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Update

June 2019

Shipping Offshore

Lapse of class certificates ruled breach of condition under BARECON form. • PAGE 22

SHIPPING OFFSHORE UPDATE

IN ARBITRATION, INDEPENDENT THINKING AND CREATIVITY ARE AS VALUABLE AS EXPERIENCE

PAGE 18

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Update June 2019 Shipping Offshore

Dear friends and readers,

It is with great pleasure that we introduce this Nor-Shipping edition of Wikborg Rein's Shipping Offshore Update, where we consider recent legal developments in the shipping and offshore markets.

In this edition we have prepared articles covering a wide range of topics. Autonomous ships represent great opportunities for the shipping industry, but create significant legal uncertainties given that the existing regulations are based on vessel´s having crew on board. The global sulphur cap – IMO 2020 – is soon a reality, and we look at BIMCO's new sulphur cap contract clauses and also consider LNG as an alternative compliant fuel. As wreck removal is among the most expensive claims for insurers worldwide, we consider how Norway is preparing for ratification of the Nairobi Wreck Removal Convention. We look at how arbitration may be improved and recent English court decisions concerning worldwide freezing orders and the charterers' breach of its class maintenance obligations in bareboat charterparties, as well as many other topics.

We hope that you will find the articles interesting and informative.

If you require any legal advice or further information, please contact any of the contact persons in the relevant article or your usual contact person at Wikborg Rein.

Enjoyable reading!

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Head of the Shipping Offshore Group

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PHOTO: Wikborg Rein

Autonomous ships in UNCHARTERED WATERS

Unmanned ships are sailing onto the horizon and the Norwegian maritime cluster is uniquely positioned to take a leading role internationally in the development and commercialisation of this new technology. But is the legal framework keeping pace?

Norway is already a world leader in maritime autonomy, i.e. technology that allows a vessel to sail by itself, independent of human interaction. Indeed, the world's first fully electric and autonomous containership, the "Yara Birkeland", is currently under construction for Norwegian fertiliser and chemicals company, Yara International, which, when commissioned and delivered, is expected to replace more than 40,000 annual truck journeys between Herøya, Brevik and Larvik.

ASKO, Norway's largest grocery wholesaler, is also planning two autonomous, electric sea drones that will carry goods across the Oslo fjord, saving 2 000 000 truck-kilometres per year.

The potential environmental benefits of both projects is clearly significant, a fact that has been recognised by the Norwegian government, with the Yara and the ASKO projects having received grants of NOK 133.6m (USD 16m) and NOK 119m (USD 14m) respectively from the Norwegian government enterprise, Enova.

However, the expected benefits of autonomous ships do not solely relate to the environment and relieving congested roads – with time, the hope is to reduce costs both compared with conventional ships and road transportation.

A CHANGING RISK PICTURE

Autonomous ships will however significantly alter the risk picture at sea.

Today, the majority of maritime casualties are caused by human error. The introduction of autonomous ships equipped with radar, GPS, infrared cameras and other sensors, in addition to systems determining correct course and speed, may therefore be expected to reduce the risk of mishaps and accidents caused by human error. However, it is inconceivable that accidents involving autonomous ships will not occur and new risk factors will no doubt emerge, such as technological failures and inadequacies, cyber threats and hacker attacks.

This changing risk picture will unquestionably require action

With no crew onboard and the human element absent, will a claimant be able to prove culpability?

New risk factors emerge, such as technological failures and inadequacies, cyber threats and hacker attacks.

from existing market players – shipowners, charterers, banks, insurers and others – who will need to adapt their practices to the new technology, as well as providing new opportunities for new players, such as suppliers of autonomous systems and onshore operators controlling or monitoring the vessels.

In terms of insurance, although some amendments would of course have to be made, it has been assumed that cover under existing maritime insurances may simply be extended to autonomous vessels. For insurers, the greatest challenge will therefore likely be to understand and price the risk correctly. Insurers are however rising to that challenge and once again, Norway is taking a lead, with Gard already providing insurance cover over "Falco" (the first autonomous ferry, operated by Finnish state-owned ferry operator FinFerries in the testing area south of Turku, Finland) and recently announcing that it will also provide insurance for "Yara Birkeland".

SHIPS WITHOUT LIABILITY?

A key question is how the current legal framework will fit with the emergence of autonomous ships, not only with respect to technical requirements, but also in terms of liability. If an autonomous vessel is involved in an accident and causes damage to a third party, establishing liability on the part of the shipowner will, as a starting point, be contingent upon the shipowner, or someone acting in the service of the ship, being at fault. With no crew onboard and the human element not present, will a claimant be able to prove culpability? Will a weakness in the navigational algorithm constitute a relevant fault? What about an incorrect decision from an autonomous and artificial intelligence system? It may also be questioned whether the shipowner will be held liable for errors by suppliers of autonomous systems or operators of onshore control centres.

The COLREGS (Convention on the International Regulations for Preventing Collisions at Sea 1972) set out a number of

navigational requirements to avoid collisions. Some of these may be pre-programmed in algorithms. But will an autonomous system be able to observe "good seamanship" when faced with an unforeseen situation?

Clarifications are therefore needed in the various regulations and, as is often the case, the law is not keeping up with technology.

THE FUTURE

In Norway it is already possible to conduct autonomous trials in test areas established by the Norwegian maritime authorities. There is close cooperation between the companies in the Norwegian maritime cluster and the authorities, who have expressed a desire to contribute to Norway leading the way internationally on unmanned vessels.

For international autonomous trade, however, transnational regulation is required – and the European Union and the IMO (International Maritime Organisation) will need to play a decisive role going forward. In this regard, in 2018 the IMO began looking into the need to amend the international legal framework to facilitate autonomous shipping, inter alia with respect to maritime safety, manning and operations, including COLREGS, SOLAS, STCW, SAR etc. The work is expected to take years however. Meanwhile, the positive attitude of Norwegian maritime authorities constitute an obvious competitive advantage for the Norwegian maritime industry – an opportunity which the industry seems to have grabbed with both hands. •

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READINESS FOR THE GLOBAL SULPHUR CAP

– BIMCO's new IMO 2020 clauses

Most of those involved in the shipping industry will by now have a clear picture of the requirements under the IMO 2020 global sulphur cap on marine fuels. Attention has therefore turned to the steps that need to be taken to put those requirements into practice. Two clauses recently introduced by BIMCO are aimed at addressing certain contractual aspects of the IMO 2020 requirements as they apply to time charterparties.

There has been a significant amount of focus and discussion on the technical and commercial aspects of compliance with the reduction in the global sulphur cap from 3.5 % to 0.5 % which will come into force on 1 January 2020 pursuant to the IMO's MARPOL Annex VI ("IMO 2020"). There has also been much debate with respect to scrubbers and what the best technical solutions may be for compliance with IMO 2020. The contractual aspects of preparation for IMO 2020 have however arguably received less attention. Nonetheless, the allocation of risk and costs relating to compliance will still need to be regulated in charterparties, in particular in time charterparties, where the owners remain responsible for operating the vessel whilst the charterers are responsible for supplying fuel.

BIMCO has recently published two new standard clauses aimed at tackling some of these issues, namely the 2020 Marine Fuel Sulphur Content Clause and the 2020 Fuel Transition Clause.

FACTS /

- BIMCO's Suite of Standard Bunker Clauses for Time Charter Parties deals with general issues relating to the specifications, grades and quality/suitability of the fuel provided by time charterer.
- 2020 Marine Fuel Sulphur Content Clause deals with the basic obligation to comply with the sulphur content requirements of MARPOL Annex VI and other applicable regulations.
- 2020 Fuel Transition Clause deals with the one-off event of switching between fuel with a maximum sulphur content of 3.50% and fuel with a maximum sulphur content of 0.50%.

THE MARINE FUEL SULPHUR CONTENT CLAUSE

This clause deals with the allocation of responsibilities and obligations between charterers and owners with respect to the provision of bunkers that comply with the new IMO 2020 requirements. The clause replaces the BIMCO Fuel Sulphur Content Clause 2005, and forms part of BIMCO's Suite of Standard Bunker Clauses for Time Charter Parties.

In summary, the clause stipulates that charterers will be under an obligation to supply fuel which at all times complies with any applicable sulphur content requirements and that such fuel must comply with the specifications and grades set out elsewhere in the relevant charterparty. The charterers' responsibilities under the clause also extends to warranting that bunker suppliers comply with the sulphur content requirements.

Although the clause mainly places obligations on the charterers, the owners will nonetheless have to warrant that the vessel can comply with the sulphur content requirements.

The relevant sulphur content requirements are defined as "MARPOL Annex VI (as amended from time to time) and/or by any other applicable lawful authority" and therefore cover the applicable regulations from time to time, including the current global cap of 3.5 %, the new global cap of 0.5 % (once applicable), the 0.1 % limit in emission control areas (ECAs), particular regulations in port states and any amendments to the foregoing. The clause can therefore be incorporated into time charterparties today and will remain valid after the new IMO 2020 regime comes into force.

