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Update

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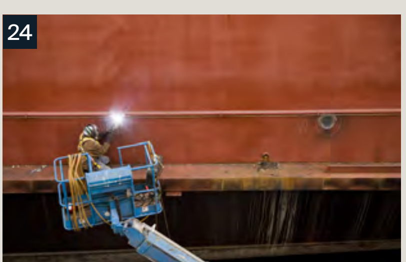

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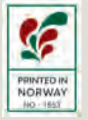

UPDATE JUNE 2024
SHIPPING OFFSHORE

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Dear friends and readers

Geopolitical tensions continue to affect international shipping.

The war in Ukraine, which has been ongoing for more than two years, trapped a large number of vessels in Ukrainian waters when Russia launched its full-scale invasion and has resulted in sanctions being imposed by the US, UK and EU. The sanctions have been severe, wide-ranging and ever-changing, but have not been as effective as intended, which is apparent by the large and growing dark fleet.

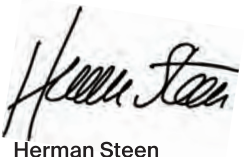
The attack by Hamas in Israel on 7 October started a war between Israel and Hamas and escalated the Middle East conflict. The Iran-backed Houthis in Yemen have attacked ships in the Red Sea and the Gulf of Aden, disrupting one of the world's busiest shipping routes.

The green transition is also increasingly impacting shipping and whilst the regulatory landscape is becoming more complex for industry players to navigate, it is also presenting new opportunities.

In this edition of the Shipping Offshore Update we have included several articles on the green transition. We look at new business ventures such as carbon capture and storage. We consider several new standard forms launched by BIMCO to assist in the negotiations of environmental and regulatory risks in ship management contracts and charterparties.

We also look at the latest development on ship recycling regulations and how the new Norwegian Transparency Act obliges shipowners to provide information on their efforts to ensure decent working conditions at the yards they use, as well as several other topics.

We hope our readers will find this edition insightful and enjoyable as we sail into the summer months.



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The green transition is also increasingly impacting shipping and whilst the regulatory landscape is becoming more complex for industry players to navigate, it is also presenting new opportunities.

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CARBON CAPTURE

– building a new value chain from a contractual perspective

With its history and extensive experience with CO_2 management as an oil and gas nation, Norway is a leading country in building a new CCS value chain in the fight against climate change.

→

Carbon Capture and Storage ("CCS") is an important platform for the further development of green industry for a low-carbon future, both in Norway and across the globe. Norway already has extensive experience in the field and since 1992 has been managing and storing CO_2 under the seabed from gas production at the Sleipner-Vest field, and since 2008 at the Snøhvit field. Moreover, Norway is home to the world's largest facility for testing and development of carbon capture technologies, Technology Centre Mongstad, located outside Bergen.

In 2020, Norway made an extensive investment in the Longship project. This is a full scale CCS-project, where CO_2 is intended to be captured, transported and permanently stored at a subsea storage site offshore Norway. An essential part of this project is the Northern Lights storage license awarded by the Ministry of Energy in 2019, being the world's first commercial multinational carbon storage project. Northern Lights is scheduled to be ready to receive CO_2 at its terminal in Øygarden, Bergen from the end of 2024 upon completion of construction of the storage infrastructure. This currently positions Norway as the world's leading storage hub for CO_2.

CAPTURE

It is not only the desire to combat global warming which is incentivising the establishment of CO_2 capture facilities. It is also that the escalating prices of climate quotas are exerting financial pressure on companies globally and the adoption of carbon capture technology can potentially be a less costly alternative in comparison to continuously paying for climate quotas. That said, a report from Oslo Economics and SINTEF Energi published 27 March 2024 states that the price for greenhouse gas emissions quotas must be quintupled before capturing CO_2 becomes profitable. Measures beyond the EU's quota system and the domestic CO_2 tax are therefore necessary to realise CO_2 capture from emitters, even though the future costs for carbon management is expected to be somewhat reduced due to learning effects.

The emission sources can be industry or waste incineration facilities, however, CO_2 may also be captured from smaller emission sources such as individual ships. The Norwegian Pollution Control Act section 11 stipulates that a company wishing to establish a CO_2 capture facility must obtain a permit license for carbon capture and temporary storage of CO_2. The require-

ments for applications are regulated by Chapter 36 of the Norwegian Pollution Control Regulations which amongst other things requires an Environmental Impact Assessment (EIA) to be performed.

TRANSPORT

CO_2 is typically not captured, liquefied and stored in one place. It therefore needs to be transported from the capture/liquification site, and to the storage facility. Transport can be carried out by various means, including in pipelines, by vessels, and by trucks/trains. In the early phases the development of CCS value chains, it is likely that seaborn transportation will be the predominant transportation method for CO_2 intended for subsea storage. The reason for this is that the use of vessels is a relatively flexible and scalable option.

In relation to the transportation of CO_2, it is important that the entities involved have a good overview of the regulatory and contractual challenges and opportunities. Amongst other things, it needs to be verified that cross border transport is possible according to international law, in particular under the London Protocol. Further, different contractual arrangements need to be considered, including transportation and storage agreements and charter parties. For a more detailed overview of transportation aspects related to CCS, we refer to our separate article on "Transportation of CO_2 – An emerging market", which is included in this SO Update.

STORAGE

The Ministry of Energy, demonstrating its commitment to CCS, has awarded seven CO_2 storage licenses since 2019 (as of May 2024) and there are currently other ongoing licence processes. However, only one licence, issued to Northern Lights in 2019, has made a final investment decision.

The EU Directive 2009/31/EC on the Geological Storage of CO_2 (the Storage Directive) sets the legal framework for environmentally safe storage of CO_2 within the EEA. Norway has implemented the directive through the CO_2 Storage Regulations of 2014 and through amendments to the Petroleum and Pollution Regulations. Whilst the Pollution Regulation applies to all forms of CCS, the Petroleum Regulation only applies if the CCS is linked to a petroleum activity and the Storage Regulation applies when CCS is conducted on a standalone basis. The Ministry of Petroleum and Energy noted in the proposal to the Storage Regulation that difficult issues of a financial and legal nature would arise if the existing petroleum production-related CCS operations came under the new regulations.

All CCS operations must obtain a permit from the Ministry of Climate and Environment under section 11 of the Pollution Control Act with respect to the drilling activity and under section 35(4) of the Pollution Regulations for the injection and storage. While operators of CCS connected to a petroleum activity must obtain from the Ministry of Petroleum and Energy an exploitation permit under section 30(e) of the Petroleum Regulations, operators of standalone CCS must obtain the corresponding permit under section 4(1) of the Storage Regulations.

> **The adoption of carbon capture technology can potentially be a less costly alternative in comparison to continuously paying for climate quotas.**

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Transportation of CO_2 – an emerging market

Following the Paris Agreement, Carbon Capture and Storage (CCS) has emerged as a promising tool to substantially reduce carbon emissions. Whilst CCS's potential is considerable, it is still a developing industry that needs efficient means of transportation.

