BIMCO PUBLISHES "SHIP SALES FURTHER TRADING CLAUSE"

Last month BIMCO published its "Ship Sales Further Trading Clause"[1] (hereinafter referred to as the "Clause"). The launch of the Clause is timely, given BIMCO's assessment that a total of 15,000 vessels may be recycled by 2032, which is more than twice the number of vessels that have been recycled in the last 10 years.[2]

A possible increase in recycling appetite should work as a reminder for shipowners to ensure that proper due diligence is performed when selling older tonnage. This due diligence should also include contractual protection, which is where this Clause is of relevance. The entry into force of the Hong Kong Convention, as also touched upon in our September Circular, will hopefully also play its part in improving the recycling standards, whilst also paving way for more recycling capacity at acceptable standards being made available.

BY OLA GRANHUS MEDIÅS

1 - Nordisk's Ola Granhus Mediås was on the drafting sub-committee
2 - https://www.bimco.org/news-and-trends/market-reports/shipping-number-of-the-week/20230516-snow

Scheme of the Clause

The Clause is intended to be used in MOAs when selling older vessels, to evidence that the vessel is not being sold for recycling. Its core element is an undertaking from the Buyers to the Sellers that they will continue to trade the Vessel for an agreed period (referred to as the "*Applicable Period*") in sub-clause (b). The length of the *Applicable Period* must be negotiated by the Parties, and the Clause will not operate unless they do so.

Our experience with similar clauses is that the period inserted depends largely on the type of vessel that is sold, but a period of between 12 and 36 months is common. The Buyers' undertaking to continue to trade the Vessel does not apply in circumstances where the Vessel is subject to an "*actual, constructive or compromised total loss*".

To avoid a situation where the Buyers of the Vessel could simply sell the Vessel upon delivery from the Sellers and then circumvent the obligations under

the Clause, sub-clause (c) sets out that if the Buyers during the *Applicable Period* sell the Vessel, the Buyers must ensure that

(i) the further agreement to sell the Vessel includes *provisions on substantially the same terms* as the Clause and
(ii) they exercise due diligence to ensure that the new buyer intends to continue to trade the Vessel for the remainder of the *Applicable Period*.

Sub-clause (d) outlines the consequences should the Buyers breach the undertakings set out in sub-clauses (b) and (c). The Parties can elect between two alternatives:[3]

(i) Alternative d(i) sets out a liquidated damages provision, obliging the Buyers to pay a pre-agreed amount to the Sellers, which sum is expressly to be a "*legitimate and fair estimate of the Sellers' estimated damages*"; or
(ii) Alternative d(ii) sets out an indemnification provision, requiring the Buyers to indemnify the Sellers against any kind of possible loss that the Sellers may suffer as a consequence of the Buyers' breach of the Clause.

Sub-clause (e) allows the Sellers to seek injunctive relief or other equitable remedies as may be available before any competent court or tribunal, whilst sub-clause (f) allows the Sellers to disclose the Clause in case the Buyers should be in breach of the same.

Further Observations

It will be interesting to see whether the Clause will gain traction in the industry. There is an obvious conflict between the Sellers' and the Buyers' interests when deciding the length of the *Applicable Period* in sub-clause (b), but this is also the case when negotiating clauses limiting the Buyers' utilization of the Vessel in a way that can cause harm to the Sellers after delivery.

We believe that the Further Trading Clause may be a helpful clause to include for Sellers where concerns arise as to whether Buyers do really intend to continue trading the Vessel. If so, inclusion of the Clause may provide some comfort for the Sellers. The Clause is not, however, to be used in connection with recycling sales.[4]

For the avoidance of doubt, contractual regulation alone is not sufficient to give the Sellers of an aging Vessel sufficient comfort that it will not be recycled in violation of any applicable laws. As always when considering selling older tonnage, proper due diligence, and assessment of both the Buyers and the recycling market is important to minimize the risk of being entangled in criminal proceedings should the Vessel in question be recycled in violation of applicable environmental regulations. Careful assessment must also be made as to whether the Buyers have the necessary financial means to fulfil any payment obligations towards the Sellers that may arise under the Clause.

The Nordisk recycling team has extensive experience in recycling matters and remain available to assist members and non-members with queries in relation to recycling of vessels.

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3 - In case the Parties do not elect between the two alternatives, sub-clause (ii) being the indemnity provision, shall apply.

4 - In a sale for recycling, Sellers are advised to use suitable clauses dealing with how the recycling is to be conducted. Nordisk has drafted a set of clauses that is available for members upon request.

EU EMISSIONS TRADING SCHEME – Q & A SESSION

At the time of writing, there are already vessels en route to the European Union which will be subject to the EU Emissions Trading Scheme (EU ETS) coming into force from 1 January 2024 (the "Directive").

We set out hereunder the typical queries we see on this topic, together with the answers, which we hope will be of assistance to all our Members who are trading to, within and out of the EU.

1. RESPONSIBILITY FOR COMPLIANCE

Q. Is the ISM Doc Holder or the Registered Owner by default responsible for EU ETS?

The definition of "Shipping Company" in the Directive encompasses not only the registered owner, but also a bareboat charterer or ISM Doc Holder such as a manager. However, the recently published implementing legislation concerning the Administration of Shipping Companies has confirmed it will be the registered owner who is by default responsible for EU ETS compliance.

