to bring the subject vessel into compliance with the EEXI.

Two practical ways of achieving the required EEXI are Engine Power Limitation (EPL) or Shaft Power Limitation (SHAPOLI). The clause has detailed regulations for these, providing that Owners must make the decision and then inform Charterers of the specifications of the modification, the estimated new maximum speed and the corresponding consumption figures of the vessel. After the modification is completed and certified, these figures, as well as any other consequential changes, shall be updated in the vessel's description. Owners are responsible for the time and costs of the modification, but they are allowed to take the vessel out of service to effect such modifications.

Some Owners may choose other energy efficiency solutions for their vessels than EPL or SHAPOLI. In such cases, the clause provides that any such other modifications shall be subject to agreement by Charterers which shall not be unreasonably withheld or delayed.

CII CLAUSE

The CII requires continuous improvements to a vessel's energy efficiency, by demanding increasingly stricter emission targets every year. Specifically, the vessel's attained yearly carbon intensity will be documented and verified against a required CII. This gives a rating on a scale from A to E. Ships rated E, or ships which for three consecutive years are rated D, will have to submit a corrective action plan showing how the required CII will be achieved.

Nearly a year after the EEXI Clause was introduced, BIMCO presented its long-awaited CII Clause for Time Charter Parties on 21 November 2022. Under BIMCO's clause, Owners and Charterers shall settle on an "Agreed CII" rating for 2023 through 2026. If the parties fail to agree on a value, the middle point of CII Rating Level C shall apply. As such, it is up to the parties to decide commercially which carbon intensity level to settle on.

Following the agreement, Charterers must operate and employ the vessel in a manner consistent with the Agreed CII, even if this for example may require alternative or adjusted voyage or employment orders. Charterers may still order the Master to adjust the vessel's speed to meet a specified arrival time, or closest thereto, as long as compliance with the Agreed CII and other regulations is upheld. Owners' warranties related to despatch, speed and consumption and other aspects of the vessel's description are maintained, but Charterers are not able to rely on a breach of these as a basis to avoid meeting their obligations under the clause. Owners are required to ensure an energy efficient vessel by operating the vessel in a manner which minimises fuel consumption. This includes performing maintenance on the vessel and adequately planning voyages.

Data regarding fuel consumption, type and distance travelled shall be provided to Charterers daily, as well as a calculation for the attained CII value. If the trajectory of the attained CII is deviating from the Agreed CII and there is a reasonable likelihood Charterers may breach their obligations, Owners may, after written notification, request a written plan from Charterers. The plan shall detail any proposed commercial operation of the vessel for at least the next voyage. If Owners can reasonably show that Charterers' written plan will result in a breach of the Agreed CII, the parties must undertake to cooperate in good faith to adjust the written plan so that compliance is reached. Until an agreement is reached, Owners are entitled to not follow Charterers' orders and to reduce the vessel's speed or take other remedial actions, with the vessel remaining on hire.

If the CII Clause is breached, Owners shall be entitled to claim any losses from Charterers. Charterers shall ensure that contracts of carriage incorporates provisions allowing Owners to comply with their obligations under the CII clause and also indemnify Owners from claims and liabilities resulting from breach of Owners' obligation to proceed with due dispatch or are held to be a deviation under the contracts of carriage in contradiction to Owners obligations under the CII clause.

> We deem it likely that the clauses will become the market standard

ETS CLAUSE

BIMCO also published its emissions trading scheme (ETS) clause for time charter parties on 31 May 2022. BIMCO's clause is drafted to be applicable to all future emissions trading schemes that permit the emission of greenhouse gases in exchange for allowances. The

Parties are therefore well-advised to carefully consider whether the clauses provide for the desired allocation of duties and responsibilities in their individual charter parties.

BIMCO clause follows the principle that the party providing and paying for the fuel should also provide the emission allowances to cover the greenhouse gases emitted by that fuel.

