

SHIPSALE 22 – SO WHAT'S NEW?

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A summary of this article can be found in table format [here](#).

BACKGROUND

On 25 April 2022, BIMCO published its first own standard form of a ship sale and purchase agreement, called: SHIPSALE 22. According to BIMCO's accompanying statement, publication concluded a two-year drafting process, which reportedly considered over 800 comments and suggestions from the shipping industry.

The head of the nine-person drafting team, Francis Sarre of CMB, Belgium, stated: *"with SHIPSALE 22, the team has focussed on drafting an agreement that is clearly written and will need far fewer amendments and additional clauses compared to other standard sale forms. This will make the negotiation process faster and simpler and ultimately saves users time and money"*.

The standard sale form in recent years has been the *Norwegian Saleform 2012* ("NSF 2012"). The challenge for SHIPSALE 22 is to provide enough practical benefits to convince the shipping industry to move away from the familiar standard of NSF 2012.

This article reviews SHIPSALE 22 in general and analyses its key differences with NSF 2012.

Capitalised terms not otherwise defined in this article take the meaning given to them in SHIPSALE 22.

GENERAL STRUCTURE

SHIPSALE 22 is divided into four sections – Parts I and II, Annex A (Delivery Documents List) and Annex B (Excluded Items List). Interestingly, SHIPSALE 22 does not provide line numbering, making it stylistically very different from NSF 2012, so precise clause referencing will be required by industry parties and their lawyers and brokers going forward. Another point to note is that individual paragraphs in SHIPSALE 22 are relatively brief, especially in comparison to NSF 2012.

The most visible stylistic difference between SHIPSALE 22 and NSF 2012 is the former's formatting structure, which follows the usual "boxed" format seen at the front of BIMCO contracts. Part I is the box section where the user must enter contract-specific information. Unlike in other BIMCO contracts however, the boxes do not contain references to the clauses to which they relate. Part II contains contractual clauses, followed by Annex A (Delivery Documents) which contains a list of the Sellers' Delivery Documents in Part 1, a list of the Buyers' Delivery Documents in Part 2, the form for the Protocol of Delivery and Acceptance in Part 3 and, lastly, Annex B (Excluded Items List), which is left blank for parties to individually insert the excluded items.

COMPARISON WITH NSF 2012

Part I: Contract-specific information of the Vessel and the Sale

As mentioned above, this part is in the usual BIMCO "boxed" format where all specific factual information must be entered in numbered boxes and concludes with a signature block for the parties involved.

In terms of the specific factual information that needs to be included, this is largely the same in SHIPSALE 22 as in NSF 2012, though a few important deviations from NSF 2012 do exist. One difference is that SHIPSALE 22 does not contain any provisions if a box is left blank. For example:

- in Box 8 (Inspection), there is no fallback presumption that an inspection has already been carried out if nothing is included.
- in Box 10 (Deposit), the amount of the deposit must be stated (unlike in NSF 2012, where a fallback to a 10% deposit applies if no amount is entered); and

Part I also provides some additional information compared to NSF 2012:

- firstly, Guarantors for the Sellers in Box 5 and for the Buyers in Box 6 can now be included, with the former also included in the signature block. However, our view is that the guarantee language contained in the signature block is insufficient as it only covers performance guarantees and not further financial guarantees and indemnification obligations. Therefore, a well-advised Buyer or Seller should insist on having the other side Guarantor sign up to a separate guarantee which could form part of the Subjects (Box 25) that needs to be lifted;
- Box 18 distinguishes between (i) Bunkers and (ii) Oils and Greases. This creates an option to exclude Bunkers in particular from the sale, especially in cases where the current Charterers are the Buyers and already own the Bunkers.
- Box 19 provides the option of an electronic closing, which has increasingly become the norm as a result of the Covid-19 pandemic, better technology and a drive to keep costs down;
- Box 20 provides for the length of the validity of classification certificates, which we tend to see used in the case of older vessels and is in Buyers' interest;
- in Box 25, any relevant Subjects to the agreement can be entered; and

A further point to note that Box 11 refers to "Deposit Holder" but, given that escrow arrangements are often used for at least the balance of the Purchase Price, it might have been better to refer to an "Escrow Agent" here so that the two terms can be used interchangeably or the relevant option chosen.

Part II: Terms and Conditions including Definitions

Part II contains contractual clauses and is intended to broadly follow the actual chronological order of an S&P transaction (certainly more closely than NSF 2012), making it easier to follow for the user.

Clause 1 (Definitions and Interpretations)

The definitions are intended to work in conjunction with those included in the Part I boxes. There have been some helpful new additions, including “Notice of Readiness” and “Cancelling Date”, which are terms that are used in capitalised form throughout NSF 2012 without complete contractual certainty as to their meaning. By using more definitions, SHIPSALE 22 can be more precise and more concise.

