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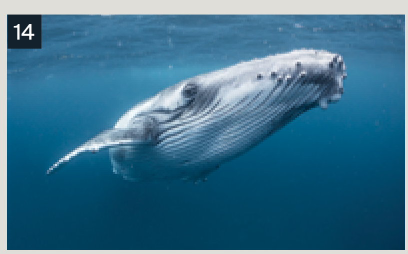

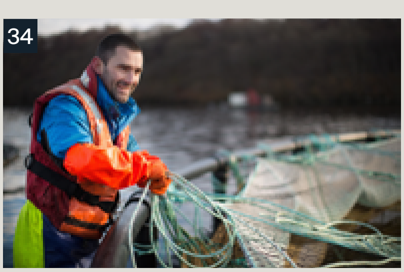

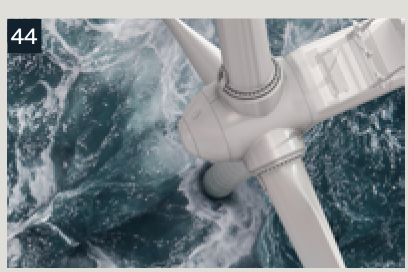

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SHIPPING OFFSHORE

Dear friends and readers

The last couple of years have been marked by uncertainty and the need for constant adaptation in the shipping industry and in international trade. With the ongoing war in Ukraine and increased rivalry between USA and China, global tensions are still impacting international shipping and trade. In this Update we analyse some of the issues arising in this respect, including war risks insurance of vessels trapped in Ukraine and how international companies operating in China are adapting to changing geopolitical risks.

At the same time, 2023 is promising to become an important year for global shipping, with key players fixing their focus towards the green transition in shipping and tackling the challenges posed by climate change. Important legislative premises for the shipping industry have been set out with the EU Council adopting the EU Emissions Trading Scheme (ETS) for shipping this spring with implementation starting already in 2024. You can read more about the EU ETS in this edition, and keep yourself up to date on the most recent developments in green shipping.

In this edition of the SO Update we also look into similarities and differences between the Nordic Marine Insurance Plan and the Institute Time Clauses Hulls, provide you with updates on recent shipping cases from Norway and the UK, as well as discuss legal questions relating to the transportation of live fish and developments in offshore wind and more.

Enjoyable reading!

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2023 is promising to become an important year for global shipping, with key players fixing their focus towards the green transition.

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De-risking China

– international companies respond to pressure to diversify supply chains

The world relies heavily on China for its supply chains and access to strategic resources. Whilst the geopolitical risk may be increasing, a complete decoupling is still undesirable for most companies. Faced with mounting pressure to diversify out of China, many foreign companies are therefore exploring alternative de-risking strategies to help with effective supply chain diversification and key-asset distribution.

→

Over the past two years, foreign companies have experienced increasing difficulties in doing business in China due to stringent policies, such as the zero tolerance on COVID and China's stronger inwards focus and push for self-sufficiency. Asset exposure, supply chain disruption and logistics are among the most critical areas impacted by a changing political and business environment.

These factors, and the perception that geopolitical risk has increased in general, have hastened many foreign businesses to re-assess the scale and nature of their China operations and to consider options for diversification away from China. To face the increasing risk and to find the right position in the Chinese economic eco-system, it is key for international players to understand the underlying political and economic drivers.

DE-RISKING RATHER THAN DECOUPLING

The EU still relies heavily on China for strategic resources that will be crucial for the shift to net zero carbon emissions. Therefore, a decoupling approach would be unlikely to work, and the EU is aware that a slow and structural de-risking process is preferable. As stated by EU Commission President Ursula von der Leyen on 17 January 2023 at Davos, the EU should de-risk rather than decouple its trade ties with China and that the EU should use its foreign subsidies to do so.

Many company executives are tasked with developing strategies for "de-risking China" to prepare their companies for the future of doing business in China as well as seizing growth opportunities in a risk-reduced manner.

Whilst it is impossible to avoid policy and geopolitical risks altogether, it can be significantly reduced with sound strategies of supply chain diversification and key-asset distribution.

THE "IN CHINA, FOR CHINA" STRATEGY

Securing supply chain stability in China has become increasingly challenging in recent years. Companies are being confronted with unprecedented risks and are forced to approach risk mitigation from a new perspective.

One popular concept that has arisen out of this is the "In China, For China" strategy, meaning that foreign investors are re-orienting their China investments to serve Chinese consumers rather than international ones. Rather than relying on China as a production base for their global export manufacturing and to produce goods that are sold elsewhere, foreign investors are producing their goods specifically for local consumption. For some companies, "In China, For China" is merely giving a positive spin on a partial move away from the Chinese market.

De-risking

De-risking marks a sudden and significant shift in attitudes towards the country that has long been known as "the factory of the world".

EXIT BARRIERS

Foreign investors often encounter issues when they attempt to exit the Chinese market, which might constitute part of the reasoning behind a decision on a partial, rather than a complete, move away from the Chinese market. Some of the most common issues are:

- A lengthy and cumbersome tax review and de-registration procedure upon liquidation of the local company entity
- Expensive financial severance packages imposed on the company as well as the difficulty to obtain approval and support from local government for significant layoffs
- Strict review by local banks of all documentation in respect of any transfer of funds back to foreign investor's country after de-registration of company
- Additional subsidies and incentives may be offered by the local government to retain foreign investments in the region

Even a partial exit can be lengthy and sometimes painful. However, the trend of companies pivoting to lower cost alternatives like India, Indonesia, Thailand and Vietnam for export-driven production is clear and the stringent Chinese Covid-19 restrictions, which made it difficult to enter and leave the country for years, have only served to reinforce this trend.

Samsung, for example, has closed its last smartphone factory in China and began operating the world's largest mobile phone manufacturing facility in India. Compared to Samsung, whose smartphone production has been completely moved out of China, many other companies are instead adopting a "China plus

The EU should de-risk rather than decouple its trade ties with China and that the EU should use its foreign subsidies to do so.

one" strategy where higher value manufacturing continues to be done in China whilst lower value production is moved to a lower cost country.

KEY ASSET DISTRIBUTION – FINANCIAL SALE AND LEASE BACK

Regardless of the exact strategy being used, mitigating the risk of supply chain disruption is a complex undertaking. Alongside the approach to diversify and relocate the supply chain out of China, international investors are also conducting careful risk assessments and adopting financial solutions to proactively manage the political risk of staying in China.

One of the efficient tools that has been used is the sale and leaseback of self-owned assets in China, usually seen in the Western market as a tool for freeing up capital. Under a typical sale and leaseback transaction in China, the owner of a property (usually a Chinese subsidiary of a foreign company) enters into a set of agreements simultaneously to sell the property to a buyer and lease the property back from the buyer for a designated period and with agreed conditions.

Depending on the nature of the asset and property, the main categories of buyers are usually government / state-owned enterprises, industrial developers, investment institutions, manufacturing end users and local investors. The procedure for the sale of assets usually varies with the category of buyers. Normally, if the buyer is a government or state-owned enterprise, the process will involve more formal procedures, including a bidding and auction as well as the requirement for an evaluation report issued by a Chinese qualified evaluation agency.

Under a sale and leaseback transaction foreign investors are able to maintain control of property for as long as needed, and are also able to raise capital via non-traditional sources.

In addition to the usual benefits, sale and leaseback transactions in China also serve as a method of making a future exit from China easier to manage, should the need arise. This, alongside other methods of "de-risking", allow foreign companies the flexibility they need to continue their profitable operations in China while maintaining an eye on the horizon so they can adapt should any of the current risks materialise.

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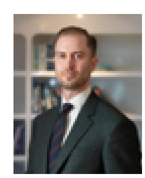

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War risks cover for ships trapped in Ukraine
– CTL and the Nordic perspective

The Russian invasion of Ukraine continues to cause uncertainty in the marine insurance market, in particular as a result of a potentially large number of total loss claims from owners of vessels that have been trapped beyond 24 February 2023, which marks the one-year anniversary of the full-scale invasion.

About 100 vessels were originally estimated to have been caught in Ukrainian ports and rivers as a result of Russia's invasion on 24 February 2022. Whilst some of the vessels managed to make their escape when the UN negotiated the grain corridor in the summer of 2022, it is assumed that around 70 vessels still remain trapped in Ukrainian waters.

Several of the trapped vessels were insured against war risks pursuant to the Nordic Marine Insurance Plan. The Nordic Plan offers cover for all standard non-P&I insurances for vessels and has comprehensive cover for war risks in Chapter 15, which includes damage, total loss, loss of hire and liability.

> **Some owners have been reluctant in claiming for a CTL.**

WAR RISKS

Although the circumstances relating to each affected vessel must be assessed individually, in the Nordic marine insurance market the general view has long been that the vessels which have been prevented from leaving Ukrainian waters since the outbreak of the war, are there on account of war risks as defined by the Nordic Plan, which under Cl. 2-9 includes "war" and "war-like conditions", as well as "interventions" by a foreign state power for political purposes.

TOTAL LOSS

There are two possible grounds on which owners may claim that their vessel is a constructive total loss (CTL) under the war risks insurance in the Nordic Plan:

- Under Cl. 15-11 the owners may claim for a CTL when they have been "deprived of the vessel by an intervention of a foreign State power" for a period of more than 6 months. It does not matter if the intervention is permanent or temporary as long as it lasts for over 6 months. In the 2023 version of the Nordic Plan, the period was extended to 12 months, but for the trapped vessels it is of course the policy in place at the time of the invasion which applies. Some of the policies underwritten in the Nordic market provided for a 12 month period, which was also the typical period in several other markets.
- Under Cl. 15-12 the owners have the same right to claim for a CTL if the vessel has been "prevented from leaving a port or a similar limited area due to blocking" if the obstruction lasts for more than 12 months. The blocking clause is primarily aimed at physical obstructions, such as the laying of mines or a collapsed bridge blocking the way out from a port, but it also includes detention by a foreign state due to fear that the vessel will fall into enemy hands without physical measures being implemented.

If the assured has brought a claim for a total loss and the relevant time-limit stipulated has expired, it is irrelevant for the assured's claim under the Nordic Plan that the vessel is subsequently released, see Cl. 15-11 (3) and 15-12 (2).

We have seen examples of vessels insured in the Nordic market which owners have claimed as a CTL on expiry of the six-month period with war risks insurers consequently accepting the claim without much discussion.

There are also examples of cases where questions have been raised as to whether the owners have fulfilled their obligations to take reasonable measures to avert or minimise losses by securing the release of the vessel, for example in connection with the grain initiative.

STRATEGIC CONSIDERATIONS FOR OWNERS AND INSURERS

Given the rise in vessel values over the last year for certain types of tonnage, some ships have a market value higher than their insured value. Most of the ships remain intact and many owners have been able to engage local seafarers for maintenance and security purposes in place of crews that were extracted from the region, especially at the beginning of the conflict. This has led to some owners being reluctant in claiming for a CTL and rather wanting to retain their assets with the aim of retrieving them later, instead of handing them to insurers against a CTL payout lower than the vessel value.

