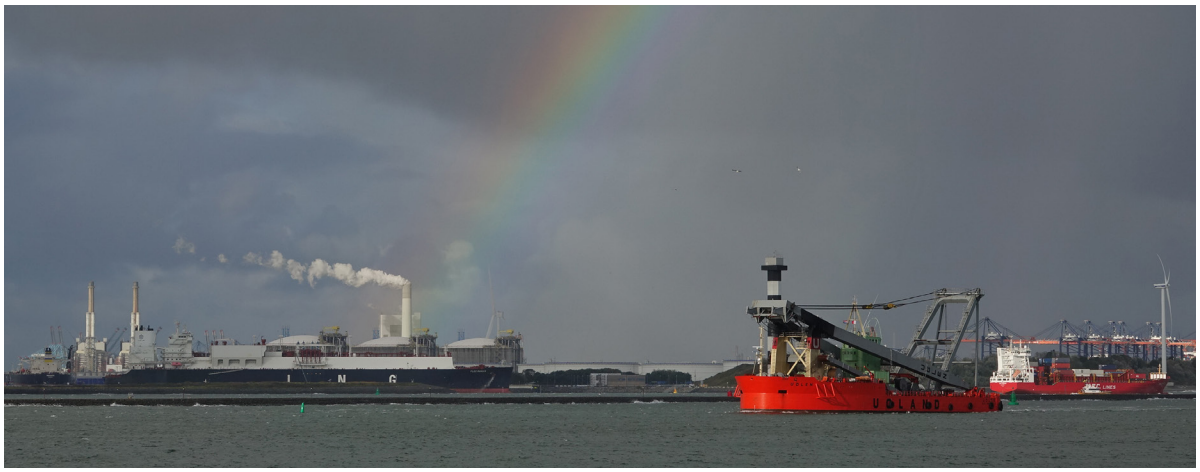


TRANSPORT OF LIQUID CO2 – SOME CHARTER PARTY CONSIDERATIONS

Capture of CO2 is frequently referred to as one of several steps that is necessary for the world to reach the aim of reducing the CO2-emissions in line with the Paris Agreement. The technology typically requires capture of CO2 at the emitting source, having it liquefied and then transported and stored at an offshore location. There are two ways of transporting LCO2: by pipelines or carriage onboard vessels. Although pipeline transportation of LCO2 is the most cost-efficient method, sea transport is more viable for longer distances, particularly when the sources of LCO2 are geographically dispersed[1].

Currently there are far from enough specialized tonnage to cater for the volumes of LCO2 that may be shipped in the years to come. Existing pressurized gas carries cannot be used because of the specific properties of LCO2, which differ significantly from other gases like LNG or LPG.

Although one could think that transportation of LCO2 would be possible to utilize onboard the already existing fleet of pressurized gas carriers, this is largely not the case due to the unique characteristics of the LCO2, for instance that it requires pressure to reach its liquid state in contrast to natural gas. To maintain CO2 in its liquid state, a precise combination of high pressure and low temperature is required[2]. In contrast, LNG can be liquified using only extremely low temperature, whilst LPG can be stored at much lower pressures compared to what is required to liquify CO2. Another challenge is the lack of universal standards for pressure and temperature combination. Each tender and project may require a different balance between the two, depending on specifications of the project, as well as specifications of the cargo[3].

BY OLA GRANHUS MEDIÅS

Carriage of LCO2 largely raises the same issues as transportation of pressurized gases, and it therefore makes sense to use a charter party catered specifically for this type of trade. However, there are a few differences and a couple of points need to be addressed when drafting the charter party specifically for the carriage of LCO2.

Firstly, at least in LNG charter parties, one would typically see the boil off warranty linked to the speed and performance warranties, linked with an ability to use the boil off as fuel for propulsion. Using boil off for propulsion is not feasible when carrying LCO2 as fuel, which means that provisions concerning the use of boil off for propulsion will not be relevant.

