



## DECARBONISATION IN SHIPPING: CONTRACTUAL AND CHARTERPARTY ISSUES

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**In this article, originally published by Standard Club, Alessio Sbraga and Joseph Malpas discuss how decarbonisation regulations may impact contractual relationships in the shipping sector, and the steps parties should consider taking now.**

In terms of global intervention, there are the IMO's mandatory short term goal-based technical and operation measures for the reduction of greenhouse gas (GHG) emissions – namely, the Energy Efficiency Existing Ship Index (EEXI) and Carbon Intensity Indicator (CII) regimes under MARPOL Annex VI, which will enter into force on 1 November 2022 and will apply to applicable ships from 1 January 2023.

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Regionally, the EU’s ‘Fit for 55’ package also seeks to regulate the shipping sector’s carbon footprint, for example by including shipping in the EU Emissions Trading System (EU ETS) and the FuelEU Maritime initiative, in line with the bloc’s aim to reduce net greenhouse gas emissions by at least 55% by 2030, compared to 1990 levels.

In this article, we will discuss how these regulations may impact contractual relationships in the shipping sector, and the steps parties should consider taking now.

## IMO Regulations

The IMO’s Energy Efficiency Existing Ship Index (EEXI) and Carbon Intensity Indicator (CII) regimes (the operation of which is set out in the Club’s previous article ‘[Overview of the regulatory framework](#)’, are likely to impact the performance of both existing and future contracts and the traditional rights and obligations of the parties involved.

The possible commercial/legal challenges that could materialise from these regulations and create disputes are varied and complex, but may include:

- allocation of responsibility/risk/ cost of compliance with EEXI (technical) and CII (operational) regulations;

- how a ship’s attained operational CII will be maintained (or improved) on an annual basis and what possible steps can be taken to do so;
- risk and likely impact of failing to maintain a ship’s CII rating – enforcement, sanctions and/or commercial consequences; and
- risk and exposure to third party claims and impact on insurance coverage.

Traditional time charters are likely to be most impacted. Compliance with the CII regulations is likely to be the main complicating factor, but there are also important considerations for EEXI too<sup>1</sup>. It should also be noted that this is not simply a shipowners’ problem; the regulations will impact all the main parties involved in the shipping contractual chain.

## Time Charters

### *Standard time charter framework*

The following fundamental rights and obligations feature in most standard time charters:

- Charterers are entitled to direct the use and employment of the ship within limits set out in the charter (e.g. trading, cargo and safety), in return for payment of hire.

- The Master is obliged to follow charterers’ legitimate/lawful orders within the charter limits, and execute them properly and promptly. This includes entering into third party contracts for the carriage of cargo (e.g. shipowners’ bills of lading) on terms.
- Typically, shipowners warrant that the ship will be seaworthy and fit for the service (or that they have exercised due diligence to maintain seaworthiness) throughout the charter.
- An express or implied indemnity in favour of shipowners may arise against liabilities or harmful consequences incurred as a result of complying with charterers’ employment orders.

On a practical level, compliance with the IMO regulations (in particular, CII) require adjustments to the way in which a ship is operated. These are not aligned with current commercial shipping practices, and they directly impact charterers’ traditional rights enjoyed under time charters.

## **EEXI**

Shipowners are primarily responsible for compliance with international regulations. This will include the EEXI regulations provided the flag of the ship is a MARPOL contracting state. It may be possible to contractually

<sup>1</sup> Ships certified under the Energy Efficiency Design Index (EEDI) will also have to determine whether their attained EEDI is equal to or lower than the acquired EEXI in order to avoid making further technical modifications to ensure compliance.

allocate the risk and cost of compliance, but in the absence of specific provisions, shipowners are likely to remain responsible under either (i) as part of the seaworthiness/due diligence obligations (as modified by the Hague/Hague-Visby Rules, if incorporated), or (ii) the legal fitness obligations (per *The Elli and The Frixos* [2008] EWCA Civ 584).