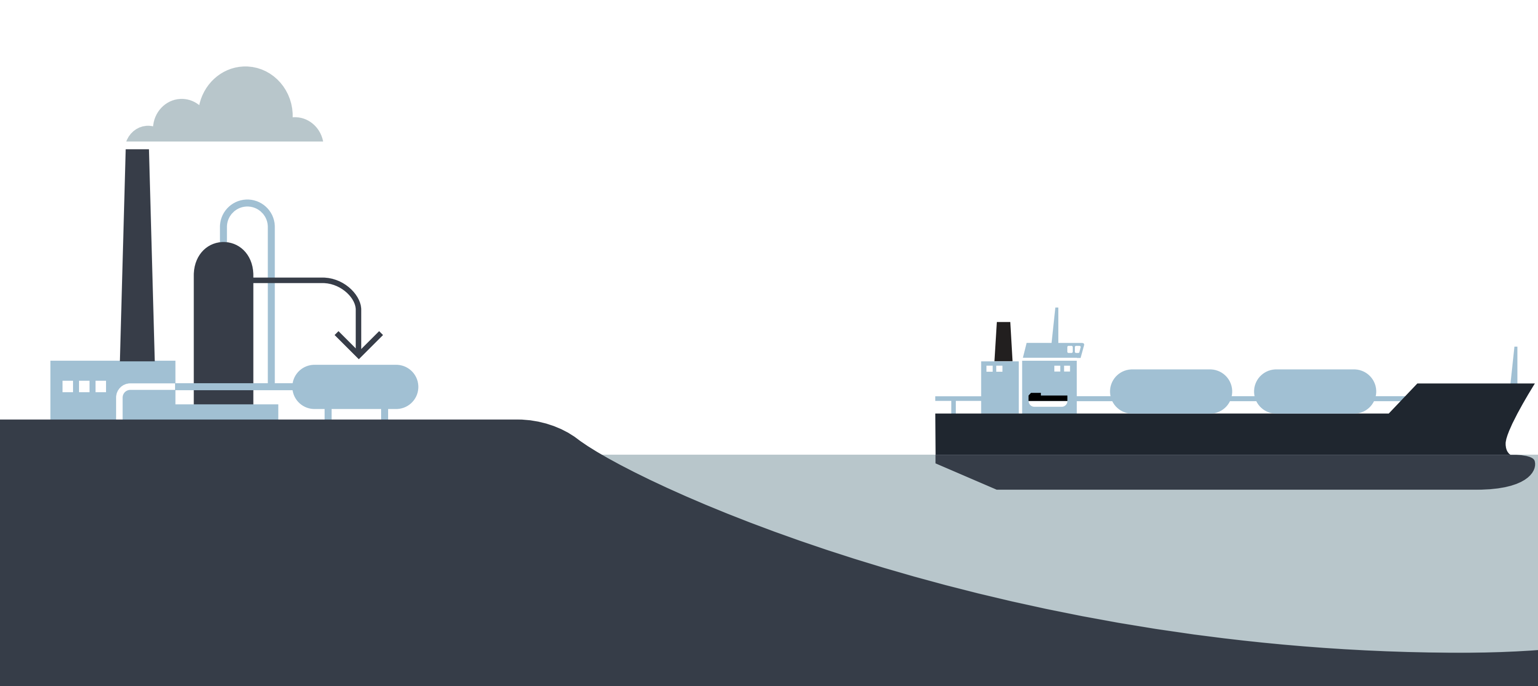


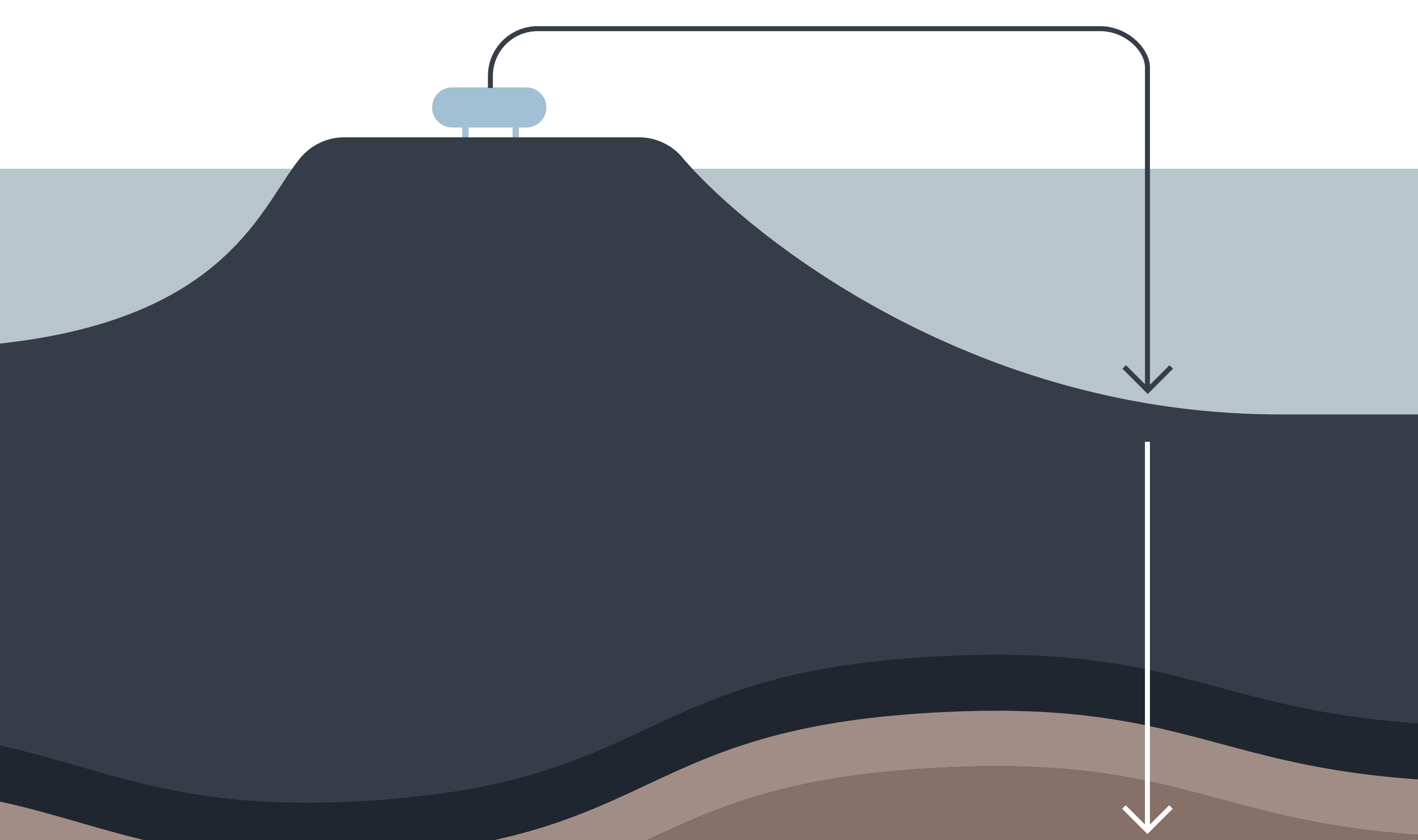
Illustration: Roy Smith

Captured CO_2 can primarily be transported from the emitter to the storage provider by pipelines or ships. Whilst pipelines may prove to be more cost-efficient, at least over time, ships are generally more flexible and quickly scalable.

CROSS BORDER TRANSPORTATION OF CO_2 AS "WASTE"

A first hurdle facing CCS projects where the captured CO_2 is to be transported across borders for storage in a foreign subsea reservoir, is the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 (the London Convention) and its 1996 protocol (the London Protocol). The London Convention and Protocol aims to prevent pollution at sea by dumping of wastes and other matters. One of the principles in the London Protocol, is that the contracting parties shall not allow the "*export of wastes or other matter to other countries for dumping or incineration at sea*". An unintended consequence of this is that CO_2 intended for storage, and not for commercial use, cannot be transported from one contracting state to another.

Having realised this, some of the signatories to the London Protocol proposed an amendment in 2009, aiming to make it possible to export CO_2 intended for disposal when the states involved have entered into an agreement or arrangement, and notified the International Maritime Organization ("IMO") of the agreement or arrangement. Whilst the amendment has, as of today, not been ratified, the lack of ratification has been temporarily resolved by the adoption in 2019 of a special resolution, which allows for the provisional application of the 2009-amendment.



For signatories to the London Protocol, it is therefore now in principle possible to transport CO_2 for CCS-purposes. The key conditions in order to make this possible, are that the relevant loading / discharge states have adopted the 2009-amendment, and that they have entered into an agreement or arrangement. Recently, several states have entered into such agreements or arrangements. For example, Norway entered into arrangements (titled Memoranda of Understandings) with Sweden, Denmark, Belgium and the Netherlands on 15 April 2024. This has effectively removed the red tape that would have prevented these countries from utilising the full potential of the CCS infrastructure that is under development, and marks a welcome development which we expect to be followed up by similar agreements between other countries.

STRUCTURING OF THE TRANSPORTATION ELEMENT OF CCS

CO_2 transportation by ships from the emitter to the storage provider have thus far been arranged by either the storage provider or the emitter. However, neither land based CO_2 emitters, nor the emerging storage providers, are typical shipowners.

In the early projects that we have seen, transportation has been offered as an integral part of the storage provider's services under a Transportation and Storage Agreement (TSA). The vessels are ordered and built by the storage provider, who aims to time charter the vessels, and thus the actual transportation element, to a third party shipowner. This makes sense in an immature industry like CCS where vessels capable of carrying CO_2 are few and far between.

In later projects, we have also seen that large emitters are prepared to arrange for the transportation themselves, by entering into long-term time charters for dedicated vessels to be built and operated by a third party shipowner. As the industry matures, we expect to see more of these kinds of arrangements in the future.

We also expect that CO_2 loading terminal operators, which collect CO_2 captured by several emitters pending shipment to a storage provider, may add transportation to their terminal services and charter in the required tonnage.

> **CO_2 transportation by ships from the emitter to the storage provider have thus far been arranged by either the storage provider or the emitter. However, neither land based CO2 emitters, nor the emerging storage providers, are typical shipowners.**

CO_2 TIME CHARTER PARTY

Whilst the time chartering of CO_2 carriers is relatively straight forward and similar to charter parties commonly used for transportation of other liquified gases, there are some CO_2 specific issues that should be addressed, particularly related to boiloff and venting of CO_2.

BIMCO has commenced a project to develop a standard time charter partly tailored for seaborne carriage of CO_2. Their view is that whilst it is possible to use existing charter parties for this purpose, the unique conditions and potential liabilities associated with CO_2 carriage and storage warrant the development of a dedicated standard that specifically addresses the needs of shipowners and charterers involved in transportation of CO_2.

We are pleased that our partner, Andreas Fjærvoll-Larsen, has been invited to join the BIMCO subcommittee working on this new charter party which is expected to be published in 2025.

CO_2 TRANSPORTATION AND STORAGE AGREEMENT

A CO_2 Transportation and Storage Agreement (TSA), where the transportation is offered by the storage provider and included as part of the storage service fee, is significantly more complex. Firstly, it has similarities with regular offtake agreements that we see in the petroleum, energy and renewables industry, but operates in reverse compared to those. Secondly, it is a framework agreement for transportation services at sea, or a Contract of Affreightment (CoA).

The two elements raise different practical and legal challenges, where the transportation element is in our view the most complex – unless the parties are happy to rely on background law.

The storage provider should be aware that if it also assumes an obligation to transport the CO_2, it will be regarded as a "carrier" under maritime law. In the Nordic countries, the national maritime codes will

therefore, to some extent, be mandatorily applicable at least if nothing to the contrary is clearly agreed in the TSA. A relatively strict liability regime will consequently apply during the transportation, although the carrier is normally able to limit its liability in accordance with the applicable law.

Another issue that always arises is the question of flexibility; should the emitter be obliged to pay for the full storage capacity reserved but not necessarily used, or should it be allowed a certain degree of flexibility between the capacity reserved and a (lower) basic payment obligation? On the one hand, a storage provider who has made large up-front investments, naturally wants to secure its cashflow to protect that capex. The emitter, on the other hand, may argue that since it is not in the business of producing CO_2 – it is simply a by-product – its obligation to pay for storage capacity should be as limited as possible to reflect the potentially fluctuating demands for its other – and main – products.

A key rationale both economically and environmentally for CCS projects is that CO_2 is actually stored. A further, albeit related issue is therefore whether the emitter should be obliged to deliver a certain fixed volume of CO_2, or simply be obliged to pay for the capacity reserved. This issue is particularly important to storage providers that have been granted subsidies based on actual quantities stored, as a "deliver or pay" regime may not provide adequate compensation if parts of the subsidised capacity built is left unused. If the emitter is obliged to deliver a fixed volume of CO_2, the question is then to what extent the emitter should also be obliged to try to source in and deliver CO_2 from third parties if it fails to deliver the agreed volume itself.

Other issues the parties should bear in mind are how they regulate loss of CO_2 during transportation, including boiloff thresholds, forced venting and valuation of the CO_2 cargo; transfer of ownership of the CO_2; storage provider's right to use the vessel to collect CO_2 from other emitters and co-mingling of CO_2; liability for off-spec CO_2 and off-spec CO_2 vapour return; possible force majeure relief for emitter; price adjustment based on CPI and/or ETS costs; laytime and demurrage; storage terminal downtime and possible penalty for the storage provider; etc.

Whilst some of the above issues may have found their common solution in general shipping practice, others have not. And for those issues there are currently little industry practice to rely on for the parties. Hence, it will be interesting to follow this emerging market in its continued development.

A first hurdle facing CCS projects where the captured CO_2 is to be transported across borders for storage in a foreign subsea reservoir, is the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972.

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Calls on IMO to solve legal inconsistencies on ship recycling

BIMCO has, together with the International Chamber of Shipping, Norway, Bangladesh, India and Pakistan, urged the International Maritime Organisation (IMO) to solve possible conflicting requirements between the Hong Kong Convention and the Basel Convention ahead of the entry into force of the Hong Kong Convention on 26 June 2025. The potential conflicts may expose shipowners and others to severe consequences, particularly when recycling ships in the major ship recycling countries in South Asia such as Bangladesh, India and Pakistan, even if the ships and facilities comply with the Hong Kong Convention.

The lack of clarity regarding the relationship between the Hong Kong Convention and the Basel regime creates unwanted uncertainty and risks for stakeholders involved.

In the previous edition of the Shipping Offshore Update (December 2023) we addressed the entry into force of the Hong Kong Convention, which will change the global legal framework on ship recycling and is expected to improve the standards on safe and environmentally sound ship recycling particularly in South Asia. We also addressed the potential conflicts between the Hong Kong Convention and the Basel Convention, which the IMO has now been called on to solve.

WHAT IS THE PROBLEM?

Once the Hong Kong Convention enters into force, it will require ships flagged in contracting states to comply with the Convention, including the requirement that ships must only be recycled at facilities authorised under the Convention. It will also require recycling facilities in contracting states to be authorised by national authorities and to operate in compliance with the Convention.

Once a ship has obtained an International Ready for Recycling Certificate (so-called IRRC) under the Hong Kong Convention, which is valid for three months, there is however a risk that it will at the same time be considered as hazardous waste under the Basel Convention.

The Basel Convention does not directly apply to ship recycling, but controls the movement of hazardous waste across international borders and its disposal. Ships are, however, normally considered as hazardous

waste under the Basel Convention when they are heading for recycling. Shipowners must then seek prior informed consent from the exporting, transiting and importing state if they are contracting states, which may take up to 60 days, during which the ships must remain idle in the exporting state. The Basel Ban Amendment goes one step further and prohibits export of hazardous waste to non-OECD states. That would prohibit ships from being exported from an OECD state to be recycled in any of the major ship recycling states in South Asia such as Bangladesh, India, Pakistan, even if the ships and the facilities comply with the requirements of the Hong Kong Convention.

This would entail a risk that the ship could be arrested and, can result in severe sanctions for the shipowners and others involved, including several months of imprisonment of key personnel, as has been seen in several cases particularly in the Netherlands and in Norway.

POTENTIAL SOLUTIONS

Some believe that the Hong Kong Convention will take precedence over the Basel Convention since the Basel Convention allows other instruments to supersede if they impose waste management requirements not less environmentally sound than those under the Basel Convention, and also since the Hong Kong Convention is a more recent convention which regulates a more specific subject matter. However, whether the Hong Kong Convention takes precedence is disputed by some, including several NGOs.

The lack of clarity regarding the relationship between the Hong Kong Convention and the Basel regime creates unwanted uncertainty and risks for stakeholders involved, both in respect of owners of ships that are soon to be recycled and the recycling facilities that are now investing to improve their facilities.

A potential resolution could draw inspiration from the EU's approach to the interface between the EU Ship Recycling Regulation and the EU Waste Shipment Regulation. While the former is based on the Hong Kong Convention and the latter on the Basel regime, the EU has established that the Waste Shipment Regulation does not apply when the Ship Recycling Regulation does. Whether such a solution is feasible in practice in connection with the Hong Kong Convention, remains to be seen. Some NGOs have indeed advocated for the opposite, namely that it should be established that the Basel regime should take precedence over the Hong Kong Convention.