When claiming for a CTL, the total loss claim will absorb any loss of hire claims beyond the first month of loss of time, see Cl. 15-17 (2), which means that the owners cannot recover the CTL payout as well as retaining the full loss of hire payments.

If the insurers accept the assured's claim for a CTL, the insurers will need to decide whether to take ownership or tender notice of abandonment. Under the Nordic Plan the insurers will be automatically subrogated to the ownership of the vessel upon payment of the total loss compensation, unless they waive ownership before at the time of payment, see Cl. 5-19. The title comprises the vessel with all appurtenances that were covered under the insurance at the time of the total loss.

If insurers waive their right to become subrogated, ownership remains with the owners. They will then need to decide whether to retain the vessel or whether to sell it off to a third party.

If the insurers take title to the vessel, they will assume the responsibilities and liabilities of an owner, which includes having to ensure crewing and maintenance of the vessel, and will also expose the insurer to risks such as pollution or wreck removal liability. Owning a vessel in a war-torn region carries with it a range of risks, but there are examples of war risks insurers having taken title to ships trapped in Ukraine and have therefore become shipowners.
It is of course possible for insurers to take title and sell the vessel at a later stage to a third party.

Other options include compromised solutions between the insurers and owners, for example the assured keeping the vessel for a discount in the CTL payment or the sale of the vessel to a third party with insurers receiving the sales price or keeping an economic interest in the vessel.

Resolving the CTL claims will most certainly require thoughtful analysis and planning in each case as well as close cooperation between insurers and owners.

”Insurers will need to decide whether to take ownership or tender notice of abandonment.

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The High Seas Treaty – implications for shipping

After several years of negotiations, an intergovernmental conference at the UN has reached an agreement on a draft treaty aimed at conserving marine biodiversity in areas beyond national jurisdiction. The treaty has a potential to significantly impact international shipping.

"Shipowners and other relevant stakeholders should remain mindful of the impact of the High Seas Treaty on international shipping, which may necessitate changes to vessel design and operation."

Although the final text has been agreed, the High Seas Treaty will only come into effect after it has been formally adopted at a later UN session and then ratified by at least 60 member nations. This process is expected to take years. Once in effect, the treaty is expected to have significant implications for various sectors such as scientific research, deep-ocean mining, and various offshore activities. However, the treaty may also have significant implications for international shipping.

APPLICATION BEYOND NATIONAL JURISDICTION

As a starting point the treaty will only apply to areas beyond national jurisdiction. As such, the provisions of the treaty do not affect the jurisdiction which nations enjoy under the UN Convention on the Law of the Sea (UNCLOS), including in the exclusive economic zone and on the continental shelf. The maritime area beyond national jurisdiction, nevertheless, amounts to 64% of the entire ocean, and 45% of the planet as a whole.

Broadly, the substantive provisions of the treaty can be divided into two separate categories: the conservation of marine life and the shared use and exploration of areas beyond national jurisdiction.

> **The treaty is expected to have significant implications for various sectors, including scientific research, deep-ocean mining, and various offshore activities.**

PROTECTION OF MARINE BIODIVERSITY

The first category of provisions concerns the protection of marine biodiversity. The treaty creates a mechanism whereby signatories can propose relevant areas to be subject to "area-based management tools". These are defined as tools for a geographical area through which one or several sectors or activities are managed with the aim of achieving particular conservation and sustainable use.

One tool is defining an area as a "marine protected area", which is an area designated and managed to achieve specific long-term biodiversity conservation goals. The use and exploitation of such an area is only permitted if it is deemed sustainable and in line with the conservation objectives. Annex I of the treaty sets out indicative criteria for the identification of such areas, which include uniqueness, sensitivity, special importance of the species found therein, and economic, cultural and social factors. However, the treaty does not actually designate or establish specific areas to be protected.

Furthermore, the parties to the treaty shall conduct environmental impact assessments before engaging in any activities in marine areas. This obligation extends to activities carried out within a state's territorial waters, exclusive economic zone or continental shelf, if the activity could cause substantial pollution or significant and harmful changes to the marine environment in areas beyond national jurisdiction.

Furthermore, the treaty also establishes a mechanism to implement emergency measures in case of a natural or human-caused disaster that threatens to cause serious or irreversible harm to marine biological diversity beyond national jurisdiction.

SHARED USE AND EXPLORATION

The second category of provisions concerns the shared use and exploration of areas beyond national jurisdiction. This includes, inter alia, an obligation to cooperate in capacity-building and transfer of marine technology, particularly to developing countries. Reportedly, one of the most difficult negotiation items was the sharing of scientific research between developed and developing nations.

IMPACT

Freedom of the seas

Pursuant to UNCLOS article 87, the freedom of the high seas extends to all states and comprises as a general starting point the freedom of navigation, fishing and scientific research. The High Seas Treaty will, by imposing stricter environmental requirements on the use of the high seas, influence how this freedom is exercised.

Routes and fishing

One of the more straight-forward and direct impacts of the treaty is on existing shipping routes, to the extent these inter-

fere with, for example, marine protected areas. Potential requirements may include restrictions on speed and fuel consumption, as well as an outright ban on shipping activities in certain areas.

Similarly, the treaty will likely impose limitations on fishing activities, particularly for species that are close to extinction or are vital for maintaining the marine ecosystem and biodiversity of certain areas.

Noise

Another impact of the treaty is related to the issue of noise pollution from shipping and other shipping-related activities. Noise pollution has increased significantly over the last few decades, and although its effects are not yet fully understood, it is believed to have negative impact on several marine mammals. The treaty will likely affect the requirements for shipboard systems, such as propellers and sonar equipment, to reduce noise pollution. Additionally, requirements to minimise noise pollution may also apply to ancillary activities, such as oil and gas exploration and ocean mining.

Scubbers

There is a debate about whether the use of open-loop scrubbers will be compatible with new requirements imposed by the High Seas Treaty. Since the International Maritime Organization passed its 2020 regulation, which limits the sulphur content of fuel oil, the use of scrubbers has become increasingly popular.

In essence, a scrubber sprays seawater into the exhaust gas stream, which removes sulphur oxide from the exhaust. In an open-loop scrubber, which is the most commonly used type, the resulting wastewater is discharged directly back into the ocean. However, this wastewater is considerably more acidic than unaffected seawater and may have significant environmental implications. A Swedish study has found that scrubber wastewater accounts for up to 9% of certain emissions of carcinogenic and environmentally harmful substances in the Baltic Sea.

Expect consequences

In conclusion, whilst the full implications of the treaty's impact on shipping are uncertain and may only become apparent with time, it is clear that international shipping will need to adjust. As such, shipowners and other relevant stakeholders should be mindful of the potencial influence of the High Seas Treaty on international shipping in the months and years to come, including the possibility of requiring changes to both vessel design and operation.

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Insurers prevail in landmark Nordic Plan CTL judgment

Following a long legal battle before the Norwegian courts, the Court of Appeal has dismissed a claim by the owners of the vessel "Champion Express" for a constructive total loss ("CTL") under the Nordic Plan. Wikborg Rein acted for the insurers in what has been the first Norwegian judgment on CTL since the now 31 year old ND-1992-172 *Berglift* judgment.

Pursuant to the duty of loyalty the owners must make wholehearted efforts to obtain available waivers from regulations issued by public authorities, particularly where such waivers may be decisive for CTL.

In LA-2021-97236-4 *Champion Express*, which was handed down on 7 July 2022, the Court of Appeal reversed the District Court's judgment. The outcome of the appeal was largely due to the insurers' being able to obtain evidence previously concealed by the owners. Following the Supreme Court's rejection of the owners' further appeal on 17 November 2022, the decision is now legally binding.

The judgment confirms that the contractual duty of loyalty applies to marine insurance. In the *Champion Express*, this meant that the owners' were inter alia obliged to make wholehearted efforts to obtain flag state waivers from regulations which would make repairs more expensive to the extent that it could affect the level of insurance cover. The judgment affirms the principle that information for the appraisal of repair costs should be obtained by a pre-agreed and tenable procedure, as established in the Berglift case 30 years prior, and includes comments on the allowance for unforeseen costs.

THE NORDIC PLAN CL. 11-3

Pursuant to the Nordic Plan Cl. 11-3, the assured may claim for CTL (which in the Nordic Plan is called ”condemnation”) if the repair costs will amount to at least 80% of:

- the insurable value according to the hull insurance, or
- the value of the vessel after repairs, if the latter is higher than the insurable value according to the hull insurance.

The assessment includes all foreseeable costs of removal and repairs which, at the time when the request for CTL is submitted, must be anticipated if the vessel is to be repaired. Costs of salvage shall not be taken into consideration.

If the conditions for CTL are fulfilled, the owners would be entitled to total loss compensation not only under the hull insurance, but also under the hull interest and freight interest insurances.

BACKGROUND

The vessel's main engine broke down in August 2018. On 7 December 2018, the owners claimed for a CTL based on estimated repair costs exceeding 80% of the insurable value. The claim mainly relied on:

- the need to equip a new non-identical replacement engine with a NOx reducer system in order to comply with Tier III requirements under MARPOL Annex VI, Regulation 13.2.2, and
- a 15% write up of the total repair costs in contingent expenses.

The need to equip the vessel with a NOx reducer relied on the assertion that the owners were unable to obtain a waiver from the Tier III requirements from the flag state pursuant to IMO's resolution MEPC.230(65). This assertion was supported by rather brief correspondence between the owners and their flag state and classification society respectively, including an email from the latter in which the possibility of a waiver was seemingly summarily dismissed.

Upon the insurers' requests for full disclosure of the owners' correspondence with the flag state, the owners repeatedly claimed that all such correspondence had been duly presented and disclosed in the proceedings.

The District Court ruled in the owners' favour based on the evidence available to it.

Simultaneously with the futile efforts to obtain the requested documentation from the owners in the Norwegian proceedings, the insurers also filed for discovery against the vessel's flag state in the U.S., where the flag state's administrative headquarters were located. The discovery process revealed that the owners had concealed a substantial amount of their correspondence with the flag state in the legal proceedings, including emails to the flag state's local representative's private email address, by which they had secretly argued for a negative reply to their application. The arguments were dismissed by the flag state's main office, which instead provided a relevant example of a waiver granted to another vessel.

Shortly before the hearing in the Court of Appeal, the insurers also managed to obtain another example of a waiver granted by the same flag state, by means of a Norwegian court order against a different classification society.

Among the correspondence disclosed by the flag state was also internal correspondence and correspondence between the flag state and the vessel's classification society. This correspondence revealed that the classification society's dismissive email to the owners – which the owners had relied heavily on when arguing the case before the District Court – was labelled by the flag state as internal and non-conclusive.