Although the provision mainly places obligations on the charterers, the owners will nonetheless have to warrant that the vessel can comply with the sulphur content requirements.

THE FUEL TRANSITION CLAUSE

The fuel transition clause is not part of the Suite of Standard Bunker Clauses, but is intended to cover the one-off transitional period during the move from high to low sulphur fuels. It is therefore only relevant to time charterparties entered into prior to 1 January 2020 that extend beyond that date and where low sulphur fuels have not been required from day one.

The clause is not only intended to ensure that the vessel has compliant fuel onboard in time for 1 January 2020, but also deals with issues arising with respect to the prohibition of carriage of non-compliant IMO bunkers from 1 March 2020 – the so called "carriage ban".

In brief, the clause provides that charterers prior to 1 January 2020 are under an obligation to supply the vessel with sufficient compliant fuel to reach the nearest bunkering port where compliant fuel is available and requires owners and charterers to "use reasonable endeavours so that no later than 1 January 2020 there shall be no non-compliant fuel carried by the vessel". With regard to the carriage ban, it stipulates that no later than 1 March 2020, there shall be no non-compliant fuel onboard the vessel. The disposal of non-compliant fuel shall be at the charterers' time, risk and cost, whilst the obligation of ensuring that the vessel's bunker tanks are ready to receive compliant fuel is at the owners' time, risk and cost.

THE THIRD AND MISSING BIMCO CLAUSE – SCRUBBERS

BIMCO was also expected to issue a "scrubber clause" in early 2019 which was expected to address issues arising with respect to the cost, installation and use of scrubbers, and potentially regulate off-hire events resulting from the breakdown of scrubbers. The clause has, however, not yet been published.

COMMENT

The new BIMCO clauses attempt to address several of the key contractual issues relating to compliance with IMO 2020. However, as with all standard clauses, their inclusion in charterparties should be evaluated on a case-by-case basis and it should always be considered if they are suitable to be included in their original unamended form or if amendments are required. We expect to see bespoke and tailored versions of the clauses being used.

From a drafting point of view, the consequences of breaching the new clauses are not dealt with in the clauses themselves and will have to be regulated elsewhere in the relevant charterparty. The inclusion of the new clauses may also require re-wording of other provisions in charterparties, for example bunker delivery/redelivery clauses should be carefully considered with respect to the types of fuels onboard and the prices to be paid – in particular for time charterparties spanning 1 January 2020 up to the carriage ban date of 1 March 2020.

The new clauses also require owners and charterers to cooperate to facilitate bunkering/debunkering operations. This is likely to result in disputes. Further, the requirement under the transition clause to use "reasonable endeavours" to ensure that there is no non-compliant fuel onboard by 1 January 2020 may prove difficult to enforce as the meaning of "reasonable endeavours" is open to interpretation under English law. •

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THE BUNKER BALANCE

– owners consider LNG in advance of 2020

Using LNG rather than fuel oil is one of a range of options available to owners seeking to comply with IMO 2020[1]. Given that shipbrokers have long predicted the emergence of a two-tier shipping market with 'greener' ships commanding a premium over older less eco-friendly vessels, what then is the future for LNG bunkering and what challenges does it present?

The shipping trade press initially took a somewhat pessimistic view of LNG bunkering as a solution to the IMO 2020 problem[2] with forecasts suggesting that high costs and technical difficulties would present a commercial barrier to LNG bunkering being adopted across the industry. Despite the forecasts however, in the past year we have seen an interesting series of "world firsts" for new-build and retro-fitted LNG powered vessels in different sectors including cruise ships, ferries and more general commercial carriers. For example, Maritime Executive reported in March[3] of this year on the retrofitting of the "SAJIR", which will be the first mega-container vessel to be converted to a dual-fuel system. Various innovations are also underway, including Cryo Shipping's conversion of platform supply vessels into LNG tankers for STS supplies, which may help ease congestion at LNG bunker ports or provide supplies in areas not serviced by such ports. These reports, together with commitments from large owners such as CMA CGM and MSC, suggest that owners may be more receptive to LNG bunkering than was initially expected. The world fleet of LNG powered has jumped in size since 2017 from 118 vessels to 143 vessels, with around 135 LNG-powered vessels also on order[4].

In the past year, we have seen an interesting series of 'world firsts' for new-build and retro-fitted LNG powered vessels

Whether owners choose to adopt LNG bunkering as a solution to the IMO 2020 problem or adopt one of the other available options such as using low sulphur fuel or installing scrubbers depends on a myriad of factors with owners adopting different solutions, sometimes even within their own fleets. This is essentially because there is no perfect solution. Owners have needed to be sensitive to trading patterns and available infrastructure. Using low sulphur fuel leaves owners at the mercy of oil and freight volatility. Scrubber retrofits may not provide a fully predictable outcome – with new geographical restraints having emerged since their introduction – including the ban on open loop scrubbers in Singapore, China and Fujairah, and the anticipated ban in the Norwegian fjords. Likewise, given the high cost of LNG retrofitting, it would not make sense to undertake it on vessels close to scrapping age or those operating without ready access to LNG bunkering ports. LNG bunkering is therefore best suited for owners ready to invest in new vessels, or for retrofitting less elderly vessels which will operate in areas where there is existing LNG bunkering infrastructure, such as Northern Europe.

A report from Jack Sharples of the Oxford Institute for Energy Studies had this to say in his 2019 report on LNG bunkering: "... the introduction of more stringent environmental regulations can solve the 'chicken and egg' dilemma of energy companies not wishing to invest in LNG bunkering infrastructure until there is substantial demand for LNG as a marine fuel". This seems to be reflected in the increased activity in projects to support LNG bunkering not only in areas traditionally supplying LNG but across many major transport hubs. This means that LNG fuelled vessels will likely become far more attractive to owners.

But for vessels already on the water, what issues does a retrofit present? One perhaps unforeseen issue is that IMO 2020 has added to tightening of availability at shipyards for retrofit solutions. The resulting pressure to move quickly to secure slots leads to negotiating constraints. This impacts on timing and cost and can also create legal problems. Often, there is a shift in bargaining power from owners to the yard in times of high demand and less attention is paid to the finer points of contract drafting. We see the effects of this in an increasing number of disputes and difficulties under retrofit contracts and related charters. Owners should therefore keep in mind that a retrofit contract requires consideration of similar issues to a full shipbuilding or conversion contract with special attention needing to be paid to items that are likely to impact on earnings under associated vessel charters, such as the warranty for the work (including where warranty work can be done), the amount of liquidated damages and related delay provisions. Clarity, as always, is key. Where there needs to be flexibility, such as for modifications and regulatory change, this must be supported by appropriately drafted triggers for change, remedies and dispute resolution procedures. Any existing charter obligations must be reviewed and added to as needed, for example, to deal with anticipated unexpected loss of use of the vessel.

There will also be different safety procedures to take into account, for example, ISO 20519:2017 (Ships and marine technology – Specification for bunkering of liquefied natural gas fuelled vessels) and the IGF Code (International Code of Safety for Ship Using Gases or Other Low-flashpoint Fuels). Both are designed to provide standards for ships operating using gas i.e., as a fuel, whether newly built or converted, rather than being aimed at more traditional gas carriers.

Finally, owners/charterers will need to be prepared for reviewing new bunker contracts. Traditionally, contracts for the sale and purchase of LNG are more detail oriented than say, heavy fuel oil contracts. One option is to adapt existing bunker agreements that owners/charterers are already comfortable with, but this does require specialist drafting. Specifications and tolerances will need to be updated. Attention also needs to be paid to LNG-specific terms, such as transfer of title for return vapour, commingling considerations, the effect of off-specification gas, and related operational issues. Help may soon be at hand however from BIMCO, who announced that they would be working on a new LNG Bunker Purchase Contract and LPG voyage charter for the Asian market as of January 2019. This is expected to be ready for publication within 18 months. Whether or not an owners' organisation can create a form that finds favour with brokers and suppliers has yet to be seen. In the meantime, we have specialist trading and LNG lawyers available to assist with bespoke solutions and contract reviews.