1 - DNV Maritime Forecast to 2050, p. 49

2 - https://www.sigtto.org/media/4004/sigtto-carbon-dioxide-cargo-on-gas-carriers.pdf p. 28

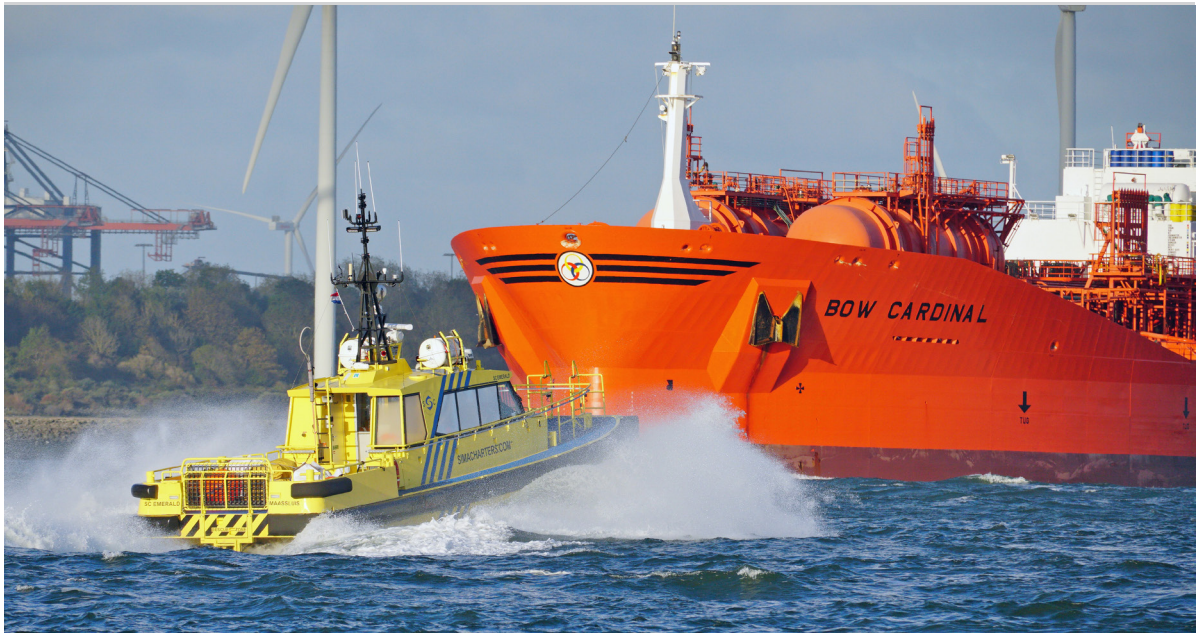
3 - https://www.dnv.com/focus-areas/ccs/carbon-shipping/

Secondly, due to the unique characteristics of LCO2, provisions dealing with *venting* of cargo in certain circumstances is required, for instance, to cover for situations where the pressure might increase or decrease in the cargo tanks, thereby creating a risk of the cargo either solidifying or turning into gas again[4]. In some tenders, we have seen provisions allowing Owners to ventilate cargo for safety reasons, as well as clauses permitting Charterers to request ventilation to meet their commercial or operational needs. In the latter situation, Owners should ensure that they are adequately protected from liability, including pollution fines and potential claims from bill of lading holders.

Furthermore, as our experience so far suggests that the vessels will be built and employed on long term charter parties, members should ensure that, to the extent commercially possible, the charters contain provisions dealing with substantial changes in the law and regulations in the future that may have an effect on the performance of the charter party. Owners should seek to introduce provisions allowing them to recover increased costs following such new requirements, as well as seeking to introduce language allowing Owners to increase the rate in accordance with changes in inflation, for instance.

Nordisk is pleased to assist in this new area of shipping that is starting to take place. We remain ready to provide assistance in tenders and shipbuilding contracts that deal with carriage of LCO2. Should you have any questions, feel free to reach out to your contact at Nordisk, or reach out to the author of this article at omedias@nordisk.no.

4 - https://www.sigtto.org/media/4004/sigtto-carbon-dioxide-cargo-on-gas-carriers.pdf p. 10



NO LOSS OF BARGAIN DAMAGES WITHOUT REPUDIATORY OR RENUNCIATORY BREACH

This was the recent decision of the English Commercial Court in *Orion Shipping and Trading Ltd v. Great Asia Maritime Ltd (The "LILA LISBON")*[1].

In this case, the cancelling buyers under a Memorandum of Agreement ("MOA") agreed on an amended Norwegian Saleform 2012 ("NSF 2012") brought a claim for damages against defaulting sellers for their failure to give Notice of Readiness ("NOR") and be ready to deliver the vessel by the cancelling date.

The significance of this judgment for parties involved in sale and purchase of ships, particularly on the standard NSF 2012 terms, is that in situations where the buyers elect to cancel the contract pursuant to clause 14 they are unlikely to recover damages for loss of bargain (prospective losses) *unless* sellers are in repudiatory or renunciatory breach of contract.