The EEXI does not require technical modifications to ships – this will depend on the type and design of the relevant ship, her trade, the attained EEXI, and the particular required EEXI the ship has to meet. However, for many ships, technical modifications may be the only realistic way to attain the required EEXI. This may give rise to disputes over what type of modifications are required and acceptable to the parties and what impact this may have on the commercial operation of the vessel.

If technical modifications are to be made, bespoke contractual solutions may be required to allocate the risk, time and cost of such modifications. For example, in the absence of an applicable compulsory modification clause, dealing with the cost of purchasing, installing and trialling new equipment, responsibility for time out of service, and when/where any drydocking is to take place are likely to be important issues in both mid to long-term time charters. The shorter the duration of time charter, however, the less likely there is to be community of interest and traditional off-hire, time out of service and drydocking provisions will be more relevant. Dependent on the nature of the technical modifications, consideration will need to be given as to whether the technical description, questionnaires and speed and consumption warranties in the charter require amendment. This will impact both existing and future charters (regardless of duration) running into 2023 and will lead to significant complications, especially for shipowners, if not adequately addressed in the contract.

Due to favourable installation time and cost implications, engine power limitation (EPL) and shaft power limitation (ShaPoLi) appear to be the preferred choice for compliance. However, as the EEXI regulations do not mandate the type and nature of technical modifications,

disputes may arise over what is required and/or necessary in the particular circumstances - for example, over more expensive and innovative solutions for compliance. It is again possible that compulsory modification clauses may resolve this issue, but this will be dependent entirely on the particular wording used, and again tailor made provisions may be required.

With technical modifications may come additional training and awareness for a ship's crew and this may also have an impact on the existing maintenance regime under time charters.

### CII

At the outset, it is very important to understand that whilst compliance with the EEXI (a technical requirement) and CII (ongoing operational requirement measuring carbon dioxide (CO<sub>2</sub>) emissions per unit of 'transport work') are interconnected, they are nevertheless separate requirements. The annual carbon intensity reductions achieved by a ship will be highly dependent on how it is operated, not just its technical efficiency. Operational efficiency, however, has no influence on the EEXI.

Complying with the CII regulations on an ongoing basis is likely to be complicated.

- A ship will be required to calculate its required operational CII for a three-year period in advance and in accordance with a CII reduction factor, using an equation set out in Regulation 28 of MARPOL Annex VI. Whilst guidelines regarding how to complete these calculations will be published by the IMO in due course, they may be difficult to achieve with any real accuracy in practice.
- On a practical level, a ship's attained operational CII (and, in turn, its CII rating) in any given year will be heavily dependent on the way in which the ship is traded and also external factors (e.g. the weather), which impact on the way in which the ship can perform. These are all factors likely to be outside of shipowners' control. Extended port stays, lay-up and off-hire periods could also adversely impact the carbon intensity of a ship.

- It will be prudent for shipowners to monitor and assess the ship's actual operational CII in real time in order for them to establish how close they are to that ship's required operational CII, and they may need to take appropriate steps/actions to avoid being in breach of their CII obligations.
- Calculating actual carbon emissions of a ship upon the date of delivery or redelivery under a time charter is also likely to be an important (yet complicated) exercise to carry out for shipowners and (both redelivering and incoming) charterers alike, especially when this takes place in Q2/Q3 of a calendar year.

Such corrective steps, could, depending on the specific circumstances, conceivably involve one or more of the following:

- **Option 1:** reducing speed/slow steaming.
- **Option 2:** deviating from the shortest/quickest route.
- **Option 3:** increasing distance sailed (including ballast voyages).
- **Option 4:** reducing cargo intake.

