COMMENTS TO BIMCO SHIP SALE AGREEMENT FROM MARITIME LAW ASSOCIATION OF THE UNITED STATES

EXECUTIVE SUMMARY

This Memorandum sets forth the Maritime Law Association's comments to the BIMCO Ship Sale Agreement. The comments set forth in this Memorandum are aimed at clarifying the various concepts embodied within the Agreement and offering suggested improvements to the Agreement based on our collective experience handling vessel transactions in the United States and around the world. In sum, our comments can generally be grouped into two categories. One category of comments focuses on the mechanics of the Agreement and the interrelationship of the various provisions, with the other category focusing on the commercial terms and suggested areas of improvement based on our experience. The comments represent the views of U.S.-based lawyers, though they are applicable regardless of the place of contracting. We would be glad to discuss the comments further, and to continue the dialogue, as needed.

This Memorandum serves to combine the comments submitted by or on behalf of the following members of the Maritime Law Association:

- Hank Arnold and Chris Hannan (Baker Donelson)
- Will Baldwin, Lance Sannino, and Chris Ulfers (Jones Walker)
- John Benson (Watson Farley & Williams)
- John Bradley and John Imhof, Jr. (Vedder Price)
- David J. Farrell, Jr. (Farrell Smith O'Connell)
- Geoffrey Ferrer (Cozen O'Connor)
- Robert Poster (Gilmartin, Poster & Shafto)
- John Stratakis (Poles, Tublin, Stratakis & Gonzalez, LLP)
- Jovi Tenev (Holland & Knight)

LIST OF COMMENTS BY PART, CLAUSE, AND LINE

- **PART I**
  - Boxes 3 and 4 – We suggest adding the Sellers' and Buyers' jurisdictions of formation in Boxes 3 and 4, as applicable.
  - Boxes 5 and 6 – We suggest adding the Sellers' Guarantor's and Buyers' Guarantor's places of business and jurisdictions of formation in Boxes 5 and 6, as applicable.
  - Box 7 – We suggest adding the Vessel's Official Number as a subpart in Box 7. We also suggest including the name and yard of the builder in the subpart that calls for the "year and place of build."
  - Box 10 – To avoid confusion, we suggest allowing the Deposit to be identified as a fixed amount rather than a percentage of the Purchase Price. This could be accomplished by revising the parenthetical as follows: "Deposit (stated as

percentage of Purchase Price or fixed amount)". We also suggest including in Part II a definition of the term "Deposit," perhaps by reference to the fixed amount or percentage of the Purchase Price identified in Box 10.

- Box 11 – We suggest adding the address and jurisdiction of formation for the Deposit Holder in Box 11.

- Box 18 – We suggest including an option for the parties to conduct a virtual closing, as more and more transactions are taking place virtually these days as opposed to in person. As set forth below, this concept should flow through to Clause 16(a), which contemplates a physical location for closing.

- Boxes 20 and 21 – We suggest adding notice boxes for the Sellers' Guarantor and Buyers' Guarantor, perhaps by reference to Boxes 5 and 6, as applicable.

- Box 24 – In our view, the term "Subjects" is confusing. We suggest replacing it with "Conditions" or "Conditions Precedent" and flowing the change throughout the Agreement. It also seems problematic to build in conditions that have to be satisfied before the deposit is paid, as that would seem counterintuitive and could lead to situations where the buyer is able to walk away by simply failing to comply with a condition precedent. This concern could be addressed by incorporating a time period by which the Deposit must be paid, irrespective of whether the Conditions or Conditions Precedent have been satisfied.

- Box 25 – We suggest including an alternative to English law and London arbitration, perhaps by including in Clause 26 an option to use the BIMCO Dispute Resolution Clause 2017, which allows for the election of English law and London arbitration, U.S. law and New York arbitration, English law and Singapore arbitration, or the other law and arbitration provisions to be agreed upon between the parties.

- Signature Block – We suggest adding spaces for the name and title of each signatory. In addition, the guarantee language should be expanded to make it clear that it is a guarantee of payment and performance, not just collection. It may be desirable to have a few guarantee language options and have the parties select which option is agreed for the transaction.