Clause 2 (Sale and Purchase)

This stipulates the main obligations of Buyers and Sellers and sets out exactly what is being bought and sold and what is excluded. The same can be understood from NSF 2012 through correct drafting but requires jumping between clauses, which is less user friendly.

Clause 3 (Subjects)

Based on our experience, many lawyers in the industry might have preferred this clause to have not been included in SHIPSALE 22. Usually, “lifting of Subjects” refers to one or both parties obtaining board approval in order for the sale agreement to be effective. The concept, and the drafting, of this clause leave open a number of potential concerns however:

- firstly, it should be considered good corporate practice for an agreement to sell an asset potentially worth many millions to have been agreed by the board upfront before the agreement itself is signed;
- secondly, SHIPSALE 22’s obligation to demonstrate that Subjects are lifted is weak, being a simple notification, with no evidence such as board minutes/resolutions needing to be provided, making it difficult if not impossible to verify facts; and
- linked to this, if the board meeting/resolutions provided as part of the delivery documents are dated later than the notification, this can always be problematic.

On a positive note, at least the drafting now makes it clear what happens if Subjects are not lifted by the specified date, whereas NSF 2012 left this open to interpretation.

In addition, our view is that paragraph (a) of this clause has not been drafted adequately for it to work as intended. There are certain parts of SHIPSALE 22 that need to be effective on signing and dating in order for Clause 3 to bite as follows: Box 2, Box 3, Box 4, Box 25, Signature blocks, certain definitions in Clause 1(a), Clause 1(d), Clause 3 itself and, if electronically signed, Clause 27. In addition, as a matter of good commercial and legal practice, we believe that Clauses 23, 24 and 26 should also be effective on signing and dating and not conditional on lifting Subjects.

Clause 4 (Purchase Price)

Some useful clarifications have been added to this clause, namely that:

- the Included Items are stated; and
- the Bunkers, Oils and Greases are not included in the Purchase Price.

Whilst NSF 2012 does covers this, it does so across various clauses, so SHIPSALE 22 simplifies this.

A point to note for anyone entering into an agreement for sale and purchase is that the broker (or similar) commission should not be mentioned in the Purchase Price clause and should instead be addressed in Clause 14 (Payments) by way of deduction from the balance.

Clause 5 (Deposit)

The Deposit provisions have been changed in a number of ways:

- Clause 5(d) provides additional limbs for the start of the three Banking Day period for payment of the Deposit, which is a helpful clarification to ensure that both parties are absolutely aware as to when the Buyer's obligation is due;
- Clause 5(d)(ii) is a new requirement that the Deposit Holding Agreement must have been signed by all parties to it and exchanged, which is good practice and necessary for the parties and the Deposit Holder to establish detailed terms upon which the Deposit is held and released;
- Clause 5(d)(iii) expands on NSF 2012 clause 2(ii) by adding that the Deposit Holder must have notified the parties that the Deposit Account is in all respects ready to receive the Deposit (by contrast, NSF 2012 only requires the account to be opened). This is a useful addition because (i) for regulatory reasons the Deposit Holder should not accept any funds into the Deposit Account until its KYC and AML checks are complete and (ii) if a law firm is used as Deposit Holder, a new account will not always be opened as in many cases the firm's own client account can be used; and
- Clause 5(d)(iii) includes detailed reasons (named "Disruptive Banking Events") which allow the Buyers' obligation to pay the deposit be extended from 3 days to 5 days in case of payment delays for which the Buyers are not responsible. Although the reasons are rather vague, it offers the basis of a grace period and mitigation for the Buyers in circumstances outside of their control.

Clause 6 (Inspection)

Clause 6 (Inspection) now contains all three possible variants for an inspection:

- the inspection has already taken place;
- the Buyers still have a right to inspection; and
- the Buyers waive their inspection right entirely.

The third option is a new addition compared to NSF 2012, in which parties have to manually amend the form to cater for this eventuality. This option may also be a viable when the Buyers are the current charterer of the Vessel or the Vessel is being sold for recycling.

Clause 6(b) also determines the scope of the inspection by excluding the Vessel's engines, machinery, equipment or systems. In comparison, NSF 2012 does not specify the extent of the inspection. Since it could in the interest of the Buyers to examine the engine parts as well, we expect this clause may well become one of those which the parties focus on during their commercial discussions. In addition, it is worth noting that Clause 6(b)(v) extends the deadline for acceptance after the inspection to 5 days compared to 72 hours under NSF 2012.