Owners will likely be responsible for complying with the obligations under the various schemes. The main obligation will probably be to submit allowances which cover the vessel's yearly emissions. However, Charterers will, under a traditional time charter, be providing the fuel for the vessel and give orders regarding its voyages and operation, and thereby effectively be exerting control over the level of emissions. Therefore, the starting point under BIMCO's ETS clause is that Charterers shall transfer the requisite amount of emissions allowances into Owners account each month. The amount of allowances is based on verified emission data, provided by Owners.

If Charterers fail to timely transfer the requisite amount of allowances, Owners have the right to suspend the charter, with the vessel remaining on hire. This seemingly intrusive right is warranted, as it is Owners that will suffer public sanctions if the requirements under the relevant ETS are not fulfilled. Conversely, Charterers' obligation does not apply during periods of off-hire, and they will have a right to offset or demand return of any allowances submitted for such periods.

The EU ETS is likely to be the first notable scheme to cover maritime emissions. On 30 November 2022, the EU Commission, the EU Council and the European Parliament reached a preliminary agreement to include maritime emissions, with a final text expected in late December. For the sake of completeness, BIMCO has announced that they will amend its SHIPMAN-contract once the EU ETS is finalized.

CONCLUSION

Like all of BIMCO's clauses, the EEXI, CII and ETS clauses have been carefully drafted by working groups consisting of industry experts and representatives of all main stakeholders. Having this in mind, we deem it likely that the clauses will become the market standard, and that they will provide the baseline for contract negotiations going forward. However, as with all standard clauses, they will not suit all individual circumstances and contracts. Parties are therefore well-advised to carefully consider whether the clauses provide for the desired allocation of rights and obligations in their individual charter parties. •

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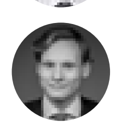

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Contracts for Difference in shipping:

The Zero-Emissions Catalyst?

Although more typically associated with the renewables space, Contracts for Difference (CfDs) are increasingly being considered as a key part of the puzzle in achieving a zero-emissions future in the shipping sector.

The discussions and initiatives for a shift to green fuel solutions in the maritime sector are well underway, but the industry still has a long way to go in order to reach decarbonisation and to meet its national and international emissions targets. With target milestones fast approaching, including those set by the EU and the Paris Agreement, industry stakeholders are struggling with the pressing need for acceleration towards the first key decarbonisation goals in 2030.

The shipping industry is inherently competitive and in many respects characterised by capital-intensive investments in long-term assets. This creates a challenging environment for investors to venture into to develop and produce new green fuel solutions necessary for achieving the required zero-emissions future. A vicious circle is formed where uncertainty as to demand for green fuel hampers investments in green fuel solutions, creating uncertainty for green fuel availability and price, which in turn impedes investments in vessels for which such green fuel would be purchased. Increasingly, stakeholders are looking to CfDs as potentially being part of the solution, by acting as a viable supporting tool to effecting and incentivising coordinated investment to secure production and availability of green fuel at scale in combination with other initiatives to support decarbonisation of the shipping fleet.

Whichever route is taken, in order to capitalise on the potential CfDs have to act as a catalyst towards zero-emissions, it is key that decisions from governments and/or industry bodies are made quickly.

WHAT ARE CFDS?

A CfD is a policy instrument in the form of an asset derivative contract, typically entered into between a private developer / investor and a government or government-backed counterparty. Under the CfD the supplier of a new, high-cost commodity (e.g. green fuel such as hydrogen or ammonia) is paid the difference between a pre-determined reference price (e.g. the cost of fossil fuels) and a set fixed "strike price". The strike price is usually set at a level required for the new technology to be viable and attractive, and can be decided either administratively or by way of a competitive auction. If the reference price is lower than the strike price then the supplier will receive the difference, thereby effectively securing a guaranteed minimum price during the term of the CfD. Conversely, if the reference price is higher than the strike price then the supplier would in a two-way CfD repay the subsidy. In this way CfDs mitigate market risks faced by suppliers and in turn incentivise investment at scale in the commodity in question.