THE COURT OF APPEAL JUDGMENT

The Court of Appeal established that the contractual duty of loyalty obliges an assured shipowner to make wholehearted efforts to obtain available waivers from regulations issued by public authorities, particularly where such waivers may be decisive for CTL.

Based on the evidence obtained by discovery, the Court of Appeal concluded that the owners had not wholeheartedly attempted to obtain a waiver from the flag state, but instead found that:

"The correspondence with the [flag state] clearly indicates that the owners wanted it to appear as if they had applied, whilst in reality, they wanted the application to be dismissed."

The Court of Appeal also considered that the owners had not only failed to include the insurers in the process to clarify whether there were grounds for a waiver from the flag state, but had seemingly also provided the insurers with information that was either wrong, or at least misleading and highly inaccurate. On this basis, the court found that the owners' approach "must be considered as an 'untenable procedure' pursuant to the Berglift judgment".

The Court of Appeal went on to consider the consistent application of MEPC.230(65) by the flag state and two "well renowned classification societies" in the two examples presented by the insurers where waivers had been granted by the flag state. On this basis, the court found it probable that the owners would have obtained a waiver if they had made wholehearted efforts.

CONTINGENCY FOR UNFORSEEN COSTS

The Court of Appeal held that whether to add a margin for contingency expenses is discretionary and in particular depends on the level of uncertainty about the repair cost estimate. As a benchmark, the court referred to the 10% margin applied by English courts in Brillante Virtuoso, Renos and Irene EM, two of which concerned engine room fires, which the Champion Express did not. The court went on to emphasise witness statements that such engine room fires typically make it more difficult to estimate repair costs.

On the specific facts of the case, the Court of Appeal found that the quotations obtained from the engine manufacturer for a new engine, as well as the quotation from a reputable yard, reduced uncertainty about the purchase and installation costs.

On this basis, the Court of Appeal found that neither the damage nor the repairs were sufficiently complicated to justify a contingency for unforeseen costs above 10% of the otherwise estimated costs.

CONCLUSION

Based on the Court of Appeal's findings, the repair costs were estimated to be lower than the required 80% of the insurable value, and thus the insurers were acquitted after more than two years of legal battle.

The first Norwegian judgment to provide guidance on the CTL assessment for more than 30 years.

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Insurers may deposit insurance payments under the Nordic Plan

In the first arbitration award known to have been rendered under the new procedural rules of the Nordic Offshore and Maritime Arbitration Association (NOMA), the tribunal clarified that the insurers' right under Norwegian insurance law to deposit insurance payments with liberating effect, also applies to co-insurance pursuant to the Nordic Marine Insurance Plan (Nordic Plan).

Wikborg Rein successfully defended insurers against a co-insured bareboat charterer's claim for direct payment.

The award assessed the applicability of the Norwegian Insurance Contracts Act of 1989 (NICA), and also examined the co-insureds' rights pursuant to:

- Barecon 2001, as amended
- Loss Payable Clauses, as agreed, and
- The Nordic Plan, Chapter 8

The arbitration award, which was issued on 19 December 2022, is the first award known to have been rendered under NOMA rules, since their implementation with clause 1-4B of the 2019 version of the Nordic Plan.

NICA SECTION 7-4

According to section 7-4 of the NICA, a co-insured will not be able to object to the insurer placing the insurance payment in a bank account where it will be held at the joint disposal of the policyholder and the co-insured. By making the deposit, the insurer is considered to have satisfied its payment obligations under the relevant policy regardless of the policyholder or the co-insured's interests, rights, or claims for compensation. The subsequent distribution of the deposited payment will no longer concern the insurer and it will be for the policyholder and co-insured to battle it out between themselves – through negotiations or legal proceedings.

> **By making the deposit, the insurer is considered to have satisfied its payment obligations under the relevant policy regardless of the policyholder or the co-insured's interests, rights, or claims for compensation.**

BACKGROUND

Two car ferries were chartered on similar Barecon 2001 bareboat charterparties in 2014. As customary, the charterers were obliged to maintain the vessels in accordance with Barecon 2001 clause 10 (line 169-182), while insured repairs should be carried out by the charterers subject to any provision in the Financial Instrument (i.e. owners' financing and security arrangements) and the approval of the owners and the insurers in accordance with clause 13 (line 373-386).

Importantly, clause 13 had otherwise been amended so that the owners – and not the charterers – would arrange for insurance, presumably to allow the charterers to take advantage of the owners' fleet discount. The owners had in turn duly insured the vessels with the charterers as a named co-insured, but had also included Loss Payable Clauses to the sole benefit of their mortgagees and themselves.

The Loss Payable Clauses specified that all insurance compensation for repairs above a certain level should be paid directly to the mortgagee, while lesser amounts were to be paid directly to the owners.

During the charter period, both vessels suffered damage which the charterers repaired, but without seeking prior clarification and approval of the repairs and of how they were to be compensated from owners and the insurers. The charterers, as named co-insured under the Nordic Plan clause 8-1, then turned to the insurers and claimed compensation for their disbursements, less the deductibles.

The insurers accepted coverage, quantum and the fact that the disbursements had been paid by the charterer. Being well aware of the Loss Payable Clauses and the owners' interest in first-hand payment due to an underlying redelivery dispute with the charterers, the insurers decided to deposit the full compensation amount for the joint disposal of the owners and charterers (which was also initially encouraged by the charterers). When informed of the payment deposit, the charterers changed their minds and rejected deposit on grounds of invalidity based on the Nordic Plan's regulation of co-insurance. They primarily argued that the Nordic Plan could not be supplemented by NICA section 7-4, and alternatively that the deposit failed to fulfil various preconditions that were allegedly in the provision.

THE AWARD

Curiously, and despite this not being directly relevant issue to be determined by the Tribunal (the issue being the effect of the deposit paid by the insurer), and also despite the charterparty being subject to English law and owners' not being involved in the arbitral proceedings, the Norwegian arbitration tribunal chose first to assess the charterers's rights and interests under the charterparty with the owners. Largely based on more contextual interpretations than on the strict wording

of the charterparties and the Loss Payable Clauses, the tribunal concluded – albeit obiter dictum – that the compensation could have been paid by the insurers directly to the co-insured charterers.

Regardless of this conclusion, the tribunal found that (1) Norwegian law should apply exclusively by way of the Nordic Plan clause 1-4B which includes the NICA section 7-4, and that (2) the provision applied unless otherwise agreed, cf. NICA section 7-5.

With reference to NICA's preparatory works, the tribunal highlighted that the reasoning for granting the insurers right to deposit the insurance payment stemmed from a desire to free the insurers from a duty to manage the money in a situation where the compensation had been duly calculated, but where it was unclear whether it could be rightfully claimed by the policyholder or a co-insured. On this basis, the tribunal did not hesitate to supplement the Nordic Plan with NICA section 7-4.

The tribunal went on to establish that there were no further or stricter conditions to meet with respect to deposits of insurance payments than what was contained in the provision itself (which did not name any conditions), or the preparatory works (which simply referred to the unclear relationship between the policyholder and the co-insured). Due to the owners' failure to explicitly accept payment of the insurance compensation to the charterers, the condition was met. The tribunal also found reason to believe that the insurers did not want to be involved in an arbitration between the owners and charterers, which the tribunal found to be sufficient reason for the insurers to be able to exercise their right to deposit the insurance payment.

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Nordic Plan vs. ITCH
– what are the main differences?

The Nordic Marine Insurance Plan of 2013, now in its 2023 version, is the preferred choice of insurance conditions for vessels and mobile offshore units in the Nordic market for all standard non-P&I insurances. The Nordic Plan is also gaining popularity with insurers and owners outside the Nordic countries. Previously those insurers and owners would often turn to the Institute Time Clauses Hulls of 1983 (ITCH) developed by the London market. This article considers some of the key differences between the two sets of conditions.

The Nordic Plan is based on the Norwegian Plan of 1996, which traces its roots back to the Norwegian Plan of 1871. It is an agreed document that has been negotiated between representatives of shipowners and insurers. The Nordic Plan is supported by an institutional framework and is subject to revision every third year. It is a balanced and continuously up to date document, with little need for additional clauses. With the Nordic Plan comes an extensive Commentary on the various provisions and clarifies many issues of interpretation. The Nordic Plan and its Commentary is available online.

The ITCH date back to the establishment of the Institute of London Underwriters in 1884. It is the standard insurance conditions for hull and machinery insurance in the London market.

As the ITCH were drafted 40 years ago and is only 11 pages long, a number of additional clauses are often used and many issues are left to the background law, which is English law. The Nordic Plan offers a comprehensive regulation of most issues, minimizing the need for additional clauses or background law supplements. The Nordic Plan is subject to either Norwegian law or to the laws of another Nordic country, depending on the location of the claims leader's main office, as we will consider further below.

Hull and machinery cover affects, and must be co-ordinated with, cover for loss of hire, total loss only insurances (hull interest and freight interest) and war risks cover. When underwriting insurance on ITCH terms, additional clauses must be used to include and coordinate between these insurances. The Nordic Plan, on the other hand, includes standard terms for such insurances, which avoids gaps in cover and unnecessary overlap.

PERILS INSURED

The Nordic Plan provides for an all risks cover against marine perils, see Cl. 2-8. This means that the scope of cover is defined by the various exceptions, which includes:

- Named war perils as set out in Cl. 2-9, interventions by state power where vessel is flagged or major ownership interests are located and requisition by any state power
- Perils covered by the Race II Clause (radioactive contamination, chemical weapons etc)
- Wear and tear etc (under the hull and machinery cover), see Cl. 12-3
- Damage to defective part, unless approved by class (under the hull and machinery cover), see Cl. 12-4

The burden of proving that the loss has been caused by an excluded peril is on the insurer, whilst the burden of proving that the loss is of a kind covered by the insurance is

on the assured, e.g. physical damage in the case of hull insurance, as well as the extent of the loss, see Cl. 2-12.

The ITCH provide named perils cover only. If loss or damage is caused to the subject-matter insured by one of the named perils in ITCH Cl. 6 and 7, then this is covered, unless the loss or damage falls within the exclusions for war, strikes, malicious acts and nuclear risks in ITCH Cl. 23 to 26. It is for the assured to prove that the loss or damage incurred is caused by one of the named perils.

Loss or damage caused by piracy is included amongst the named perils, cf. ITCH Cl. 6.1.5, however, this peril is often transferred to the war risks policy by way of an additional clause. Under the Nordic Plan piracy is part of the standard war risks cover.

Most hull policies incorporating ITCH also include the Additional Perils Clause, which covers accidents and negligence of any person etc. To some extent this clause therefore also provides cover for the cost of repairing a latent defect. Under both the Additional Perils Clause and ITCH Cl. 6.2, cover is however still subject to a due diligence proviso.