- **PART II**
  - General Comment – We note that vessel sale-and-purchase transactions typically implicate the laws of the state in which the vessel is located at the time of closing, including but not limited to in the sales-tax context. This is something that any users of the BIMCO form should keep in mind.

  - Clause 1

    - Definition of "*Bunkers, Oils and Greases*" (Lines 6 and 7) – This term is defined as "unused bunkers, lubricating oils, hydraulic oils and greases in

designated storage tanks and unopened drums, cans or containers on board the Vessel at Delivery." Should it not refer to "remaining bunkers and unused lubricating oils, hydraulic oils and greases in storage tanks and unopened drums, cans or containers on board the Vessel at Delivery"? "Remaining" is more appropriate than "unused" to describe bunkers. Sellers will likely forget to "designate" any storage tanks and the form is not clear on how these tanks are to be designated.

- Definition of "*Disruptive Banking Event*" (Lines 12 through 19) –
    - There is a stray quotation after Buyers in Line 19 that should be deleted.
    - Also, it seems that the concept of a "*Disruptive Banking Event*" should apply equally to payments under Clause 14.
- Definition of "*Excluded Items*" (Line 20) – Should items that are always excluded be listed and any additional Excluded Items be listed on Annex B, e.g., "Library and forms exclusively for use in the Sellers' vessel(s) and captain's, officers' and crew's personal belongings including the slop chest are excluded from the sale without compensation, as well as the additional items listed on Annex B." *See SALEFORM 2012.*
- Definition of "*Included Items*" (Lines 21 through 24) – We suggest adding "the" before the word Inspection in Line 22.
- Definition of "*Total Loss*" (Lines 33 and 34) – We suggest adding a new paragraph before the definition of Total Loss in Line 33.
- In Lines 38 through 40, we suggest clarifying whether the reference to "without condition/recommendation" is intended to encompass a lack of conditions or recommendations that are not overdue. We suspect that is the intent.
- We suggest adding a definition of the term "*Classification Society*" as "a classification society that is a member of the International Association of Classification Societies (or some other vessel classification society agreed to in writing by the parties)".
- As noted above with respect to Box 10 in Part I, we suggest adding to Clause I of Part II a definition of the term "*Deposit*," perhaps by referencing the fixed amount of percentage of the Purchase Price identified in Box 10.

o <u>Clause 2</u> –

- In Lines 46 and 47, we suggest revising as follows: "(b) The Sellers are not required to replace any spare parts which are used as replacements before Delivery (except for spare parts that are required to be on board the Vessel

by the Classification Society, which Sellers shall be required to replace before Delivery), and any such replaced items shall automatically constitute Included Items.

- In Line 48, we suggest revising as follows: "(c) Items on board the Vessel at the time of the Inspection which are on hire or leased from or owned by third parties but which . . . ."

- Line 51 states that "[t]itle and risk in the Vessel shall remain with the Sellers until Delivery." We note that, for sale and purchase contracts governed by New York law, and specifically Article 2 of the New York Uniform Commercial Code, the passage of title is not a determinative event. This may be different under English law, i.e., the Sale of Goods Act 1979 (as amended by the Sale and Supply of Goods Act 1994).

o Clause 3 –

- We disagree with the idea that the Agreement only becomes "effective" when all "Subjects" are lifted. The Agreement should become effective upon signing. If there are conditions to performance by either Seller or Buyer, those conditions can be made explicit. Linking the effectiveness of the Agreement to the lifting of "Subjects" is bound to lead to disputes over contract formation. Clause 3(d)(i) states that if Subjects have not been "lifted" by the date stated in Box 24, the Agreement "shall become null and void" – which suggests that the Agreement was never valid until that date. In our view, if the drafters are intent on linking the effectiveness of the Agreement with the lifting of Subjects, it might make more sense to make the Agreement "voidable" by either party (instead of null and void) if Subjects are not lifted on or before the prescribed date.