The recent submission to the IMO is in any event a welcome development, as this will hopefully result in a resolution of the issue. Addressing these legal challenges will be essential to realise the full potential and widespread compliance with the Hong Kong Convention as we approach its entry into force in June 2025.

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SHIPMAN 2024 – a welcome, gentle revision

Since its original introduction in 1988, the BIMCO standard ship management agreement SHIPMAN (revised in 1998 and 2009) has established itself as the global standard ship management agreement. Adopted on 22 March 2024, the new SHIPMAN 2024 represents a light touch revision of the standard form, incorporating established standalone clauses and new provisions reflecting these developments.

Since the last edition was published in 2009, ship management practices, environmental, social and governance matters (ESG) and contract practice in the maritime industry have continued to develop and a number of standalone clauses have been adopted by BIMCO for use with SHIPMAN.

SHIP MANAGEMENT PRACTICE

Recognising the practical reality that an incoming ship manager is normally expected to make preparations and incur costs in advance of the date the manager will assume responsibility for the vessel, SHIPMAN 2024 includes a concept of predelivery services and provides for a "predelivery management fee". The predelivery management fee is set to one month's management fee if nothing else is agreed, and also payable if handover of management responsibility for the vessel does not occur for any reason other than default by the managers. The introduction of a concept of predelivery services in SHIPMAN 2024 also clarifies that the managers are covered by the management agreement's limitations of liability already during the performance of pre-delivery services for the owners in preparation for handover.

New provisions regulating the managers' information system and vessel-specific documents and data have also been included. These clauses clarify that (i) whilst the owners shall be given access to the managers' information system during the management period in order to consider vessel data, the managers retain the rights to their information system; and (ii) all vessel-specific documents and data shall be the property of the owners.

REGULATORY FRAMEWORK

In line with developments in regulatory framework since 2009, six existing standalone BIMCO clauses (with some minor adjustments) have been included addressing environmental, social, and governance (ESG) matters. The first clause, MLC Clause for SHIPMAN 2009, provides that the managers assume the "shipowner's" duties under the ILO Maritime Labour Convention for Management Services. The second, Personal Data Protection Clause for SHIPMAN 2009, mandates compliance with data protection regulations, including GDPR. The third, BIMCO Cyber Security Clause 2019 (with some adjustments) introduces cyber security measures. The fourth, based on BIMCO's existing Designated Entities Clause for SHIPMAN 2009, addresses sanctions. The fifth, adapted from BIMCO's existing Anti-Corruption Clause for Charter Parties 2015, mandates compliance with anti-corruption legislation.

The sixth standalone clause, BIMCO's ETS – SHIPMAN Emission Trading Scheme Allowances Clause 2023, was developed as part of BIMCO's work on the revision of SHIPMAN but initially adopted and published as a standalone clause for use with SHIPMAN 2009 in late 2023, ahead of the adoption of SHIPMAN 2024. For a discussion of this clause, see the separate article in this Shipping Offshore Update.

CONTRACT PRACTICE

In line with more general developments in contracting practice, a new change of control provision has also been introduced in the new SHIPMAN 2024. This new clause obliges each of the parties to give fifteen days' written notice of any proposed change of control, defined broadly as a change in 50% or more of the direct or indirect ownership of a party. If the other party does

not object in writing within fifteen days of receiving the written notice, they are deemed to consent, and both parties have a right to terminate the management agreement if they cannot agree on the change of control.

Following experience in recent years and current events, the catalogue of force majeure events in the force majeure provision has also been expanded to cover plagues and pandemics, a broader category of natural disasters or extreme natural events and ionising radiation or contamination by radioactivity, chemical or biological contamination.

A WELCOME, LIGHT TOUCH REVISION

In addition to the topical amendments discussed above, SHIPMAN 2024 has undergone gentle revision throughout, among other things to improve clarity. Christian Hoppe, BIMCO's General Counsel, provided the following statement regarding the new SHIPMAN 2024:

"SHIPMAN is one of BIMCO's flagship contracts which has gained increasing popularity in the ship management sector since its first publication in 1988. The 2024 edition reflects topical and important updates in ship management practices and includes a number of standard clauses which reduces the need for users to add rider clauses in the agreement. I am therefore particularly happy to see us making a revised version of this form available to the industry."

We agree and welcome this revision, which provides a practical and timely update to a well-used and important contract in the global shipping industry.

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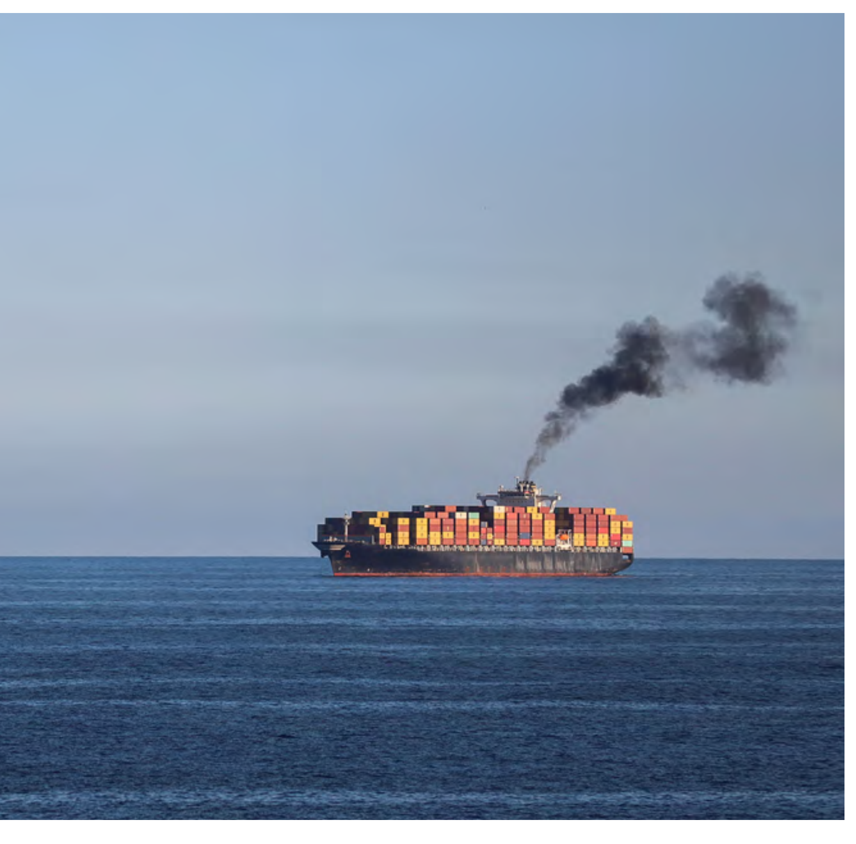
The introduction of a concept of predelivery services in SHIPMAN 2024 also clarifies that the managers are covered by the management agreement's limitations of liability already during the performance of pre-delivery services for the owners in preparation for handover.

Integrating emissions trading schemes in ship management agreements – BIMCO's new ETS clause and mandate letter

In advance of the recent inclusion, as from January 2024, of the shipping industry in the European Union Emissions Trading System (EU ETS), BIMCO introduced a new ETS clause tailored specifically for ship management agreements.



The EU ETS is established pursuant to EU directive 2003/87 EC and (EU ETS Directive) designed to decrease the emission of greenhouse gases by establishing caps on the emissions permitted in specified sectors of the economy, assigning the emissions allowances to businesses and permitting businesses to trade the assigned allowances in a secondary market, thereby implementing the principle that the polluter pays.

Pursuant to a revision of the EU ETS Directive adopted as part of the Fit for 55 climate package in the spring of 2023, shipping activities across the European Economic Area (EEA), including EU member states and Iceland, Liechtenstein, and Norway, were included in EU ETS starting in 2024. Shipowners subject to EU ETS are consequently now required to monitor, report, and surrender allowances for each ton of CO_2 equivalent they emit.

NEW BIMCO ETS CLAUSE FOR SHIP MANAGEMENT AGREEMENTS

BIMCO released an ETS clause for time charter parties in 2022. In response to

the inclusion of the shipping industry in the ETS provisions starting in 2024, BIMCO released four new ETS clauses on 8 December 2023: three clauses tailored for voyage charter parties and one clause intended for use in ship management agreements. In anticipation of further developments in this area within the international arena, the BIMCO ETS clause for ship management agreements is drafted generally to cover not only EU ETS, but also analogous schemes that may be introduced in the future by the EU or other jurisdictions, e.g., the UK ETS scheme which is due to take effect from 2026.

The main purpose of the clause is to clearly allocate the costs and responsibilities related to acquiring, transferring, and surrendering required emissions allowances for vessels subject to an emission scheme such as the EU ETS. The clause uses a mechanism of direct transfer of allowances rather than cost reimbursement to integrate the allowances into the conventional cost allocation framework of a ship management agreement as an operating cost to be borne by the owners.

> **The BIMCO ETS clause for ship management agreements affords the parties flexibility to allocate the tasks relating to compliance with EU ETS – and future ETS schemes – to suit the specifics of their trade and business.**

OWNERS' AND MANAGERS' RESPONSIBILITIES

Structurally, the clause is divided into a sub-clause (a) and a sub-clause (b).

Sub-clause (a) applies when the owners are the responsible party towards the authorities under the relevant ETS scheme. Subclause (b) applies when the managers are the responsible party towards the authorities – either because the relevant ETS scheme designates the managers as the responsible party, or because the managers have assumed this responsibility on a contractual basis. As drafted, the clause presupposes that the managers' assumption of responsibility under an ETS scheme will be documented under a separate undertaking issued to the relevant authorities. BIMCO published the ETS Mandate, a standard format for such a document, on 8 May 2024.

As noted in our previous Shipping Offshore Update in December 2023, the adoption of implementing regulation (EU) 2023/2599 in November 2023 clarified that the responsible party towards the authorities under the EU ETS is the registered owner of the vessel. The responsibility may, however, be assumed by the ISM responsible company by written undertaking submitted to the relevant authorities. EU ETS will thus fall under sub-clause (a) unless the managers assume responsibility. Amendments to the standard clause should be considered in cases where the vessel's registered owners – and thereby the responsible party towards the authorities under EU ETS – are a different entity from the contractual owners under the management agreement, including in case of vessels on bareboat charter.

Sub-clause (a)(i) obliges the owners to ensure compliance – at their own cost – with the relevant emissions trading scheme for the duration of the ship management agreement. To enable the owners to comply with this obligation, sub-clause (a)(ii) obliges the managers to furnish the owners with pertinent ship emission data in a timely manner or at agreed intervals. Pursuant to an optional sub-clause (a)(iii), the managers may, in addition, undertake to provide the owners with a set of emission scheme management services, including monitoring and reporting of emissions data to the authorities, calculating required allowances and arranging the surrender of the owners' emissions allowances to the authorities on the owners' behalf.

Sub-clause (b), applicable when the managers are the responsible party towards the authorities, necessarily goes a step further than sub-clause (a)(iii). Where

sub-clause (a)(iii) obliges the managers to provide emissions data, monitor and report the emissions data to the authorities, calculate the emission allowances required and arrange surrender of the owners' allowances, sub-clause (b) obliges the managers to provide monthly estimates of the allowances they will be required to surrender in the next month and obliges the owners to obtain the allowances and transfer them to the managers within an agreed time to enable the managers to surrender them to the authorities. Reconciliation between estimated and actual allowances is done monthly and at the end of the management period.

BIMCO ETS MANDATE LETTER

The BIMCO ETS clause for ship management agreements helps allocate the various responsibilities among the parties to the ship management contract. However, the responsibility towards the authorities will, as a starting point, rest with the registered owner of the vessel, no matter which party is designated as responsible in the ship management agreement and according to the ETS clause.

As outlined in several of our previous articles on the subject, the registered owner and the ISM-company may agree that the ISM-company should assume this responsibility instead of the registered owner. One of the key requirements set out in Implementing Regulation (EU) 2023/2599 for delegating this responsibility is that the registered owner and the ISM-company taking over the responsibility must sign a "mandate letter". The EU has not published its own standard form mandate letter, and up until recently, we have seen several different versions of the mandate letter being used.