COMBINATION OF PERILS

Where the loss has been caused by a combination of perils, the Nordic Plan as a main rule applies the apportionment principle, meaning that if one or more of the perils are not covered by the insurance, the loss is apportioned over the individual perils according to their influence on the occurrence and extent of the loss. Consequently, the insurer is only liable for the part of the loss attributable to the covered perils, see Cl. 2-13. There are also other rules in the Plan, such as the dominant cause principle, which apply if the loss has partly been caused by a combination of war and marine perils, see Cl. 2-14.

Conversely, under ITCH and English law, where there are concurrent causes of loss, both regarded as proximate causes, the assured can recover if one of these causes of approximately equal efficiency is an insured peril and the other operative cause although outside the scope of the policy is not expressly excluded. However, if there are two causes of approximately equal efficiency, one covered and one excluded, the assured cannot recover (see B Atlantic [2018] UKSC 26).

ALTERATION OF RISK AND SAFETY REGULATIONS VS. WARRANTIES

The Nordic Plan does not apply the English law concept of warranties found in the ITCH, but has a nuanced set of remedies for alteration of risk and safety regulations.

The only alteration of risk for which the Nordic Plan prescribes automatic termination, is loss or suspension of class or change of ownership, see Nordic Plan Cl. 3-14 and 3-21. In other cases of alteration of risk, such as change of flag or management, the insurer is free from liability only insofar as the assured has intentionally caused or agreed to the alteration, and it must be assumed that the insurer would not have accepted the insurance, if it had known that the alteration would take place. Where the latter criteria is not fulfilled, and it must be assumed that the insurer would have accepted insurance but on other conditions, the insurer is liable to the extent that the loss is proved not to be attributable to the alteration of risk. However, in all instances of an alteration of risk, the insurer is entitled to cancel the insurance by giving 14 days' notice, see Nordic Plan Cl. 3-10.

ITCH Cl. 4 provides for automatic termination of the insurance contract in case of certain changes of risk, i.e. in the event of loss or change of class, change of ownership, flag, management, requisition or charter on a bareboat basis, subject to certain conditions set out in the provision.

Moreover, for insurance contracts governed by English law, s.3 of the Insurance Act 2015 ("IA") requires the assured to make a "*fair presentation of the risk*" which requires the assured to disclose to the insurer "*every material circumstance which the insured knows or ought to know*". A "*material circumstance*" is defined by s. 7 IA as one that "*would influence the judgement of a prudent insurer in determining whether to take the risk and, if so, on what terms*". The insurer's remedies for such a breach of duty are set out in Schedule 1, IA.

The Nordic Plan Chapter 3 Section 3 contains provisions on safety regulations. The duty of the assured is to comply with safety regulations as defined in Cl. 3-22, which includes rules for prevention of loss issued by for example the flag state and class. As a main rule the insurer can avoid liability for breach of safety regulation only where (a) the breach is due to the assured's negligence and (b) to the extent that the loss is a consequence of the breach, see Cl. 3-25. In certain situations the insurer may also cancel the insurance by giving 14 days' notice, see Cl. 3-27.

Under English law, the duties of care and safe operation of the vessel are set out in the Marine Insurance Act ("MIA") s. 39, which contains rules on the warranty of seaworthiness. In a time policy under ITCH, if a vessel is sent to sea in an unseaworthy state due to lack of due diligence by the assured, any loss attributable to the unseaworthiness will not be covered under insurance.

COLLISION LIABILITY

The Nordic Plan provides 4/4 liability for collisions with other ships (RDC – running down clause) and for striking of fixed and floating objects (FFO), subject to a separate sum insured, see Clause 13-1. All collision liability is placed with the hull and machinery insurer since collisions often result in mutual damage and it is practical that the hull and machinery insurer handles claims both from and against the other vessel.

The ITCH Cl. 8 provides 3/4 collision liability with vessels only (3/4 RDC and no FFO cover), subject to a separate sum insured.

Normally, the P&I insurance will cover the share of collision liability which is excluded from cover and any excess liability above the sum insured under the hull and machinery (and any hull interest) insurance.

The Nordic Plan Cl. 4-14 provides that the principle of cross-liability is to be applied in all cases, also where both vessels in a both-to-blame collision are able to limit their liability, whilst the ITCH Cl. 8.2.1 does not apply the cross-liability principle where the liability of one or both vessels becomes limited by law. The English solution is considered by the Commentary to the Nordic Plan to represent a disadvantage to the assured, as an insignificant increase in liability which would make limitation applicable, could result in a substantial reduction of the reimbursement of the shipowner's loss of time. The approach adopted by the Nordic Plan represents a modified cross-liability settlement in the limitation cases whereby the largest gross amount of liability in the insurance settlement is reduced by the same amount as the liability balance in the external settlement has been reduced as a result limitation.

CONSTRUCTIVE TOTAL LOSS (CTL)

Under the Nordic Plan, the assured may claim for a total loss when the repair cost exceeds 80% of the insured hull value or the market value of the vessel, whichever is the higher, see Cl. 11-3.

Under the ITCH, the vessel is a CTL where the cost of recovery and/or repair would exceed 100% the insured value, see Cl. 19 and MIA s. 60.

The apparent difference between the Nordic Plan and ITCH, is somewhat modified by salvage costs being excluded from the CTL repair cost calculation in the Nordic Plan, whilst these costs are included when calculating repair costs under ITCH, however, excluding SCOPIC, see the UK Supreme Court decision [2019] UKSC 29 Renos.

A further difference is that under the Nordic Plan, costs relating to the repair of all reported unrepaired damage in the last three years shall be included in the repair costs calculation, whereas under the ITCH the repair costs included in the calculation are limited to costs relating to a single accident or sequence of damages arising from the same accident.

Furthermore, the point in time for making the CTL assessment is different under the two sets of conditions. Under the Nordic Plan the assured must present a request for condemnation to the insurer without undue delay *after* the vessel has been salvaged and it has had an opportunity to survey the damage, see Cl. 11-5. The CTL assessment will then take place after the salvage operation of the vessel has been completed and once the vessel is in a position of being surveyed.

On the other hand, CTL under English conditions requires the assured to elect to abandon the vessel by presenting a *notice of abandonment*. Traditionally, shipowners were required to make such an election soon after the incident, but UK Courts have since accepted notice of abandonment made as late as five months after the incident, see *The Renos*. The situation must then be judged as at the time notice of abandonment is given, which, depending on when notice is given, could lead to the inclusion of future salvage costs in the calculation (if notice is given whilst the vessel is in the grip of a casualty and salvage is doubtful or unlikely).

SOME OTHER DIFFERENCES

There are also a number of other differences between the Nordic Plan and the ITCH, for instance:

- **Claims lead**: The Nordic Plan has a comprehensive set of rules for the claims leader's authority in Chapter 9, whereas there are no such regulations in the ITCH.
- **Trading areas**: The Nordic Plan Cl. 3-15 has a system of ordinary, conditional and excluded trading areas. The ITHC does not differentiate between conditional and excluded trading areas (often Institute Trading Warranties of 1976 are included in the policy).
- **Deductible:** Under the Nordic Plan there is no deductible for costs to avert or minimise loss covered under the insurance, see Cl. 12-18. Under the ITCH the standard deductible applies, see Cl. 12.
- **Recovery from third parties:** Under the Nordic Plan Cl. 5-13 recoveries from third parties are apportioned proportionally between the assured and insurers, whilst ITCH Cl. 12.3 prioritises the insurer before any recovery is apportioned on the assured.
- **Choice of repair yard**: Under the Nordic Plan the assured may choose the repair yard, but cover is normally limited to the cheapest yard and tender, see Cl. 12-12. Under ITCH Cl. 10.2 the insurer has the ultimate right to decide. This distinction may be practically relevant when estimating repair costs in respect of CTL or compensation for unrepaired damage.
- **Co-insurance of mortgagees**: The Nordic Plan Chapter 7 provides for automatic co-insurance of mortgagees, whilst under the ITCH and English law, the position of the mortgagees are protected through assignment clauses.
- **Interest**: Under the Nordic Plan the assured may claim interest as from one month after the date on which notice of the casualty was sent to the insurer, even if payment is not yet due, at the US Prime Rate on 1 January of the year the insurance contract came into effect (7.5% p.a. in 2023), see Cl. 5-4. The ITCH has no similar regulation.

LAW AND JURISDICTION

The Nordic Plan is subject to Norwegian law, unless the leading insurer has its head office in Sweden, Denmark or Finland, in which case the laws of that country applies, see Cl. 1-4 A and B. Any disputes shall, if there is a *Nordic* claims leader, be referred to the exclusive jurisdiction of the courts where the claims leader's head office is located. Any co-insurers may be sued there. If there is a non-Nordic claims leader, any disputes shall be referred to arbitration in Oslo under the procedure adopted by the Nordic Offshore and Maritime Arbitration Association.

Although the parties are free to agree on a different law and jurisdiction, we would advise against agreeing non-Nordic law since the Nordic Plan is drafted with Norwegian and Nordic law in mind. If the policy is governed by non-Nordic law and incorporates some of the Nordic Plan conditions, an alternative is to specify that the Nordic Plan shall be interpreted in accordance with Norwegian law.

Under the ITCH, English law applies, including the rules of the IA and MIA, unless otherwise agreed. While the majority of policies written on ITCH elect for the jurisdiction of the High Court in London (to logically follow English law) this choice is not mandated by the ITCH and is a matter for commercial policy.

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Charter payments and sanctions
– an update from the Commercial Court

In a summary judgment relating to a dispute arising out of the charterers' failure to make hire payments under bareboat charterparties, the Commercial Court provides guidance on the impact of sanctions on the parties' obligations to make payment.

The dispute arose out of two 2019 bareboat charterparties (Charters) made between (i) Gravelor Shipping Limited as charterers ("Charterers") and (ii) GTLK Asia M5 and GTLK Asia M6 as owners ("Owners") in respect of the bulk carriers MV "WL TOTMA" and MV "WL KIRILLOV" ("Vessels"). The Owners' parent company, JSC State Transportation Leasing Company ("Owners' Parent"), was owned and/or controlled by the Russian Ministry of Transportation.

The Charters in question were financial leases for financing the acquisition of the Vessels and accordingly, provided that the Charterers should take title to the Vessel(s) upon expiry of the relevant Charters. Provided there was no default on the part of the Charterers, title transfer could be by way of (i) an early purchase option in favour of the Charterers, or (ii) a purchase obligation on the Charterers at the end of the charter period. However, the Charters also provided under clause 18.3 that if there was a Charterers' default, the Charterers would pay, on demand to the Owners, a termination amount together with unpaid hire and other amounts due, and that upon such payment the Owners would transfer title to the Vessels to the Charterers. The Charters set out the mechanisms for calculating the purchase price (or termination amount as applicable) depending on the circumstances in which the relevant Charter came to an end.

The Charters contained the usual default provision for the Charterers' failure to pay hire and certain provisions dealing with sanctions and sanctions payment restrictions.