Owners should keep in mind that a retrofit contract requires consideration of similar issues to a full shipbuilding or conversion contract

We will be watching with interest to see the extent to which LNG bunkering continues to be adopted by the industry and the impact this has on spot trading of LNG and of course hire rates for LNG carriers and LNG fuelled vessels and will report back on this in further issues of Update. •

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1 See also our latest Green Shipping Update - https://www.wr.no/aktuelt/publication/green-shipping/

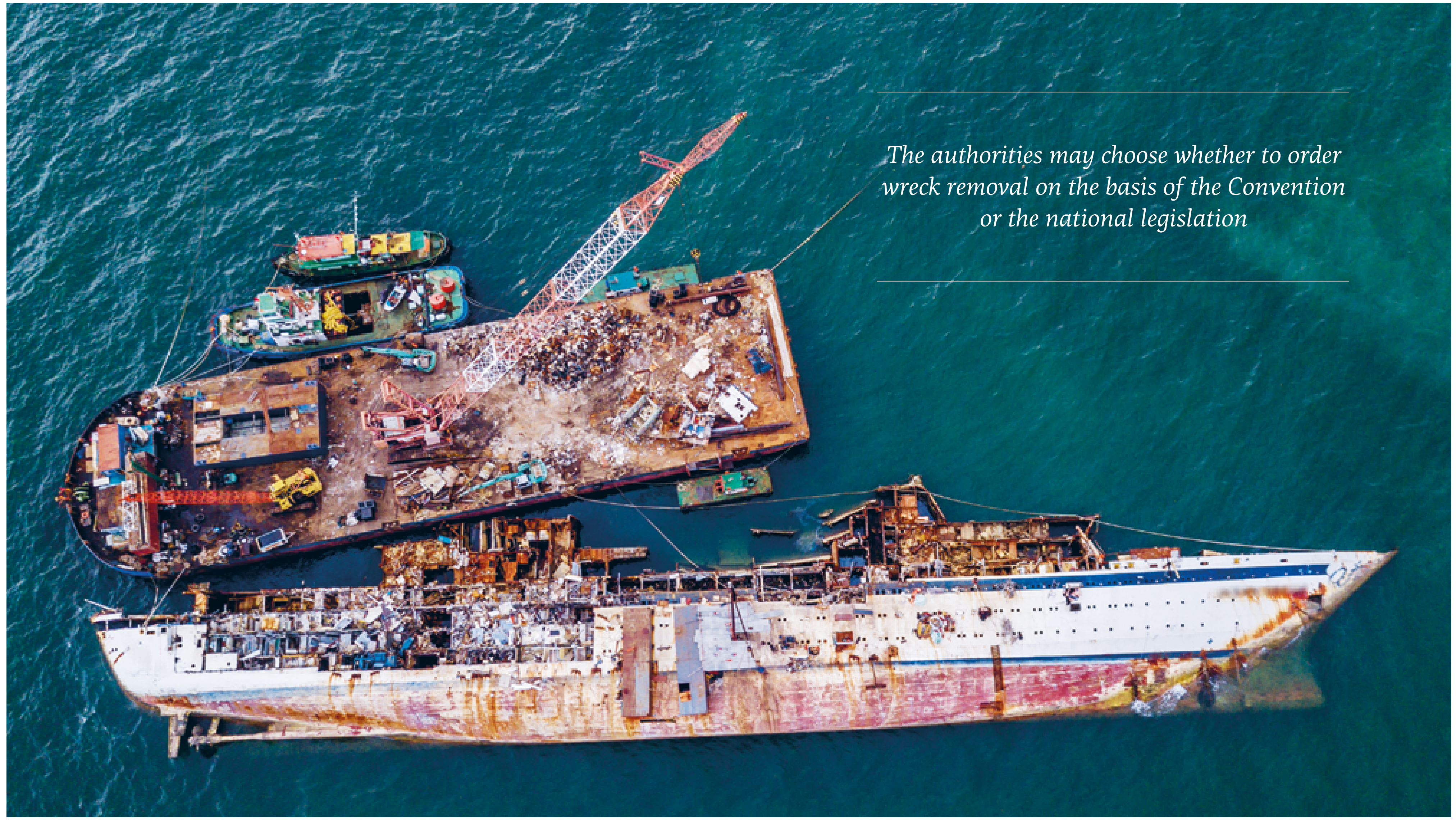
2 E.g. - http://www.seatrade-maritime.com/news/asia/high-cost-of-retrofit-slows-lng-bunkering-uptake.html

3 https://www.maritime-executive.com/article/world-s-first-mega-container-vessel-lng-retrofit-contracted

4 Source: Maritime Executive as previous.

Norway prepares for ratification of the NAIROBI WRECK REMOVAL CONVENTION

The Norwegian Parliament has recently decided that Norway shall ratify the Nairobi Wreck Removal Convention and that the Convention shall be given effect not only in Norway's exclusive economic zone, but also in its territorial waters. The Norwegian Parliament has also adopted legislation to implement the Wreck Removal Convention into Norwegian law once ratified.



The legislation, which was adopted in December 2018, will, as expected, introduce a dual system where the national rules on wreck removal will continue to be in effect and the Convention rules will be introduced as a parallel set of rules.

DUAL SYSTEM

The authorities may under the dual system, in each particular case, choose whether wreck removal shall be ordered on the basis of the Convention, as incorporated in the Norwegian Maritime Code, or on the basis of the current national legislation found in the Norwegian Harbour and Waterways Act and the Pollution Act.

NOTABLE DIFFERENCES

There are a number of differences between the existing national legislation and the Convention. For example, although the provisions are all based on strict liability, the Convention channels liability solely to the registered owner of the vessel, whereas the national legislation has a broader definition of the liable party. Furthermore, under the Convention, the threshold for ordering a wreck removal on the basis of environmental concerns is that the wreck "may reasonably be expected to result in major harmful consequences to the marine environment, or damage to the coastline or related interests" of one or more states. The threshold in the Pollution Act on the other hand is lower; it is sufficient that the wreck "may" cause "damage or inconvenience" to the environment. Another difference is that a reimbursement claim under the Convention will become time-barred three years after a hazard has been determined in accordance with the Convention. The Pollution Act has a five year deadline from the date when a final administrative decision on reimbursement has been made. It remains to be seen how these differences will play out in practice.

The authorities may choose whether to order wreck removal on the basis of the Convention or the national legislation

DIRECT ACTION

Ratification of the Convention will also establish an obligation on the part of the owner to take out insurance against wreck removal liability and will create an automatic right for the authorities to claim directly against the vessel's insurers for reimbursement of wreck removal costs. This requires that the costs have in fact been incurred by the claimant, and the insurers can rely on the owner's right to limit liability under the applicable global limitation of liability rules. Since no automatic right of direct action exists under the current legislation, claims are likely to be based on the Convention provided that the stricter requirements under the Convention are met. It is however important to note that the duty to remove a wreck cannot be enforced against the insurers; their liability is of a financial indemnity nature only.

ENTRY INTO FORCE

The entry into force of the newly adopted legislation is awaiting the adoption of various regulations, related to inter alia practicalities concerning mandatory insurance certificates. For the same reasons, the formal ratification of the Convention has not yet taken place. We understand that ratification of the Convention can be expected in the near future. •

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Oslo – an efficient market for CAPITAL RAISINGS

The Norwegian capital markets offers a flexible, time- and cost efficient process for equity issues (private placements). A key consideration for investors is, however, tradeable securities. The N-OTC can offer instant low threshold listings of shares with a minimum of reporting requirements.

Oslo is well established as one of the go-to jurisdictions for raising capital for the shipping and offshore industries. Measured by the number of listed companies, the Oslo Stock Exchange is the largest securities market place for shipping in Europe and the second largest globally, offering a variety of listing opportunities for Norwegian and foreign companies. Norwegian investment banks are also global leaders with strong market presence and reach within the relevant sectors.

"NORWEGIAN STYLE" PRIVATE PLACEMENT AND IMMEDIATE TRADING IN SHARES

Carrying out an equity financing in the Norwegian market is a fairly uncomplicated and document-light exercise as this is often carried out in a private placement structure relying on available exemptions from prospectus requirements. The documentation will normally comprise of an application form, a term sheet and a company presentation. The most relevant prospectus exemptions applied in private placements are offers of securities with a minimum subscription of at least EUR 100,000 or offers made to less than 150 non-professional investors (also combined). In addition, private placements are regularly made in reliance on exemptions under the US Securities law (144a/Reg S). A limited legal due diligence will normally be required by the engaged investment bank.

Upon completion of the private placement, provided that a diversified investor base (i.e. more than 50 shareholders) can be demonstrated, a listing on the N-OTC can be applied for immediately. Such an application will be submitted by the engaged investment bank on behalf of the company. The N-OTC is an information system for unlisted shares, where buy and sell interests as well as transactions are reported and disclosed (no-auto matching platform). No admission document or a prospectus is required for the listing. However, it should be noted that the N-OTC does require listed companies to report their financials and certain price sensitive information, with such information becoming publicly available.

As an alternative to, or as a next step from a N-OTC listing, the Oslo Stock Exchange offers listing on the multilateral trading facility, Merkur Market (on the Oslo Stock Exchange regular trading platform). Admission to trading on Merkur can be obtained 5 days after the company has submitted its application (fast track). The listing process involves preparation of an admission document (again no prospectus requirement) in addition to an application.