BY VICKI TARBET

Q. What are the formalities for delegating responsibility for the EU ETS?

Notwithstanding the above default position, the registered owner can delegate responsibility for compliance with the EU ETS to the ISM DOC Holder, whether this is the manager or the bareboat charterer. However, the entity responsible for EU ETS must be the same entity that is responsible for compliance with MRV.

Delegation takes the form of a mandate and the formalities are set out in Article 1 of the implementing legislation. There is no set format, but a document containing the following details, signed by both the registered owner and the entity to whom responsibility for EU ETS has been mandated, is required:

1. *Name and IMO unique company and registered owner ID number of the entity mandated by the registered owner;*
2. *Country of registration of the entity mandated by the*

registered owner, as recorded under the IMO Unique Company and Registered Owner Identification Number Scheme;
3. Name and IMO unique company and registered owner ID number of the shipowner;
4. Following information for the registered owners' contact person:
4.1. First name
4.2. Last name
4.3. Job title
4.4. Business address
4.5. Business telephone number
4.6. Business email address
5. Date of application of the mandate from the registered owner to that entity;
6. The IMO ship ID number of each ship falling within the mandate

The document must be submitted to the mandated entity's Administering Authority to perfect the delegation. The mandate should also be reflected in the Monitoring Plan.

If there is any change in the identity of the party delegated, for example a change in management company, the mandate and documentation (including the Monitoring Plan) with the relevant authorities will need to be updated.

If the required documentation is not provided to the mandated entity's Administering Authority, the registered owner remains responsible for EU ETS.

Q. What About the Situation Under a Bareboat Charter?
Per the implementing legislation, responsibility for EU ETS compliance can be delegated to a bareboat charterer (if they are the ISM Doc Holder), but the bareboat charterer cannot itself delegate a manager (as ISM Doc Holder) to take on responsibility for the EU ETS.

Traditionally, the registered owner of a vessel out on bareboat charter is completely hands off, however, that will no longer be the case. If the bareboat charterer wants the technical manager to take on EU ETS responsibility, only the registered owner will be able to complete the necessary formalities for that appointment towards the authorities. The standard printed form bareboat charterparties do not expressly cater for this and since the registered owner is not a party to the management contract (between the bareboat charterer and its manager), how to implement this in the contracts will need to be considered.


BY CAROLINE LINDFORS

2. ALLOWANCE OBLIGATIONS

Q. How many allowances need to be covered?
It is a phased scheme, so 40% of emissions reported for 2024 must be covered by emissions Allowances to be surrendered in September 2025. This means that for the first year, 40% of emissions on a per voyage basis need to be accounted for by emissions Allowances.

Q. What is a "voyage"?
A "voyage" for emissions reporting purposes is as per the EU MRV regulation, and is defined on a berth to berth basis, i.e. from the berth at one port of call to berth at the next port of call.

This means that all emissions from departure from the berth to arrival at the next berth counts as a "voyage" as per the MRV, and are to be reported in addition to all in-port emissions. The concept of voyage for MRV purposes is therefore more limited than the concept of voyage in a charterparty context, which in many instances will encompass multiple voyages (as per the MRV definition).

Q. What happens if the voyage began before 1 January 2024
The first reporting period for the shipping industry begins on 1 January 2024. For voyages beginning prior to 1 January 2024, only the emissions starting from 1 January 2024 will need to be reported and Allowances surrendered.

The same also follows for voyages that straddle two separate calendar years. A voyage that began in December 2024 and ends in January 2025, falls within two reporting periods. The emissions up to 31 December 2024 will be reported in the 2024 emissions report and the emissions from 1 January 2025 will be reported in the 2025 emissions report. The corresponding Allowances will also need to be surrendered across two submission dates.

Q. How are allowances transferred?
The Union Registry is the centralised registry for all participants in the EU ETS across all industries. Accounts within the Union Registry are managed by the individual Members States. Every entity or person wishing to hold or trade Allowances must open an account at the Union Registry, by sending a request to its national administrator. Any company (not just the "Shipping Company" as defined in the Directive) wishing to buy, transfer and trade Allowances will need to open a trading account.

The "Shipping Company" (whether the registered owner or delegated ISM company) will need a Maritime Operator Holding Account ("MOHA") to hold allowances (i.e. receive and submit, rather than trade) which needs to be opened by the Member State corresponding to its Administering Authority.

As of now, it is not possible to open a MOHA. Current indications are that MOHAs will be available to open by 1 February 2024. This coincides with the date the European Commission is due to publish the list of Administering Authorities for known "Shipping Companies". In the interim, Shipping Companies can open trading accounts. However, companies registered outside the EU may face bureaucratic challenges opening not only trading accounts but there may also be uncertainties as to whom their Administering Authority will be. This time lag in the availability of MOHAs coupled with potential difficulties in being able to open a trading account, means that some companies may need to reach ad hoc arrangements with their counter parties to postpone the transfer of Allowances until all the necessary accounts are up and running.