The lack of a standard template has led to increased discussions and efforts needed to formalise the change of the responsible entity towards the authorities. Therefore, it was a pleasant surprise to see BIMCO launching its own standard ETS template mandate letter on 8 May 2024. Instead of drafting bespoke mandate letters, as has been the case until now, industry players may now simplify the proceed by filling out the standard form and submitting it to the relevant administering authority.

IMPLEMENTING ETS COMPLIANCE IN SHIP MANAGEMENT AGREEMENTS

The BIMCO ETS clause for ship management agreements affords the parties flexibility to allocate the tasks relating to compliance with EU ETS – and future ETS schemes – to suit the specifics of their trade and business. Together with appropriately-drafted ETS clauses up and down the contractual chain, the clause can be used to ensure that current and future ETS schemes applicable to the vessel are complied with and that the costs of compliance are ultimately allocated in line with the principle that the polluter pays.

> **The main purpose of the clause is to clearly allocate the costs and responsibilities related to acquiring, transferring, and surrendering required emissions allowances for vessels subject to an emission scheme such as the EU ETS.**

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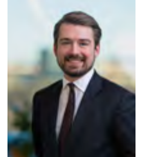

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Photo: Torbjørn Kjosvold / The Norwegian Armed Forces

BIMCO publishes first standard-form quiet enjoyment letters for ship financing

Charterers are increasingly requesting to receive quiet enjoyment letters ("QELs") from the mortgagees of chartered vessels. As there has not been any standard format for QELs, owners have often found themselves caught in the middle of protracted negotiations between the charterers and the mortgagees when QELs are requested. To meet the longstanding need for a standard format acceptable to charterers, mortgagees and owners, BIMCO published two standard form QELs on 21 February 2024.

The charterers of a vessel risk having their use of the vessel interrupted by enforcement actions taken by creditors of the owners, with whom the charterers ordinarily have no direct contractual relationship. If such enforcement actions culminate in a forced sale of the vessel, the charterers risk losing their right to use the vessel outright and being left with a claim for damages against the owners for breach of the charter party. In order to better secure their right to use the vessel, charterers therefore frequently require the owners to procure a QEL from the vessel's mortgagee. This is particularly the case for long-term charterers of specialised offshore vessels, which may be difficult or impossible to replace and mobilise on short notice. The key feature of most QELs is a contractual right granted by the mortgagee to the charterers for their quiet enjoyment and continued use of the vessel, so long as the charterers pay charter hire and otherwise conform with the terms and conditions of the underlying charter party.

QELs are therefore frequently structured as two-way letter agreements, with undertakings also by the charterers to give the mortgagee some notice before terminating the charter party and to cooperate with the mortgagee in transferring the charter party to another entity in connection with a forced sale of the vessel.

Photo: Torbjørn Kjosvold / The Norwegian Armed Forces

> Our objective has been to fill a gap in the market by providing a balanced starting point which generally reflects market practice and fairly represents the rights and obligations of the parties. We were also mindful that the two QELs would complement BIMCO's suite of term sheets for ship financing and ship sale and leaseback transactions published a few years ago.
>
> Christian Hoppe, General Counsel, BIMCO

QELS OFFER BENEFITS TO CHARTERERS AND MORTGAGEES

A right on the part of charterers to the continued use of the vessel necessarily restricts the flexibility of the mortgagee for enforcement of the mortgage following a default under the mortgage loan, and QELs are therefore frequently seen as primarily benefiting charterers.

Often, however, the mortgagee and the charterers will have a common interest in ensuring that the charter party can continue to be performed following a default by the owners under the mortgage loan. The vessel's earnings are typically used to service the mortgage loan (with the income stream from the specific charterer party often having been a key factor in the credit assessment for such mortgage loan) and it may be difficult for the mortgagee – or the new owners of the vessel following a forced sale – to find new employment for a specialized vessel on short notice following a default.

QELs are therefore frequently structured as two-way letter agreements, with undertakings also by the charterers to give the mortgagee some notice before terminating the charter party and to cooperate with the mortgagee in transferring the charter party to another entity in connection with a forced sale of the vessel. In these cases, the QEL may be of benefit also to the mortgagee.

THE NEW BIMCO QELS
BIMCO has published two versions of the new standard QEL.

The longform version takes the form of a letter agreement between the mortgagee, the charterers and the mortgagor and includes an undertaking by the mortgagee not to disturb the charterers' use of the vessel for so long as the charterers perform their obligations under the charter party. In addition, the BIMCO QEL includes references to an assignment of the owners' rights under the charter party in favour of the mortgagee and a clause whereby the charterer is notified and acknowledges being notified of such assignment, practically obviating the need for notice of assignment to be sent to the charterers as a separate document in connection with the mortgagor's financing. The longform version also includes various undertakings by the charterers not to vary or terminate the charter party without the consent of the mortgagee and to cooperate with the mortgagee in transferring the charter party to another entity in connection with a forced sale of the vessel, all of which are helpful starting points but should be assessed on a case-by-case basis to fit the specific mortgage loan and chartering structure.

The shortform version takes the form of a simple letter, signed by the mortgagee and addressed to the charterers, and includes only the undertaking not to disturb the charterers' use of the vessel for so long as the charterers pay charter hire in accordance with the charter party.

Both versions of the new form are intended for use with time and bareboat charter parties (including leasing structures) and are intended to complement BIMCO's existing suite of standard term sheets for ship finance. Christian Hoppe, BIMCO's General Counsel, provided the following statement regarding the new BIMCO QELs:

"Our objective has been to fill a gap in the market by providing a balanced starting point which generally reflects market practice and fairly represents the rights and obligations of the parties. We were also mindful that the two QELs would complement BIMCO's suite of term sheets for ship financing and ship sale and leaseback transactions published a few years ago."

The new BIMCO QELs represent a milestone in ship finance, offering mortgagors for the first time a balanced, standardised document that can be used as a template and reference point in discussions with charterers and mortgagees when requests for QELs are made. We highly endorse this effort by BIMCO, which should assist the industry in reducing difficult and time consuming discussions regarding QELs.

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Equipment leasing in the shipbuilding industry – inherent risks and how to mitigate them

In aviation and other sectors, equipment leasing has long been a recognised tool for companies looking to finance expensive items of equipment. Whilst to date equipment leasing has been less visible in the shipping industry, we are now seeing an increased interest in this type of financing from both shipowners and equipment lessors. However, leasing arrangements do include some inherent risks which the parties should seek to mitigate.

> The most efficient way to mitigate the risk is to mark the leased equipment with the lessor's logo or similar signs that clearly evidence that the equipment belongs to the lessor.

Leasing enables the party leasing the equipment (the "lessee") to utilize the relevant equipment without capital expenditure, and is used both for long and short term. However, for the party providing the equipment (the "lessor") the leasing arrangement may entail certain risks. These risks faced by the lessor may vary from jurisdiction to jurisdiction, however, there are some general situations and concepts to which the lessor should pay extra attention.

ACQUISITIONS IN GOOD FAITH

Acquisition in good faith refers to a transaction where a purchaser buys assets in the belief that the seller has a legitimate right or title to sell them and that there are no legal impediments or undisclosed liabilities associated with the property or assets. A typical scenario from the shipping industry is where the leased equipment is located onboard the ship, and the lessee sells the ship voluntarily to a third party. The third party could then claim title to the relevant equipment on the basis of having been acquired in good faith and in the belief that the equipment was part of the sale.

SHIP MORTGAGES

The lessee in the shipbuilding industry is normally a shipowner. As part of the financing of the ship, it is very common that the shipowner establishes a ship mortgage in favour of the relevant lenders, so that the lenders may enforce the ship mortgage if the shipowner is in default of its financing obligations. In most jurisdictions however the ship mortgage will include an explicit reference to the mortgage covering the relevant

ship as well as all equipment or appurtenances which are onboard and connected to the ship. This especially applies to equipment which is regarded as an integral part of the ship e.g. a crane or drilling rig. Consequently, the lenders under the relevant ship mortgage may refuse to recognise a lessor's title in the equipment when enforcing the ship mortgage.

BANKRUPTCY EVENT

In addition to the above, the leased equipment may be at risk in the event of insolvency or bankruptcy proceedings against the lessee. In these situations, unsecured creditors will seek to obtain as much recovery as possible to reduce their losses. In some jurisdictions, the creditors may be entitled to take possession of everything that is within the possession of the debtor, which could include leased equipment onboard the debtor's ship. A similar concept is where the creditors become entitled to take possession of any de facto assets of the debtor.

MITIGATING THE LESSOR'S RISK

The most efficient way to mitigate the risk is to mark the leased equipment with the lessor's logo or similar signs that clearly evidence that the equipment belongs to the lessor. By doing this, the risk of third party acquisitions or potential creditors taking possession of the equipment becomes significantly reduced.

Where high value equipment is leased to a shipowner, the lessor should also seek to enter into a coordination agreement, intercreditor agreement, quiet enjoyment letters or similar arrangements with the lessee and any ship mortgagee. The purpose of these agreements is, amongst other things, to explicitly state that the relevant equipment is owned by the lessor and to set out in writing what would happen in a default/insolvency situation. Typical clauses to include in these agreements are:

- A statement that the lessor is entitled to remove the equipment prior to the enforcement of the ship mortgage.
- A second priority mortgage upon the ship in favour of the lessor, securing its right to title and/or right to remove the relevant equipment prior to enforcement of the first priority mortgage.
- Assurances that commingling of assets will not happen with the relevant equipment and the ship.
- Assurances that sale of the ship to a third party must include a clause stating the ownership of the relevant equipment, preventing the purchaser from acquiring title to the equipment in good faith (in this regard we would note that the standard industry contract forms used in ship sale and purchase do generally contain provision for lists of hired items to be excluded from the sale).
- Assurances that the shipowner will indemnify the lessor for any loss in connection with any liens being levied over the relevant equipment for reasons that are not attributable to the lessor.

In respect of any leasing arrangement, the jurisdiction for the registration of the ship (and any related mortgage) and the jurisdiction where the ship operates (and thus where a potential third party action may be initiated), are highly relevant and may affect the risks related to a leasing arrangement. Legal analysis as to whether the equipment will be deemed an integral part of the ship increases the need for contractual arrangements involving the ship owner and the financiers of the ship.

Currently, there are no standard leasing agreement or formulae properly developed for equipment leasing within the shipping industry, and careful drafting of the underlying leasing agreement is therefore required to properly protect the parties in a balanced manner.

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"Ever Given" – Court of Appeal upholds that no salvage contract was concluded

The English Court of Appeal has recently rendered judgment in the dispute between salvors and the shipowners as to whether a salvage contract on commercial terms had been made in connection with the re-floating of the "Ever Given" in the Suez Canal in March 2021 (SMIT Salvage & Ors v. Luster Maritime SA & Anr (The Ever Given) [2024] EWCA Civ 260). The judgment illustrates the importance of the parties making clear during negotiations whether they intend to be bound.

The "Ever Given", a 400 meter long container ship with a capacity of 20 388 TEU, made headlines around the world when it ran aground at one of the narrowest places in the Suez Canal on 23 March 2021, blocking the canal for almost a week and causing significant disruptions to international trade.

CONTRACT OR NO CONTRACT – THAT'S THE QUESTION

After the "Ever Given" was re-floated the salvors, led by SMIT, made a salvage claim under the Salvage Convention 1989 or alternatively at common law. The owners of the "Ever Given" rejected the claim, arguing that the services had been rendered pursuant to a pre-existing agreement whereby the salvors were to be remunerated on a day-rate basis, which would provide for a significantly lower remuneration than a salvage reward based on the salved values.

The Court of Appeal upheld the Admiralty Court's judgment and found that the parties did not have an intention to be bound, irrespective of the fact that the salvors had mobilised and even started providing assistance while continuing to negotiate with the owners.

The judgment illustrates the importance of the parties making clear during negotiations whether they intend to be bound.

KEY FACTS

The key facts can be summarised as follows:

- **23 March 2021**: The owners contacted SMIT requesting technical advice and possible salvage assistance, and the parties opened initial discussions on remuneration. A first attempt to re-float the vessel by Suez Canal Authority (SCA) failed.
- **24 March 2021:** SMIT sent a detailed commercial proposal to the owners which included the scope of services to be provided and the remuneration terms, and proposed that a contract should be concluded on the Wreckhire 2010 form. The proposal constituted an offer, but was never accepted by the owners.
- **25 March 2021:** The owners requested SMIT to mobilise a tug if SCA allowed SMIT's assistance. SMIT requested

a formal response to the commercial proposal before further mobilisation. The owners replied requesting SMIT's continuing assistance, however without accepting the commercial proposal or making a counter-offer. Same day, SMIT arrived at the site, and later SMIT sent a revised commercial proposal, now including a detailed Wreckhire 2010 wording.