Transitioning to zero-emissions fuels (including both zero-carbon and net-zero-carbon alternatives) is thought to be key to the shipping industry reaching its emissions targets. In order to reach the Paris Agreement decarbonisation goals it is estimated that zero-emissions fuels must make up 5% of the international shipping fuel mix by 2030[1]. For this to become a commercial reality, the significant costs gap between fossil fuels and zero-emissions fuels needs to be bridged within a short space of time, and CfDs could be a key component in making this happen.

1 Figures from the Getting to Zero coalition and UMAS (University Maritime Advisory Services, UK).

ARE FUEL-BASED CFDS THE WAY TO GO?

CfDs based on fuel cost or production cost have been identified by multiple industry stakeholders as the most relevant and fit-for-purpose contender to accelerate movement towards zero-emissions shipping.

In Norway, the Zero Emission Resource Organisation (ZERO) has identified hydrogen as a viable zero-emissions fuel source to be targeted with CfDs. Overall, ZERO concludes that competition based CfDs aimed at producers or end-users of hydrogen would likely be the most feasible solutions to implement in the maritime sector. ZERO considers how each such CfD would conceivably be implemented:

- CfDs for **producers of hydroge**n would be awarded through reverse auction or administratively, with producers competing on the basis of the lowest production cost per tonne of hydrogen. The reference price would be the actual or estimated market price for hydrogen in general, which could be restricted by a floor price connected to the natural gas price. The difference between the reference price and the production cost would then be calculated and paid to the producer on an annual basis up to a maximum annual production volume (assuming the reference price is lower than the production cost). The proposed contract term for producer CfDs is 10 to 15 years in order to provide producers with sufficient visibility in respect of their investments.
- CfDs for **end-users of hydrogen** as a fuel, on the other hand, would be based on a strike price tied to the hydrogen-based zero-emissions fuel cost and a reference price linked to the cost of fossil fuels. Similarly to producer CfDs, the difference between the reference price and strike price would be calculated and paid to the end-user on an annual basis. The proposed contract term would be slightly shorter at 5 to 10 years.

The Getting to Zero coalition, a partnership between the Global Maritime Forum and the World Economic Forum, has further proposed that CfDs for end-users of hydrogen could be coupled with the end-users entering into offtake agreements with fuel producers on the basis of the fixed strike price, which in turn would encourage fuel producers to reduce costs to maximise profits.

TIME IS OF THE ESSENCE

Each of the CfD mechanisms set out above has the potential to propel the shipping industry towards its zero-emissions goals. Policymakers will however need to make several detailed considerations in relation to the structuring of the CfDs. An overarching consideration for governments, international organisations and other industry stakeholders looking to push for the implementation of CfDs, will be whether to focus on producers or end-users. A user-based focus has the potential to have the widest market impact, but it risks leading to delays in investments in production. A producer-focused approach, on the other hand, would secure investments in production to a larger degree.

Whichever route is taken, in order to capitalise on the potential CfDs have to act as a catalyst towards zero-emissions, it is key that decisions from governments and/or industry bodies are made quickly. An announcement regarding the use of CfDs in principle, could be a beneficial way to kick start the process without having all details in place. Thereafter, it is vital that the process is characterised by transparency and foreseeability, in order to incentivise early movers, maintain momentum and at the same time retain the required flexibility as markets develop and the need for governmental support shifts. •

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The most important updates in

GREEN SHIPPING

– December 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.

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

The EEXI and CII regulations will require compliance from 1 January 2023. Relevant stakeholders are now conducting their final preparations to ensure compliance. Further, commercial relationships are amended to take into account the costs and responsibilities associated with the regulations. For instance, BIMCO released a novel "EEXI Transition Clause for Time Charter Parties 2021" on 7 December 2021. A similar CII Clause was released on 21 November 2022. You can read more about the clauses in the article "BIMCO completes its suite of CII, EEXI and ETS time charter clauses" in this SO Update.