In the absence of tailor-made clauses, if shipowners were to unilaterally pursue any of these options to maintain and/or improve the ship's attained operational CII (and therefore CII rating), disputes could arise. Option 1 may place shipowners in breach of speed and performance warranties. Options 2 and 3 could lead to shipowners being in breach of their due/utmost despatch obligations, employment orders/instructions or sailing directions, and could amount to a deviation, again leading to a breach. If pursuing option 4, shipowners would likely find themselves in breach of express cargo capacity warranties, the obligation to make sure the whole reach is available, and employment orders. Option 4 could also breach shipowners' due diligence obligations.

In most standard charters, breach of these obligations will result in claims for damages, rather than creating rights of termination, although the consequences under tanker charters could be more significant. In relation options 1 – 3, off-hire clauses or other hire deductions could be triggered,



subject to the facts. Claims for delay or damage to cargo may also be brought against shipowners or the ship by third party cargo interests under bills of lading.

Any defences are likely to be limited and complicated to run, especially in relation to short term charters. To succeed, shipowners would need to establish a clear and determinable causal link between charterers' order(s) and a clear breach of the IMO regulations, which may not be straightforward. It is difficult to see which traditional exceptions (such as frustration) could apply, although this would have to be considered on a case by case basis. Arguing that terms should be implied (e.g. any implied term that charterers are not entitled to issue orders adversely impacting the ship's attained operational CII) or an implied indemnity applies are also likely to be difficult.

Under the current regulations, should a ship get a CII rating of "D" for three consecutive years, or an "E" rating, a corrective plan will need to be devised and a revised Ship Energy Efficiency Management Plan (SEEMP) filed. If the corrective SEEMP is not followed, then this could potentially invalidate the ship's Statement of Compliance. Alternatively, where the SEEMP forms part of a ship's Safety Management System (SMS), this could impact seaworthiness and shipowners' due diligence obligations.

Apart from that, there are presently no formal sanctions set out in MARPOL Annex VI for non-compliance with the CII regulations, although this could start to be addressed in the coming 12 months through updated guidelines (as happened with IMO 2020). Alternatively, it may be that a ship's CII rating will have significant commercial importance for charterers, in that a minimum CII rating will be prescribed in commercial contracts (e.g. in Questionnaires and Q88s) or even for trade (e.g. SIRE reports). Further, a CII rating may in due course be a factor taken into consideration by banks and lenders when providing ship-related finance.

## Voyage Charters

Whilst it may be more commercially straightforward to negotiate terms in spot voyage charterparties for compliance with the CII regulations (e.g. more narrow speed and performance warranties), similar issues to those seen in time charters might arise if specific clauses are not agreed.

Standard industry clauses, such as the BIMCO Slow Steaming Clause 2012, might assist with compliance (by allowing shipowners to reduce speed in certain circumstances). However, these clauses often give this right in return for a minimum speed and performance warranty, which in particular circumstances could itself lead to non-compliance with the CII regulations.

## Contracts of Affreightment (COAs)

Slow steaming or otherwise extending voyage lengths might reduce total annual voyages in pre-existing long term COAs, potentially reducing shipowners' earnings under the relevant COA, or placing shipowners in breach of any term stipulating a minimum number of annual voyages. However, reducing cargo intake (as a way of complying with the CII regulations) would probably not be an option.

In those circumstances, if protective clauses had not been agreed, shipowners would have to argue that there is an implied duty of cooperation on the parties, requiring them to cooperate to obtain compliance with the regulations. Alternatively, that an implied term operates in the circumstances. However, such arguments will be prone to difficulty.

## Bareboat Charters

In most standard pro-forma bareboat charters (e.g. BARECON), the risk and responsibility for complying with the EEXI regulations is likely rest with charterers, including making any technical modifications sufficient to meet the required EEXI, due to (i) charterers' obligation to keep Class up to date and all necessary certificates in force; and/or (ii) their maintenance obligations. However, it may be possible to apportion costs of any technical modifications, depending on the nature and value of these modifications.