Clause 7 (Buyers' On-board Representatives)

This clause broadly follows NSF 2012 with no notable amendments or additions.

Clause 8 (Underwater Inspection)

Clause 8 does not stipulate a 9 day period for exercising the option to perform an underwater inspection ("UWI") before Notice of Readiness is given. Instead, it is suggested that any UWI is to take place at the place of delivery, which is in line with the current practice of conducting the UWI close to delivery and then obtaining a Sellers' letter of confirmation that the Vessel has not touched bottom since the UWI.

Clause 9 (Drydock Inspection)

The only notable change from NSF 2012 is the automatic extension of the Cancelling Date if, as a result of a Drydock Inspection, the Vessel has to be repositioned, (up to 21 days extension, compared to 14 in NSF 2012).

Clause 10 (Condition of Vessel at Delivery)

Clause 10 is an expanded combination of NSF 2012's Clauses 9 and 11, which will be a welcome change for Buyers seeking confirmation that they are getting clean, unencumbered title to the Vessel. Sellers, however, should be careful to review this clause and negotiate out any points which they think may be of a concern, for example arising out of cargo or charterer claims or potential maritime liens as a result of unpaid crew wages.

Clause 11 (Delivery Notices)

The suggested time periods for notices has not changed but, unlike NSF 2012, there is no distinction between "approximate" and "definite" notices. This is likely to be a welcome difference and reflects how the delivery date can often change due to environmental conditions and the practicalities around getting the Vessel physically and documentarily ready for closing. In practice, all notices are approximate until a Notice of Readiness is tendered in any event.

Although paragraph (e) of this clause stipulates that "*Notice of Readiness shall not be given later than the Cancelling Date*", our view is that this could and should have gone further by including some wording to address around a clarification which is typically sought by parties on ship sale and purchase transactions, namely that the Cancelling Date should be the last date that Notice of Readiness can be given, and not the last day by which the Vessel needs to be delivered.

Clause 12 (Vessel Delay)

This broadly reflects paragraph (c) of Clause 5 of NSF 2012 with no notable amendments or additions.

Clause 13 (Bunkers, Oils and Greases)

This clause has been welcomely updated to reflect the commercial practice that the quantity of the Bunkers, Oils and Greases are determined by joint survey and, also, that the joint survey should be completed prior to Delivery. It is sometimes the case that, on the intended Delivery date, the Buyers and Sellers spend a significant amount of time negotiating the price that should be paid for these items, and such negotiations add to the time pressure to complete the Delivery within business hours at the port of delivery and/or the place from where the payment is being made.

Clause 14 (Payments)

This clause includes an additional gross-up provision which is not expressly included in NSF 2012. Generally, the wording has been tightened up to make the Buyers ensure that all payments they send result in the Sellers receiving the full amount(s) they are entitled to under the agreement. In our view, it would have been useful to include optional drafting for scenarios where an escrow arrangement is being used for payment of the balance of the Purchase Price, as such gross-up language is typically included in most well-drafted escrow agreements.

Clause 15 (Delivery Documents)

Clause 15 requires the exchange of copies of the Delivery Documents no later than 5 days after the first delivery notice. This is a new requirement compared to NSF 2012, albeit that such a timeframe would typically be included in an addendum to NSF 2012 where one was drafted to address the exchange of an agreement on the respective parties' delivery documents.

Clause 16 (Delivery)

SHIPSALE 22 provides for electronic and physical closing, which is a useful and practical solution reflective of more recent market practice. Paragraph (d), however, requires 2 "originals" of the protocol of delivery and acceptance ("PDA") to be exchanged at Delivery, which would not be possible if the closing occurs electronically. Whether the incoming flag may accept an electronically signed PDA for registration purposes would then have to be clarified in advance in each case. To avoid any potential dispute over the time of delivery, our suggestion is that the PDA should always be executed at the documentary closing and not at physical delivery, and certainly there should not be duplicate PDAs.

Clause 17 (Post-Delivery Obligations)

The principal change is stylistic, in that although these provisions are contained in NSF 2012, they are not neatly grouped into one clause as they now have been in SHIPSALE 22.

Clause 18 (Sellers' Termination Rights)

This clause has been amended from NSF 2012 to reflect an often-negotiated point, in that the amount of compensation the Sellers may claim from the Buyers, in excess of the Deposit, is limited to "*direct losses and expenses*". NSF 2012 does not provide for the same distinction.

Clause 19 (Buyers' Termination Rights)

The same addition described above has been made in Clause 19(b) in respect of Buyers' Termination Rights.

Clause 20 (Total Loss)

There are no notable amendments or additions to these provisions.