FACTS /

N-OTC:

- Owned by Oslo Børs – administrated by the Norwegian Securities Dealers Association
- An unregulated electronic "bill-board"
- Invitation must come from a brokerage house (no application by company)
- Lifetime requirement (more than one year), exemptions available
- Market cap of at least NOK 20 million
- Minimum 50 shareholders, exemptions available
- Financial reporting: recognised accounting standards
- No listing prospectus/admission document required
- No due diligence required for listing
- Disclosure obligations undertaken – price relevant information "of significant importance"

MERKUR MARKET

- Multilateral trading facility (i.e. not a "regulated market")
- Private and public companies
- 15% spread in shares and min. 30 (independent) shareholders
- Financial reporting in accordance with GAAP or IFRS
- At least one audited interim or annual report
- Limited due diligence – no requirement for independent due diligence advisor
- Admission document
- Admission process: 1-2 weeks

OSLO AXESS

- Regulated market for public companies
- 25% spread in shares and min. 100 (independent) shareholders
- Min. NOK 8 million in market cap.
- At least one audited interim or annual report (IFRS)
- Legal and financial due diligence
- Financial reporting in accordance with IFRS (min. half-yearly)
- Prospectus requirement (EU prospectus) – 4-6 weeks approval process
- Admission process: 8 weeks - fast track process available (4 weeks)

OSLO BØRS

- Regulated market for public companies
- 25% spread in shares and min. 500 (independent) shareholders
- Min. NOK 300 million in market cap
- At least three years' history and activity. An exemption may be applied for
- Legal and financial due diligence
- Financial reporting in accordance with IFRS (min. half-yearly)
- Prospectus requirement (EU-prospectus) – 4-6 weeks approval process
- Admission process: 8 weeks – fast track process available (4 weeks)

Several companies have used this market place for growth, capitalisation and to build up a sufficient spread in the shares to qualify for listing on one of the regulated market places operated by the Oslo Stock Exchange.

TRANSFER TO A REGULATED MARKET PLACE

Oslo Børs and Oslo Axess are fully regulated market places. The Oslo Axess has somewhat more liberal listing criteria and is more suited for companies in an earlier phase of commercialisation than the Oslo Børs. Companies having shares admitted to trading on Merkur Market, may qualify for a simplified listing process should they apply for listing on Oslo Børs or Oslo Axess at a later stage. Listing on a regulated market will always require that the Company prepares a listing prospectus, but for transfers from Merkur Market certain due diligence requirements may be exempted from and the listing processes will in general be shorter and more efficient.

Wikborg Rein has a long history of assisting companies in the shipping and offshore sectors in raising capital on each of the above exchanges including assisting Songa Bulk and ADS Crude Carriers in the recent years. For further information, please contact Dag Erik Rasmussen, Per Anders Sæhle, Christian Emil Petersen, Maria Krog Eik or Karoline Stock Evje. •

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IMPROVING ARBITRATION IN NORWAY

There are a number of ways to make arbitration more attractive and efficient and the inherent flexibility of arbitration provides practitioners with the necessary tools to achieve just this aim without resorting to the development and adoption of further written "guidelines" or "best practices".

Traditionally, arbitration in Norway has been practiced by litigation lawyers whose clients occasionally face a dispute arising out of a contract containing an arbitration clause. This has shaped generations of very experienced dispute resolution lawyers, whose handling of arbitration cases however, is often heavily influenced by the habits and routines developed in proceedings before the ordinary courts. For example, it is not unusual to see experienced counsel agree on unnecessarily long arbitration hearings in larger cases – at times clogging the lawyers' and the client's calendars for months on end. The lawyers know that the Norwegian procedural law rule requiring that written evidence be presented orally does not apply to arbitration, but they tend to bask in the comfort of their experience from court proceedings.

In arbitration, independent thinking and creativity are as valuable as experience

In arbitration, however, independent thinking and creativity are as valuable as experience. A new generation of dispute resolution lawyers is emerging with increasing international exposure, either by education or through engagement in the international legal community. The interaction between this new generation and the older, more experienced generations that go before them can lead to significant improvements in the field.

Below we identify some areas which clients/practitioners may consider in order to achieve more efficient and improved dispute resolution services.

MORE FAST-TRACK ARBITRATION:
Not all disputes require a panel of three arbitrators and comprehensive proceedings with lengthy oral hearings. Under the

2004 Norwegian Arbitration Act, parties are free to agree on a sole arbitrator. Institutional rules, such as the Oslo Chamber of Commerce (OCC) and the International Chamber of Commerce (ICC) rules provide for fast-track or expedited arbitration. Parties to an ad hoc arbitration also have considerable flexibility to agree on a simplified procedure. One guiding principle may be the amount in dispute (e.g. NOK 2 million under the OCC fast-track rules and USD 2 million under the ICC expedited procedure provisions), but experienced counsel should be able and prepared to recommend the adoption of simplified procedures also when the amount in dispute is large but the dispute is not qualitatively complex.

MORE DIVERSITY OF ARBITRATORS:
Repeat appointment of a relatively small group of jurists (professors, practitioners and judges) may not be in the best interests of developing new and efficient practices in arbitration. This is especially true as experience shows that many of the usual suspects in this group are older, white males. Provided that the essential requirements of quality, independence and impartiality of the arbitrator are ensured, counsel should consider a larger pool of candidates. Again, the guiding principle may be the nature and scope of the dispute. What younger practitioners may lack in experience – though initiatives such as the Young Arbitration Practitioners Norway (YAPN) show that there is a host of jurists below 40 with considerable experience in arbitration – they make up for in eagerness and dedication to resolving the dispute in a just, legally correct, and efficient manner.

IMPROVED CASE MANAGEMENT:
One of the most valuable characteristics of arbitration has always been (or at least has always been perceived to be) its inherent flexibility. Both in ad hoc and institutional arbitration, the parties are provided with extensive freedom to tailor the procedure to their own needs. Counsel, together with their clients, as well as arbitrators should consider on a case-by-case basis what the most appropriate, detailed rules should be. The object of these rules ranges from the approach to document production requests, to the use of technology, to page limits for written submissions, to the early allocation of costs at each procedural crossroad, etc. It is naive to think that the best way to address these issues is to adopt one-size-fits-all "best practices" or "guidelines", which continue to proliferate in relation to most subjects and industries and whilst such suggested best practices may often provide welcome inspiration, they cannot and should not substitute the independent thinking and creativity of counsel.

Both in ad hoc and institutional arbitration the parties are provided with extensive freedom to tailor the procedure to their own needs

Other areas for possible improvement include the use of alternative dispute resolution (ADR) mechanisms, such as mediation. These may precede or even run in parallel to arbitration. Again, however, the opportunity of conducting such additional efforts – which obviously come at a cost – should be thoroughly assessed by counsel together with the client on a case-by-case basis.

In conclusion, users of arbitration should take advantage of the flexibility they are given in order to tailor a procedure which is both efficient and free from preconceived and archaic practices. To achieve this result, the involvement of the new generation of dispute resolution lawyers, who can contribute innovative ideas to resolve old issues, is key. One essential element in developing and exchanging such ideas is the growing engagement in the community of young arbitration practitioners. In this respect, an even higher involvement of in-house counsel would be welcome, so as to ensure that the needs and expectations of the client are put in focus. •

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INSOLVENCY IN CHINA
– how to minimise risk when a customer is facing bankruptcy

Ever since China strengthened its legal framework for bankruptcy proceedings in 2007, the number of Chinese bankruptcies has increased significantly. For the seller in a supply contract, protection against bankruptcies should be considered when drafting the contract and suitable protections built in, to the extent possible.

Insolvency may involve economic hardship not only for the insolvent debtor, but also for creditors having large claims against the insolvent entity. When China's Enterprise Bankruptcy Law (the "Bankruptcy Law") came into force in 2007, it marked a significant improvement in the legal framework of Chinese insolvency proceedings.

The Bankruptcy Law introduced so-called "bankruptcy reorganisation", a corporate restructuring scheme resembling US "Chapter 11" proceedings. Under the Chinese scheme, insolvent enterprises are allowed an attempt at regaining solvency, with the bankruptcy administrator either controlling or supervising the continuation of business. Meanwhile, there is also a suspension of enforcement proceedings against the insolvent enterprise, which implies that creditors holding a valid judgment and/or award will have to wait until the reorganisation either succeeds or culminates in bankruptcy liquidation.

THE SELLER'S KEY QUESTION

If the insolvency results in bankruptcy liquidation, an appointed bankruptcy administrator will collect assets belonging to the insolvent enterprise, convert these into cash and distribute same to creditors as dividends. However, as always, the creditors' respective dividends tend to be considerably lower than the value of their claims, as the insolvent debtor's debt generally exceeds the cash generated from the collected assets. A key question is therefore how a seller otherwise can secure either full payment or return of the object, should their buyer go bankrupt.