Shipowners' prior approval will often be required before charterers can make any structural or "substantial" changes to the ship or its machinery, unless (for example) Class have directed that the changes are necessary. This could be problematic if, for example, shipowners did not approve of the type of technical modifications required, particularly if they also had to contribute to costs, given the value. The fact that MARPOL Annex VI does not mandate the type and nature of technical modifications required to comply with the EEXI regulations may also lead to disagreement.

As charterers are obliged to return the ship in the same condition as on delivery, it is arguable that they must also maintain the ship's CII rating. However, there may not be any identifiable breach when redelivery takes place, because the assessment of the ship's attained operational CII (and CII rating) might take place months after the event. In these circumstances shipowners might be able to rely on indemnity provisions (e.g. in the BARECON standard forms) depending on the specific facts.

## EU Measures: The EU ETS/ FUELEU Maritime

It should be noted that the measures put forward by the European Commission (EC) on 14 July 2021 as part of its 'Fit for 55' package are still subject to the EU legislative approval process, which involves consideration by the European Parliament (EP) and the European Council. As such, they do not yet form part of EU law and there is still much to be worked out (for example, delegated acts of the EC still need to be formulated and published). It is therefore conceivable that the measures eventually adopted may differ from the text currently proposed.

Subject to this caveat, there are a number of important considerations which are likely to impact both existing and new contracts running into 2023 and these are discussed below. This section focusses on the EU ETS and FuelEU Maritime. Whilst not exhaustive, there are likely to be common issues (Section I) and issues which are specific to each of those measures (Sections II and III). However, there are two important points to note at the outset. First,

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these measures apply to ships irrespective of which flag they fly. Secondly, the scope of application is wider than intra-EU voyages. Therefore these regional measures will have a significant impact on global shipping.

Whilst outside of the scope of this article, it must be noted that there are additional measures which are likely to impact the maritime sector within the European Economic Area (EEA). These include the Energy Taxation Directive (which seeks to introduce taxes on bunkers sold in the EEA for EEA voyages and electricity used to directly charge ships at berth) and the Alternative Fuels Infrastructure Regulation (which seeks to regulate the infrastructure required to enable ships to have access to alternative fuels at EU ports).

## Potential issues arising under both the EU ETS and FuelEU Maritime

### Responsibility for and cost of compliance

Under both the EU ETS (new Article 3(v) to Directive 2003/87/EC (the ETS Directive)) and FuelEU Maritime (Article 3(k)), the definition of the responsible party (the Shipping Company) includes the wording “the shipowner or another organisation or person, such as the manager

or the bareboat charterer, that has assumed the responsibility for the operation of the ship from the shipowner”, which is the same definition under the Monitoring, Reporting and Verification (MRV) Regulation (2015/757). However, the EU ETS expands on this shared definition, adding the wording “...and that, on assuming such responsibility, has agreed to take over all the duties and responsibilities imposed by the International Management Code for the Safe Operation of Ships and for Pollution Prevention” – in other words the party responsible for the Document of Compliance (DOC) under the ISM Code will be the Shipping Company. It remains to be seen whether the ‘expanded’ definition under the EU ETS is, ultimately, extended to the provisions FuelEU Maritime as adopted<sup>2</sup>.

Whilst Recital 20 of the EU ETS and Recital 6 of FuelEU Maritime state that “in line with the polluter pays principle, the shipping company could, by means of a contractual arrangement, hold the entity that is directly responsible for the decisions affecting the [CO<sub>2</sub> emissions<sup>3</sup>/greenhouse gas (GHG) intensity of the energy used by the ship<sup>4</sup> accountable for the compliance costs”, in the absence of clear

contractual clauses providing otherwise, charterers will not be responsible for compliance or the costs of purchasing (and surrendering) emissions allowances in a time charter context.

In recently proposed amendments to the MRV Regulation, the EP amended the definition of the Shipping Company to cover whoever is “responsible for paying the fuel consumed by the ship”. This would extend responsibility automatically to charterers in a time charter context. It is presently unclear whether this will have any impact on the final text of the EU ETS and FuelEU Maritime.