3. CHARTERPARTIES – ETS CLAUSES

Q. Do I need an EU ETS Clause?
The standard printed form charterparties do not cater for allocation of the cost of compliance with the EU ETS, or indeed any ETS scheme. Specific clauses are therefore required across the board if the owner wants to recover either the actual Allowances or the cost of purchasing Allowances, from its charterer.

As introduced in the December 2022 Circular BIMCO has published an ETS Allowances Clause for Time Charterparties (2022), which caters for the EU ETS scheme and other similar schemes that remain to be seen. The essence of the BIMCO clause obliges an owner to provide emissions data to allow their charterer to calculate, pay for and provide sufficient Allowances to cover the vessel's emissions during the charter period.

We anticipate BIMCO will publish further clause(s) for voyage charters and Contracts of Af-

freightment, as well as the revised SHIPMAN contract which we expect will contain an ETS clause.

Q. What are the common points of negotiation in EU ETS clauses?

The main point of negotiation we see in the time charter context is the timing of the charterers obligation to transfer Allowances to the owner. The BIMCO clause referred to above contemplates a monthly transfer of Allowances to the owner, whereas charterers often want to delay that obligation to closer to the annual September submission date.

Another point for negotiation is whether charterers' liability for Allowances is calculated using owners' data or verified data. If charterers insist on the calculation of Allowances being based on verified data, owners need to consider whether they can comply (i.e. because they are using a data management provider authorised by the EU to verify data) and if so, then how frequently owners will receive verified data from their data management provider.

We have also seen some instances where the monthly calculation and transfer of Allowances in the BIMCO has been amended to a voyage by voyage calculation. As long as the calculations cover the entire charter period, the end result should be the same, but there are practical aspects which owners should consider before agreeing this.

Finally, there will be commercial negotiations between the parties over the allocation of any Allowances (or the price thereof) arising at either end of the contractual period i.e. by reason of a ballast voyage delivering into a charterparty and / or after completion of final discharge.

Dates for the diary

31 December 2023
List of container transhipment ports per Art.3ga (*expected*)

1 February 2024
List of Administering Authorities for known Shipping Companies (*expected*) MOHAS become available for opening (*expected*)

1 April 2024
Submission deadline of updated Monitoring Plan

31 March 2025
Verified company emission report submission to administering authority

30 September 2025
Submission deadline for Allowances for 2024 calendar year

We are available to assist Members in drafting and advising on possible ETS clauses to manage and allocate the exposure to EU ETS Allowances.

WILL THE UK ELECTRONIC TRADE DOCUMENTS ACT FINALLY USHER IN THE ERA OF ELECTRONIC BILLS OF LADING?

The advent of electronic bills of lading (eBL) has been discussed for decades, driven by the eBL's potential to address several issues associated with traditional paper-based trade documents. Paper trade documents are logistically inefficient, vulnerable to fraud, and have resulted in the widespread use of Letters of Indemnity (LOIs), principally to cover the practical problem of cargoes arising at destination before the original bills of lading are available.

The eBL movement has been tempered, however, by widespread industry resistance to change, uncertainty about transitioning to digital processes, and concerns about the legal validity and functionality of electronic documents. The Electronic Trade Documents Act 2023 (ETDA), which came into force in the United Kingdom on September 20th, provides a much needed legal framework for the transfer of electronic trade documents in a key maritime jurisdiction.

BY PAIGE HALVORSEN

Traditional paper-based bills of lading are often not just a receipt for goods but also documents of title. In many circumstances when goods change hands, the corresponding bill of lading is endorsed and transferred to the new holder, effecting the transfer of ownership.

One of the main problems posed by electronic trade documents ("ETDs") is the "double spend" problem – an ETD cannot be accessed and modified by several parties at the same time, which can be a challenge in the digital age. Another problem is transferability. Parties need to be assured that an ETD, like an eBL, has the same functionality and validity at law as its paper equivalent. Prior to the

recent enactment of the ETDA, English law did not recognise that an electronic trade document could be possessed or endorsed. eBL providers (like Bolero) addressed these issues by relying on a contract-based system but that solution, thus far, has not gained widespread traction.

The ETDA, which is based on the UNCITRAL Model Law on Electronic Transferable Records, addresses both of these key issues. The ETDA begins by identifying the group of paper trade documents to which the legislation applies (including bills of lading and mates receipts). A qualifying document becomes an ETD if there is a "reliable system" in place that meets the criteria set out in Section 2 of the ETDA. Once a document achieves ETD status, it can then be possessed, endorsed, and transferred electronically under English law.

There are still hurdles to the widespread use of eBLs. The maritime industry is inherently global and while some jurisdictions, like Singapore and the UAE, have already enacted similar legislation, other key shipping jurisdictions need to follow suit. The systems currently in existence that support the use of ETDs also need to adapt their platforms from a closed loop contract-based system to a system that allows for eBLs to be transferred across different platforms. This will allow the users of eBLs the freedom to choose a provider without having to force other counterparts to sign up with the same system.

These challenges are not insurmountable, however. The enactment of the ETDA might create enough industry momentum to see the eBL finally become widely used.

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