BY RITUPARNA CHATTOPADHYAY

1 - [2024] EWHC 2075 (Comm)

Background

The parties entered into the MOA for the sale of the vessel. Sellers failed to tender NOR and deliver the vessel by the agreed cancellation date. The buyers then cancelled the MOA, arrested the vessel and sought security for a claim in damages for the difference between the market price and the contract price of the vessel.

Clause 14 of the MOA (*Sellers' default*) provided: *"Should the Sellers fail to give Notice of Readiness in accordance with Clause 5(b) or fail to be ready to validly complete a legal transfer by the Cancelling Date the Buyers shall have the option of cancelling this Agreement…*

Should the Sellers fail to give Notice of Readiness by the Cancelling Date or fail to be ready to validly complete a legal transfer as aforesaid they shall make due compensation to the Buyers for their loss and for all expenses together with interest if their failure is due to proven negligence and whether or not the Buyers cancel this Agreement." (emphasis added).

Arbitration

Buyers commenced arbitration and claimed (among other things) market damages for their losses following cancellation of contract by them pursuant to clause 14 of the MOA. The Tribunal held that:

1. The sellers' failure to give NOR and complete transfer of the vessel by the original cancelling date was due to their "*proven negligence*" in that they had failed to take reasonable care in making arrangements for the disembarkation of the crew.
2. However, Sellers were not in repudiatory breach of the MOA and accordingly buyers were not entitled to terminate on grounds of repudiatory breach.
3. Sellers' failure entitled buyers to cancel the MOA and their termination was valid.
4. Buyers were entitled to recover damages for the difference between the market price and the contract price of the vessel, as at the date of termination[2].

High Court (Commercial Court)

Sellers appealed the award. The question of law addressed by the Court was:

"Where a Memorandum of Agreement on the SALEFORM 2012 is lawfully cancelled by a buyer under clause 14 in circumstances where the seller has failed to give notice of readiness or failed to be ready to validly complete a legal transfer by the Cancelling Date and such failure is due to the seller's "proven negligence", is that buyer entitled to recover loss of bargain damages absent an accepted repudiatory breach of contract?"

The Court decided that buyers did not have such a right.

Sellers argued that there was no clear wording in clause 14 which allowed buyers to recover damages for loss of bargain and that such damages were only recoverable if there was a repudiatory breach or a breach of condition.

Buyers argued that the Tribunal's decision to award market damages was correct, that "*due compensation*" in clause 14 meant appropriate compensation by reference to the usual principles of causation, remoteness and mitigation and that the clause gave effect to the normal measure of damages for non-delivery. Alternatively, buyers argued that time of delivery of the vessel was of the essence and that their cancellation under clause 14 was in substance a termination for breach of condition which entitled them to such damages.

The Court allowed the appeal, set aside the section of the award where the Tribunal had awarded market damages to the buyers and held that:

(1) Under the terms of the MOA there was no positive obligation on the sellers to tender NOR or to be ready to deliver by the cancelling date, which could give rise to a breach of contract.[3] As such there was no breach of contract by the sellers. The only obligation on sellers was to give NOR when the vessel was at the delivery place and physically ready.

(2) Even if there was a positive obligation on the sellers to tender NOR by the cancelling date, it was not as a condition of contract and there was no clear wording in the MOA to suggest otherwise. In the circumstance, the buyers' contractual right to cancel in itself did not entitle them to recover damages for loss of bargain without a repudiatory breach.

(3) Clause 14 only provided a contractual right to buyers to terminate if NOR was not tendered by the cancelling date and it set out specific consequences of the parties' conduct.

(4) On a construction of clause 14, the compensation recoverable by buyers would be restricted to their accrued losses and wasted expenses caused specifically by the sellers' failure to give NOR and deliver by the cancelling date.[4] Such losses crystallised at the point of cancellation and did not include prospective losses/expenses caused by the

2 - Pursuant to the usual measure of damages for non-delivery under s. 51 of the Sale of Goods Act 1979 ("SOGA")

3 - The Court distinguished the situation from that in Bunge Corporate v Tradax Export SA, [1981] 1 WLR 711 where the last day for shipment/delivery of the cargo was 30 June 1975 and there was a positive obligation on the buyers to give prior notice of readiness and deliver cargo by a specific date. The Court also drew an analogy with delivery into a time charter where it is well established that failure to deliver by the cancelling date gives rise to a right to cancel which is independent of any breach.