AVOID RELYING ON CIRCUMSTANCE

Under the bankruptcy proceedings in China, the estate may generally only seize property owned by the insolvent debtor. The seller could therefore claim that the buyer has yet to acquire the ownership of the object pursuant to the Chinese Property Law. Pursuant to this law, ownership to movable goods normally transfers from seller to buyer upon physical delivery. If the buyer goes bankrupt before delivery and the purchase price has not been paid in full, the seller may take back goods in transit.

A key question is therefore how a seller otherwise can secure either full payment or return of the object, should their buyer go bankrupt.

However, these rules are too reliant on arbitrary circumstances to provide adequate protection for payment in valuable supply contracts. Already at the contracting stage, the seller should instead, as creditor for the purchase price, seek to secure the debt owed from its counterparty.

AGREE ON COLLATERAL

A well-tried procedure for securing the debt is to pre-agree in writing that the buyer shall offer property as collateral to secure their payment of the purchase price. This should be agreed when drafting the supply contract. Under the Chinese Bankruptcy Law, such an agreement will give the seller the right to satisfy their claim before the estate may seize any remaining value of said property.

Multiple forms of collateral exist under Chinese law, including guarantees, pledges, mortgages and floating charges. For commercial purposes, non-possessory security interests such as mortgages are convenient, allowing the buyer to retain possession of the object placed as security. Chinese law

acknowledges mortgages for movable and immovable property alike. For stock, goods and other assets disposed of in the course of business, Chinese law provides for floating charges covering categories of objects in fluctuating amounts.

RETAIN OWNERSHIP

If the buyer's assets are of little or deteriorating value, or are to be incorporated into other objects, the buyer might lack adequate property to place as collateral.

If so, the seller may secure payment with the sold object itself. This is done by way of a title retention clause, in which the parties agree that irrespective of delivery, the seller retains legal ownership (title) to the movable goods until full payment of the purchase price. Logically, the seller should therefore be able to retrieve the object from the bankruptcy estate without further involvement. However, the Supreme People's Court has stipulated two exceptions.

Firstly, the bankruptcy administrator may choose to fulfil the contract, and keep the object while offering security for the payment. In essence, this should nonetheless ultimately ensure payment to seller.

However, secondly, the seller's claim for return of the object will not be supported if 75% or more of the purchase price has been paid. The buyer's estate may then keep the object, but shall instead settle the remaining price. If not settled, the seller's losses can, upon seller's request, be regarded as a priority claim, which is paid out before dividends. In other words, 75% payment marks a threshold at which the seller, despite owning the object, is compensated for the remaining price more like a creditor with collateral than an owner.

In any event, the seller may lose the retained ownership if the buyer proceeds to sell the goods to an unknowing third party. Therefore, title retention clauses may in certain respects leave the seller somewhat more at risk than the aforementioned collateral rights.

While not entirely fail-safe, it overrides the implications of delivery, and demonstrates that predictable insolvency protection is best when sought in the contract itself. •

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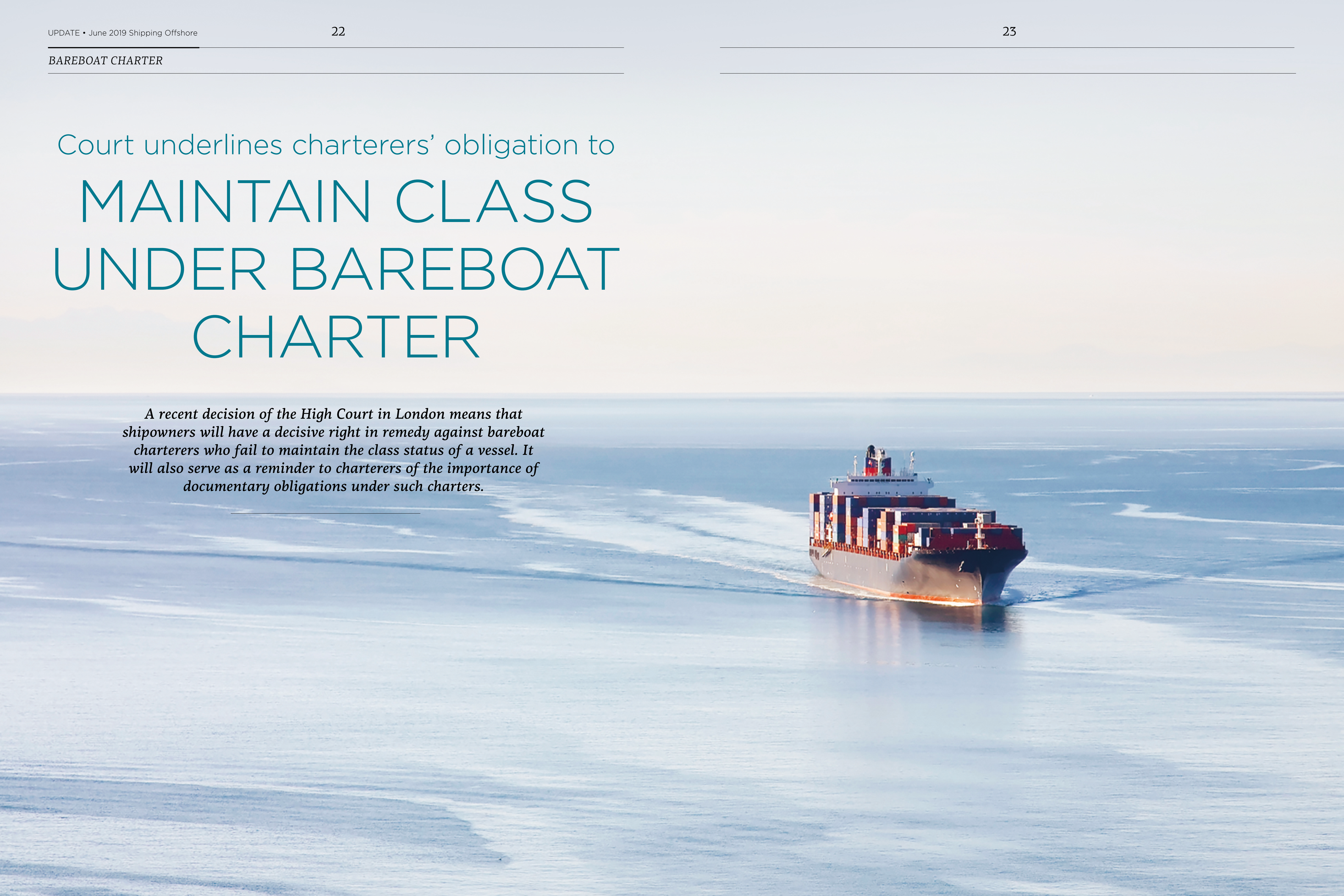
Court underlines charterers' obligation to

MAINTAIN CLASS UNDER BAREBOAT CHARTER

A recent decision of the High Court in London means that shipowners will have a decisive right in remedy against bareboat charterers who fail to maintain the class status of a vessel. It will also serve as a reminder to charterers of the importance of documentary obligations under such charters.



Lapse of class certificates ruled breach of condition under BARECON form.

In Silverburn Shipping (IoM) Ltd v Ark Shipping Company LLC [2019] EWHC 376 (Comm), Mrs Justice Carr held that, in circumstances where a vessel is on bareboat charter, the obligation on charterers to keep the vessel with unexpired class certificates at all times is both an absolute obligation and a condition of the contract. Expiry of those certificates will result in termination of the charter.

The dispute arose in connection with the chartering by Silverburn Shipping of the newbuild anchor-handling tug (AHT) "Arctic" to Ark Shipping on a 15-year amended BARECON 89 standard form. Roughly five years into the charter, the vessel's special survey was due but, because Ark Shipping had failed to make adequate and timely preparations, the class certificates expired.

Silverburn sought to terminate the charter but Ark Shipping resisted on the basis that the vessel was in drydock and was soon to undergo repairs, following which class would be invited to survey the vessel.

The vessel's class certificates expired on 6 November 2017, before the vessel was drydocked for repairs. A month later, although now in drydock, the vessel was still out of class and Silverburn sought to terminate the charter party for breach of Clause 9. Ark Shipping resisted and maintained that the charter was still ongoing.

Clause 9(a) of the charter provided:

"Maintenance and Operation: The vessel shall during the charter period be in the full possession and at the absolute disposal for all purposes of the charterers and under their complete control in every respect. The charterers shall maintain the vessel, her machinery, boilers, her appurtenances and spare parts in a good state of repair, in efficient operating condition and in accordance with good commercial maintenance practice and (...) they shall keep the vessel with unexpired classification of (...) class (...) and with other required certificates in force at all times. The charterers to take immediate steps to have the necessary repairs done within a reasonable time failing which the owners shall have the right of withdrawing the vessel from the service of the charterers without noting any protest and without prejudice to any claim the owners may otherwise have against the charterers under the charter. (...)."