Notwithstanding the above, in the event that the costs associated with the EU ETS and/or FuelEU Maritime are not allocated under the contract, it is possible that the comparative cost will be factored into charter and freight rates from 2023 onwards so that the cost of compliance is, ultimately, passed down the contractual chain and, potentially, onto the end consumer.

Where ship managers are the DOC holders and are not affiliated with the shipowners, consideration should also be given to reviewing ship management agreements.

<sup>2</sup> Although peculiarly it already does appear in Recital 6, but not the regulation text.

<sup>3</sup> As per Recital 20 of the EU ETS

<sup>4</sup> As per Recital 6 of FuelEU Maritime

## **Scope: regulated emissions**

Under both the EU ETS and FuelEU Maritime, regulated emissions include 50% of emissions generated from both international inbound voyages and outbound voyages to and from EEA ports, and 100% of emissions generated whilst at EEA ports. What is presently unclear, however, is whether emissions generated from ballast legs qualify as regulated emissions (as this is not expressly identified in either of the measures), although guidance relating to the treatment of ballast legs under Recital 14 to the MRV Regulation suggests that this could be the case.

In view of the voyages that will be covered by the measures, it is possible that shipowners and ship managers will take a more active role in determining the scope of voyages permitted under time charters. For example, in the form of more qualified trading limits or limits on the number of EEA port calls in any given calendar year.

Whilst the immediate focus of both the EU ETS and FuelEU Maritime is on CO<sub>2</sub>, it is envisaged that both regimes will seek to include other GHGs in due course, particularly methane and nitrous oxide.

## **Access to/sharing of emissions data**

A Shipping Company will be required to monitor and report emissions data under both the EU ETS and FuelEU Maritime.

Under the EU ETS, a Shipping Company will monitor and report emissions data in accordance with the MRV Regulation (as amended), which already applied to ships above 5,000 gross tonnes (GT) travelling to or from ports within the EEA.

Under FuelEU Maritime, whilst information and emissions data collected for the purpose of the MRV Regulation will be used where appropriate, a Shipping Company will need to adhere to a separate monitoring and reporting regime – for example, under Article 7, by 31 August 2024 a Shipping Company will need to submit a monitoring plan for each ship, containing amongst other things the chosen methodology from those set out in Annex I and a description of the procedures for

monitoring the fuel consumption of the ship.

In the event that responsibility for compliance is allocated under a contract (e.g. a time charter), additional considerations may arise in the context of emissions data. As shipowners will principally have access to the relevant emissions data (unless otherwise provided for under the contract), coordination and cooperation between the parties will be necessary for charterers to gain access, and disputes may arise. An adapted form of the Sea Cargo Charter Clause, which also seeks to ensure that charterers get access to data necessary for them to calculate emissions for themselves, could be of assistance here.

## **Compliance, enforcement and penalties**

Under the EU ETS, as from 31 March 2024 onwards, a Shipping Company must submit a report containing emissions data collected over the previous calendar year (new Article 11a of the MRV Regulation) which is to be verified by the relevant administering authority. This administering authority will be the Member State where a Shipping Company is registered. Alternatively, where a Shipping Company is based outside the EU, the Member State where the Shipping Company's ship had the highest number of port calls in the two previous monitoring years will act as the designated administering authority (new Article 3gd of the ETS Directive).

Once the emissions data is checked by the administering authority, within 30 April a Shipping Company must surrender emission allowances equal to its verified emissions over the previous calendar year (amended Article 12 of the ETS Directive). Failure to surrender the necessary allowances will result in fiscal penalties, presently EUR 100/tCO<sub>2</sub> (USD 114.22/tCO<sub>2</sub>) for each tonne of CO<sub>2</sub> emitted for which no allowance has been surrendered, in addition to purchasing and surrendering the equivalent amount of allowances. Member States must also publish the name of any Shipping Company who is in breach of the requirement to surrender sufficient allowances (amended Article 16 of the ETS Directive).