- If Clause 3 is retained in its current form, we suggest revising Line 58 as follows: "(i) this Agreement shall become null and void without further liability of either party;"

o Clause 4 – In Line 63, we suggest making the Purchase Price exclusive of any banking fees.

o Clause 5 –

- In general, we suggest further defining the scope of the inspection contemplated by Clause 5, perhaps by revising the title of Clause 5 to "Topside Condition Inspection" and flowing that concept through Clause 5.

- In Line 97, please replace the reference to "Clause 9 (Drydocking Inspection)" with "Clause 9 (Drydock Inspection)".

- In Clause 5(c), it would seem that if the Buyers are waiving their inspection rights, there is a good possibility that the Buyers would also waive their

rights to an underwater inspection (Clause 8) and a drydock inspection (Clause 9); yet, as drafted, Clause 8 and Clause 9 would apply. Defining the scope of the inspection in Clause 5 as suggested above would help to address this issue.

- We also suggest incorporating the ability for the parties to set a cap on the length of any such inspection.

- Clause 6 –

  - In Lines 100 to 101, we suggest making the Deposit exclusive of banking fees.

  - In Lines 102 through 104, we suggest revising as follows: "Without delay, but in no case later than [--] Banking Days after request by the Deposit Holder, the Parties shall provide the Deposit Holder with all documentation and information which it reasonably requires to open, maintain and operate the Deposit Account.

  - In Lines 105 through 109, Clause 6(c)(ii) provides that "[t]he agreed basis on which the Deposit will be received, held and released by the Deposit Holder shall be set out in the Deposit Holding Agreement save that it is agreed that . . . any interest which accrues on the Deposit shall be credited to the Buyers when the Deposit is released." We recommend adding "except as otherwise provided in Clause 18(d)(i) (Sellers' Termination Rights)," before the words "any interest" in Clause 6(c)(ii). Clause 6(c)(ii) provides that the Sellers are entitled to the accrued interest on the Deposit if the Sellers terminate the Agreement following the Buyers' failure to pay the Purchase Price.

  - We suggest including specific provisions for the deposit of the balance of the Purchase Price into escrow as well. We are seeing this approach being taken more and more frequently as banks increasingly disfavor (or simply are unable to accommodate) MT-199s and other conditional transfers.

- Clause 7 –

  - What about lodging and meals on board? Does the Seller have to provide them, and at whose expense? We suggest clarifying these issues in Clause 7.

  - In Lines 136 through 140, we suggest inserting a new clause (iii) as follows: "(iii) abide by any health or safety protocols of the Vessel's master;" The subparts currently numbered as (iii) and (iv) would then become (iv) and (v), respectively.

- Clauses 7(a), 8(f), and 9(f) – These clauses reference a P&I club letter of indemnity, but what if the ship is not entered into a P&I club? We suggest including an option

for a non-P&I club letter of indemnity to be prepared by the Sellers and signed by the Buyers.

- Clause 8 –

  - Clause 8(a), Lines 142 to 143, references a ship's Classification Society, as do many other provisions in the Agreement, but what if the ship is not classed? The easy fix is to include "as applicable" after references to the Classification Society, which will carve out any class-related requirements from deals that do not involve classed Vessels.

  - Clause 8(f), Lines 157 through 161, permits Buyers to place two representatives on board the Vessel during an Underwater Inspection. Are these two representatives in addition to those permitted to board the Vessel pursuant to Clause 7? We suggest clarifying this issue based on the drafters' intent.

  - In Clause 8(f), Line 159, we suggest deleting the words "at their expense and risk" and replacing them with "in accordance with subclause 7(b)".

  - In Clause 8(g), Lines 162 through 168, if unexpected underwater damage is discovered, it seems that the Sellers should have the right to terminate the Agreement and return the Deposit if the parties cannot agree on a path to repair or a discount the purchase price. Also, please replace the reference in Clause 8(g)(i) to "Clause 9 (Drydocking Inspection)" with "Clause 9 (Drydock Inspection)".

  - In Clause 8(i), Line 177, consider including a blank for the parties to insert the number of Banking Days to obtain the quotes. Two (2) Banking Days may be insufficient in some instances.