Clause 21 (Sanctions)

SHIPSALE 22 contains BIMCO's standard sanctions wording which, if breached, entitles the non-breaching party to cancel the agreement and claim damages. We often see such clause negotiated into NSF 2012 form, so the inclusion of this in the standard form SHIPSALE 22 reflects current market practice.

Clause 22 (Anti-Corruption)

This is a new clause (which follows the BIMCO standard anti-corruption wording) providing that if a party breaches anti-corruption legislation, it must defend and indemnify the non-breaching party against any fine, penalty, liability, loss or damage arising from said breach. The non-breaching party is also entitled to terminate the agreement and claim damages.

Clause 23 (Confidentiality)

This is a new addition (as compared to NSF 2012) but reflects the commercial reality that parties often want to keep the details of the sale confidential at least until completion.

Clause 24 (BIMCO Electronic Signature Clause 2021)

This is a new clause which addresses electronic signing of documents, reflecting recent market practice, largely due to COVID-19. Parties should seek confirmation that an electronic signature is acceptable in the relevant jurisdictions to create a valid and binding contract and amend this clause accordingly as required.

Boilerplate provisions

SHIPSALE 22 also includes the usual suite of boilerplate provisions, including Clause 24 (*Notices and Communications*), Clause 25 (*Entire Agreement*) and Clause 26 (*BIMCO Law and Arbitration Clause 2020*), which parties will be familiar with.

Annex A: Delivery Documents

The List of the Sellers' (Part 1) and the Buyers' (Part 2) Delivery Documents are almost identical in wording to the documents required under clause 8 of NSF 2012.

As between Part 1 and Part 2 of Annex A, there are some minor differences:

- in comparison to NSF 2012, a Sellers' letter of confirmation not to be blacklisted by any nation or organisation is not required;
- Part 1 Clause 2 and Part 2 Clause 2 provides respectively for Sellers' and Buyers' corporate documents to be handed over only as copies and not as originals; and
- the deadline for requesting additional Sellers' Delivery Documents (see Part 1 Clause 11) is 2 weeks from the first Delivery Notice (and, not as with NSF 2012, 10 days before the anticipated Delivery date).

Part 3 of Annex A contains, as a further Delivery Document, the Protocol of Delivery and Acceptance, which, according to Part II (d), each party is to receive two signed copies. This seems for the sake of completeness to repeat Clause 16(d), which is discussed above.

Still not included is a procedure for the exchange of the Delivery Documents in case of an electronic closing, which appears to be an unfortunate omission, in particular in light of the inclusion of new Box 19 and relevant wording in Clauses 16 and 27.

Annex B: Excluded Items List

Annex B is left blank for the parties to insert the excluded items on a case-by-case basis. In comparison, in NSF 2012 Clause 7 specifies the items included in the sale of the vessel but does not provide for a list of the excluded items.

CONCLUSION

The minor differences in SHIPSALE 22 compared to NSF 2012 are comprehensible and address issues which have arisen over the years from standard market practice. SHIPSALE 22 adopts clauses that have been frequently negotiated by parties into the NSF 2012 form over the years. Accordingly, the editing effort for the user is reduced and key points less likely to be overlooked.

The biggest stylistic differences between SHIPSALE 22 and NSF 2012 are the different format and the ordering of the clauses.

As standard for BIMCO contracts, SHIPSALE 22 consists in Part I of only slightly more than one page in which the contract-specific information must be entered. Whereas in NSF 2012, the contract-specific information must be entered throughout the entire contract in the respective clause. This changed format is much more user-friendly. Entering information only on the first page streamlines the drafting process and provides a quicker overview of the finished, negotiated document. This is complemented in Part II by shortened paragraphs and more detailed structuring in the core contractual provisions. The aim of the drafting team to create a simplified structure therefore appears to be visible and successful.

The clause ordering to reflect an actual S&P transaction is very sensible, to engage the parties with the relevant issues at the relevant time, and will also help guide those new to the market, either in a legal or commercial capacity, through the process.

However, we also identified a few practice-relevant issues that were not or only inadequately addressed by SHIPSALE 22. This includes the lack of (i) procedures in case of an electronic closing, (ii) considerations of the balance payment via an escrow agreement including a broader definition of the Deposit Holder as escrow agent, (iii) a precise definition of the Cancelling Date and its effects as well as general concerns about the “lifting of Subjects”. Lastly references in the Box Section (Part 1), like in other BIMCO contracts, to the relevant clauses would have been helpful, especially in a new standard format.

On balance, we consider the user-friendliness of SHIPSALE 22 and certain other helpful additions included may be good reasons for it to replace NSF 2012 as the standard form for ship sale and purchase agreement, though it remains to be seen how quickly and broadly it will be taken up.

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