Under Article 20 of FuelEU Maritime, a compliance deficit (see below) may result in payment of a penalty, calculated on the basis of formulas contained in Annex V. Each non-compliant port call will be subject to a penalty, calculated by multiplying EUR 250 by megawatts of power installed on board and by the number of completed hours spent at berth. Member States may also impose their own specific sanctions for non-compliance under Article 23, provided they are “effective, proportionate and dissuasive”.

Under both the EU ETS (amended Article 16 of the ETS Directive and Article 20 of the MRV Regulation) and FuelEU Maritime (Article 23), instances of repeated non-compliance could also lead to the offending ship and even “*the ships under the responsibility of the Shipping Company*” being refused entry to ports of all Member States (apart from those of its Flag State if that is also a Member State, although the ship could still be detained). Consequently, there are also potential significant implications for shipowners who have fleet operations.

Actions taken against the ship for non-compliance could potentially lead to delays in service and disputes between the parties. Absent specific clauses allocating responsibility for fiscal penalties, this is also likely to lead to disputes in a charter context, especially in circumstances where shipowners might be the responsible party, but it is charterers' employment of the ship that may have led to non-compliance with the relevant measure.

## **Potential issues arising under the EU ETS only**

### **Allocation of emissions allowances and trading**

If the EU ETS proposals are adopted, to account for the inclusion of the shipping sector, the EU-wide quantity of allowances shall be increased by 79 million allowances in the year following entry into force under a new paragraph to Article 9 of the ETS Directive. Each allowance represents the right to emit one tonne of carbon dioxide equivalent.

These ‘extra’ allowances will be added to the total number available for all sectors under the EU ETS, not just

the shipping sector. It appears that there will be no free allocation of allowances for maritime transport, so all allowances will need to be purchased in accordance with Article 10 of the ETS Directive, which will apply to maritime transport under amended Article 3g of the ETS Directive. A Shipping Company should also be able to trade allowances with other participants in the EU ETS under amended Article 12 of the ETS Directive.

Under new Article 3ga of the ETS Directive, there will be a phase-in period for the surrender of allowances by a Shipping Company. In 2023, allowances for only 20% of verified reported emissions will need to be surrendered, followed by 45% in 2024, 70% in 2025, and 100% for 2026 onwards. The remaining allowances that a Shipping Company would otherwise have had to surrender in 2023 to 2025, based on its verified reported emissions, will be cancelled to maintain the integrity of the wider ETS (i.e. to prevent allowances essentially being used twice).

The above raises numerous potential issues under commercial contracts, in particular in a time charter context, including how the cost of purchasing the allowances are allocated under the charter, what kind of planning is required to ensure that the requisite quantity of allowances are in place to comply, which party (shipowners or charterers) is administratively responsible for purchasing allowances and from which administering authority, and, if it is agreed that charterers are to pay for the cost of allowances in return for access, the extent to which charterers are permitted to trade such allowances. It is likely that the trading of allowances may be of importance to both shipowners and charterers, particularly if they own or operate fleets calling at EU ports, so contractual provisions regulating this could become relevant.

### **Potential issues arising under FuelEU Maritime only**

#### ***Compliance surplus, deficit and pooling***

Under FuelEU Maritime, relevant ships will be ascribed a 'compliance balance', defined under Article 3(aa) as the measure of the ship's over- or under-compliance according to the

limits to the yearly GHG intensity of the energy used on-board a ship (set out in Article 4). Depending on the relevant ship's performance, it may have a 'compliance surplus' for the relevant year (i.e. over-compliance with the relevant GHG intensity limit), or a 'compliance deficit' (i.e. under-compliance with the applicable limit).

Under Article 17, where a ship has a compliance surplus in any given calendar year reporting period, that surplus can be 'banked' to the following reporting period. Conversely, where a ship has a compliance deficit in a given reporting period, it can 'borrow' a portion of its allowed GHG intensity for the following reporting period to meet its obligations (albeit with conditions).