EU EMISSIONS TRADING SCHEME (EU ETS)

The final text of the EU ETS has been negotiated within the EU since early autumn. The negotiations are between the EU Commission, the EU Parliament and the EU Council, which have all submitted draft proposals. On 30 November 2022, the institutions reached a preliminary agreement to include maritime emissions. The provisions require that each shipping company must submit allowances for 40 % of its emissions in 2024, 70 % of its emissions in 2025 and 100 % of its emissions in 2026. Allowances also have to be submitted for 50 % of emissions on international voyages to or from an EU port (and 100 % for intra-EU voyages). Some items still remain unclear, including the directive's scope, which entity will have the ultimate responsibility of complying with the directive, which entity will ultimately pay the costs associated with compliance, and how the revenues from the directive will be distributed in the scheme. We expect a final text to be presented around the turn of the year, with the directive likely taking effect from 1 January 2024.

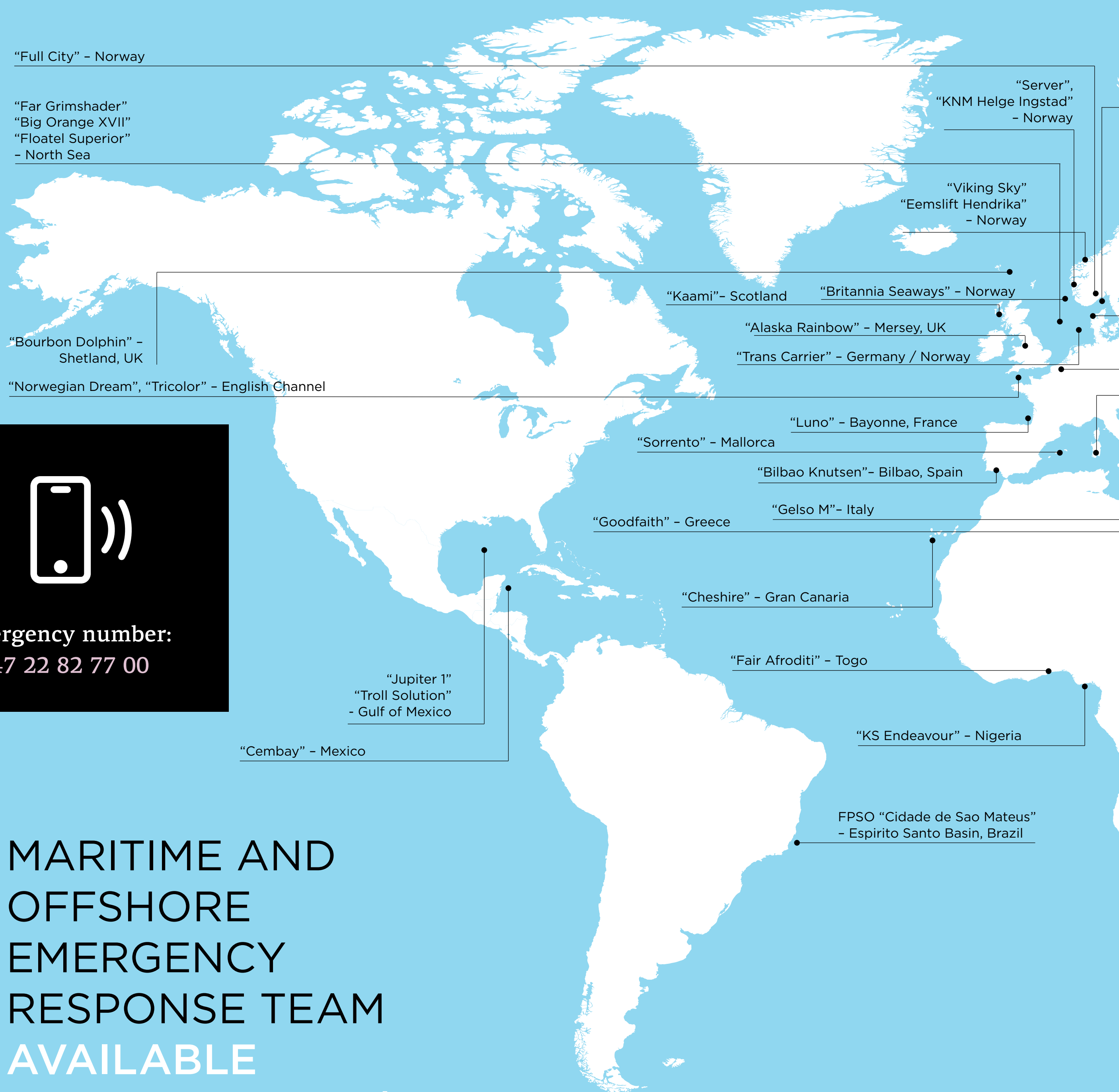
EU TAXONOMY

From 1 January 2023, Non-financials are required under Article 8 to report on Taxonomy eligibility and alignment of 3 KPIs – turnover, Capex and Opex. On 6 October, the European Commission published the final version of its 33 frequently asked questions on the interpretation of these obligations. The FAQs provide further clarification on the implementation of the regulation and cover areas such as: how turnover, Capex and Opex are defined; how the NACE code should be used to identify Taxonomy-eligible activities in the context of eligibility reporting; double reporting; reporting in relation to non-EU activities; and how the Delegated Act interacts with the proposed Corporate Sustainability Reporting Directive.

	Regulation[1]	Essence of regulation	Scope (technical)
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).
Technical Requirements	**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.
Technical Requirements	**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.
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
Operational Requirements	**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).
Operational Requirements	**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
Operational Requirements	**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