IMPOSITION OF SANCTIONS

In early March 2022, the Charterers exercised their purchase options under the Charters. However, as a result of the Owners' Parent and its associates having been added to the EU sanctions regime in April 2022 following Russia's invasion of Ukraine in February 2022, the Charterers were unable to pay hire and other amounts due and owing to the Owners.

The Owners subsequently terminated the Charters citing the Charterers' default for non-payment of hire, and nominated a Moscow bank account for payment of the relevant termination amounts by the Charterers. The Charterers were however prevented from paying the relevant termination sums to the nominated account in Moscow due to the impact of the applicable EU sanctions.

The Owners' Parent and its subsidiaries were further designated in August 2022 by the US State Department as "blocked" under Executive Order 14024 with the effect that payments in the contractual currency i.e. US dollars became impossible.

As a result of the resulting impasse, the Charterers issued proceedings and applied for summary judgement on, inter alia, a claim for specific performance of the purchase options. The Charterers' asserted the provisions of clause 8.10 of the Charters which provided that where a payment under the Charters is "*incapable of being processed by the relevant banking institution and has not been received by the Owner on the due date by virtue of the Owner becoming a Sanctions Target, the Owner and the Charterer shall cooperate and promptly take all necessary steps in order for the payment to be resumed. Any delay in payments [resulting from such circumstances] shall not be deemed an Event of Default*".

THE COMMERCIAL COURT'S DECISION

The Commercial Court considered, inter alia, the following key issues:

Key issues

- What would constitute payment of the termination amounts to the Owners in light of the applicable sanctions preventing payment to the Owners' nominated account?
- If the Owners had an obligation to transfer title to the Vessels from the above, would the Commercial Court order specific performance?

Payment

Ordinarily the Charterers would only be entitled to acquire title to the Vessels under clause 18.3 upon payment of the required termination amounts in USD into the Moscow bank account nominated by the Owners. In light of the sanctions imposed on the Owners however, the Charterers could not do so.

The Court considered various arguments stemming from clause 8.10 and determined that:

- Relying on *Mur Shipping BV v. RTI Ltd* [2022] EWCA Civ 1406, the Owners were required to nominate an alternative bank account (other than the Moscow account nominated by them) and to accept payment in Euros instead of USD (despite USD being the currency for payment stipulated under the terms of the Charters).
- Justice Foxton stated that "*While the facts are different, MUR Shipping does, however, demonstrate that clauses in contracts which are intended to address extraneous circumstances which render performance in the manner originally anticipated impossible,*

while keeping the relevant obligations alive as a matter of substance, or in "a ... practical sense", may well involve one party accepting performance otherwise than "in strict accordance with its terms"."

- The words "all necessary steps" in clause 8.10, as a matter of construction, extend to the Owners being required to nominate an alternative bank account where the required payment could be made, even if the Owners would be restricted in their ability to access those funds following such payment.
- The fact that the transfer of funds was made into a bank account from which the Owners would have great difficulty withdrawing them did not of itself mean that payment had not taken place for the purposes of the Charters. The Owners' inability to access the funds would arise from their being designated as a sanctions target, rather than anything to do with the contractual payment process itself.

Specific performance

The Court considered that damages would not be an adequate remedy in this case, particularly taking into account the incapability of the Owners to make good on any such award in the light of sanctions, and ordered specific performance of the Owners' obligation to transfer title to the Vessels. This order was subject to the Charterers being able to satisfy their obligation under clause 19.3 to provide evidence of there being no material risk of any clawback of payments made by them.

COMMENT

The Commercial Court's decision (and the decision in *Mur Shipping*) clearly indicates that, against the background of international sanctions, English courts are inclined to prioritise contractual performance where it is possible to do so without breaching relevant sanctions, even if it is in a manner which is not strictly in accordance with the terms of the contract.

In the ever-evolving domain of international sanctions it is therefore increasingly important for parties to carefully assess the sanctions provisions in their contracts, the potential impact of international sanctions on their obligations and to the extent possible address such risks under comprehensive sanctions clauses.

Should the obligations (particularly payment obligations) of a party to a contract become subject to any applicable sanctions, it is vital to carefully consider the steps one would take in the light of the international sanctions regime, the contractual terms and the possibility of performance.

In the ever-evolving domain of international sanctions it is therefore increasingly important for parties to carefully assess the sanctions provisions in their contracts.

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Transportation of live fish
– contracting out of liability for cargo damage

To meet the demand for the transportation and handling of live fish, fish farmers can either charter well-boats or enter into general contracts for carriage of goods. The type of contract used will determine the shipowners' possibility to limit liability for loss or damage to live fish during transportation.

Although fish farmers' demand for well-boats for transportation of live fish is mainly met by traditional contracts of carriage (Norwegian: "stykkgodsbefraktning") concluded in the spot market, transportation of fish may also be conducted under charterparties, often in the form of time charters. As voyage chartering of well-boats is more uncommon, we will for the purpose of this article focus on time charters.

When transporting live fish, there is an inherent risk of loss or damage to the fish, which may result in significant economic loss. Traditionally, shipowners have had limited possibilities to insure against liability for such loss, making it of the utmost importance for shipowners to be able to adequately limit liability in their contracts. When seeking to limit liability, it is crucial to determine whether the contract used is in fact a time charter or whether it may be interpreted as a contract for carriage of goods.

LIABILITY PROVISIONS IN THE NORWEGIAN MARITIME CODE

A shipowner's liability for loss or damage to live animals, including fish, during transportation is governed by section 277 of the Norwegian Maritime Code ("NMC"). Pursuant to section 277, a shipowner is not liable for loss or damage to live fish caused by the "particular risks" inherent to carriage of such cargo. As such, if the shipowner can establish that instructions given by the fish farmer related to the transportation have been complied with, and that the loss or damage may be caused by such particular risks, the shipowner will not be liable, unless the fish farmer proves that the loss was partly or wholly caused by negligence on the part of the shipowner or someone for whom he is responsible, including the crew.

For contracts for carriage of goods, NMC section 277 applies invariably and the parties cannot contract their way around the regulation. However, section 277 does

When seeking to limit liability, it is crucial to determine whether the contract used is in fact a time charter or whether it may be interpreted as a contract for carriage of goods.

Photo: Akvafuture

Photo: Akvafuture

not apply directly to time charters, see NMC section 253. Thus, the parties are free to agree on deviating principles for division of risks and liabilities under time charters. The provisions of section 277 will, however, apply as relevant background law if the parties to a time charter have not specifically agreed on an alternative regulation of risks and liabilities. Moreover, section 277 applies directly and invariably to a shipowner's liability towards a third-party holder of a bill of lading issued under a time charter, provided that the bill of lading determines the legal relationship between the shipowner and the holder, see NMC section 253. The parties involved in chartering of well-boats are also advised to take note that NMC section 277 applies invariably for voyage chartering in domestic trade in Norway, see NMC Section 322 with reference to section 347.

Consequently, should the parties wish to deviate from the provisions on liability in NMC section 277, they may do so by way of a time charter. If they choose this approach, it is important that they include in the contract clear and specific provisions for allocation of risks and liabilities.

Where NMC section 277 applies, it should also be noted that NMC section 280 provides basis for the carrier to limit its liability for loss or damage to cargo. However, depending on the situation at hand, the limitation of liability in NMC section 280, may exceed the value of the cargo carried, and thus not provide an actual limitation to the carrier's liability. Whether to deviate from the provisions on liability in NMC section 277 will thus often be a question of whether the liability shall be limited beyond the limits of NMC section 280.

GUIDING PRINCIPLES FOR DETERMINING THE TYPE OF CONTRACT

Occasionally, disputes may arise regarding the type of contract agreed upon, making it necessary to determine if the contract entered into is in fact a time charter or a contract for carriage of goods. Although a contract is intended to be a time charter, there is still a risk that the courts will interpret it as a contract for carriage of goods, which in turn will render any deviations from section 277 void.

The NMC does not specifically define or clearly distinguish between time charters on the one hand, and contracts for carriage of goods on the other. Although the definitions in NMC section 321 gives some guidance, the classification of the contract will generally depend on an interpretation of the specific contract.

Some questions which may provide guidance when trying to determine the classification of the contract, are:

- Has the contract been concluded on the basis of a standard charterparty form, or is it called a charterparty?
- Is the shipowner's obligation under the contract to provide the fish farmer with a vessel (in whole or in part) for a certain period, or is the shipowner's obligation merely to provide transportation of a certain amount of goods, in this case fish, from one destination to another? In the first case, the contract will normally be classified as a time charter, whilst in the latter case, the obligation of the shipowner would generally suggest that the contract in question is a contract for carriage of goods.
- Is the price calculated on the basis of a daily hire or on the basis of the quantum of goods transported? While NMC section 321 defines a time charter as a contract where payment is based on hire per day (or pro rata thereof), contracts for carriage of goods are often compensated based on the quantum of goods transported.
- Does the contract oblige the fish farmer to pay variable costs such as bunkers and port expenses? Under a time charter the fixed costs related to maintenance and crew are normally covered by the shipowner, whilst variable costs such as bunkers and port expenses are normally covered by the charterer. Under a contract for carriage of goods on the other hand, all costs are generally covered by the shipowner and included in the freight. Hence, if the fish farmer under the contract is obliged to cover the variable costs, this may suggest that the contract should be interpreted as a time charterparty.

The answers to the above questions may provide some guidance when trying to establish how a contract should be classified. However, the question of classification will inevitably depend on a concrete assessment of the specific facts at hand. Thus, there is no decisive and clear cut line to be drawn between a time charter on one hand and a contract for carriage of goods on the other hand. In order to minimise the risk of undesirable disputes, the parties are advised to express clearly in the contract that it is the parties' intention to enter a charter party, and to keep in mind the distinctions between the two types of contracts set out above. By considering the shipowner's obligations, pricing mechanism and responsibility for variable costs, among other things, the parties may ensure that the terms of the contract in fact amounts to those of a time charter.

The parties involved in chartering of well-boats are also advised to take note that NMC section 277 applies invariably for voyage chartering in domestic trade in Norway, see NMC Section 322 with reference to section 347.

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Using well-boats in Norwegian aquaculture

– a complicated legislative framework

In addition to complying with private contracts with fish farmers and general shipping regulations, well boat operators have to comply with certain aquacultural rules. For anyone operating in the well-boat market, basic knowledge of this regulatory framework is crucial.

Well-boat operators in Norway are subject to a myriad of different aquacultural rules and regulations. In addition to some of the general aquacultural rules, applicable both to fish farmers and well-boat operators alike, there are also *specific aquacultural rules* applying to well-boat operators alone. Recently added to the mix is the new Animal Health Law Regulation from the EU. The regulatory framework applicable to well-boat operators is therefore both complex and fragmented, and constantly changing and developing.