Two or more ships can also 'pool' their compliance balances in certain circumstances under Article 18, therefore netting their individual compliance surplus/compliance deficit (as the case may be) as part of the pool (although under Article 18(6), ships participating in a pool will not be able to borrow GHG intensity from a following reporting period). Pooling may be of interest to shipowners, or charterers or commercial operators, who either own or operate fleets or liner services visiting EEA ports.

In a long term time charter, the parties could agree that in return for assuming responsibility for FuelEU Maritime, charterers will have oversight of the compliance balance. However, it may be important for shipowners to manage charterers' rights here. For example, shipowners may wish to limit charterers' ability to bank compliance to following reporting periods, particularly towards the end of the charter in order to safeguard ship compliance with FuelEU Maritime. Conversely, charterers could be incentivised to trade the ship efficiently so that a compliance surplus exists on redelivery. These are just some of the many issues which could arise out of these provisions.

#### ***Requirement for connection to on-shore power supply***

Recital 20 of FuelEU Maritime notes that according to data collected under the MRV Regulation in 2018, passenger ships and containerships are the ship categories producing

the highest amount of emissions per ship at berth. In light of this, from 1 January 2030, containerships and passenger ships will be required to connect to an on-shore power supply and use it for all energy needs while at berth at an EEA port (Article 5).

There are limited exceptions available under Article 5(3), including instances where ships are unable to connect to an on-shore power supply due to lack of availability of connection points in the relevant port (Article 5(3)(d)) or where the ship's and port's respective on-shore power installations are incompatible (Article 5(3)(e)). However, these exceptions are ship- and fact-specific. Further, under Article 5(6), from 1 January 2035 an applicable ship will only be able to rely on the exceptions at Article 5(3)(d) and 5(3)(e) up to five times per reporting year (although a port call will not be counted here if a Shipping Company can demonstrate that it could not have reasonably known that the ship would not be able to connect to shore power).

Unless specifically provided for under a charter, responsibility for installing any equipment on the ship to enable connection to on-shore power may rest with shipowners, as part of their seaworthiness/due diligence/legal fitness obligations. Whether the cost of electricity should be treated as port charges (which can often be for charterers' account) could be subject to dispute, absent specific provisions.

## **Conclusion**

As the above hopefully shows, the regulations put forward at the IMO level and by the EC present numerous potential issues/challenges for the traditional contractual relationships seen in the shipping sector. The impact of these regulations cannot be overstated. Additional potential measures on the horizon may also create yet further requirements and challenges for all the key stakeholders. For example:

- Potential national measures that might be implemented – China, the UK and the USA, for example, have all tentatively explored the possibility of including shipping in their own national emissions trading systems.
- It is possible that the IMO may introduce a global market



based measure (MBM) in order to incentivise further decarbonisation of the shipping industry – this might take the form of a carbon or bunker levy, or perhaps even a global emissions trading system.

In light of both the known and 'known unknown' challenges facing parties to commercial shipping contracts, there is a need to plan in advance, and think carefully how to mitigate the risk, cost and responsibility of compliance with the upcoming regulations under both existing and future contracts. In short, who will bear the cost of GHG emissions, and at what price. There is also likely to be an important role for collaboration and cooperation between the parties to the commercial contract – particularly in respect of the sharing of fuel consumption and emissions data and the planned commercial employment of ships – in order to achieve compliance and avoid disputes. There is unlikely to be a one size fits all solution for members and it may depend on a wide variety of considerations which may differ from contract to contract. However, BIMCO is currently working on draft clauses which are aimed at addressing the issues arising out of the EEXI/CII regulations and the EU ETS. These clauses are likely to be fair and balanced clauses which can be inserted into time charters.

In any event, members should seek guidance from their claims handlers on how best to achieve compliance with the new and evolving carbon emissions regulatory regime.

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