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.	Certain types of commercial vessels of 5000 GT and above.
Commercial Incentives	**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.
Commercial Incentives	**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

[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

Scope (geographical)	Implementation date	Next steps / recent updates
Worldwide	Compliance required as from 1 January 2023.	BIMCO launched EEXI Clause on 7 December 2021.
Worldwide	8 September 2017	
Worldwide	1 January 2013	1 January 2025: Phase 3 requiring increased energy efficiency to initiate.
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.	• 2 June 2022: European Council adopted its position, with minor changes compared to the original proposal. • 3 October 2022: EU Parliament's Transport Committee adopted its report. The Transport Committee introduced higher cuts to GHG intensity compared to the original proposal from the Commission, and a new target of 2% use of renewable fuels. • 19 October 2022: EU Parliament voted on the proposal. Adopted the revised requirements proposed by the Transport Committee • 1 January 2025: Proposed implementation
Worldwide	Compliance required as from 1 January 2023 (more stringent rating thresholds towards 2030).	BIMCO launched CII Clause on 21 November 2022.
Worldwide, with stricter requirements within emission control areas.	1 January 2020	June 2022: Marine Environment Protection Committee's (MEPC) 78th session suggested to designate the Mediterranean Sea as an emission control area from 2025 (to be ultimately decided during MEPC 79 in December 2022).
Worldwide	1 January 2013 Compliance required as from 31 December 2022.	1 January 2023: Shipowners must implement and verify a SEEMP Part III (Ship Operational Carbon Intensity Plan related to CII). BIMCO launched CII Clause on 21 November 2022, which includes requirements for compliance with the SEEMP.
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.	December 2022: EU institutions seek to finalize legislation. 1 January 2024: Proposed implementation.
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.	• 2022/2023: Technical screening criteria for the remaining four environmental objectives • 1 January 2023: Non-financial undertakings start disclosing the full KPIs on taxonomy-alignment under Art 8. • The Platform on Sustainable Finance published its report on Minimum safeguards in October 2022
Worldwide	18 June 2019	