- **26 March 2021**: SMIT informed that it would start demobilising if agreement on main terms was not reached. After several exchanges between the parties, agreement was reached on remuneration, and the owners promised to revert to discuss a contract wording. Also that day another failed re-floating attempt by SCA was carried out.
- **27 March 2021**: No further terms were agreed.
- **28 March 2021**: The owners proposed significant changes to SMIT's proposal of 25 March 2021, including to the scope of services, the standard of care, and the payment terms. Several exchanges followed, but no further progress was made on the contract terms. SMIT continued negotiations for tugs to be ready on site the next day.
- **29 March 2021**: Tugs arrived at the site and took part in the successful re-floating.

THE COURT OF APPEAL JUDGMENT

The owners' case was that the parties on 26 March 2021 had entered into a binding contract since there had been agreement with respect to remuneration. It was not disputed that the parties had agreed on remuneration. However, the Court of Appeal highlighted that several issues had not been agreed, including "*such basic matters as the nature of the services which SMIT would provide, the standard of care which it would be required to exercise, and the payment terms, and left it for future agreement a detailed contract on the Wreckhire 2010 form*".

The question was therefore whether the initial agreement on remuneration was sufficient to establish a binding contract. The Court considered the communication between the parties leading up to the re-floating, including two e-mails from SMIT to the owners containing detailed commercial proposals and offers, and found that SMIT's consistent position had been that it wanted a binding contract dealing comprehensively with all aspects of the

> Whether agreement on remuneration terms is sufficient to create a binding contract depends on whether that is the intention of the parties.

services it would provide and that SMIT "*had not suggested at any point that it would be content with a binding contract dealing only with its remuneration, leaving other matters for future agreement*".

In their submissions in the Court of Appeal, the owners had particularly relied on three "ultimatums" given by SMIT on 26 March 2021, where SMIT in various ways indicated that they would demobilise unless the parties agreed on main terms. Since SMIT did not demobilise after 26 March 2021, this demonstrated, according to the owners, that the parties had reached a binding contract. Also this argument was rejected by the Court, which found that the decreased urgency expressed by SMIT following the agreement on remuneration could also be explained by the fact that SMIT, following another failed re-floating attempt by the SCA the same day, was in a stronger commercial position. From that point on, it appeared increasingly likely that SMIT's assistance would be needed for the "Ever Given" to be re-floated and that, consequently, SMIT would become entitled to salvage remuneration for their contribution even if no contract was concluded.

COMMENTS

There was no dispute as to the legal principles to be applied and the Court of Appeal reiterated established principles, including that a binding contract may be reached even if some terms are yet to be agreed upon, that the courts will determine whether the parties intended to be legally bound based on an objective appraisal of the communications and conduct by the parties, and that the burden of proof rests with the party alleging that a binding contract exists.

The decision therefore hinged on the Court of Appeal's detailed analysis of the communications and conduct by the parties.

A key take-away is that whether agreement on remuneration terms is sufficient to create a binding contract depends on whether that is the intention of the parties or whether the intention is that there is no binding contract until certain other terms are also agreed.

In many cases it will however be clear that the intention is, whether stated expressly or not, that the services shall be remunerated on certain agreed commercial terms even though the exact scope of services is not yet agreed.

"KVITNOS" – A NORWEGIAN EXAMPLE

A dispute as to whether a salvage contract on commercial terms had been concluded was also considered by the Norwegian Court of Appeal in the "Kvitnos" case (ND-2018-5). The vessel had experienced a main engine breakdown and was drifting in good weather conditions at a relatively comfortable distance from shore.

The question was whether a salvage contract had been entered into by phone between the tug owner and the hull underwriters of the vessel. The hull underwriters had suggested using one of BIMCO's standard form towage contracts, Towhire or Towcon. The tugowner agreed to assist, quoted the standard hourly rate for towage services, but did not say which of the contract forms he preferred and suggested to take care of the paperwork the next day. The Court of Appeal analysed the communications and conduct of the parties and found that the parties had reached a binding agreement since they had agreed on the "main terms". They had fully agreed the scope of services to be provided, namely towage of the vessel with a certain tug and that the practicalities would be sorted out between the two captains. They had also agreed the time for rendering the services, the destination of the towage and that the tug would engage a pilot. The tug owners took no reservations, except as to the exact hourly rate.

The Court of Appeal concluded that the hull underwriters had reason to believe that the tug owners intended to be bound by a towage agreement on an hourly rate.

CONCLUSION

Both cases illustrate the importance of the parties making clear whether they intend to be bound and that, unless they express their intentions clearly, the courts will need to establish their intentions based on their communications and conduct.

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The Electronic Trade Documents Act 2023

– the framework we've been missing?

The Electronic Trade Documents Act, which came into force in September 2023, enables a "trade document" in electronic form to be used in the same way as its paper equivalent provided that certain criteria are met.

For centuries, paper bills of lading have dominated international trade. Due to their physical form, however, paper bills of lading are susceptible to forgery, may be delayed in arriving at discharge ports, and sometimes simply disappear altogether. While several attempts have been made to digitalise bills of lading, until recently, a regulatory framework (in English law) was missing. The question now is whether the new Act can provide the necessary assurances to the market to have a meaningful effect and scale up the use of electronic bills.

LEGAL FRAMEWORK

A bill of lading has three primary functions:

1. as evidence of the contract of carriage;
2. as a receipt for the goods; and
3. as a document of title to the goods.

Background and the need for reform

There have never been any issues regarding the digitalisation of the first two functions of a bill of lading. We are all familiar with electronic contracts and receipts. However, the digitalisation of the third function has been more problematic. A bill of lading can operate as a transferable document of title to the goods in the sense that transfer of the bill transfers constructive possession of

> **It is suggested that the transition from paper to electronic bills will lead to costs savings, increased efficiency, better supply chain transparency, and enhanced security.**

the goods. Pursuant to the Carriage of Goods by Sea Act (COGSA) 1992, the right to sue the carrier and the liability of the cargo owner to the carrier is transferred from holder to holder when the bill of lading is transferred from one lawful holder to another, irrespective of any transfer of property in the goods themselves.

However, until the Act came into force, English law did not recognise the concept of "possessing" electronic documents. The holder of an electronic bill of lading would therefore not have the right to demand delivery of the goods in the same way that the holder of a paper bill of lading would have.

Early versions of electronic bills of lading therefore relied on all parties signing up to an electronic platform and being subject to that platform's contractual framework. Whilst these contractual frameworks generally gave the parties to a transaction similar rights to those enjoyed pursuant to a paper bill of lading, it was recognised by the Law Commission of England and Wales that there were a number of issues with platforms' contractual frameworks, including that the contractual framework increased the complexity of transacting, that the contractual framework did not sit easily with the English law of bailment and liens, and that the legal validity and interpretation of the contractual frameworks were untested and therefore uncertain.

How the Act resolves the issue

The Electronic Trade Documents Act resolves this issue as an "electronic trade document" will now be capable of possession. Section 3(1) of the Act provides that "*a person may possess, indorse and part with possession of an electronic trade document*" whereas section 3(2) provides "*an electronic trade document has the same effect as the equivalent paper trade document*". This means that the electronic bill of lading can operate as a document of title, and will constitute a bill of lading for the purposes of COGSA 1992.

In order to be an "electronic trade document", an electronic bill of lading will need to include the information that would be included in a paper bill of lading and be on a "reliable system" that is used to do the following:

a. identify the document so that it can be distinguished from any copies;
b. protect the document against unauthorised alteration;
c. secure that it is not possible for more than one person to exercise control of the document at any one time;
d. allow any person who is able to "exercise control" of the document to demonstrate that the person is able to do so; and
e. secure that a transfer of the document has effect to deprive any person who was able to exercise control of the document immediately before the transfer of the ability to do so.
f. The Act provides that a person exercises control when the person "uses, transfers or otherwise disposes of the document".
g. It is not specified how one "uses" an electronic trade document but the Act does provide that simply reading or viewing the document does not amount to "use" of the document.

LOOKING TO THE FUTURE

The potential benefits of electronic bills of lading are well known. It is suggested that the transition from paper to electronic bills will lead to costs savings, increased efficiency, better supply chain transparency, and enhanced security. Despite this, to date, stakeholders in the shipping industry have been slow to adopt them. It is widely hoped that the Act will change this and provide industry stakeholders with further confidence to use electronic bills of lading and finally lead to their widespread adoption.

The Act has been championed by the International Group of P&I Clubs (IG) and the IG clubs' P&I rules provide that liabilities arising under electronic bills are covered provided that the system used to use and transfer the electronic bill has been approved by the IG. To date, the IG has approved 10 such systems. Furthermore, industry bodies, large container lines and miners have also launched campaigns to increase the uptake of electronics bills of lading.

We will be closely monitoring developments in this area and wait to see whether the Act lives up to its full potential.

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NORWAY SIGNS AGREEMENT

– ensures international cooperation on the operation of autonomous vessels

On 10 May 2024 the Norwegian Ministry of Trade, Industry and Fisheries announced that Norway had signed an agreement with the United Kingdom, Belgium, Denmark and the Netherlands to facilitate cooperation on the international operation of autonomous ships. The agreement is particularly aimed at the operation of autonomous vessels in the North Sea basin.

This progress is particularly driven by concepts for autonomous vessel inspection and maintenance of offshore wind parks.

The agreement aims to simplify the operation of autonomous vessels by ensuring their safe operation within the respective national requirements and frameworks of each signatory state. The signatory states commit themselves to exchange knowledge and information about national activities and to follow a common approach to international autonomous vessel operations where appropriate.

The agreement concerns cooperation on the development of requirements for autonomous vessels operating in the North Sea basin, that is, outside national waters, so that the signatory states can agree on common technical standards and solutions for the vessels while waiting for global regulations.

Although most autonomous vessel projects have been aimed at vessels in national traffic within

territorial waters, there are now several ongoing projects considering market opportunities in the North Sea basin. This progress is particularly driven by existing and expected developments in offshore wind and the development of vessels and operating concepts for inspection and maintenance of offshore wind parks. The Norwegian maritime industry is at the forefront of developing autonomous solutions on the technical, regulatory, operational and legal side. The agreement can contribute to establishing a new international market for the Norwegian maritime industry.

The agreement is based on existing guidelines from the UN's maritime organisation, IMO, and the EU. IMO has initiated a process to develop non-binding rules for autonomous cargo vessels, which are expected to be finalised by 2025. Norway is actively participating in this work.

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Working conditions at Turkish yards and the Norwegian Transparency Act

Norwegian media has recently published a number of stories on the alleged poor working conditions at Turkish shipyards. Norwegian shipowners contracting with foreign yards must be prepared to provide information on their efforts to ensure decent working conditions pursuant to the Norwegian Transparency Act.

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According to Aftenposten/E24, a leading Norwegian newspaper, more than 100 Norwegian ferries and other vessels have been built in Turkey over the last 10 years. The costs of building vessels at Turkish yards are significantly lower than at Norwegian yards.

WORRYING MEDIA REPORTS ON WORKING CONDITIONS

According to the newspaper, Turkish union leaders and yard employees are complaining over hazardous working conditions and low wages. Reportedly, the daily wage for a worker at a Turkish yard can be as low as NOK 350 (≈USD 35). Every year, a significant number of workers reportedly lose their lives at Turkish yards. Norwegian labour union spokespersons have also criticised the health, safety and environment (HSE) culture at Turkish yards, alleging that shipowners prioritise profit over health and safety. Norwegian shipowners however underline that they place great emphasis on sound working conditions at the yards and note that they have seen improvements in Turkey over time.

THE NORWEGIAN TRANSPARENCY ACT

The Transparency Act, which entered into force on 1 July 2022, shall promote companies' adherence for fundamental human rights and decent working conditions in connection with the production of goods and the provision of services. Furthermore, it shall ensure the general public access to information regarding how companies address adverse impacts on fundamental human rights and decent working conditions.