The dispute was referred to arbitration and the tribunal awarded in Ark Shipping's favour, concluding that Clause 9(a), insofar as it related to keeping the vessel in class, did not impose an 'absolute' obligation but only a qualified obligation of reasonable diligence, i.e., the obligation was to reinstate the vessel's class within a reasonable time, should class expire. This obligation was held to be an intermediate obligation rather than a condition of the charter party.

Silverburn appealed to the High Court, arguing that a bareboat charter is fundamentally different to a time charter in that the asset of the owners is entirely at the disposal of the charterer, and owners have no crew on board, no rights to contract with class directly, and no rights to force charterers to dock the vessel for inspection.

This could conceivably have grave consequences not only for owners and their asset, but also for third-parties such as insurers, mortgage providers and flag state authorities which may require the vessel to be kept in class. In such circumstances, owners could be without cover but also without remedy.

Silverburn's appeal was based on two questions of law. Firstly, was the obligation on Ark Shipping in Clause 9(a) to " keep the vessel with unexpired classification of (...) class (...) in force at all times" an absolute obligation, or merely an obligation to reinstate expired class certificates within a reasonable time? And, secondly, was the obligation a condition of the contract or an innominate term which could not be defined as either a condition or a warranty?

The High Court found in Silverburn's favour, holding that there was a natural and ready distinction to be drawn between a vessel's physical condition and maintenance status on the one hand and its classification status on the other. It was found that there was an absolute obligation on Ark Shipping to keep the vessel with unexpired classification certificates.

The High Court also found that, in the event of a breach of the obligation to keep the vessel in class, the obvious intention of the parties would be that the owners would have the right of termination. Moreover, it was deemed that the absence of the remedy of termination from the written clause in the charter party did not preclude the obligation from being a condition.

Clause 9 is materially the same in all iterations of the BARECON form, so that this decision will provide comfort for owners, who will be able to terminate a charter immediately and repossess their asset in the event that charterers fail to class a vessel, neglect to keep up with special survey intervals or in any way fail to maintain class status.

The BARECON is a commonly used form in the shipping industry and the decision is especially significant as loss of class inevitably leads to loss of insurance coverage. The judgment should also serve as a stark reminder to charterers and managers that documentary obligations, however seemingly trivial or arduous, go to the root of the contract and can have potentially very expensive consequences in damages – not just in terms of loss of profits, but potentially in terms of damages sought by any sub-charterers or cargo interests further down the chain – if the vessel is withdrawn. •

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Worldwide freezing orders upheld in MULTI-NATIONAL SHIPPING FRAUD CASE

In a recent decision by the English High Court (Manchester Shipping Ltd v Balfour Worldwide Ltd & Anor [2019] EWHC 194 (Comm).) two worldwide freezing orders in a multi-national shipping fraud case were upheld, rejecting the defendant's allegations of breaches of full and frank disclosure and provided useful confirmation of the standing of an intermediary charterer to claim for the full value of the hire.

The charterer, Manchester Shipping Ltd ("Manchester"), had chartered three vessels from an Isle of Man company, Silverburn Shipping (IoM) Ltd ("Silverburn") and had sub-chartered them to a Russian co pany called Caspian Hydra Technologies ("KGK").

During the charter period, the sub-charterer KGK stopped paying hire for the vessels and Manchester suspected that hire was fraudulently being diverted from KGK to a UK company, Balfour Worldwide Limited ("Balfour"). Manchester was granted two worldwide freezing orders in May 2018 in support of its claim. In its attempts to discharge the worldwide freezing orders, the defendants (Balfour and Mr Sochin, who was the owner of Balfour) contended Manchester had not suffered any loss and accused it of breaches of the duty of full and frank disclosure of such severity and culpability that the orders ought to be scrapped.

THE DEFENDANTS' CASE

Fraud

The defendants admitted the fraud by admitting that they had fraudulently created sham charterparties between KGK and Balfour in an attempt to divert hire monies to Balfour away from Manchester (the "Balfour Charterparties"), even going so far as to sue under the forged charterparties in Russia both at first instance and on appeal.

The defendants also argued that there had been numerous breaches of the duty of full and frank disclosure on behalf of the claimant.

In the London proceedings, in which the defendants attempted to discharge the worldwide freezing orders, the defendants claimed that a Russian company, Ark (also owned by Mr Sochin) had in fact chartered the three vessels to Manchester and not Silverburn. The defendants submitted and relied upon three written charterparties purporting to support the position that Ark had chartered the vessels to Manchester instead. This claim was however flawed, with the judge Sonia Tonlaney QC noting in her comprehensive judgment that "in May 2018, in proceedings in Russia, Mr Sochin expressly disavowed the existence of any charterparty between Manchester and Ark – a point which I raised with Mr Hayman QC, Leading Counsel for the Defendants, but in respect of which the Defendants had no explanation".

The Judge went on to comment that:

"A fundamental flaw in the Defendants' case, however, is the fact that until October of this year, the Defendants claimed that the Hire was payable [by KGK] to Balfour pursuant to the Balfour Charterparties. Indeed, and as further described below, Balfour brought proceedings in Russia to enforce its alleged right under those agreements. However, the Defendants now admit in these proceedings that the Balfour Charterparties were concocted by Mr Sochin and were sham charterparties".

Full and frank disclosure in application for worldwide freezing orders

The defendants also argued that there had been numerous breaches of the duty of full and frank disclosure on behalf of the claimant. The court gave a comprehensive recap of the duties of a claimant at a without notice application. The test as to whether there was material non-disclosure is whether the fact which had not been disclosed would have been material in the exercise of the Court's discretion. The court was very critical of the defendants and their legal advisors' approach; it was not at all proper for a defendant to try and allege as many allegations of non-disclosure as possible and "hope that something sticks". The Judge commented that she "found the Defendants' scattergun approach of making a large number of generalised complaints in lengthy and discursive evidence extremely unsatisfactory. It is trite that allegations of non-disclosure should be capable of being concisely and precisely stated." She went further to criticise the way in which the various allegations were made in that in "many of those allegations, neither the evidence nor the written submissions served by the Defendants identified with any precision the facts and matters alleged not to have been disclosed".

The defendants finally claimed that as an intermediary charterer, Manchester had suffered very little to no loss.

Standing of an intermediary charterer

The defendants finally claimed that as an intermediary charterer, Manchester had suffered very little to no loss. Manchester was contractually obliged to pay 99% of hire monies received further up the charter chain and, on the defendants' case, Manchester's loss was limited to 1% of the charter value and it was not therefore just and convenient to sustain a worldwide freezing orders for USD 5.6m. The court rejected this argument in simple terms. Manchester was entitled to hire under the charterparties, the full sum of that hire, and not just the 1% commission, "accordingly it is entitled to sue for the full amount. The arrangements it made in respect of any onward payment are not relevant to its present claim".

COMMENT

This is a useful and thorough judgment from the English High Court for three reasons.

Firstly, the judgment sets out a useful summary of the obligations of an applicant at a without notice hearing to make reasonable and full enquiries of the relevant facts and present these fully and openly to the court. That obligation extends to facts which are adverse to the applicant's case. However that obligation does not extend to every conceivable piece of information. Only those which would or could have reasonably be expected to have a material bearing on the court's discretion at the without notice hearing. Those challenging injunctions on the basis of non-disclosure as a ground for discharge should also note that any such allegations should be well thought out and capable of precise simple articulation, general allegations will not be sufficient.

Secondly, the judgment illustrates the English courts' intolerance of parties who seek to use technical loopholes in order to evade consequences for fraudulent wrong doing.

Finally, it is a useful confirmation and strengthening of the standing of intermediary charterers to sue for the full value of the hire in circumstances where the claimant's ultimate loss may be substantially lower.

Wikborg Rein (Chris Grieveson and Fiona Rafla) acted for Manchester Shipping in the proceedings. •

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FINANCE AND OPERATING LEASES IN THE CHINESE MARKET – key differences

Chinese sale and leaseback deals are now a well established financing option in the shipping sector. Whilst Chinese leasing companies have traditionally opted to go down the finance lease route, they are increasingly assuming more risk and opting for either a full operating lease arrangement or a hybrid structure adopting elements of both finance and operating leases.

We discuss a number of key differences between finance and operating leases below.

RESIDUAL VALUE RISK

Under a typical "finance lease" arrangement, the lessee has an obligation to take title in the vessel for a specified price (the purchase obligation price) at the end of the charter period, with the lessee therefore assuming the residual value risk (or reward) in the vessel at term. Under an "operating lease" model the lessor retains ownership of the vessel at the end of the charter period, with the residual value of the vessel remaining on the lessor's balance sheet. An operating lease may also be structured with a purchase option in favour of the lessee at the end of the charter period, but in general, risk and reward in the residual value remains with the lessor, though we have seen the purchase option terms at the end of some Chinese operating leases being structured in a manner which makes the price of exercising them (or the downside of not doing so) compelling.

