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MARITIME

SALE & PURCHASE: DELIVERIES TAKING
PLACE IN INTERNATIONAL WATERS
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- THERE ARE SIGNIFICANT PRACTICAL CONSIDERATIONS TO BE MADE IN ADDITION TO THE TAX IMPLICATIONS WHICH ARE OFTEN THE PRIME DRIVER BEHIND DELIVERIES IN INTERNATIONAL WATERS
- THESE INCLUDE CREW AND FLAG CHANGES, CHANGE OF TECHNICAL MANAGER AND ITEMS NOT FORMING PART OF A VESSEL'S SALE



With an up-tick in sale and purchase activity being seen across a number of sectors in the broader maritime industry, it is worth revisiting certain aspects of such deals. This briefing note will focus on issues to be considered when the place of delivery is to take place at sea in international waters.

Delivery at sea: some practical considerations

Some of the more commonly encountered issues for consideration by both the seller and buyer include:

(i) Crew Change

Whilst a crew change can present a logistical challenge, they are not overly problematic from a sale and purchase perspective for a well-practised and experienced owner/operator or manager. The main consideration for the seller will be how to get its crew off the vessel in a timely fashion for repatriation or, as the case may be, reassignment. For the buyer, the main issue will be how to get its crew on the vessel as quickly, safely and efficiently as possible so that the vessel can start earning for its new owner(s) at the first opportunity. Where the vessel is being sold alongside in port, there is only a relatively short distance that needs to be travelled across the gangway by the out-going/in-coming crew, therefore such a delivery location should not pose a significant logistical hurdle.

“IT WOULD ALSO BE NECESSARY TO ENSURE THAT SUITABLE INDEMNITIES ARE IN PLACE PROTECTING THE VESSEL’S NEW OWNER FROM ANY INJURIES THAT MIGHT BE SUSTAINED BY THE OUT-GOING CREW WHILST REMAINING ON BOARD.”

The situation is more challenging however where the crew change takes place in international waters. It is not difficult to imagine a scenario where, in the interests of time, the in-coming crew is transported alongside the target vessel in anticipation of imminent completion only to find that a last minute issue causes delay. This unforeseen delay leaves the unfortunate crew on-board, potentially in a deteriorating sea-state, generally feeling miserable and sorry for themselves. Not the best start for a crew looking to join their new vessel for the first time and certainly not good for their welfare.

As there will be two crews in close proximity during the change-over at sea, advanced planning and co-ordination between the seller and buyer is required to address health and safety issues and to make sure that there is sufficient space on board the vessel to allow both crews to embark and disembark safely. Such issues also arise when the vessel is alongside or at a safe anchorage but these are not so acute as the environment is more controlled and stable. Following completion of the sale and purchase transaction, it may be possible for the seller’s crew to remain on board the vessel until she calls at her next port. This would however add an additional complication into the mix with tensions perhaps developing between the two crews, lack of suitable berthing (if the out-going crew is to remain on board overnight) and victualling to name but a few. It would also be necessary to ensure that suitable indemnities are in place protecting the vessel’s new owner from any injuries that might be sustained by the out-going crew whilst remaining on board.

(ii) Flag Change

Certain out-going and in-coming flag authorities will require their representatives on board the vessel at the time of completion to take delivery of the out-going flag’s vessel certificates and the delivery of the in-coming flag’s equivalents. Where the vessel is being delivered in international waters, similar logistical issues to those applicable to crew changes will apply. There may also be additional fees payable to the flag states concerned in the event of delays in completion. Some flag states issue their certificates electronically, so the need to have a representative on board falls away. Where delivery has taken place at sea, and depending on the requirements of the in-coming flag and potentially those of the vessel’s next port of call, the marking of the vessel must be carried out before leaving that port.

(iii) Change of Technical Manager

Where there is to be a change of technical manager, it may not be possible for the change of ownership to take place at sea. The in-coming flag, for example, may not be prepared (or able) to issue the required documentation under the International Safety Management Code (the “ISM Code”) for the new technical manager until the vessel is in port. This is primarily linked with the need for the in-coming flag to have an interim audit carried out by Class on its behalf to check on compliance with the ISM Code. However, it may be possible for such an audit to be completed prior to the change in manager at the vessel’s last port of call before completion. Whether or not this is possible would need to be checked with the relevant flag at the time. Again, this is an issue that should be given consideration by a buyer before agreeing to take delivery of the vessel in international waters.

