



ARTICLE – PART 1 OF 2

## FUELEU MARITIME SERIES - ENCORE: CONTRACTUAL ALLOCATION OF RESPONSIBILITY BETWEEN SHIPOWNERS AND CHARTERERS AND SHIPOWNERS AND MANAGERS UNDER THE 2024 BIMCO CLAUSES

In this two-part series, we examine how two recent BIMCO clauses - FuelEU Maritime Clause for Time Charter Parties 2024 and FuelEU Maritime Clause for SHIPMAN 2024 - were developed to assist contractually-linked parties, subject to FuelEU Regulation obligations, achieve a more equitable allocation of responsibility between themselves.

### FuelEU Regulation

Shipping companies are responsible for complying with the greenhouse gas intensity on board a vessel as defined by the FuelEU Regulation. Importantly, if the vessel has a negative compliance record, shipping companies are liable to pay a FuelEU penalty (Art. 23 FuelEU Regulation).

According to the FuelEU Regulation,

the shipowner or any other organisation or person such as the manager or the bareboat charterer, which has assumed the responsibility for the operation of the ship from the shipowner (i.e. the Document of Compliance holder under the ISM Code - the DoC holder) is responsible for compliance with the regulation, not the time charterer. That means, that the shipowner or the DoC holder is liable for any financial penalties regardless of whose actions/decisions caused the penalty.

The responsibility of the shipowner or DoC holder towards the competent authority it-self ("external relationship") can neither be waived by contractual agreement between the parties of the charter party nor by contractual agreement between the

parties of the ship management agreement. However, this newly introduced regulatory responsibility often does not reflect the reality of the way things are handled in practice.

In the past, the common understanding has been that the polluter pays, i.e. the party whose actions/decisions determine the level of emissions. Following this inconsistent new approach of the EU legislator, there is now a need for the stakeholders to clearly allocate responsibility for compliance with the FuelEU Regulation between themselves on a contractual level ("internal relationship").

Therefore, it is advisable to include clauses addressing the new requirements arising out of the FuelEU Regulation in charter parties and ship

management agreements that define who is responsible for compliance with the FuelEU Regulation and whether a party can claim compensation from the other contracting party in the event that their actions cause a failure to comply with the regulation.

## **BIMCO's response – the new FuelEU Maritime Clause for Time Charter Parties 2024 and FuelEU Maritime Clause for SHIPMAN 2024**

As early as last November, BIMCO had already adopted a model clause for time charter parties for this purpose, to support shipowners and charterers in amending their contracts in line with the obligations under the FuelEU Regulation. By using the "FuelEU Maritime Clause for Time Charter Parties 2024", the parties may – within their internal relationship – clearly define and distribute responsibilities that arise under the FuelEU Regulation.

The incorporation of the model clause enables the shipowner or DoC holder to pass on their "external" responsibility towards the competent authority internally to the time charterer, i.e. the actual polluter. This puts the shipowner or DoC holder in a position in which they can claim compensation from the time charterer even if their "external" responsibility under the FuelEU Regulation towards the competent authority remains unchanged.

In addition, and as was already expected, BIMCO also adapted the "FuelEU Maritime Clause for SHIPMAN 2024", which can be used by shipowners and ship managers in their

ship management agreements. The purpose of this model clause is similar to the one for time charter parties: a clear allocation of responsibility within the internal relationship with the aim of placing responsibility for payment of potential penalties at the door of shipowners and further granting the ship manager compensation rights against the shipowner.

Overall, the new BIMCO model clauses seek to rectify the broken "polluter pays" principle by shifting responsibility back to the party that usually causes the emissions or is at least capable of influencing their causation and by granting the other party in the agreement the contractual right to claim reimbursement.

## **FuelEU Maritime Clause for Time Charter Parties 2024 and FuelEU Maritime Clause for SHIPMAN 2024 – what do they say?**

The "FuelEU Maritime Clause for Time Charter Parties 2024" and the "FuelEU Maritime Clause for SHIPMAN 2024" are a further development of BIMCO's pre-existing "Emissions Trading Scheme Allowances (ETSA) Clause for Time Charter Parties 2022". In May 2023, BIMCO released the latter clause for use in time charter agreements.

The purpose of the ETSA clause was to allocate the costs and responsibilities for obtaining, transferring and surrendering greenhouse gas emission allowances for ships operating under an emissions trading scheme such as the EU Emissions Trading System (EU ETS). Based on the "polluter pays" principle, which is the fundamental principle behind the EU

ETS, the basic idea of the ETSA clause was that the party polluting, i.e. providing and consuming the fuel, was also responsible for providing and paying for the emission trading certificates.

At first glance, the new "FuelEU Maritime Clause for Time Charter Parties 2024" and the new "FuelEU Maritime Clause for SHIPMAN 2024" are much more extensively formulated than the "Emissions Trading Scheme Allowances (ETSA) Clause for Time Charter Parties 2022". This is because the FuelEU Regulation is likely to have an even greater impact and cause a larger burden on the shipping industry than the EU ETS.

The FuelEU Regulation – unlike the EU ETS – does not follow the "polluter pays" principle. It declares the shipowner or the DoC holder overall responsible, irrespective of their ability to influence the amount of emissions produced. Therefore, the new model clauses aim to restore the "polluter pays" principle – at least in the internal relationship between shipowner and charterer or shipowner and ship manager (as DoC holder).

In the next article, we will look in specific detail at the "FuelEU Maritime Clause for Time Charter Parties 2024" and the "FuelEU Maritime Clause for SHIPMAN 2024" and we will examine how the clauses operate to allocate in a more equitable manner the responsibilities that arise under the regulation.



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