- Clause 9 –

  - Clause 9(f), Lines 204 through 208, provides in part that "The Buyers' shall have the right to arrange for representative(s) of the Buyers to be present at the Drydock Inspection at their expense and risk as observer(s) only without interfering with the work or decisions of the Classification Society surveyor." Is there no limit to the number of representatives that the Buyers can place on board the Vessel for this purpose? Also, please replace the references to "Drydocking Inspection" in Clause 9(d) with "Drydock Inspection".

- Clause 10 –

  - We suggest inserting an "as is, where is" option for the condition of the Vessel at Delivery, which would be useful particularly if the Buyers have waived their inspection rights as noted above.

- With respect to Clause 10(a), Lines 249 to 250, depending on the amount of specificity used to describe the Delivery range in Box 15, we often see that the actual Place of Delivery must be reasonably agreed by the Buyers and the Sellers so that each of the Buyers and the Sellers are not required to make or accept Delivery in a jurisdiction that would expose it to any sales taxes or sanctions liability. We suggest inserting in Clause 10(a) an option for the Vessel to be delivered at a place certain rather than within the range stated in Box 8.

- In Clauses 10(c) and (d), Lines 263 through 271, we suggest adding a representation and warranty to the effect that the Vessel has not engaged in any sanctioned trade activity prior to Delivery. We have seen instances where a Buyer purchases a vessel only to learn post-closing that the vessel engaged in sanctionable activities prior to closing.

- In Clause 10(c), Line 265, we suggest revising as follows: "(ii) mortgages and other security interests, maritime, possessory and other liens, except for permitted liens and liens incurred by Buyers;"

- In Clause 10(d), Line 270, we suggest deleting the following: ", or any blacklisting"

- In Clause 10(e), Lines 272 to 273, we suggest revising as follows: "Sellers hereby undertake to defend, indemnify and hold harmless the Buyers against all claims, demands, losses, expenses, actions, suits, judgments, costs, damages, and any other consequences of claims made against the Vessel which have been incurred at any time before Delivery, except for any such claims demands, losses, expenses, actions, suits, judgments, costs, damages, and any other consequences of claims incurred by or on behalf of Buyers."

    - Also, consider whether this provision should extend to all *causes of action* that *may exist* against the Vessel prior to Delivery? As Cl. 10(e) is currently drafted, it only extends to claims *actually made* against the Vessel prior to Delivery, but there could be inchoate claims that *exist* against the Vessel, but have not been asserted prior to Delivery. Query whether these inchoate/latent claims should be covered here? Relatedly, the indemnity should survive closing and, if the Seller is a SPV, should be accompanied by some form of third party credit support.

    - A reciprocal indemnity should be considered to be inserted for Buyer for post-closing claims.

- Clause 11 –

- In Line 276, we suggest including an approximate/definite notice breakdown (e.g., five and more days—approximate, three—definite).

- In Line 283, please replace the reference to "Clause 9 (Drydocking Inspection)" in Clause 11(c)(iv) with "Clause 9 (Drydock Inspection)".

- Clause 12 - We do not see what purpose is served by Clause 12(c) in restricting the number of times that the Buyers and Sellers may request an extension of the Cancelling Date. If the Sellers are not ready to tender a Notice of Readiness by the Cancelling Date and their proposal to extend the Cancelling Date is accepted or deemed accepted by the Buyers, shy should the Sellers be prohibited from requesting a further extended Cancelling Date if they are not ready by the first extended Cancelling Date? The Buyers are always free to reject the second request and terminate the Agreement.

- Clause 13 – We often see a requirement that the Vessel be delivered with sufficient bunkers on board to reach the nearest bunkering port or place if the Place of Delivery has no bunkering facilities. We suggest incorporating a similar concept in Clause 13.

- Clause 14 –

  - In Lines 313 and 315, we suggest deleting the following language: "but not later than three (3) Banking Days after the date that the Notice of Readiness has been given in accordance with Clause 11 (Delivery Notices)" and replacing it with "as set forth in Clause 15." The language that we suggest deleting has always been somewhat confusing as it's not clear exactly when Delivery is supposed to occur and at which party's option. It's understood to be at Buyers' option, but this isn't as clear as it could be from the language as drafted.