“AS PART OF THE DISCUSSIONS ABOUT THE PLACE OF DELIVERY, IT WOULD BE PRUDENT FOR THE PARTIES TO CHECK THAT THE PROPOSED DELIVERY PLACE WILL NOT TRIGGER A TAX LIABILITY, SHOULD THE VESSEL BE DELIVERED THERE.”

(iv) **Bunkers, lubes and items not forming part of the vessel’s sale**

Part of the preparations for closing the sale and purchase will be for the parties to agree on the amount of bunkers and lubes remaining on board the vessel at the time of delivery. One aspect of the process for determining the weight of bunkers on board is to take a sounding, the accuracy of which may be effected by the movement of the vessel in the water (trim and list for example). Should completion be taking place in international waters and in a poor sea state, this could impact on the accuracy of the sounding and consequently the final amount to be paid by the buyer at the time of completion. One solution would be for a sounding to be taken whilst the vessel is lying alongside at her final port of call prior to completion of the sale and the parties agreeing to a daily consumption figure which will be aggregated and applied at the time of delivery in order to determine the amount payable by the buyer. This and other considerations pertaining to bunkers need to be borne in mind by both buyer and seller.

Where items do not form part of the vessel’s sale and are to be removed from it at the time of completion, the seller in particular needs to give consideration as to how these are to be taken from the vessel when in international waters. Whilst this may not be a problem for smaller items, it may simply not be practical for larger items requiring mechanical assistance for their removal, for items that are sensitive to exposure to salt water or those that require substantial de-rigging and storage following their removal (seismic survey equipment such as streamers are a good example of the latter).

Why might the buyer and/or the seller want the delivery to take place in international waters?

The sale and purchase of a vessel could, within certain jurisdictions, fall to be treated as a taxable event triggering a tax liability for one or other of the parties in the transaction. Such tax issues can generally be avoided by delivering in international waters. As part of the discussions about the place of delivery, it would be prudent for the parties to check that the proposed delivery place will not trigger a tax liability, or an obligation to register for any tax purpose, should the vessel be delivered there. Where there is a risk of such a liability, the parties may want to agree that the delivery takes place in international waters. It should be noted that in some instances where a fleet of vessels is being purchased, the timing of the transaction may be such that there is little practical choice but for deliveries to be completed in international waters.

Contracts for the sale and purchase of vessels typically include a provision dealing with tax liabilities arising out of the sale. For example, The Norwegian Sale Form 2012 contains a provision that states:

“10. Taxes, fees and expenses

Any taxes, fees and expenses in connection with the purchase and registration in the Buyers’ Nominated Flag State shall be for the Buyers’ account, whereas similar charges in connection with the closing of the Sellers’ register shall be for the Sellers’ account.”

Under this provision, the liability to pay sales taxes could fall on the buyer, whether directly or indirectly through the seller seeking to re-charge the buyer for any sales taxes that the seller has to pay to the authorities out of the sales proceeds. The parties can of course agree to amend the language to make it clear, for example, that the seller will not seek to pass on any sales tax it may be required to pay but such amendments to the standard text are often strongly resisted.

A seller may be concerned about not triggering any tax filing or tax registration obligations within the jurisdiction where the sale takes place. A jurisdiction may, for example, impose corporate taxes on sales of goods taking place within their borders or impose VAT/sales taxes, even if the seller has no other connection with the jurisdiction. Vessels are often exempted from VAT/sales taxes but the route to that exemption is not always simple and may involve the seller first registering for VAT, applying for the exemption and then subsequently cancelling the registration. Each step adds time and costs, even if no tax liability eventually arises. A buyer will be concerned not to have to pay any local stamp duty or similar transaction fees, as well as wishing to avoid the cost of reimbursing the seller for their own tax or administrative costs incurred in obtaining any available exemptions.

In order to avoid any dispute over taxes (or otherwise a party finding itself unexpectedly liable to pay taxes), well advised parties should check the tax position that may apply in the proposed place of delivery and accordingly be informed in respect of any additional amounts that may be payable in addition to the purchase price.

Conclusion

Whilst tax considerations may be the prime driver behind the parties wanting delivery to take place in international waters, there are consequential issues that need to be considered as in some instances, a delivery in international waters may simply not be possible from a logistical perspective. Further, the cost of checking for tax exposure (there often are none) must however be weighed against the practical benefits of completing the sale in port. If the problem is checked and actual tax liabilities exist and/or registrations are required, it is often preferable for all parties to co-operate in finding a suitable alternative jurisdiction for completion.

FOR MORE INFORMATION

Should you like to discuss any of the matters raised in this briefing, please speak with a member of our team below or your regular contact at Watson Farley & Williams.



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