It is estimated that around 9000 Norwegian companies are subject to provisions of the Act, including many Norwegian shipowners contracting with Turkish yards. The Act applies to "larger companies" covered by section 1-5 of the Accounting Act or those that exceed the threshold for two of the following three conditions: (i) a sales revenue of NOK 70 million, (ii) a balance sheet total of at least NOK 35 million, or (iii) an average number of 50 full-time equivalent employees. Parent companies shall be considered "larger companies" if the conditions are met for the parent company and subsidiaries as a whole.

DUE DILIGENCE

If encompassed by the Act, shipowners are obliged to carry out human rights due diligence in accordance with the OECD Guidelines for Multinational Enterprises. Not only does section 4 of the Act require shipowners to embed reasonable business conduct into their polices, such as in their code of conduct, supplier code of conduct and other internal policies and procedures. They shall also identify and assess adverse actual and potential impacts on human rights and decent working conditions; cease, prevent or mitigate such adverse impacts; track implementation and results of mitigating measures taken; communicate with affected stakeholders and provide for or co-operate in remediation and compensation where this is required. In simpler terms, companies must assess whether they impact people's basic rights negatively, and if so, consider which impact is the most severe and prioritise and enact suitable follow-up measures.

Generally, and in light of the risk that many foreign shipyards represent, it is necessary to undertake adequate due diligence of foreign yards before and during the building period. Relevant measures that shipowners should consider implementing in relation to shipbuilding contracts include:

- Before entering into the business relationship, conduct background checks of the potential shipyard with a view to identify and mitigate any risks relating to human rights and decent working conditions.
- Incorporate necessary contractual terms into the shipbuilding contract relating to human rights and decent working conditions, including granting shipowners access to relevant information and documentation, and a right to conduct a proper due diligence. This should include a right to conduct site visits or audits in order to review the working conditions for the workers at the yard.
- Ensure that such contractual terms also extend to sub-suppliers.
- Include measures to promote that workers receive a living wage for the work they conduct, given that workers are reported to receive very low daily wages.
- Consider whether any of the shipowners own commercial demands could lead to a negative impact on human rights or decent working conditions, e.g. by setting unreasonably short deadlines for delivery, and adjust as needed.

In addition, shipowners should keep in mind that risk-based measures should also be implemented in relation to, for example, yards providing repair services or other services to their vessels.

TIME TO REVIEW

According to the Transparency Act section 5, a report of the due diligence shall be published at least every year and at the latest within 30 June each year. The purpose is to ensure that the public has information on the due diligence and the results thereof, so the report must be made easily available on the shipowners' webpages.

In this respect it is worth noting that the Norwegian Consumer Authority, through their controls relating to the Transparency Act, has found that several Transparency Act reports lack information about actual adverse impacts identified through the companies' human rights due diligence. The Transparency Act section 5 specifically requires companies to include information about actual adverse impacts and significant risks that they have identified. In light of the recent news articles referred to above, shipowners should pay particular attention to how to address issues relating to human rights and decent working conditions at relevant shipyards in the next version of their Transparency Act reports.

The Transparency Act also provides the public with a right to request information on how a company addresses actual and potential negative impact on human rights and decent working conditions. Shipowners must be prepared to receive requests for information on the situation at the yards building their vessels. As a starting point, such requests shall be responded to within three weeks of receipt.

Violations of the Act may result in prohibitions or orders being imposed by the Consumer Authority or the Norwegian Market Council. The Consumer Authority can also impose financial sanctions on companies for repeated infringements of the requirements relating to the Transparency Act reports and the rules on information requests, including fines of up to 4 percent of annual turnover or NOK 25 million, whichever is higher.

In light of the worrying allegations regarding Turkish yards in the recent media reports, shipowners wishing to ensure compliance with the Transparency Act and to protect their reputations would be well advised to re-evaluate if they have sufficient information on whether their suppliers and sub-contractors are respecting fundamental human rights and decent working conditions.

> **If encompassed by the Act, shipowners are obliged to carry out human rights due diligence in accordance with the OECD Guidelines for Multinational Enterprises.**

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Defence procurements at Norwegian yards

– new rules on ownership control

Norway's new long term defence plan will most likely lead to several new defence contracts. Contractors entering into such contracts may have to comply with additional contractual and regulatory requirements. This includes the Norwegian Security Act, and its recently revised rules on ownership control.

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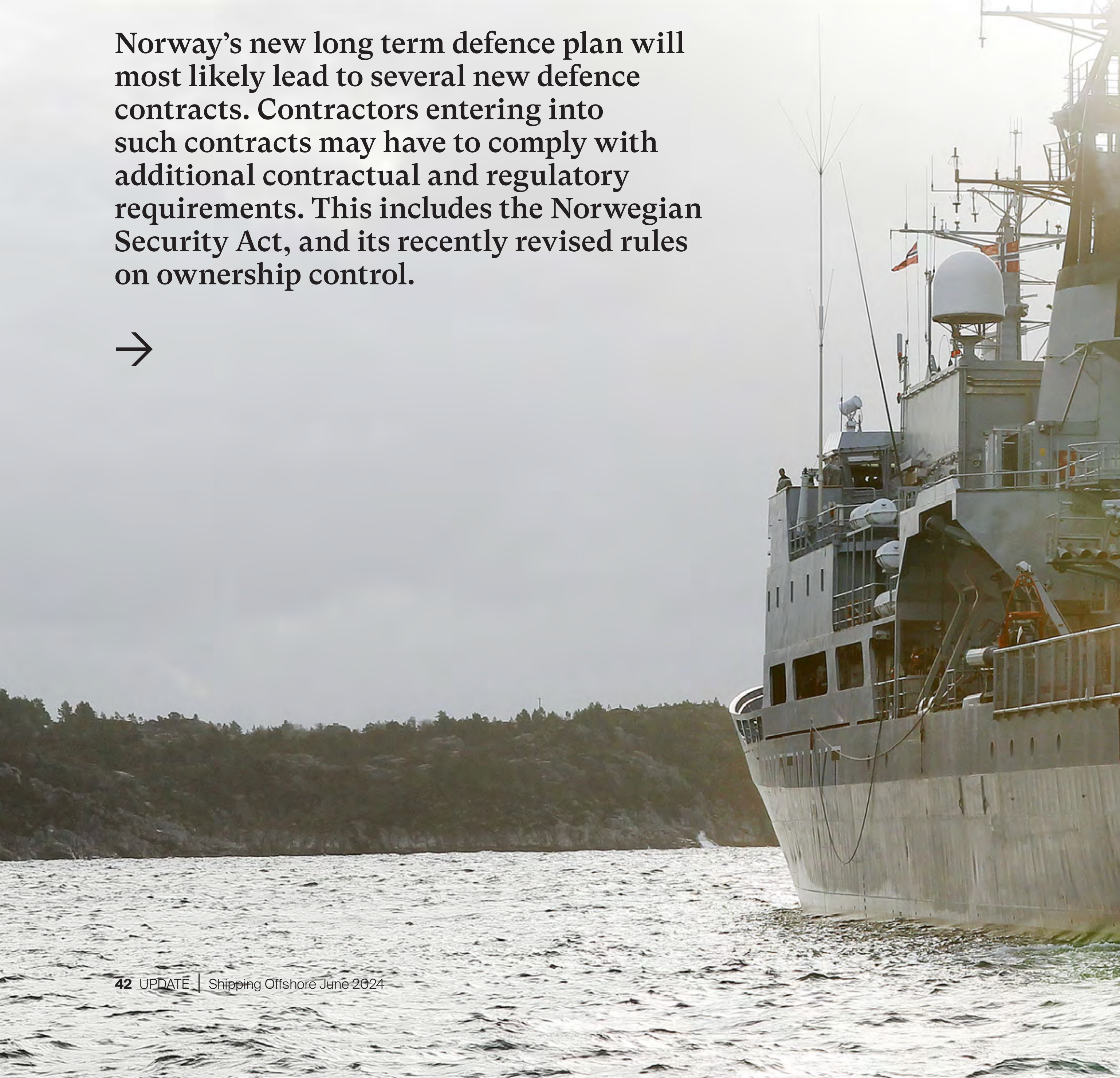

> The number of undertakings subject to the rules on ownership control in Chapter 10 will significantly increase.

Photo: Torbjørn Kjosvold / The Norwegian Armed Forces

On 5 April 2024 the Norwegian Government presented its new long term defence plan for the period from 2025 to 2036. All parliamentary parties have approved the plan which is due to be formally adopted by Parliament in June 2024 and which will lead to defence spendings of more than 1600 billion Norwegian kroner over the coming 12-year period. A large proportion of the money has been allocated to the Norwegian Navy, which will get at least five new frigates, additional submarines, and a new fleet of "standardised class vessels" consisting of up to ten larger and eighteen smaller vessels. Contractors, including shipyards and suppliers, that intend to participate in defence procurement projects must comply with the Norwegian Security Act, including the rules relating to ownership control, often referred to as Foreign Direct Investments ("FDI") rules.

CURRENT LEGISLATION

The rules on ownership control are primarily found in Chapter 10 of the Security Act. Several amendments to these rules were passed by the Norwegian Parliament in 2022 and 2023, however, some of the new rules have not yet entered into force.

Pursuant to the Security Act as currently in force, the rules on ownership in Chapter 10 only applies where the authorities have issued an individual decision ("*enkeltvedtak*") that an undertaking shall be wholly or partially subject to the Act. The fact that a contractor enters into a defence procurement contract therefore does not mean that it automatically becomes subject to the rules on ownership control in Chapter 10. In our experience, such individual decisions have rarely been issued. Consequently, the rules on ownership control in Chapter 10 today apply to relatively few undertakings.

WIDER SCOPE OF APPLICATION

Once the new rules enter into force, the number of undertakings subject to the rules on ownership control in Chapter 10 will significantly increase.

Amongst other, the rules in Chapter 10 will apply automatically to all contractors holding a Facility Security Clearance ("FSC") pursuant to the Security Act Section 9-3. A FSC is required for all contractors that are granted access to information classified as "Confidential" or above. Key contractors in defence procurement will likely be required to hold a FSC, and consequently many contractors in the future must also comply with the rules on ownership control.

In addition to expanding the scope of Chapter 10 to FSC-holders, the changes to the Security Act Section 1-3, which have been in force since 1 July 2023, have given the authorities a wider authority to make individual decisions on the application of Chapter 10, also with respect to contractors which are not required to hold a FSC.

PRACTICAL IMPLICATIONS

Undertakings that become subject to the rules in Chapter 10 will have to issue notifications and will become subject to a FDI-screening process.

Today, the rules apply if a "*qualified ownership interest*" is acquired, for example where the acquirer directly or indirectly obtains "*at least one-third of the share capital, participating interests or votes in the undertaking*". However, when the changes proposed in 2023 enter into force, the rules in Chapter 10 will become stricter and get a wider application. Some of the key changes once the new rules enter into force are:

- An acquisition of at least 10 percent of the share capital, interests or votes will trigger the notification and FDI-screening process. The provisions will also apply if existing owners increase their share capital, interests or votes (within certain thresholds). As a consequence a significantly higher number of mergers and acquisitions will be subject to these rules in the future.
- Both the seller and the target company will have to issue notifications in certain cases. Under the current rules, the buyer has the obligation to notify the authorities, however, after the new changes enter into force, the seller and the target company will also need to be more involved in the FDI-process.
- It will not be possible to close mergers and acquisitions before the FDI-screening process has been completed. In other words, a "standstill obligation" will apply. Under the current rules, there is no standstill obligation. The consequence of this is that conditions precedent will have to be included in the transaction documents in order to cater for the FDI-process.
- The authorities will be able to impose penalties in the event of breach of notification obligations. If the authorities have rejected a merger or an acquisition, or only have accepted it on certain conditions, undertakings involved will also be subject to potential criminal liability in the event of intentional or negligent breach.

