



SALEFORM 2012

Explanatory notes



Introduction

The revision of any standard agreement as internationally recognised and widely used as SALEFORM 93 is not a matter lightly undertaken. The decision to revise SALEFORM 93 was based on feedback from the global ship sale and purchase sector who were asked whether an update was needed and, if so, to what extent the agreement should be revised.

The message from the feedback was very clear – while the present SALEFORM largely met the current needs of the industry, it would certainly benefit from a modest update to reflect commonly applied amendments and rider clauses.

Of equal importance to those consulted was that the general principles and structure of SALEFORM should be retained. The challenge for BIMCO, working together with copyright holders the Norwegian Shipbrokers' Association (NSA), was how to make this well-used international sale and purchase contract even better while maintaining all the key elements that the industry has come to rely on.

Over a period of 11 months the NSA/BIMCO drafting team carried out a thorough review of SALEFORM in consultation with the industry. On 10 November 2011, the Documentary Committee approved the new edition, called SALEFORM 2012.

The revision process identified the key clauses most commonly amended in SALEFORM and pinpointed areas where ambiguity in the '93 edition had, on occasion, led to misunderstanding and uncertainty. The new edition brings greater clarity to the agreement as well as amended wording that reflects current commercial practice.

The NSA and BIMCO would like to thank the following members of the SALEFORM Sub-committee for their hard work and commitment in revising SALEFORM:

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The following Clause by Clause commentary highlights the amendments that have been introduced in the 2012 edition of SALEFORM:

Definitions

A number of additional definitions are included to aid clarity.

1. Purchase Price

The Parties are now required to state the currency and amount of the Purchase Price both in words and figures.

2. Deposit

In SALEFORM 93 the size of the Deposit was predefined at 10%. Current industry practice suggests that a different percentage may often be agreed. The new edition has space for the Parties to fill in an agreed percentage of the Deposit, while providing a default percentage of 10% in case the space is left blank.

In recent years opening a bank account has become increasingly more difficult and time consuming in some jurisdictions. Commonly, entities other than banks are used to hold funds in escrow. To reflect these developments the term Deposit Holder has been introduced to identify the party holding the agreed Deposit. This can be a bank, law firm, ship broker or any other institution the Parties may agree on. The account must be capable of earning interest which is to accrue to the Deposit though it must be appreciated that the interest rate may be as low as 0%.

In order to avoid potential uncertainty the clause now states that the obligation to lodge the deposit within 3 banking days is triggered by:

- (i) the Agreement being signed by the Parties
- (ii) the Agreement being exchanged in original or by telefax or e-mail
- (iii) the Deposit Holder confirming in writing to the Parties that the account has been opened

A new provision in the clause requires the Parties to provide the Deposit Holder with all the necessary documentation to open and maintain the account without delay.

3. Payment

The three Banking days within which the Buyers are required to pay the Purchase Price is now just triggered by the date that Notice of Readiness has been given in accordance with Clause 5 (Time and place of delivery and notices), as the additional requirement in SALEFORM 1993 for the vessel to be physically ready for delivery was just a duplicate of the same requirement.

In addition the Deposit now is considered to be part of the Purchase Price, contrary to the interpretation given to SALEFORM 1993 by the English High Court judgment in the AKTOR.

4. Inspection

There are no substantive changes to this clause, although the obligations of the Parties with regard to inspection have been clarified.

5. Time and place of delivery and notices

The clause now provides a defined window within which the Sellers are entitled to give Notice of Readiness. Sub-clause (b) now requires the Sellers to give Notice of the date they *intend* to tender Notice of Readiness as well as the intended place of delivery. The Committee felt that this amendment will assist the Buyers in making arrangements for taking delivery of the Vessel. The words "in every respect" have been deleted prior to "physically ready for delivery" to clarify any uncertainty in relation to Clause 11 that the existence of minor defects in the Vessel would still make the Buyers obliged to take delivery.

Under sub-clause (c) the time within which the Buyers are to elect whether to cancel the agreement having been notified by the Sellers that the Vessel will not be ready for delivery by the Cancelling Date agreed, has been reduced to 3 Banking Days.

What was previously sub-clause (c) in the 1993 edition has been clarified so that acceptance of a new Cancelling Date does not amount to a waiver of any claims the Buyers may have under Clause 14 (Sellers' default).

6. Divers Inspection / Drydocking

Although this clause maintains the alternatives of drydocking or divers inspection, the order of the clause has been amended to reflect current industry practice, where most sales are done without drydocking. Clause 6(a) and 6(b) are alternatives where one is to be deleted. In the absence of any deletion, clause 6(a) is the default solution.

A new provision has been introduced in sub-clause 6(a)(i) whereby the Buyers' option to undertake a divers inspection has to be declared 9 days prior to the Vessel's intended readiness for delivery, linked to the 10 day notice that the Sellers are required to give under clause 5(b). It is felt that a Seller should be entitled to proper notice of any divers inspection to avoid a delay in delivery of the Vessel. New wording has also been added to ensure that a divers inspection is undertaken as soon as possible and in the presence of a Classification Society surveyor, and that whilst the Buyers are entitled to have representatives present during the inspection, they are to act as observers only and in no way interfere with the Classification Surveyor's work or decisions.

A further change provides that where an alternative location for the divers inspection has to be provided, the time used for positioning and re-positioning (alternatively any deviation) will extend the Cancelling Date.

New wording has also been added whereby the Sellers cannot tender Notice of Readiness before the completion of any divers inspection. This provision was debated at length during the revision process and it was concluded that the amendment was appropriate in light of the new obligation on the Buyers to carry out the inspection without undue delay and the aforementioned provision concerning extension of the Cancelling Date for positioning and repositioning time.