4 - The Court held that the recoverable damages under clause 14 of the MOA would include "expenses incurred by the buyers in making arrangements to crew the vessel, carrying out inspections, legal costs and preparing for delivery generally. They will also encompass any loss of profits that could potentially have been made between the date when the vessel should have been delivered but for the sellers' negligence and the date of cancellation".

buyers' cancellation.

(5) The buyers' unilateral decision to terminate pursuant to a cancellation right could not transform the case as a matter of law from one of failure to tender NOR into one of non-delivery. That prevented buyers from recovering the normal market measure of damages.

Conclusion

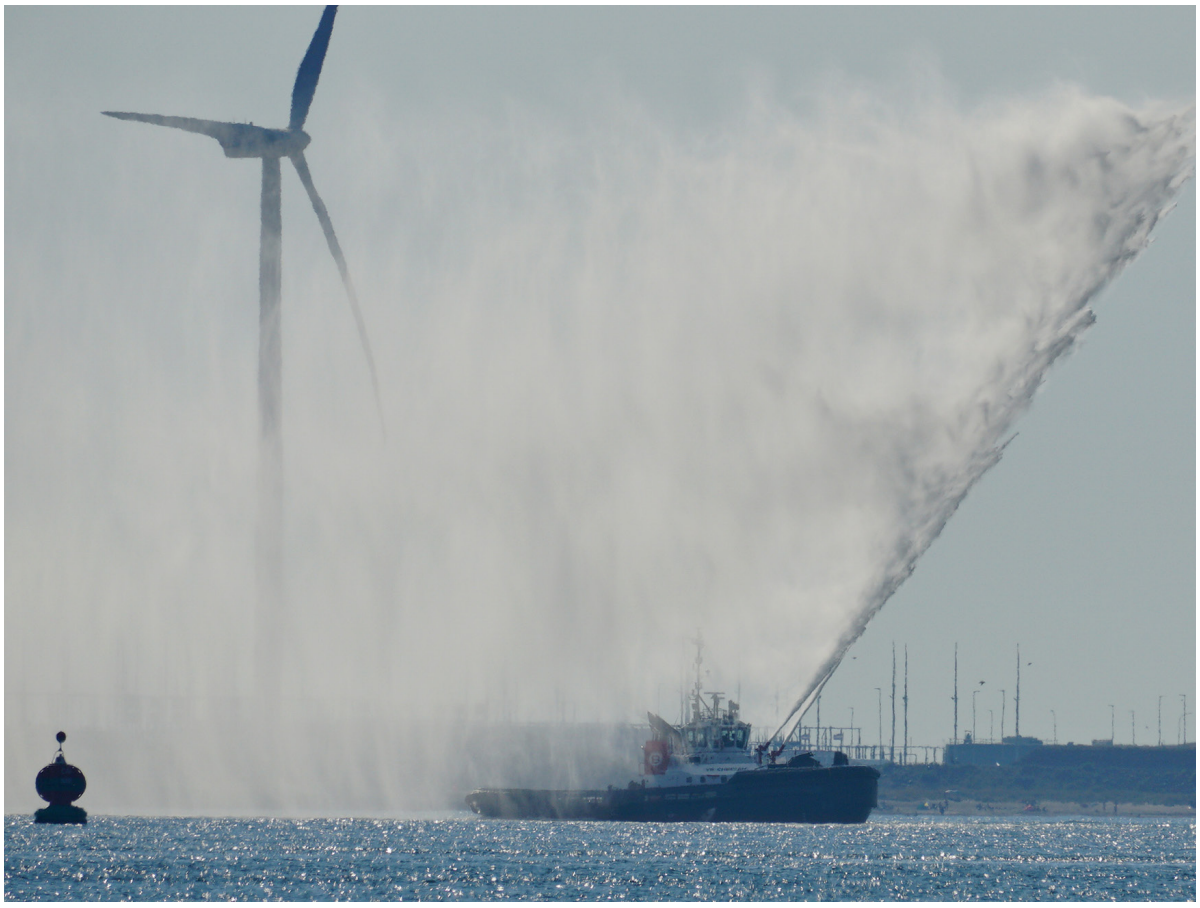
As a key takeaway from this judgment, buyers should consider negotiating terms in their ship sale and purchase contract that explicitly provide for:

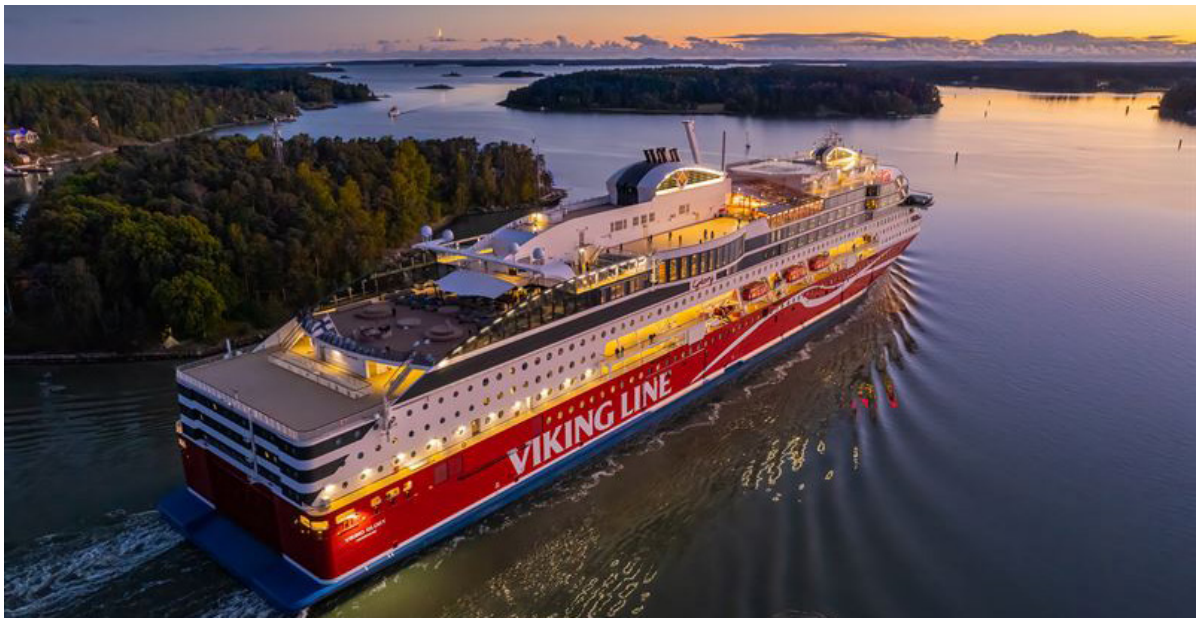
(i) the sellers' obligation to tender NOR by the cancelling date to be a condition of the contract; and,

(ii) the buyers' compensation for the sellers' failure to tender NOR by the cancelling date to include loss of bargain damages.

Sellers are, of course, expected to resist the inclusion of such terms in the contract and which party prevails will ultimately depend on their respective commercial leverage at the point of contract.

Nordisk is always available to assist Members with any queries that they may have in relation to the above. Please do not hesitate to contact us.





IMPLIED TERMS AND ENTIRE AGREEMENT CLAUSES IN THE CONTEXT OF THE NORWEGIAN SALES OF GOODS ACT AND THE NORWEGIAN SALEFORM 2012

Introduction

The interplay between contractual terms and so-called implied terms is a significant aspect of contractual interpretation. Under Norwegian law, the Sale of Goods Act 1988 ("SGA 1988") governs the sale of second-hand tonnage, mandating specific conditions for the vessel at the time of delivery, even when sold "*as is*".

A question that often arises is: are the requirements of the SGA 1988 applicable to the sale of a second-hand vessel conducted under the Norwegian Saleform 2012 ("NSF 2012") and is it governed by Norwegian law? This question was addressed in two recent cases, one in arbitration and another through court proceedings.

Background – the Entire Agreement Clause in Norwegian Saleform 2012 and "The Union Power" Case

The NSF 2012 sets minimal requirements regarding the vessel's condition at delivery. The buyers have the right to inspect the vessel and must then decide whether to reject it or accept it with the consequence that "*the sale being definitive and absolute, subject only to the terms and conditions of this Agreement*" (Clause 4). At the time of delivery, the vessel must be in the same condition as it was during the inspection, with some exceptions related to cargo on board, class condi-

BY ANDERS RØNNINGEN

tions, and average damage affecting the vessel's class (Clause 11).