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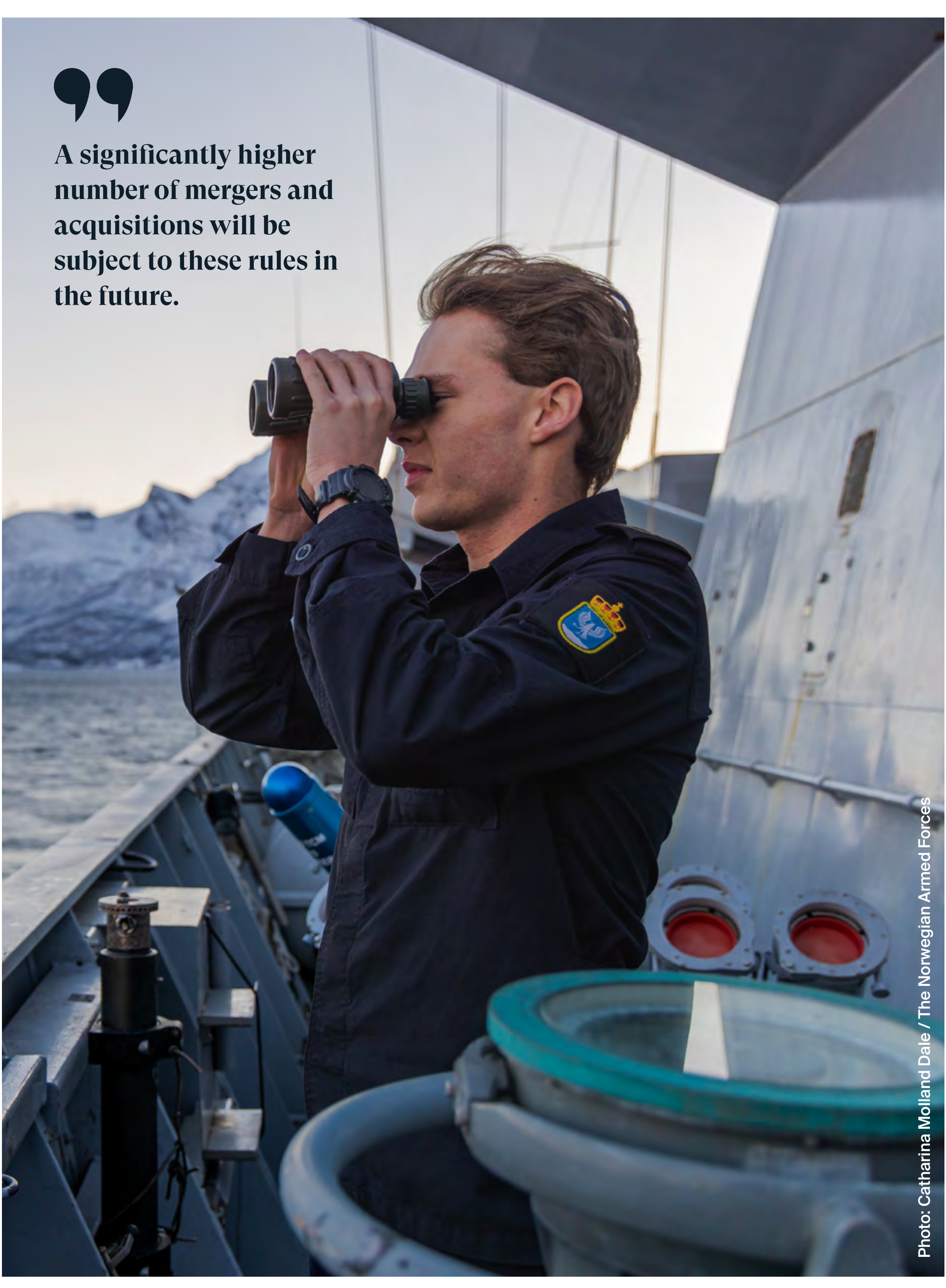


Photo: Catharina Molland Dale / The Norwegian Armed Forces

Direct lending coming to Norway

Direct lending has so far been largely absent in the Norwegian market due to regulatory constraints. However, the regulatory landscape is about to change which will present new possibilities for non-bank lending.

Direct lending is the provision of bilateral loans directly from lenders other than banks to corporate borrowers. In the Norwegian market, debt financing is typically a choice between the traditional bank market or the issuance of bonds. Over the last decade however, bank lending has become more difficult to obtain for many companies within industries such as shipping and offshore due to, e.g., capital requirements within the banks, ESG considerations, and limited risk appetite within the banks for certain shipping and offshore asset classes. Moreover, bond issuances are not always the right solution for issuers, depending on all aspects of investor demand and sophistication of the issuer. As a consequence – and as an alternative – direct lending from specialised funds has grown rapidly as a source of lending, and according to Preqin and Fidelity, assets under management have increased from approximately EUR 40 billion in 2014 to EUR 250 billion in 2022 in the EU alone.

> **The regulatory landscape is about to change which will present new possibilities for non-bank lending.**

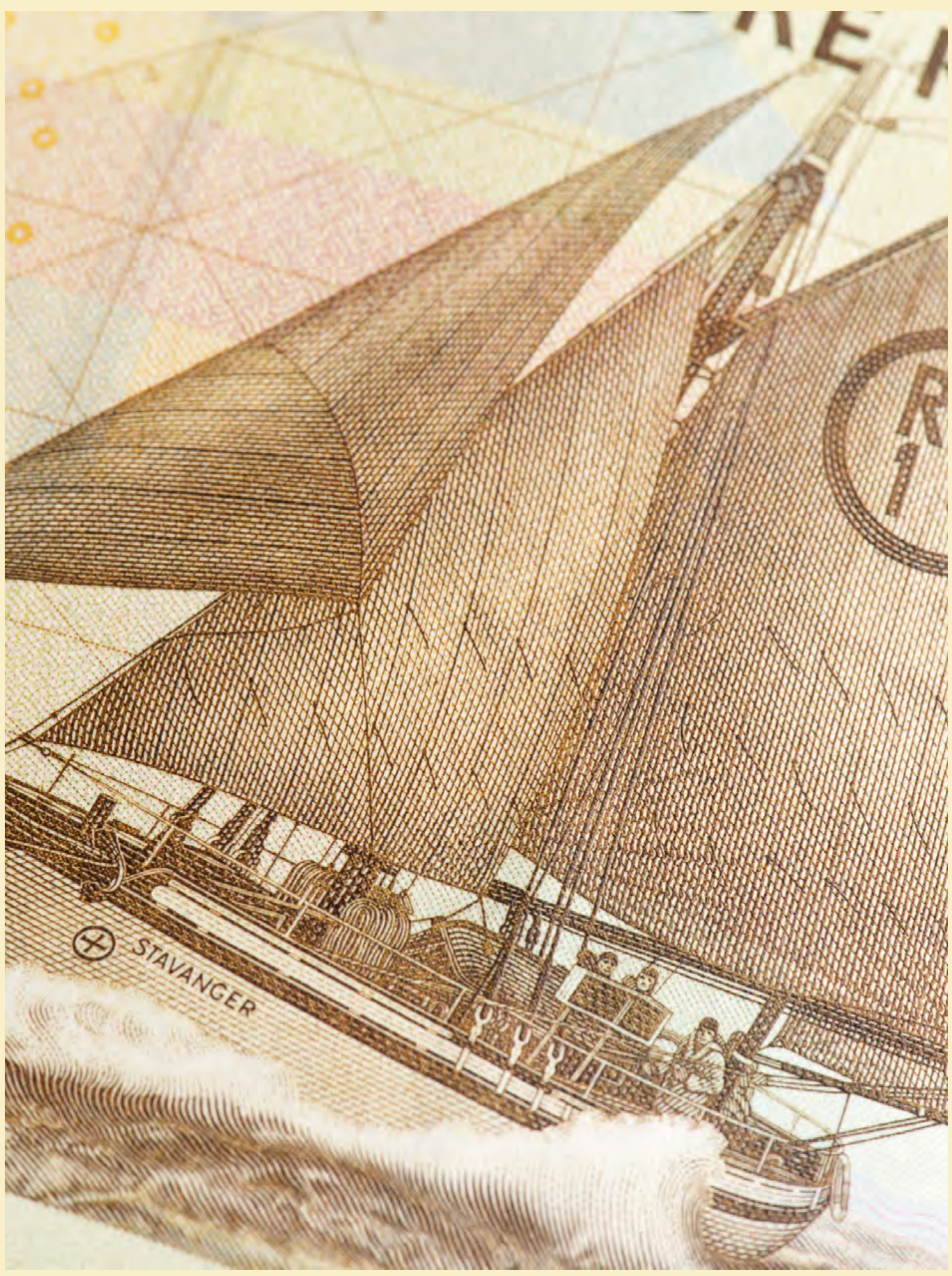
THE NORWEGIAN BANKING MONOPOLY

Whilst alternative investment funds are able to offer credit to borrowers in most European jurisdictions, Norway stands out as having one of the most restrictive credit regimes in Europe. Pursuant to the Norwegian Financial Institutions Act of 2015, so-called "financing activities" are subject to the lender having a licence as either a bank, a credit mortgage institution, or a financing company. To obtain such a licence, substantial regulatory requirements apply (mostly in relation to capital requirements and banking resolution rules). These requirements create high entrance barriers for providing credit in Norway, and are in effect barring direct lending funds from operating in Norway, unless they can rely on the exemptions the Act provides. In this respect, Norway stands out also compared to our Scandinavian neighbours; in Denmark, offering credit to non-retail borrowers based on own balance sheet does not require a licence, and in Sweden, a simple registration procedure is sufficient.

CURRENT EXEMPTIONS ALLOWING FOR DIRECT LENDING

There are certain exemptions from the Norwegian banking monopoly, which allows for direct/non-bank lending. The most practical exemptions are as follows:

- Investments in bonds are not considered as financing activity
- Financing within a group of companies
- "One-off" financings
- Seller's credit
- Financings as a result of "reverse solicitation" to corporate borrowers
- Pension schemes and life insurance companies may provide financing under certain conditions
- ELTIF, EuVECA and EuSEF funds may provide financing under specific regulations


STAVANGER

Several of these exemptions are relatively frequently used in the Norwegian market, however, any potential lender considering entering the Norwegian market should carefully analyse if an exemption is applicable and also take into consideration that these exemptions can be complex to rely on as a long term business strategy. That being said, foreign direct lending funds do have a presence in Norway (including direct lending funds established outside of Norway, and managed from Norway), and they all have to rely on these exemptions.

ELTIF is currently the only regime that allows for direct lending in an organised and larger scale. However, Norway has only implemented the first version of ELTIF (commonly referred to as "ELTIF 1.0"), which is widely regarded as an unsuitable framework for most managers and investors and as such, a relative failure in the EU with only about 50 ELTIF 1.0 funds established in the whole of the EU. To date, there is only one ELTIF established in Norway.

COMING EXEMPTIONS ALLOWING FOR DIRECT LENDING

Whilst the regulatory framework has so far held back direct lending in Norway compared to other European jurisdictions, certain legislative changes are on their way which could pave the way for more direct lending in the Norwegian market.

- **AIFMD 2**: AIFMD 2 includes a regulatory framework governing credit funds ("loan-originating AIFs"), which would allow for financing from alternative investment funds ("AIFs") in Norway. This will be a significant development in terms of allowing direct lending funds full access to the Norwegian market. AIFMD 2 entered into force in the EU on 15 April 2024 with a transposition deadline two years later on 16 April 2026. It remains to be seen whether Norway is able to implement AIFMD 2 within the deadline.
- **ELTIF 2.0**: In order to address the shortcomings of ELTIF 1.0, "ELTIF 2.0" has been adopted in the EU, but has not yet been implemented in Norway. ELTIF 2.0 has been improved compared to ELTIF 1.0, and there is a lot more uptake of this fund type in the EU already. ELTIF 2.0 entered into force in the EU on 10 January 2024. It is unclear when the regulation enters into force in Norway.
- **Shareholder financing**: The exemption for financing within groups is proposed to be expanded to include financing of companies where the shareholder holds more than 1/3 of the shares or votes. The proposal has not yet been adopted, and during the hearing a lower threshold has been suggested by several Norwegian market participants. Once enacted, financing of portfolio companies may rely on this exemption, even if the ownership is less than 50 per cent.