NECESSARY LICENSES

For starters, well-boats operating in Norway need to be approved by the Norwegian Food Safety Authority ("**NFSA**") if wishing to transport live fish. To be approved, the well-boats need to fulfil different requirements with respect to fish welfare and health, such as means to prevent spreading infectious materials. The well-boat operator must also submit an internal control system that documents the fish welfare and control measures against dissemination of diseases. The NFSA approval can be issued for a maximum of 5 years at a time. If any changes are made to the vessel which may affect the welfare of transported fish, a new approval is required. Moreover, if the well-boat has an UV-system and an ozone facility, it also has to be approved by the Norwegian Veterinary Institute and the Norwegian Medicines Agency, respectively.

Due to the new EU Animal Health Law and its subsequent regulations, the NFSA will also be introducing a new license which all well-boats must have (not only those well-boats transporting live fish). This new licence relates especially to biosecurity measures, and it will require that the operator shall implement a written biosecurity plan in relation to facilities and equipment of such vessels.

TRENDS CONCERNING OPERATIONAL REWUIREMENTS FOR WELL-BOATS

Unless the fish has any clinical disease symptoms, transportation of live fish is generally allowed. Moreover, even fish with clinical disease symptoms may be transported to the harvesting facility. However, the scope of this general starting point is becoming increasingly limited by new regulations regarding fish welfare, fish health and the environment.

The new EU Animal Health Law and its subsequent regulations which entered into force last year, forms part of this tendency. These EU regulations impose strict obligations concerning fish health on well-boat operators. Amongst other things any operator, including well-boat operators, are obliged to report immediately if they suspect fish to be infected by certain diseases.

STRICTER RULES FOR ALL OPERATORS IN THE AQUACULTURE INDUSTRY

Another recent regulatory development is the expanded scope of liability for well-boat operators and other service providers in the Norwegian regulation on the operation of aquaculture facilities. For example, all service providers now have a general duty of care concerning fish welfare and to prevent fish escapes. Moreover, these new Norwegian rules impose stricter minimum requirements with respect to professional competence on fish on the well-boat operators.

The authorities' stricter practices towards fish farmers in general, also have implications for well-boat operators. For instance, several fish farmers use one site (at sea) for production of small fish and then move the fish to another site for growth purposes (until the fish reach the final size). However, it is becoming more difficult for fish farmers to get approval to move fish because of fear that it may spread diseases. This has an effect on the well-boat industry as this type of production requires the use of well-boats.

OPERATIONAL REQUIREMENTS FOR WELL-BOATS TO PREVENT THE SPREAD OF DISEASES

In the Norwegian well-boat industry, there has traditionally been a special emphasis on preventing the spread of Pancreas Disease. This disease is classified as an endemic disease in the southern part of Norway, but still combatted in Northern Norway. This means that outbreak of Pancreas Disease in the south is accepted, but in Northern Norway fish farmers are normally required to harvest the infected fish immediately. In the Norwegian Pancreas Disease regulation, rules on when infected fish can be transported into harvesting pens are set out.

Even if the well-boat operator does not suspect any diseases, all well-boats operating in Norwegian waters have to disinfect all water loaded in or out of the vessel's wells.

> **Unless the fish has any clinical disease symptoms, transportation of live fish is generally allowed, however, the scope of this general starting point is becoming increasingly limited by new regulations regarding fish welfare, fish health and the environment.**

This is also in line with the new obligations set out in the EU Animal Health Law and subsequent regulations providing that a well-boat cannot dispose of infected water closer than 10 km to an aquaculture facility.

Also according to the Norwegian regulation on the operation of aquaculture facilities, to prevent any medicinal residues causing harm or impacting on wild shrimps or shellfish, water containing medication used for treatment of sea lice ("treatment water"), must be dropped at least 500 meters from any fishing areas for shrimps or spawning grounds. If the release of treatment water cannot be done at site, the well-boat must release the treatment water during voyage. The regulation also provides that disposal of treatment water has to be reported to the Directorate of Fisheries.

It is expected that one of the consequences of the new EU regulations, is that well-boat operators will be required to classify each vessel's risk of dissemination according to different biosecurity measures. That way, when a fish farmer requires well-boat services, they will be able to choose an operator based on the well-boat's risk profile.

CONCLUSION

There is no doubt that the well-boat businesses and their operators are already subject to a complex set of rules. Still, traditionally, well-boat operators have been subject to less regulation than fish farmers. With the new requirements imposed by the EU Animal Health Law Regulation, it remains to be seen whether this may change.

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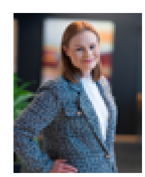

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Emission allowances trading

The European carbon market has grown substantially since its start in 2005. With the extension of the EU ETS to include the shipping sector, and an annual reduction of more than 4% of the overall number of emission allowances in the market, the price is expected to rise. This means an increased need and interest amongst stakeholders to understand how trading with emission allowances is regulated.

The EU Emissions Trading Scheme (EU ETS) is the world's biggest greenhouse gas trading programme and is a key tool of the EU policy against climate change. It is a legislative scheme by which the EU caps emissions of greenhouse gases from certain industries by requiring emitters to surrender emission allowances to offset the gases they emit. One allowance permits the emission of one tonne of carbon dioxide equivalent (CO_2), and companies must surrender enough allowances to cover their emissions for the previous year. Failure to comply can result in fines.

Figure 1: The development in the emission allowance price since 1 January 2008 Source: Refinitive

High emitters in sectors vulnerable to carbon leakage are currently granted a certain amount of free emission allowances, however, free allowances will gradually be phased out according to the new Carbon Border Adjustment Mechanism. Mostly, allowances must be purchased in auctions arranged by the European Energy Exchange (the EEX). The EEX is a regulated exchange that facilitates trading in emission allowances, carbon offsets, and renewable energy certificates. The EEX operates the spot and futures markets for trading carbon allowances under the EU ETS.

The spot market for carbon allowances on the EEX is called the "EUA spot market" (EUA stands for European Union Allowance). On this market, companies can trade allowances for the current compliance period, which runs from 1 January to 31 December each year.

The futures market on the EEX allows companies to trade carbon allowances for future compliance periods. The contracts on the futures market are standardised and have set delivery dates. The futures contracts enable companies to hedge against future price fluctuations in the carbon market and to plan for future compliance.

FINANCIAL MARKET RULES

In order to foster confidence and ensure

a safe and efficient trading environment, the European carbon market is subject to a robust regulatory regime designed along the lines of the regime applicable to the European financial markets. Since 2018, emission allowances have also been defined as financial instruments in the revised Directive on Markets in Financial Instruments (MiFID II). This means that investment services and activities related to emission allowances are subject to licensing under MiFID II. Emission allowances are also captured by the Market Abuse Regulation (MAR).

Previously, only the derivative contracts of emission allowances were considered financial instruments, thus falling within the scope of financial market rules. The current classification of all emission allowances as financial instruments, constitutes an important element in safeguarding the carbon market from market abuse and other types of market misconduct.

The regulatory framework that applies to the carbon market therefore consists of several legislative instruments and uses different tools to ensure that securities supervisors are in a position to analyse and monitor the carbon market. This includes e.g. transaction reports (including MiFIR reporting requirements and weekly and daily MiFID II positioning reporting obligations) transparency data, mechanisms to ensure orderly trading, and to prevent market abuse.

High emitters in sectors vulnerable to carbon leakage are currently granted a certain amount of free emission allowances, however, free allowances will gradually be phased out according to the new Carbon Border Adjustment Mechanism.

In contrast to energy markets, spot markets of emission allowances do not fall under the realm of the Regulation on Wholesale Energy Market Integrity and Transparency (REMIT). Furthermore, despite being subject to weekly and daily position reporting, derivatives on emission allowances do not fall under the definition of commodity derivatives under MiFID II and are therefore not subject to position limits and position management controls.

The EU Commission has summarised the impact of the application of financial market rules to the carbon market, to mean that:

- High integrity standards apply to all market participants, who are prohibited from engaging in manipulation through practices such as spreading false information or rumours;
- Companies with large installations regulated by the EU ETS are subject to stricter rules on inside information to prevent unfair advantages among market participants;
- Better transparency and simpler access to information (e.g. how much is traded and at what price on carbon exchanges) is available to all market participants;
- Anti-money laundering safeguards (e.g. know-your-customer checks) are extended to all segments of the carbon market.

THE AUCTION PROCESS

The primary market for emission allowances are auctions where most market participants are able to participate (e.g. credit institutions, investment firms, commodity trading firms without licensing requirements). The main traders in the European carbon market have so far been energy companies and industrial companies that have obligations under the EU ETS. With the inclusion of shipping in the EU ETS, shipping companies (as defined in the regulation) will make a new group of traders. Financial intermediaries such as banks also trade, usually on behalf of smaller companies and emitters.

25 of the EU Member States, as well as the EEA EFTA States, issue their emission allowances through an auctioning process hosted by the German trading venue EEX. The two remaining EU Member States (Germany and Poland) issue emission allowances through a similar auctioning process also on EEX.

Entities wishing to participate in auctions have to comply with certain regulatory eligibility criteria with the aim of guaranteeing the integrity of the auction process and ensuring a fair and open access for all action participants, as set out in the Auctioning Regulation. In addition to meeting the criteria for being eligible to bid, entities participating in the auctions must open an account in the Union Registry, appoint at least one bidder's representative and comply with the admission requirements of the auction platform.

Once an entity has been admitted by EEX, it can participate in the auctions and submit bids. The auctions take place on a daily basis according to a fixed calendar. The success of a bid will depend on the price and the amount of allowances auctioned. Article 7 of the Auctioning Regulation details how the auction clearing price is to be determined.

LICENCING REQUIREMENTS

Entities providing investment services specialising in emission allowances would, as a rule, be required to hold a MiFID licence and comply with all MiFID organisational and operational requirements (including know-your customer checks, organisational requirements, transaction reporting, record keeping and investor protection rules).

Entities with compliance obligations under EU ETS (compliance buyers) that are only buying and/or selling emission allowances on their own account for hedging purposes are as a main rule exempted from authorisation and prudential duties under the MiFID regulation. The licensing exemption does not apply to trading on own account which also implies carrying out trading for third party clients, market making activities, high frequency trading or non-ancillary investment services. Specific advice should be sought prior to engaging in emissions allowance trading.

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The current classification of all emission allowances as financial instruments, constitutes an important element in safeguarding the carbon market from market abuse and other types of market misconduct.

Launch of offshore wind tenders

for Sørlige Nordsjø II and Utsira Nord

On 29 March 2023, the Norwegian Government announced the opening of Norway's first offshore wind tenders in the areas Sørlige Nordsjø II and Utsira Nord.

The two areas will have a total capacity of 3000 MW, enough to power 460 000 households on mainland Norway. The announcement marks a big step towards meeting the Government's goal of awarding rights to develop 30 GW of offshore wind capacity by 2040.

KEY TAKE-AWAYS

Both Sørlige Nordsjø II and Utsira Nord will be awarded by the end of 2023.