The extent to which a finance or operating lease structure is appropriate for lessors / lessees depends not least on the commercial drivers behind the transaction in question.

DEFAULT PAYMENTS

Upon the occurrence of a lessee default under a normal operating lease, the lessor will retain title and the lessee will usually only be liable to pay the charter hire which has accrued up to and including the termination date plus any enforcement costs and any losses suffered by the lessor as a result of not being able to obtain an equivalent charter rate or sale price (in case of disposal) from a third party, as compared to the charterhire that would otherwise have been payable for the residual charter period. The exact amount a leasing company may hope to recover in this situation will therefore greatly depend on the strength of the market at the time the lease is terminated. Under a finance lease however, the lessee would usually be liable for all of the principal amounts (and possibly certain of the interest element of hire, normally if so at a discounted rate) which would have been payable to the lessor had the vessel been chartered for the full term of the charter period plus any enforcement costs, with the lessee taking title in the vessel upon payment in full of the aforementioned amounts.

We have recently seen some discussions around the adoption of something of a "hybrid" structure in a default scenario, with the leasing house seeking to retain title in the vessel as well as seeking to recover all or a significant portion of outstanding hire right through until the end of the charter period. However, notwithstanding that this might possibly be commercially agreed between the parties in the heat of negotiation, it is questionable to what extent this may be enforceable, as under English law, such an arrangement would likely be regarded as a penalty and therefore be ultimately unenforceable. The fall-back position, would then be as described above for operating leases.

CHARTER PERIODS

Finance leases traditionally ran for a period equivalent to the expected economic life of the vessel. Chinese finance leases however are typically for a shorter term with anywhere between 7-12 years being most common.

Operating leases have traditionally run for a period significantly shorter than the expected economic life of the vessel, though we have seen some Chinese operating leases run for periods similar to finance leases.

INTEREST PAYMENTS

In a finance lease arrangement, interest is normally applied to the outstanding principal payable during the remaining charter period at either a fixed or floating rate.

In operating leases, interest is not typically applied in such a manner, with the leasing house's profit element/cost of funds in the deal being simply built into a blended charterhire rate payable during the charter period.

ON OR OFF BALANCE SHEET

Until recently, operating leases were an "off-balance sheet" arrangement for the lessee while finance leases appeared "on-balance sheet". However, recent changes applicable to those lessees accounting under International Accounting Standards (i.e. the new IFRS16) will now also bring operating leases "on-balance sheet".

Lessees will therefore be required to show the "right to use" the vessel as an asset and their obligation to make charter payments as a liability on the balance sheet, though they will however be able to claim depreciation on the asset as well as to offset their liability to pay interest against profits.

INSOLVENCY OF THE LESSEE

Depending on the vessel's flag and local law requirements, a finance lease may be recorded with certain ship registries (e.g. Marshall Islands and Liberia) as a security interest in the vessel with the lessor as owner being granted the status of a secured party. Recordation seeks to address a concern in relation to lease financings that the courts may deem a lessee under a finance charter to be the true owner of the vessel, with the lessor as registered owner having only limited remedies available to it in the case of lessee insolvency. Recordation (though somewhat untested in the courts) seeks to give a lessor (as owner) many of the same rights as a mortgagee would have in an insolvency situation, including, without limitation, priority in the waterfall of payments flowing from an insolvency of the lessee. An operating lease does not have this advantage, but there is a lower chance of a lessee under an operating lease being characterised as the true owner of the vessel, in which case recordation in this context is perhaps something of a moot point.

The extent to which a finance or operating lease structure is appropriate for lessors / lessees depends on a myriad of factors, not least the commercial drivers behind the transaction in question. The increasing willingness of Chinese leasing houses to look at alternative structures however demonstrates the developing maturity of this market and lessees would be well advised to look East when thinking about sourcing finance for upcoming projects. •

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Quiet enjoyment letters – BENEFIT TO LENDERS?

Quiet enjoyment letters ("QEL"s) are often used where a ship, rig or other unit being financed is subject to a long-term charterparty to govern the inter-relationship between the owner, its financiers and the charterer. But what is a QEL and do they have any benefit for the lenders?

A QEL is typically an undertaking from a ship's lenders or mortgagee establishing a direct relationship between the mortgagee and the charterer pursuant to which the relevant mortgagee undertakes not to enforce its rights or security against the ship as long as the charterer continues to perform its obligations towards the owner under the charter.

In other words, a QEL provides the charterer with a right to the undisturbed use and enjoyment of the ship, independent of whether or not the owner in its capacity as borrower is in default of its obligations towards its lender under the loan agreement.

NO "INDUSTRY STANDARD" QEL – NEGOTIATIONS ARE KEY

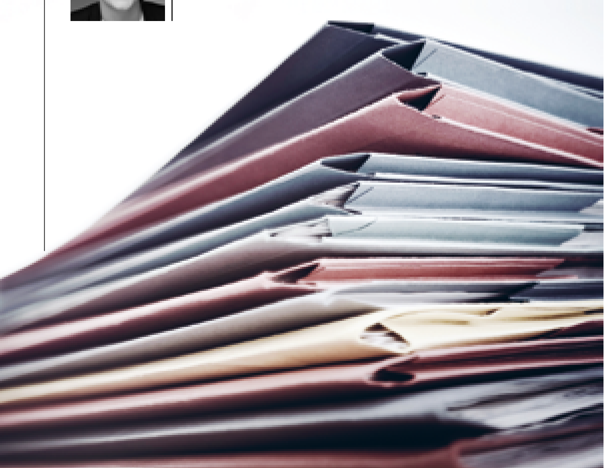
In principle the QEL might be seen as limiting the mortgagee's rights by imposing limitations on the remedies and enforcement alternatives available to it following an owner default. Having a QEL in place is therefore often perceived to be of benefit to only the charterer and owner.

However, it is not always this black and white and in most situations, preserving the charterer's uninterrupted use and enjoyment of the ship is not only beneficial to the owner and charterer but also, in most situations to the lenders, most obviously because by ensuring the charterer's uninterrupted use of the ship, the lenders are helping to ensure regular income for the owner, which in turn can be used for repayment of the relevant debt secured by the lenders' mortgage. Lenders will therefore usually agree to issue a QEL in favour of the charterer if requested, though they also often use it as an opportunity to try to secure some additional rights of their own.

For example, to ensure that the charterer maintains the charter and continues to pay hire, lenders will often require that the charterer notifies the lenders of an owner default under the charter promptly upon its occurrence and that the charterer grants the lenders a certain period of time within which to remedy such default before the charterer is entitled to terminate. Alternatively, or in addition, lenders may seek to obtain a contractual step-in right for themselves or their nominee in a default situation, giving them the right to step into the shoes of the owner under the charter and to receive hire directly from the charterer or a right to sell the ship subject to the underlying charter remaining in place.

Since there is no industry standard form of QEL, the extent to which these additional owner protections are built in to the wording of a QEL are up for negotiation between the parties and the final agreed wording will therefore ultimately depend on the respective bargaining power of the relevant parties. •

The mortgagee undertakes not to enforce its rights or security against the ship as long as the charterer continues to perform its obligations



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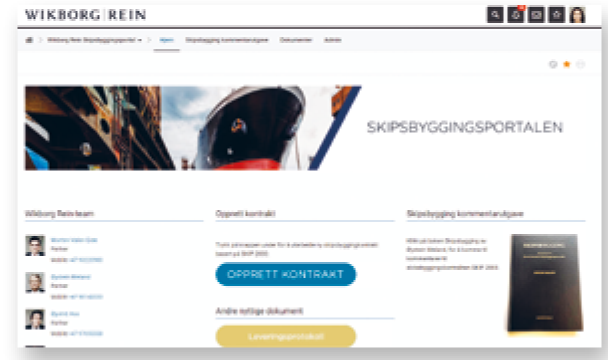

Shipbuilding Portal – DIGITAL BUILDING CONTRACTS

Wikborg Rein is launching a new digital service aimed at the shipping industry. The Shipbuilding Portal is a user-friendly online solution for the drafting of shipbuilding contacts based on the Standard Form Norwegian Shipbuilding Contract 2000, often referred to as "Ship 2000". It will simplify the drafting process and provide access to relevant practical information.

– The idea is to make the contract drafting more efficient and avoid costly errors, says Morten Valen Eide, partner at Wikborg Rein.

Based on the user's entries relating to the name of the buyer and the builder, purchase price, number of installments and other information, the contract is automatically generated. The user may also include tailored categories such as dispute resolution and guarantees. Other standard documents such as protocol of delivery and acceptance are also available on the platform. Time is saved and errors and misunderstandings can be avoided.

BY THE BOOK

The Shipbuilding Portal also gives the user easy access to commentaries and practical information relevant to the various clauses of Ship 2000. The comments are based on the Wikborg Rein book "Shipbuilding" ("Skipsbygging") authored by Øystein Meland who has played an active role in drafting Ship 2000. An English version of the book will also become available in due course.