All of the above will expand the possibilities for non-bank lending in Norway. As the conditions and demand for alternative financing in Norway should be attractive, especially within the fields of shipping and offshore, we expect a significant uptick in this asset class once the regulatory constraints are removed, and we see significant interest for direct lending mandates among our clients, both potential borrowers and lenders as well as from the financial intermediaries.

> **We expect a significant uptick in this asset class once the regulatory constraints are removed.**

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The most important updates in GREEN SHIPPING

– June 2024

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.

Carbon capture and storage – shipping perspective

On 15 April 2024, Norway entered into memoranda of understandings (MoUs) regarding cross-border transportation of CO_2 with Denmark, Sweden, Belgium and the Netherlands. The MoUs are specified to be "arrangements" according to Article 6 paragraph 2 of the London Protocol (1996) to the London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1972), as amended by Resolution LP. 3(4). The MoUs will facilitate cross-border transportation of CO_2 between Norway and the countries mentioned, and clarify previous uncertainties on this point under the London Protocol.

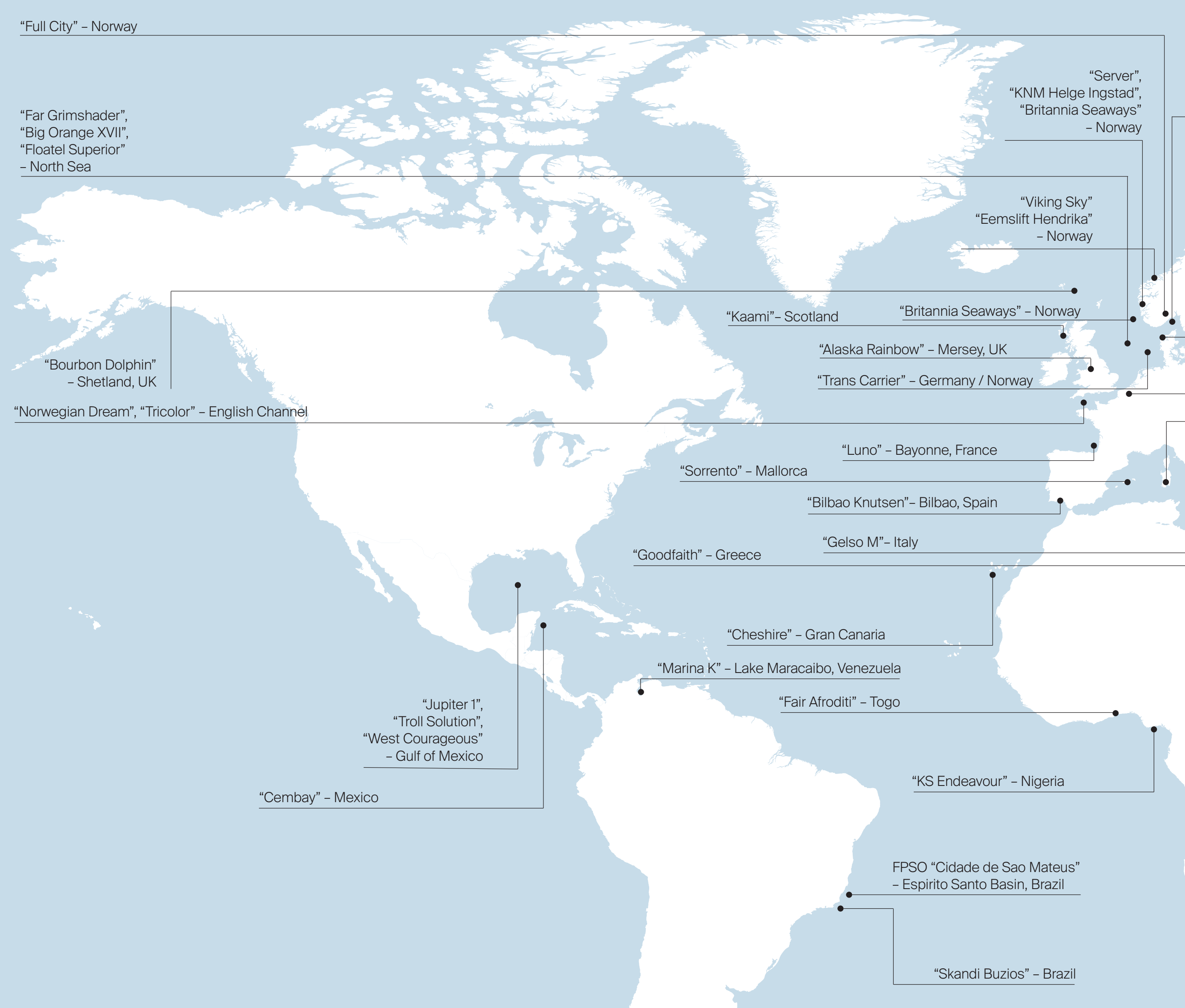
MEPC 81 in March 2024 – latest news from IMO

In March 2024 the Marine Environment Protection Committee (MEPC) held its 81st session in London. Following agreement on a revised greenhouse gas (GHG) strategy, several regulatory proposals were discussed. Whilst no agreement on the measures was reached, the MEPC approved a draft outline of IMO's new climate regulations. Both technical and economic measures for implementing the revised GHG strategy, such as a goal-based marine fuel standard and GHG emissions pricing mechanisms, will be further discussed at MEPC 82 in September 2024.

	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 Convention)	To prevent foreign organisms entering other ecosystems, vessels must implement a ballast water and sediments management plan, hold a ballast water record book, and use an approved ballast water treatment system	Applies to all vessels as a starting point, but not necessarily to vessels solely operating within one jurisdiction
	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 adhere to increasingly stringent limitations on the carbon intensity of fuels/energy used on board (from 2025) and use an onshore power supply or zero-emission technology in ports (from 2030)	Vessels over 5 000 GT transporting passengers or cargo for commercial purposes
	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 (SEEMP). 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 public-interest 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 and marine insurers' shipping portfolios are in line with adopted climate goals	Banks and lenders and marine insurers

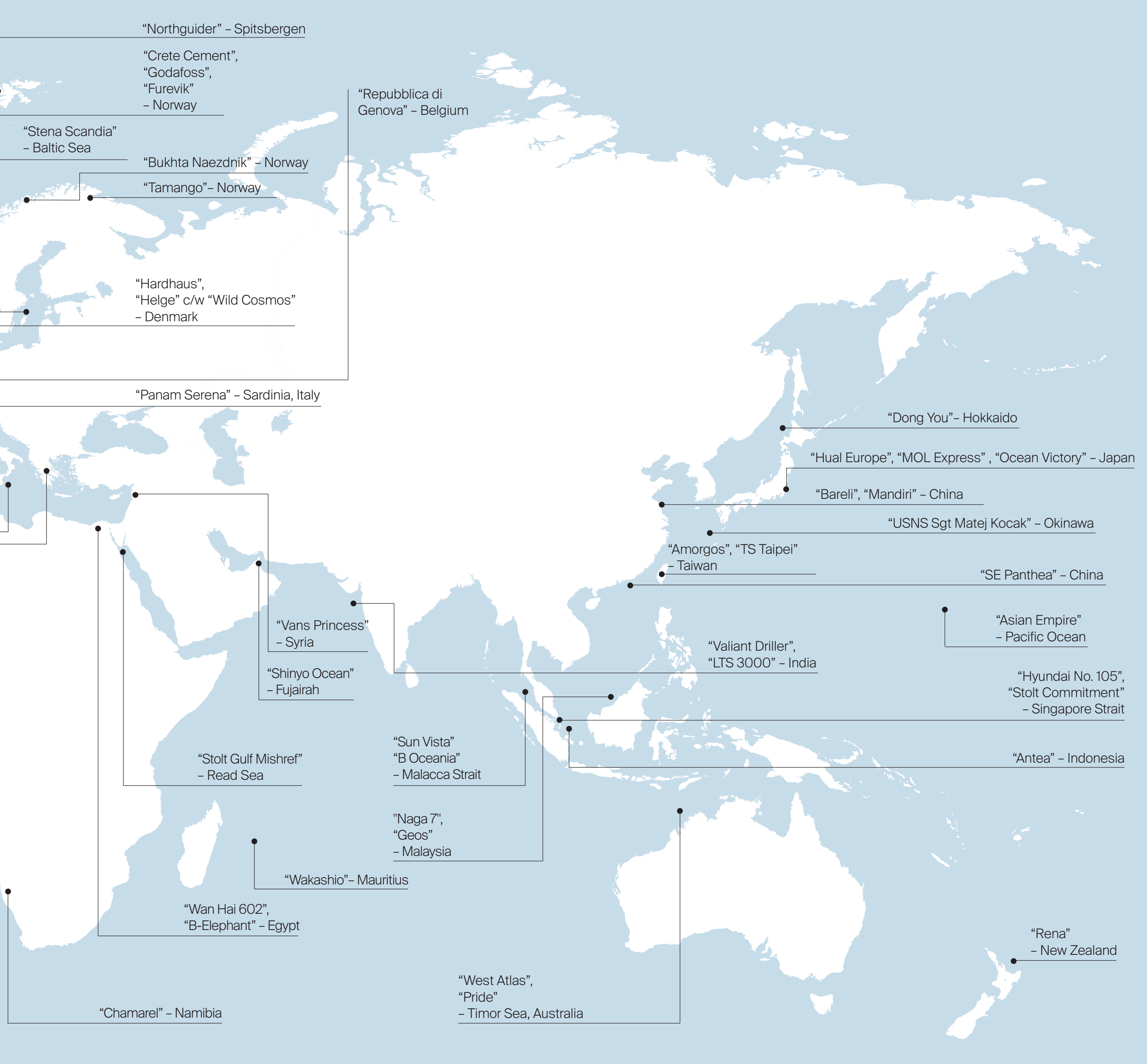
[1] The table includes a high level summary of some of the most influential and important regulations related to Green Shipping, but is not exhaustive

Scope (geographical)	Implementation date	Next steps / recent updates
Worldwide	Compliance required as from 1 January 2023	MEPC 81 approved changes to the guidelines on use of shaft/engine power limitation systems to comply with EEXI requirements, to make it easier to access sufficient power in case of unexpected events
Worldwide	8 September 2017	■ All vessels subject to the BWM Convention must meet the performance standards contained in regulation D-2, meaning that vessels without a ballast water treatment system must install an approved system before 8 September 2024 ■ MEPC 81 adopted amendments to the BWM Convention concerning the use of electronic record books. The amendments are expected to enter into force on 1 October 2025
Worldwide	1 January 2013	■ 1 January 2025: Phase 3 requiring increased energy efficiency to initiate ■ Updated ambitions in IMO 2023 GHG Strategy: Carbon intensity of the ship to decline through further improvement of the energy efficiency for new ships. IMO will review the framework with the aim of strengthening the EEDI-requirements
All voyages between ports in the EU and at berth in the EU, and 50% of GHG intensity of onboard energy used during voyages which start or end at an EU port	Proposed implementation date 1 January 2025, with stricter requirements every five years	■ 25 July 2023: Regulation adopted by the Council ■ 31 August 2024: Deadline for companies to submit to verifiers a monitoring plan for their vessels indicating the method chosen for monitoring and reporting the amount, type and emission factor of energy used on board by vessels, and other relevant information ■ 1 January 2025: Implementation
Worldwide	Compliance required as from 1 January 2023 (more stringent rating thresholds towards 2030)	Initial CII ratings will be given in 2024 based on reported data from 2023
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	
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	■ 22 November 2023: Clarification of responsible entity and rules on transfer of responsibility in Implementing Regulation (EU) 2023/2599 ■ 1 January 2024: Implementation of EU ETS ■ 1 January 2024: Implementation of changes in the Norwegian Greenhouse Gas Emission Trading Act ■ 31 January 2024: List of administering authorities and shipping companies published by the Commission (Implementing decision (EU) 2024/411)
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	As the Corporate Sustainability Reporting Directive (CSRD) takes effect for the fiscal year 2024, taxonomy reporting will merge with CSRD reporting. Companies subject to CSRD are required to seek mandatory audit (assurance) by a third party to verify its sustainability reporting including EU Taxonomy information
Worldwide	18 June 2019: (Financial institutions) 15 December 2021: (Marine insurance)	



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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