Therefore, on reading the wording of Clause 11 alone, the buyers bear the risk of hidden defects, which has led to arguments that these contracts should be supplemented with implied terms or background law. In the English law case *Dalmare SpA v Union Maritime Limited and Another (The Union Power)*[1], it was established that Clause 11 of the Norwegian Saleform 1993 (similar to Clause 11 under the NSF 2012) did not exclude implied requirements set by the English Sale of Goods Act 1979. Consequently, the Saleform was revised and now includes an explicit clause to exclude implied terms (Clause 18):

> *"The written terms of this Agreement* ***comprise the entire agreement*** *between the Buyers and the Sellers in relation to the sale and purchase of the Vessel […]* ***Any terms implied into this Agreement by any applicable statute or law are hereby excluded to the extent that such exclusion can legally be made****. Nothing in this Clause shall limit or exclude any liability for fraud."*

The drafting committee of the NSF 2012 stated regarding Clause 18 that - "*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*", which also indicates that the intention is to exclude implied terms under Norwegian law as well. As we shall see, however, this has not proven to be that straightforward.

1 - [2012] EWHC 3537 (Comm)

Entire Agreement Clauses and condition requirements under the Norwegian Sale of Goods Act

The SGA 1988 includes provisions regarding the condition of goods in "*as is*" sales. According to Section 19 of the Act, a defect exists, inter alia, if the seller has neglected to provide information about significant aspects of the vessel or its use which he must have known about and which the buyer had reason to expect to receive, provided that the omission can be assumed to have influenced the purchase, or if the vessel is in significantly worse condition than the buyer had reason to expect based on the purchase price and other circumstances.

However, Section 3 of the SGA 1988 states that "*provisions of the Act do not apply to the extent that otherwise follows from the agreement, established practice between the parties, or trade usage or other custom that must be considered binding between the parties"* – which appears to align with the intentions behind Clause 18 of the NSF 2012. Yet, the legal status of these clauses remains uncertain due to the typical civil law approach taken by courts and tribunals that favours a consideration of reasonableness.

Over the past year, the seemingly contradictory terms of Clause 18 in NSF 2012 and the above-mentioned sections of the SGA 1988 have been central in two cases.

In the arbitration case where Nordisk successfully represented the sellers, the tribunal initially determined that the parts of the vessel in discussion was in poor condition at the time of delivery.

Nevertheless, it upheld that the contract terms were sufficiently clear: the ship was sold "*as she was at the time of inspection, fair wear and tear expected.*" Thus, the buyers had accepted the vessel in its existing state upon inspection. Although there was disagreement over the scope of the above-mentioned clauses in the NSF 2012, particularly regarding the threshold for the buyers to establish a breach of contract, the tribunal did not need to resolve these disputes because it found any claims to be time-barred.

In a separate court case involving the vessel named "*Heide*"[2], the district court adopted a case-specific assessment. The key arguments for establishing the scope of the entire agreement clause were (1) that the buyers had accepted the vessel post-inspection "*subject only to the terms and condition of this Agreement*", (2) the acknowledgment of the contract as an industry standard developed over a long period, (3) the reasonableness of allocation of risk given the vessel's age and price. The conclusion of the district court was that the requirements in the SGA 1988 could be derogated from in this specific case. The court of appeal did not consider it necessary to address the interpretative questions raised by clause 18 since they did not consider there to be a breach of contract regardless. The case was not accepted into the Supreme Court for an appeal.

Thus, unfortunately, the status of these clauses remains uncertain under Norwegian law, as there is no definitive legal authority yet on this.

Key takeaways

Under English law, the general understanding is that the allocation of risk for hidden defects rests with the buyers, unless misrepresentation or fraudulent behaviour by the sellers is proven. If the buyers wish to shift this risk to the sellers, specific alterations to the contractual wording are necessary.

Under Norwegian law, the situation is less definitive. In our view, one must conduct a case-specific review of the contract and the transaction as a whole. Given that the NSF 2012 is a well-established, negotiated industry standard form and that Clause 18 explicitly excludes the relevance of implied terms under the applicable law, it might be presumed that the SGA 1988 is also excluded, unless case-specific contractual terms suggest otherwise.

This highlights the importance of conducting a thorough inspection and possibly amending contract terms to more explicitly reflect the intentions of the parties when it comes to the condition of the vessels being sold.

Photos:
Courtesy of (c) Kees Torn https://www.flickr.com/photos/68359921@N08/ (page 1, 3, 5, 7), Stena Bulk (page 2), Viking Line (page 6), Klaveness (page 8)

2 - THOD-2021-15445