Exclusivity to the 1500 MW Sørlige Nordsjø II area will be awarded to one consortium only, based on a pre-qualification stage with deadline 4 August 2023, followed by an English style open-bid auction expected in December 2023. A maximum of 8 bidders will be pre-qualified. The winner will be eligible for capped public funding through a contract for difference ("**CfD**"). The bidders will be required to provide an on-demand guarantee as security for their potential obligation to pay a penalty of NOK 400 million if the bidder fails to sign the CfD after being awarded exclusivity. A new guarantee will have to be provided under the CfD, and the CfD will contain an obligation to realise the project with sanctioned milestones.

For the Utsira Nord tender, on the other hand, there will be no pre-qualification round. The Utsira Nord area is divided into three project areas of 500 MW each, which will be awarded through a competition based on qualitative criteria, with application deadline 1 September 2023. Due to an average water depth of 265 metres, floating wind turbines are most suited in the area and the Norwegian Ministry of Petroleum and Energy (the "**Ministry**") has set qualitative criteria to develop expertise and technology within this field. Government support will be awarded to two of the three elected winners of Utsira Nord, based on a competition at a later stage. It is expected that the Government will award exclusivity to the three Utsira Nord areas in December 2023. The limit of 500 MW may be increased to 750 MW, subject to conclusions in a study undertaken by the Norwegian Directorate for Energy and Water Resources (NVE).

For both areas, it is specified in the tender rules that there will be limited possibilities to change the projects negatively after award of exclusivity, hence, the bidders will be measured on the promises made in their application documents.

The projects will be connected to the transmission grid on the Norwegian mainland, and the elected bidders will be responsible for constructing the radial connection. The Government expressed that hybrid grid connections may be relevant in the next licensing round for Sørlige Nordsjø II.

The Ministry published a proposed tender format and support scheme for the two areas in December 2022. The Ministry received over 250 contributions from relevant stakeholders, and has now finalised the tender rules for phase 1 of Norway's first offshore wind projects. However, detailed regulations clarifying the specific auction rules for Sørlige Nordsjø II, the detailed terms of the CfDs, as well as the rules for the Government support scheme competition for Utsira Nord, are yet to be announced at the date of this article. Prospective bidders will therefore have to prepare their applications without full clarity of the regulations and criteria for the award process for now.

Government support will be awarded to two of the three elected winners of Utsira Nord.

SØRLIGE NORDSJØ II – PRE-QUALIFICATION CRITERIA

The application deadline on 4 August 2023 provides the entrants with only four months to prepare their application. The bidders will have to work efficiently as their application needs to fulfil quite stringent criteria, e.g. to demonstrate a well matured project, a robust and realistic financing plan and several other criteria concerning the bidders' and the projects' characteristics and strengths.

To pre-qualify for the Sørlige Nordsjø II auction, prospective bidders must show that they satisfy each of the pre-qualification criteria, and will be given points based on how successfully they meet each criteria compared to other bidders:

- Capacity to implement the proposed project weighted at 60%:
- Sustainability weighted at 20%
- Positive local spill-over effects weighted at 20%

As part of the capacity-criteria, the bidders must demonstrate, inter alia, the following:

1. financial strength, including an average annual turnover of at least NOK 40 billion over the past three years,
2. capability of financing a minimum of 20% of the project through equity,
3. integrity,
4. experience in developing, building and commissioning large-scale offshore wind farms of at least 300 MW and HVDC installations or other complex projects,
5. compliance with HSE requirements, and
6. a realistic project concept and plan.

The sustainability criteria include requirements to present plans to (i) minimise the climate footprint of the project, (ii) ensure stakeholder engagement and cooperation with the fishing and shipping industries, (iii) ensure proper waste handling and project life cycle, and (iv) promote environmental considerations.

It is also required that the project shall contribute positively to local spill over effects, including developing expertise in the offshore wind supplier industry, providing offshore wind experience for small and medium sized businesses, and advancing the supplier industry's competence in the energy transition.

SØRLIGE NORDSJØ II – AUCTION

The competition will be held through an open-bid auction, expected in December 2023, where the bidders will bid for their CfD contract price. The Ministry has announced it will propose a maximum contract price of 0.66 NOK/kWh. Detailed rules for the auction have not yet been published, but are expected to be clarified in August 2023. The Ministry initially proposed an Anglo-Dutch auction model, but it has now moved away from a finalisation with sealed-bids, and opted for an award based on fully open-bids.

A detailed description of the CfD terms is yet to be published, but is expected in the second quarter of 2023. The Ministry has, in the meantime, confirmed that a 15 year two-sided CfD based on monthly average power prices in the relevant bidding area, is the chosen support scheme awarded to the winner of phase one of Sørlige Nordsjø II. There will be a cap at NOK 15 billion for payments from one party to another for the duration of the CfD. In addition, the Ministry has informed that the CfD will contain mechanisms ensuring that the producer will not receive support for production in hours where the hourly spot price is less than NOK 0.05/kWh. The support scheme must be approved by both the Norwegian Parliament and EFTA Surveillance Authority (**ESA**).

UTSIRA NORD – COMPETITION

The qualitative criteria which must be met in the Utsira Nord qualitative competition are quite similar to the Sørlige Nordsjø II pre-qualification criteria, save that for Utsira Nord the bidders must also provide:

- an estimate of the cost to develop 500 MW floating wind capacity operational in 2030 (weighted 30%)
- a plan to promote innovation and technological developments for future floating offshore wind projects, capable of (i) reducing costs and (ii) distribution and scale-up (weighted 20%)

Capacity to implement the project is weighted at 30%, whilst sustainability and positive local spill-over effects will be weighted 10% each.

The Ministry decided on its initially preferred model, where the highest ranking bidder receives its first preference, the second ranked bidder has its second choice, and the remaining area will go to the company coming in third. This was also the model generally preferred by the industry.

> **The bidders will have to work efficiently as their application needs to fulfil quite stringent criteria.**

UTSIRA NORD – GOVERNMENT SUPPORT SCHEME

In the Ministry's proposal for tender rules in December 2022, it was indicated that not all projects would receive financial support for Utsira Nord, which became heavily criticized by the industry. Despite protests, the announcement clarified that government support will be awarded to only two of the three elected winners. The third project will not receive financial support, but will be given a prolonged exclusivity to mature the project, and may participate in any future competitions for government support and/or seek alternative funding.

In its original proposal, the Ministry considered both an investment support scheme (capex support) and support through a CfD scheme. The Ministry has now decided on a 15 year two-sided CfD as its preferred support scheme. The state-aid will be capped, and the Ministry will set a maximum contract price. However, more detailed information about the state aid scheme is yet to be announced. The support scheme is also subject to approval by the Norwegian Parliament and ESA.

The wind farm will be visible from the municipality of Utsira, and parts will be built within the municipality's borders. The Ministry has communicated that Utsira's interests will be taken into consideration, and it is expected that Utsira municipality will profit from the projects, although the details of this are not yet clarified.

Further information about the announcement can be found here for Sørlige Nordsjø II and here for Utsira Nord.

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Life after subsidies in the offshore wind market in China

Offshore wind power is a promising renewable energy source that can help the world achieve its carbon neutrality goals and China is one of the world's largest offshore wind markets. However, the Chinese offshore wind sector is changing, especially after the government subsidies for offshore wind projects were phased out at the end of 2021.

China is one of the pioneers and leaders of offshore wind in the world.

Since the first offshore wind farm was commissioned in Shanghai in 2010, China has witnessed a rapid growth of offshore wind capacity, reaching a total of 25.6 GW by the end of 2022, accounting for approximately 44% of the global total of 57.6 GW.

THE END OF THE FEED-IN TARIFF SUBSIDIES

The end of 2021 marked a major policy transition for the Chinese offshore wind industry, with the central government terminating the feed-in tariff scheme for offshore wind. This shift in policy was aimed at enhancing the efficiency and competitiveness of offshore wind projects, and at promoting their integration into the power system.

The subsidy phase-out has had significant implications for the offshore wind market in China, both in terms of supply and demand. On the supply side, it has affected the investment decisions, project economics, technology choices, and risk management of offshore wind developers. On the demand side, the phase-out has influenced the power grid planning, dispatching, pricing, and trading of offshore wind power. New projects now have to compete in auctions or achieve grid parity. The market experienced a notable slowdown in installed offshore wind capacity from 15.7 GW in 2021 to 9.4 GW in 2022.

MARKET-ORIENTATION AND INTERNATIONAL AMBITIONS

That being said, as subsidies were phased out, offshore wind developers in China have progressively embraced a more market-oriented paradigm, as they are now seeking to lower costs and enhance efficiency by applying new technologies and operational practices. This includes a willingness to experiment with new turbine designs, using advanced materials, and adopting new operation and maintenance strategies.

Moreover, the subsidy phase-out has also created new opportunities for international cooperation between Chinese and foreign entities in the offshore wind sector. We already see major Chinese companies joining forces with foreign counterparties to introduce new technologies, as well as China working with other countries to create offshore wind projects both at home and abroad.

One such example is the strategic cooperation agreement signed between China Energy Investment Corporation and Siemens Group at the 4th China International Import Expo in November 2021. Under this agreement both parties aimed to strengthen cooperation in all aspects within the clean energy field such as gas turbines, hydrogen energy and offshore wind power etc. On the same date, China Energy Investment Corporation and Siemens Gamesa also signed a memorandum of understanding where the parties agreed to expand and strengthen strategic cooperation in large-scale offshore wind power and low-carbon technology fields. This type of cooperation may also be one of the ways in which international companies can meet the competition from Chinese companies, both within the domestic market and increasingly also beyond Chinese borders.

The end of 2021 marked a major policy transition for the Chinese offshore wind industry.

An example of a Chinese company setting its sights on foreign markets is Mingyang Smart Energy Corporation's expansion in Europe. In December 2021, the Chinese wind turbine manufacturer signed a memorandum of understanding with the UK Department for International Trade (DIT) to cooperate on realising Mingyang's investment plan for the UK offshore wind industry. The agreement focused on Mingyang's investment in building a blade factory, a service center and a turbine assembly plant in the UK. The parties also agreed to cooperate on exploring options for market access in the UK, including wind turbine testing, offshore wind demonstration projects etc. Mingyang has also signed a deal with the Italian developer Renexia to supply wind turbines for the Taranto offshore wind park earlier in 2021, and in 2022, Mingyang was selected to supply the TwinHub project, UK's first offshore wind project in the Celtic Sea.

More recently, China Energy Engineering Group Guizhou Engineering Co., Ltd. held a meeting with Japan Renewable Energy Corporation to discuss cooperation on expanding offshore wind power projects in Japan. Japan Renewable Energy Corporation fully recognised the overall engineering strength of the company and believed that cooperation would be coming soon.