In sub-clause 6(a)(ii) a new provision has been included whereby any repairs found necessary as a result of the divers inspection that affect Class, may, unless the Classification Society require such repairs to be undertaken prior to the next Class drydocking survey, be deferred until the Vessel's next scheduled drydocking, and the Sellers are entitled to deliver the Vessel with these defects against a deduction from the Purchase Price. The clause contain a mechanism to calculate the compensation due, as well as a restriction that Notice of Readiness cannot be tendered until the compensation for the defects has been established, following the procedure set out in the clause.

In sub-clause 6(b) (sub-clause 6(a) in the 1993 edition) new wording has been added to clarify that if the Vessel is put in drydock and damages or defects are found that will affect the Vessel's class, then the Sellers will be responsible for paying all costs and expenses connected with taking the Vessel in and out of drydock, in addition to paying for the repairs themselves.

SALEFORM 2012 deals more precisely with the costs connected with a survey of the tailshaft system. Sub-clause 6(c)(ii) now only deals with the costs and expenses for survey of the tailshaft system. The costs and expenses for taking the Vessel in and out of drydock are dealt with in sub-clauses 6(a) and (b). This has removed an ambiguity found in the 1993 edition. Also, in sub-clause 6(c)(iii), it has been emphasised that the Buyers' representatives can be present in the drydock as observers only.

7. Spares, bunkers and other items

This Clause now places an increased responsibility on the Sellers to accurately list items not belonging to them and the clause contains a space for listing items which the Sellers' intend to exclude from the sale. Additionally, any items on hire or belonging to third parties on board the Vessel at the time of inspection (or the date of the Agreement in case the Vessel is taken over without inspection are to be replaced by the Sellers at their cost and expense prior to delivery of the Vessel). The reason for the amendment is that equipment essential for the intended operation of the Vessel might be hired, such as life boats on cruise vessels and even hatch covers on bulk vessels. It was decided that in order to make sure the Buyers actually get what they believe they have bought, the Sellers are obliged to replace or procure any item not specifically listed for exclusion, regardless of ownership, prior to delivery of the Vessel. This provision means either buying new or similar equipment to what was on board the Vessel at inspection, or buying the actual equipment that was on board from its rightful owners in order to deliver it with the Vessel.

The bunkers provisions now include two alternative mechanisms for calculating the amount the Buyers will pay for remaining bunkers, lubricating- and hydraulic oils on board; being a) the Sellers' actual net price evidenced by invoices or vouchers, or b) the net current market price at the port and date of delivery (or the nearest bunkering port in case bunkers is not available in the port of delivery).

8. Documentation

The amendments to Clause 8 largely consist of updated documentary requirements on both Parties to the Sale to reflect current market practice.

Clause 8(a)(iv) addresses some of the issues which can arise concerning mortgage deletion. If a mortgage is to be discharged by the Sellers through the proceeds of the Sale, it will not be possible for the Sellers to table a free of encumbrances certificate prior to payment. The Clause therefore provides that a copy of the free of encumbrances certificate shall be faxed or emailed to the closing meeting. The Sellers will therefore need to make arrangements so that the mortgagee is ready for and will delete the mortgage on receipt of the Purchase Price, and for the registry to simultaneously issue the free of encumbrances certificate.

9. Encumbrances

An additional warranty has been added that the Vessel is not subject to Port State or other administrative detentions.

10. Taxes, fees and expenses

Only a minor change has been done in this clause. "Buyers' flag" has been substituted with "Buyers' Nominated Flag State".

11. Condition on Delivery

The clause additionally provides that the Vessel is to be delivered free of cargo and free of stowaways. For the sake of clarity, the terms "Class" and "the Classification Society" have been used as appropriate to distinguish between the society and the notation.

12. Name/markings

No changes have been made to this clause

13. Buyers' default

The term "paid" has been substituted with the term "lodged", in connection with the Deposit.

14. Sellers' default

The substantive change in this clause is that the grace period of 3 Banking Days following the Notice of Readiness for the Sellers' to make arrangements for the documentation required in Clause 8 has been removed. It was felt that allowing the Sellers these additional days could interfere with Buyers' plans as far as organising and/or making payment of the Purchase Price.

15. Buyers' representatives

Under the changes to this clause the Parties are now left to agree separately when the Buyers' representatives, are to be taken on board. The Buyers themselves, as well as their representatives, are now required to sign a letter of indemnity. In order to avoid "home made" letters, this is to be on the terms of Sellers' P&I Club's standard letter of indemnity.

16. Arbitration

The law and arbitration Clause is unchanged in substance, and still provides for London, New York or other law and arbitration, but has been updated. London arbitration remains the default position.

Provision has also been made for either the LMAA Small Claims Procedure or the Society of Maritime Arbitrators Inc. Shortened Arbitration Procedure to be used where claims and counter-claims do not exceed \$100,000.

17. Notices

A new clause has been added to ensure that all notices to be provided under the agreement are in writing. In order to facilitate that notices are sent correctly, space for inserting contact details for where the notices to both parties are to be sent is provided.

18. Entire agreement

The purpose of the Entire Agreement Clause is to limit the rights of the parties to the written terms of the contract. As such it would exclude representations, written and oral, not intended to be part of the final concluded agreement. Although the Clause is designed to work under any system of law, under English law it should effectively exclude the implied terms of the Sale of Goods Act 1979. This should remove the uncertainty concerning the sale of ships under English law and a potential obligation on the sellers to ensure that the vessel is of a “satisfactory quality and fit for purpose” – a difficult obligation to meet, as well as under any other applicable law which could otherwise open up for implied warranties.

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