  - In Line 317, we suggest including an option for interest to be paid to Sellers.

  - Clause 14(a)(iii) currently provides that "[o]n Delivery but not later than three (3) Banking Days after the date that Notice of Readiness has been given in accordance with Clause 11 (Delivery Notices) . . . the balance of the Purchase Price, the sum payable for the Bunkers, Oils and Greases and any other sums payable at Delivery shall be paid to the Sellers' Account." Please add the words "to the Sellers" after the word "payable" in line 319.

  - In Lines 327 to 331, we suggest clarifying whether the Buyers or the Sellers are responsible for sales taxes and/or *ad valorem* taxes and including a requirement that the responsible party provide proof of payment to the other party. As drafted, it is unclear which party is responsible for such taxes, and this is often an important point subject to negotiation between the parties.

  - In Line 329, the period at the end of the sentence should be replaced with "; and"

- As noted above in connection with Clause 6, we suggest including specific provisions for the deposit of the balance of the Purchase Price into escrow as well. We are seeing this approach being taken more and more frequently as banks increasingly disfavor (or simply are unable to accommodate) MT-199s and other conditional transfers.

- Clause 15 – Are Lines 333 to 335 referring to five (5) days after the 20-day notice of intended delivery of Notice of Readiness? If so, we suggest revising for purposes of clarity. Also, this timing seems a bit too quick, so we would suggest extending the time period.

- Clause 16 –

  - We suggest adding an option in Lines 339 – 340 for the closing to take place virtually.

  - In Lines 350 to 351, we suggest revising as follows: Delivery shall be effected when the Parties sign and deliver to each other a Protocol of Delivery and Acceptance in two (2) originals each recording the place, date and time of Delivery of the Vessel and the documentary closing.

- Clauses 16 and 17 – We suggest changing the word "Completion" in Clauses 16 and 17 to "Delivery" so that the phrase reads "Post Delivery Obligations," which seems to be more in line with the drafters' intent.

- Clause 18 –

  - Following the occurrence of certain events, the Seller or Buyer may have the right to terminate the Agreement and, in connection therewith, the Seller or Buyer may have the right to claim compensation for "direct losses and expenses." However, in each case, the defaulting party will not be liable for "any loss of use, loss of revenue, loss of profit or anticipated profit, business interruption or similar loss whether direct or indirect, not for any other consequential or indirect loss of any nature whatsoever." There may be an internal inconsistency here under New York law. If the intention of the drafters is to include direct damages and to exclude indirect or consequential damages, then parties should be aware of *Biotronik v. Conor Medsystems Ireland*, 2014 WL 1237154 (N.Y. March 27, 2014), and its progeny, in which the New York Court of Appeals held that lost profits can be a form of direct damages.

  - Relatedly, we suggest defining "direct losses and expenses" to make it clear that any expenses incurred by Sellers under the terms of the Agreement shall be deemed direct losses and expenses. The concern, as noted above, is that some items might be considered consequential damages.

  - Clause 18(c), Lines 369 to 370, provides that the Sellers have the right to terminate the Agreement "[s]hould the Purchase Price not be paid in

accordance with Clause 14 (Payments). . . ." We recommend inserting the words "any portion of" before, and inserting a comma and the words "any sum payable for the Bunkers, Oils and Greases or any other sum payable by the Buyers at Delivery" after, the words "the Purchase Price" in Clause 18(c).

- Clauses 18(b), 18(d) and (e) should be stated to survive the termination of the Agreement as the payment obligations and limits on liability contained therein are triggered by or are intended to survive the termination of the Agreement. *See, e.g., Clause 23(c).*

- Clause 19 –

  - Similar to the comments above, we suggest defining "direct losses and expenses" to make it clear that any expenses incurred by Buyers under the terms of the Agreement shall be deemed direct losses and expenses. The concern, as noted above, is that some items might be considered consequential damages.