OPPORTUNITIES AND CHALLENGES

Increased international cooperation within the offshore wind sector may present opportunities for innovation and increased profitability, both for the main players and for actors in other parts of the supply chain. Such projects often involve structures which are more complicated than purely domestic ones. This may lead to challenges, both for Chinese companies which may not be as familiar with international cooperation as some of their international counterparts, but also for foreign companies seeking business opportunities in the Chinese market or together with Chinese companies. These challenges may include contractual complexity, intellectual property protection, insurance, interface between applicable law and compliance with local environmental regulations, choice of law and the jurisdiction of dispute resolution etc. In particular, for Chinese companies undertaking overseas project, local content requirements and compliance with unfamiliar transparency requirements may pose challenges; for international companies in China adapting operations to local regulations and securing project development permits are frequent topics of concern. The parties are therefore advised to seek legal advice from a law firm with experience on international offshore wind projects at an early stage to avoid many of the most common pitfalls in such cross-border projects.

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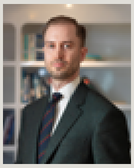

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The most important updates in

GREEN SHIPPING

– June 2023

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 came into effect on 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 our previous SO Update[1].

1 https://bit.ly/3lBWecp

EU Emissions Trading Scheme (EU ETS)

On 18 December 2022, the EU Commission, the EU Parliament and the EU Council reached an agreement to expand the scope of the EU ETS to cover maritime emissions from 1 January 2024. The 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 have to be submitted for 50% of emissions on international voyages to or from an EU port (and 100% for intra-EU voyages). Offshore vessels above 5000 GT will be included in the scheme from 1 January 2027, and the EU Commission shall by 31 December 2026 produce a report considering whether to include vessels between 400 and 5000 GT. The proposal was approved by the EU Parliament, and adopted by the Counsel in April 2023. You can read more about the EU ETS in the article "Emission allowances trading" in this SO Update.

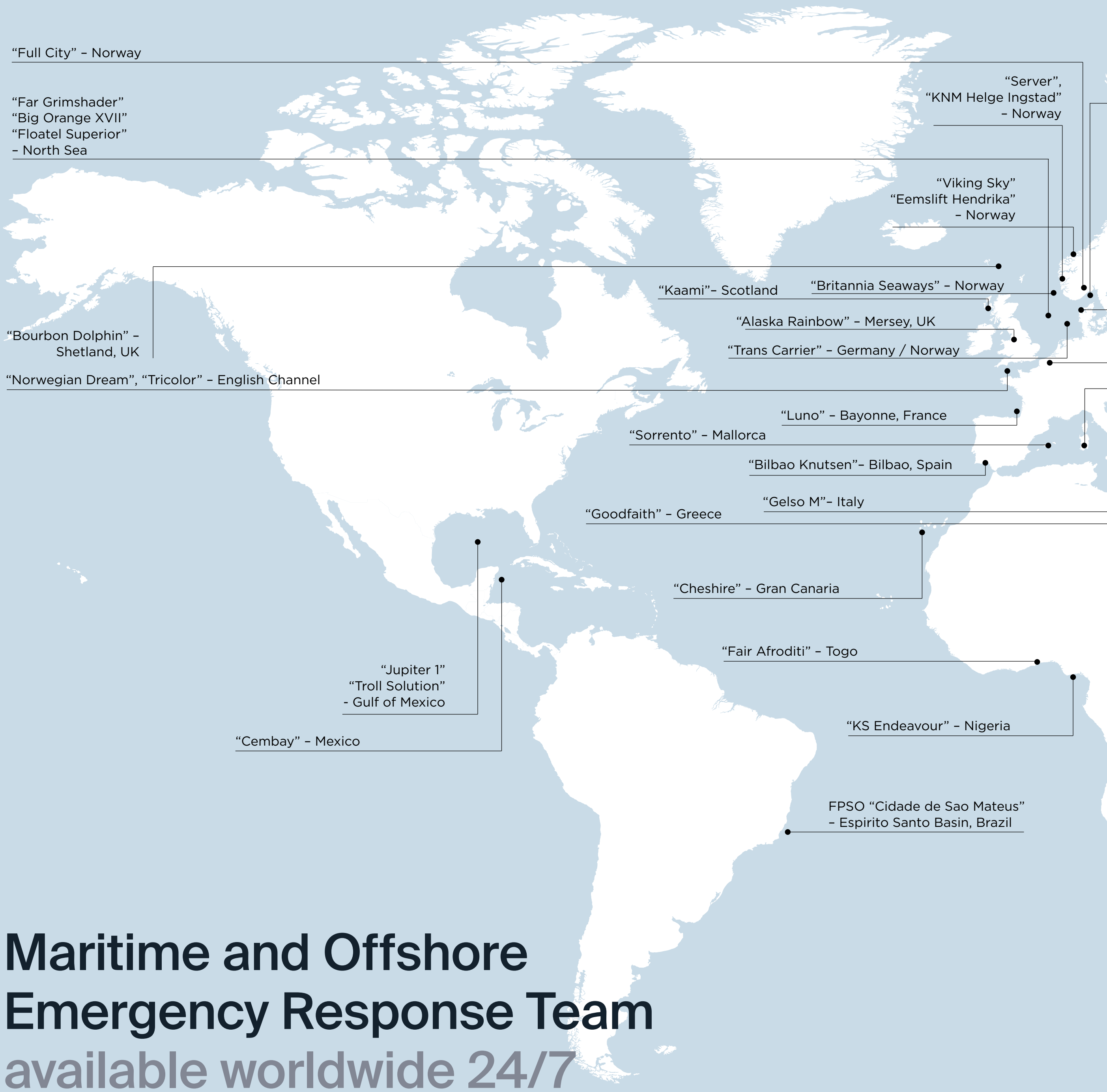
EU taxonomy

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)
	Ballast Water Management Convention (BWM Conven-tion)	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
	Energy Efficiency Design Index (EEDI)	New vessels 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 tech-nology 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
	Carbon Intensity Indicator (CII)	The annual CO2 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)
	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
	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.	Vessels over 5000 GT (including offshore vessels from 2027)
	EU Taxonomy	The EU taxonomy for sustainable activities is a classification system established to classify 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 publicinterest companies with more than 500 employees), and financial market participants
	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

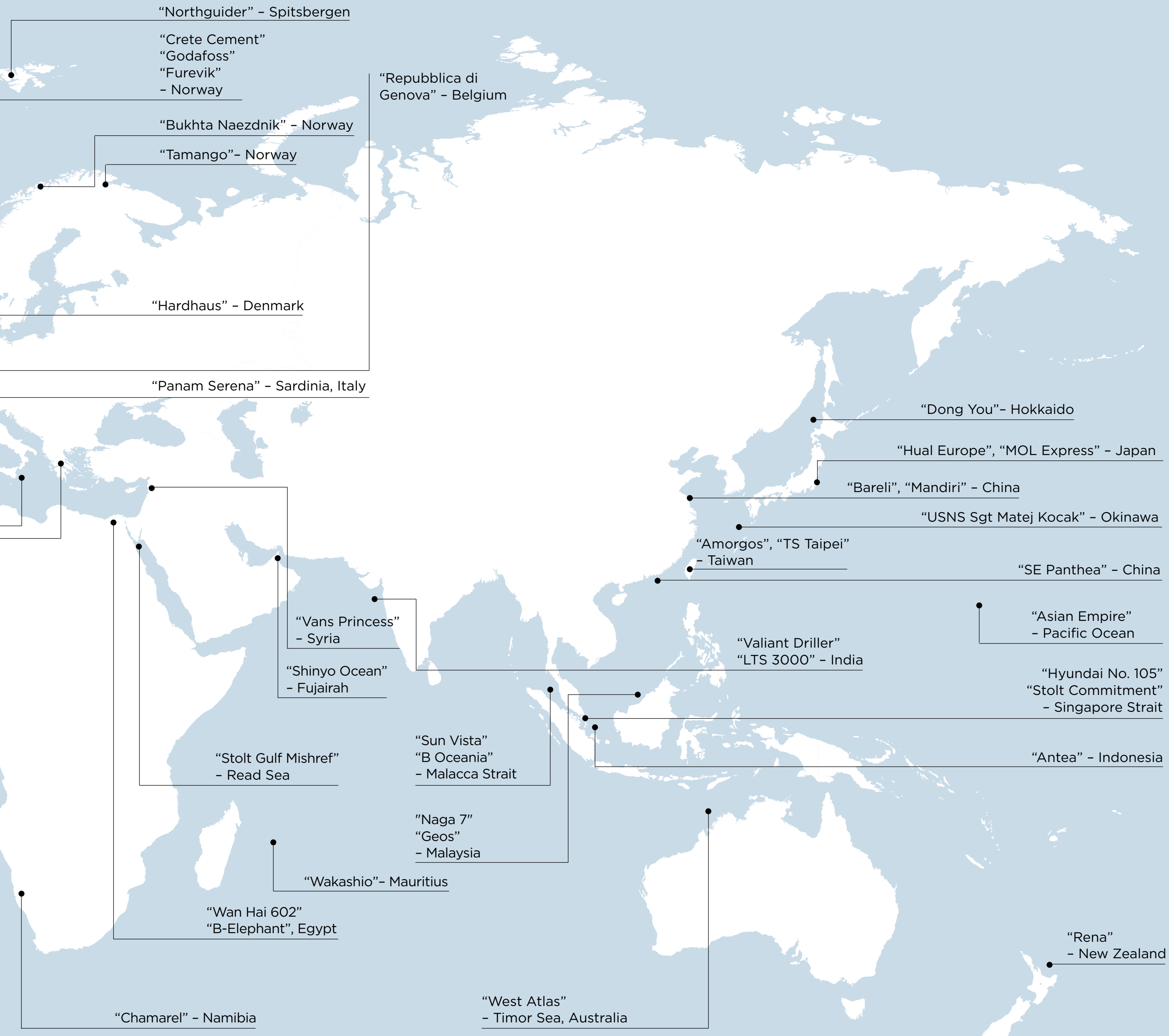
[1] The table includes a high level summary of some of the most influential and important regulations related to Green Shipping, but is not exhaustive

	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 effi-ciency 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 im-plementation date 1 January 2025, with stricter requirements every five years	23 March 2023: Provisional political agreement between the EU Council and the EU Parliament. Amendments from the EU Commission's proposal include increased reduction targets from 1 January 2035 and introducing measures to encourage the use of renewable fuels of non-biological origin 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	1 January 2025: The Mediterranean Sea becomes an emission control area
	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	Proposed implementation date 1 January 2024	• December 2022: EU institu-tions reached agreement • 18 April 2023: EU Parliament approved proposal • 25 April 2023: EU Council adopts proposal • 1 January 2024: Implementation
	Companies based in Europe, or operating a European legal entity	12 July 2020, the first of the disclosure obligations was applicable from 1 January 2022.	• 2023: technical screening criteria for the remaining four environmental objectives – signalised to be adopted at the end of June 2023
	Worldwide	18 June 2019	



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 assists insurers, owners and others in connection with a wide range of incidents around the world, such as collisions, groundings, fires, explosions, salvage, wreck removals and other.



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