– The users may navigate through the contract and also receive practical guidance to legal issues related to the shipbuilding contract, says Morten.

BRINGING THE CONTRACT SAFELY TO SHORE

The Portal also includes several useful links, an RSS news feed related to the shipbuilding industry and other documents relevant to shipbuilding.

– The main purpose of the Portal is to simplify the work related to the drafting of a shipbuilding contract and also to create a place where the relevant information related to the contract are available. It saves both time and resources as well as simplifies the contract procedure, says Morten. •

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The manager's letter of undertaking – MOVING TOWARDS A MORE BALANCED STANDARD?

Third party shipmanagers are often required to issue letters of undertaking to financiers of a managed vessel on relatively unfavourable and financier friendly terms. BIMCO's new standard Shipmanagers' Letter of Undertaking published on 28 January 2019 (the "BIMCO LoU") seeks to redress the balance and gives shipmanagers a more equitable set of terms which may be used as a starting point for negotiations.

When financing a vessel, shipowners are often required to procure that any third party manager of the vessel issues a letter of undertaking in favour of the owner's financiers in order to put the financiers in the same position as they would have been under the financing documents had the vessel been managed and operated by the owner. These letters of undertaking typically include all-encompassing subordination clauses, which, in a distress scenario, have the effect that the manager only receives payment for services and reimbursement of expenses after the shipowner's debt has been paid in full. These letters of undertaking also usually contain a requirement for the manager to assign its rights under the vessel insurances to the financiers. For a third party manager without an economic interest in the vessel, these terms may be hard to swallow.

Letters of undertaking typically include all-encompassing subordination-clauses

Management costs of a vessel may quickly add up to substantial amounts of money (in particular in a distress scenario), and whilst financiers are well advised to seek limitations on a manager's ability to make claims against the shipowner, the vessel and its other assets in competition with the financiers, for third party managers it will be unsatisfactory to provide services and be potentially out of pocket for disbursements if there is any risk that such amounts many not be paid by a client in economic distress.

The new BIMCO LoU seeks to address this issue by specifying a level of permitted credit that the manager can extend to the shipowner in connection with management of a vessel in respect of management fees, general management expenses, victualling or other costs, expenses and disbursements. Credit extended below the specified level is unsubordinated and may be pursued by the manager against the owner including in situations where a default also exists under the shipowner's financing arrangements. However, credit extended above the specified level shall be fully subordinated to the shipowners' debt to its financiers. The starting point for the permitted credit level set in the BIMCO LoU is US$750,000, but the exact threshold for the permitted credit is up for negotiation and is meant to be adjusted to suit the specific management agreement in question.

Under the new BIMCO LoU, the manager also agrees not to make material amendments to the management agreement without the consent of the relevant financiers, except that the manager may terminate the management agreement as provided therein. Contrary to what is often seen in the financier's standards, the BIMCO LoU does not contain any right for the financier to step into the management contract where the shipowner has defaulted under same. Instead the manager is required to provide the financiers with 15 days' notice prior to termination, giving the financier a window within which to try to seek a resolution with the shipmanager and potentially get them to continue providing management services. The quid pro quo however is that under the new BIMCO LoU, the financiers may require that the manager terminates the management agreement upon a default under the shipowner's debt.

Managers are often named as an assured under insurance policies for the vessels they manage and whilst financiers' standard letters of undertaking often include an assignment of the manager's rights under the relevant insurances, from a manager's point of view, such assignments should be avoided as they represent a charge over the manager's property which may be prohibited under the manager's own financing arrangements. The BIMCO LoU however does not contain an assignment of the manager's rights under the insurances. Instead, the BIMCO LoU includes a confirmation that the manager's interest in the owners' insurances shall be limited to covering certain claims, such as out-of-pocket expenses incurred on behalf of the owner and third party claims or liabilities discharged on behalf of the owners (to the extent covered by the relevant insurances), and specifies that such limitations may be endorsed in the loss payable clauses of the shipowner's insurances.

The new BIMCO LoU will provide a useful benchmark when negotiating letters of undertaking

The BIMCO LoU also includes an obligation on the manager to provide the financiers, upon request, with certain documentation related to the management of the vessel and certain other customary requirements.

The extent to which the new BIMCO LoU will be accepted by ship financiers remains to be seen, but it will nevertheless provide a useful benchmark which can be relied on by managers when negotiating letters of undertaking and hopefully assist in avoiding protracted negotiations of such documents. •

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WIKBORG REIN'S

MARITIME AND OFFSHORE EMERGENCY RESPONSE TEAM AVAILABLE WORLDWIDE 24/7

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

Viking Sky Blackout, heavy weather, claims, Norway
KNM Helge Ingstad c/w Sola TS; refloating of navy frigate, claims, Norway
Shinyo Ocean c/w Aseem; claims, off Fujairah
Northguider Grounding, removal, Spitzbergen
Antea c/w Star Centurion, total loss, claims, Indonesia
Geos Explosion on offshore exploration drill ship, fatality, wreck removal, Malaysia
Cheshire Decomposition of fertilizer, total loss, off Gran Canaria
Stolt Gulf Mishref Loss of propulsion of parcel tanker, GA, cargo issues, Red Sea
TS Taipei Grounding and wreck removal of bulk carrier, pollution, cargo, Taiwan
Stolt Commitment c/w Thorco Cloud which sank, wreck removal, cargo claims, multi-jurisdiction litigation, Singapore Strait, Indonesia
Fair Afroditi Explosion, sale of oil tanker, Lomé, Togo
Troll Solution Punch through of jack-up rig; fatalities, wreck removal, Gulf of Mexico
Sorrento Fire on ro-ro passenger vessel, CTL, cargo damage, off Mallorca
Goodfaith Grounding of bulk carrier; wreck removal, Andros, Greece
FPSO Cidade de Sao Mateus Explosion, fatalities, salvage, Espirito Santo Basin, Brazil
USNS Sgt Matej Kocak Grounding and salvage off Okinawa, Japan
Asian Empire Fire and salvage of car carrier, cargo damage, Pacific Ocean
Britannia Seaways Fire on cargo vessel carrying military equipment, including ammunition, off Norway
Luno Wreck removal of grounded bulk carrier, Bayonne, France
Wan Hai 602 Exploded container under deck at Suez Canal
B-Elephant Alleged submarine cable damage by VLCC, Alexandria, Egypt
Chamarel Wreck removal of grounded cable laying vessel, Namibia
Gelso M Wreck removal of grounded chemical tanker, Italy
Bareli Grounding of container ship; oil pollution, cargo damage, wreck removal, China
KS Endeavour Explosion and fire on jack-up rig, Nigeria
Rena Wreck removal of grounded container ship, New Zealand
Nordlys Fire on passenger ferry; c/w berth, salvage, Norway
B Oceania Wreck removal of bulk carrier; c/w MV Xin Tai Hai, Malacca Strait
Double Prosperity Salvage of grounded bulk carrier, Bakud Reef, Philippines
Godafoss Grounding; oil pollution, GA, salvage of multipurpose container ship, Norway
Jupiter 1 Wreck removal of capsized semisub accommodation rig, Gulf of Mexico
Hub Kuching Salvage after fire and CTL of container ship, South China Sea
West Atlas Wreck removal of drilling rig; blowout and fire, Timor Sea, Australia
Full City Grounding; oil pollution, refloating of bulk carrier, Norway
Bourbon Dolphin Capsizing and total loss of anchor handler; casualties, Shetland
Repubblica di Genova Refloating and sale of capsized roro ship; cargo damage, Belgium
Cembay Grounding on coral reef; salvage of cement carrier, oil pollution, cargo damage, Mexico
Big Orange XVII Well stimulation vessel c/w platform, Ekofisk field, North Sea
Server Grounding; oil pollution, wreck removal of bulk carrier, Norway
Alaska Rainbow Cargo ship c/w passenger ferry, River Mersey, England
Hyundai No. 105 Car carrier c/w VLCC Kaminesan; cargo damage, wreck removal, Singapore Strait
Rocknes Refloating of grounded and capsized bulk carrier; oil pollution, casualties, Norway
Panam Serena Explosion and fire; salvage and sale of chemical tanker, terminal claims, casualties, Sardinia, Italy
Vans Princess Grounding of roro vessel; oil pollution, cargo damage, Tartous, Syria
Tricolor Car carrier c/w container ship Kariba; sinking, wreck removal, cargo damage, multi-jurisdiction litigation, English Channel
Hual Europe Grounding of car carrier; fire, oil pollution, cargo damage, wreck removal, Tokyo Bay, Japan
Amorgos Grounding of bulk carrier; sinking, oil pollution, Taiwan
Norwegian Dream Cruise ship c/w container ship Ever Decent; fire, personal injury, cargo damage, salvage, English channel
Sun Vista Fire and total loss of cruise vessel, Malacca Strait

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