  - Clauses 19(b) through (d) should be stated to survive the termination of the Agreement as the payment obligations and limits on liability contained therein are triggered by or are intended to survive the termination of the Agreement. *See, e.g., Clause 23(c).*

- Clause 20 – We suggest revising Line 401 as follows: ". . . and void without further liability of either party."

- Clause 21 – The status representation and warranty contained in Clause 21(b) should include language stating that the party is not owned or controlled by a Sanctioned Party (ownership as per OFAC's 50% rule). The representation and warranty contained in Clause 21(c) states that, as of the date of the Agreement and continuing until Delivery, the Vessel "is not a Sanctioned Party and is not and will not be employed in any Sanctioned Activity." The language does not allow for the possibility that, prior to the date of the Agreement, the Vessel did engage in undisclosed Sanctionable Activity. The language should be modified to cover prior periods as well as actual or threatened government investigations. Clauses 21(b) through (d) should be stated to survive termination.

- Clause 22 –

  - In Clause 22(a), it is unclear which anti-corruption laws are contemplated by this clause or whether the drafters have a common understanding as to the meaning of the undefined term "anti-corruption legislation." Certain practitioners use a market standard definition in our documents. Clause 22 should be stated to survive termination.

  - Clause 22(b) has its own indemnity provision, which is separate from the indemnity contained in Clause 10(e). As a matter of sound draftsmanship,

the Agreement should have one set of comprehensive representations and warranties and one comprehensive indemnity. Otherwise, one has to scour the document in an Easter egg hunt, looking for indemnity clauses and potential differences between and among them.

- In the ship sale and purchase context, one issue that is perhaps more pressing than potential violations of anti-corruption legislation is potential violations of anti-money laundering laws. We note that this is not covered in the consultation draft.

- Clause 23 – In Line 431, we suggest adding accountants as permitted parties for disclosure.

- Clause 24 – Clause 24(b) provides that "[a]ll notices and other communications shall be sent to the person(s) and using the contact details stated in Box 20 and Box 21 respectively." After the word "respectively" and before the period please add a comma followed by the words "or such other contact details as either party may specify for itself by notice to the other party hereto in accordance with this Clause 24".

- Clause 25 – We suggest referencing the Deposit Holding Agreement in Line 444.

- Clause 26 – We suggest revising Clause 26 to include additional options for the parties with respect to the applicable law and arbitration provisions. As noted above in the context of Box 25 in Part I, one alternative would be to incorporate BIMCO Dispute Resolution Clause 2017, which allows for the election of English law and London arbitration, U.S. law and New York arbitration, English law and Singapore arbitration, or the other law and arbitration provisions to be agreed upon between the parties.

- We suggest adding provisions in Part II governing execution of the Agreement in counterparts, assignment-related issues, and the requirements for amendments or modifications to the Agreement.

- Annex C

  - Pt. 1

    - Para. 1 – Permitted liens should be carved out in the Bill of Sale.

    - Para. 2 – Please replace "Evidence of all relevant corporate documents and evidence" with "Copies of all relevant corporate documents evidencing".

    - Para. 3 – We suggest revising as follows: "Powers of Attorney of the Sellers or other evidence of authority appointing one or more representatives to act . . ."

- Para. 4 – We suggest revising as follows: "Certificate or Transcript of Registry issued by the competent authorities of the Vessel's Flag Registry on the date of Delivery evidencing the Sellers' ownership of the Vessel and that the Vessel is free from registered mortgages and other registered encumbrances, to be e-mailed by such authority to the closing meeting with the original to be sent to the Buyers as soon as possible after Delivery, or in the event that the Vessel's Flag Registry does not as a matter of practice issue such documentation immediately, a written undertaking by the Sellers to provide the copy of such documentation upon it being issued."

- Para. 7 – We are not sure what the referenced "Form 2" is.

- Para. 10 – We suggest inserting the words "draft email" after "Sellers' letter." In practice, we often see only emails sent to the satellite communication providers.

- Para. 11 – We suggest deleting this paragraph entirely.

▪ Pt. 2.

- Para. 1 – Please replace "Evidence of all relevant corporate documents and evidence" with "Copies of all relevant corporate documents evidencing".