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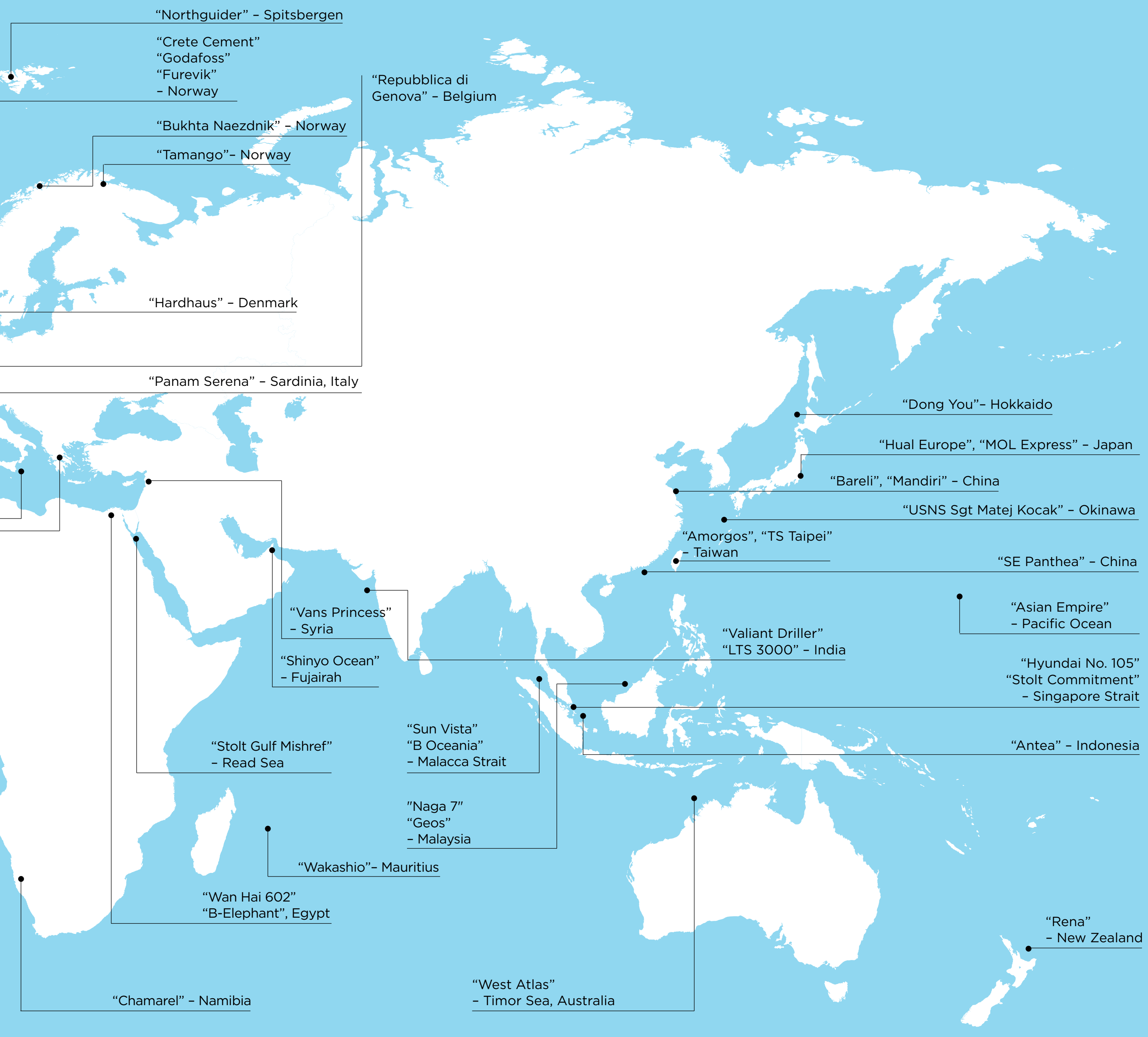
MARITIME AND OFFSHORE EMERGENCY RESPONSE TEAM AVAILABLE WORLDWIDE 24/7

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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