



ARTICLE – PART 2 OF 2

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

In Part 1 of this series, we provided an overview of the FuelEU Maritime Regulation and the manner in which responsibility for compliance with its obligations (concerning the specified greenhouse gas intensity on board a vessel) are assigned between the parties – more specifically between the shipowner and the time charterer and between the shipowner and the ship manager.

At the same time, we discussed how the regulation breaks away from the fundamental “polluter pays” principle to lay responsibility for compliance on the party that does not necessarily dictate the decisions around the greenhouse gas intensity levels on board a vessel.

To redress the balance, BIMCO deve-

loped two clauses that we will look at in detail: the “FuelEU Maritime Clause for Time Charter Parties 2024” and the “FuelEU Maritime Clause for SHIPMAN 2024”.

How are the clauses structured?

First, both clauses contain a list of definitions of the terms used, some of which also refer to the FuelEU Regulation itself. Thereafter follow fifteen sub-clauses, which define the allocation of mutual responsibilities in more detail, some of which are highlighted further below.

FuelEU Maritime Clause for Time Charter Parties 2024

In principle, the parties acknowledge that the vessel is required to comply with the regulation and that the shi-

powner will inform the charterer, upon delivery, of the vessel’s “compliance balance” for the previous two Reporting Periods and the aggregated “compliance balance” for the current Reporting Period up to the date of delivery (see Sub-Clause a “FuelEU Maritime Clause for Time Charter Parties 2024”).

The purpose of this is for the time charterer to be able to anticipate possible penalties against the vessel, which are attached to the vessel itself and not the previous charterer or owner. Penalties are only issued once per year by the competent authority, and the time charterer might ultimately have to reimburse the shipowner under the new “FuelEU Maritime Clause for Time Charter Parties 2024”.

As the clause aims to reinstate the “polluter pays” principle, it declares the time charterer responsible for the “pollution” on a contractual level (internal relationship).

Also, under the FuelEU Regulation, the longer the failure to comply continues, the more expensive the penalties will be. Depending on the extent of the non-compliance in the years prior to delivery, the time charterer may have an interest in renegotiating terms with the shipowner.

In accordance with the FuelEU Regulation, the shipowner will also ensure that a monitoring plan for the vessel is recorded in the FuelEU database and that the greenhouse gas intensity of the fuels and energy consumed by the vessel is monitored and reported for verification by an independent auditor (see “FuelEU Maritime Clause for Time Charter Parties 2024”).

The clause specifically requires the shipowner and time charterer to exchange relevant information. The shipowner is obliged to inform the time charterer of the “compliance balance” within the first fifteen days (of each month/each voyage). The “compliance balance” refers to the extent to which the limits for the annual average greenhouse gas intensity of the energy consumed on board the vessel during voyages are exceeded or not.

Although the shipowner/DoC holder always remains responsible towards the competent authority, the time charterer, who operates the vessel and generally purchases bunker/fuels, is obliged to make compen-

sation payments to the shipowner if the time charterer’s conduct has resulted in a penalty being imposed at the expense of the shipowner (see Sub-Clauses d - f of the “FuelEU Maritime Clause for Time Charter Parties 2024”). The shipowner has to provide the time charterer with the calculation and the independently validated information used to calculate a surcharge equal to the FuelEU penalty expected for every month or for that voyage (whichever is applicable) and upon redelivery.

In order not to leave the shipowner, who remains responsible in an external relationship towards the competent authority, unprotected, the clause provides the shipowner with the right to suspend the performance of its obligations under the charter party once the time charterer has failed to pay the surcharge (see Sub-Clause h “FuelEU Maritime Clause for Time Charter Parties 2024”).

Under sub-clause g of the “FuelEU Maritime Clause for Time Charter Parties 2024”, to balance things, the time charterer has a claim for reimbursement against the shipowner if a negative aggregated “compliance balance” for a particular month/voyage in a reporting period is reduced or eliminated (due to the time charterer’s actions).

Also worthy of mention are the sub-clauses i and l of the “FuelEU Maritime Clause for Time Charter Parties 2024”, which deal with the banking/pooling and borrowing mechanisms introduced by the FuelEU Regulation.

FuelEU Maritime Clause for SHIPMAN 2024

Like the “FuelEU Maritime Clause for Time Charter Parties 2024”, first, the parties to the new “FuelEU Maritime Clause for SHIPMAN 2024” acknowledge that the vessel is required to comply with the regulation.

Then, the clause continues to stress – in line with the regulation – that the ship manager, i.e. the DoC holder or its nominee, shall be the responsible compliance entity for the vessel (towards the competent authority, i.e. the external relationship) (see Sub-Clause a and f “FuelEU Maritime Clause for SHIPMAN 2024”).

Thereafter, the clause defines which information the shipowner must provide to the ship manager prior to delivery of the vessel and during the time of the ship management agreement to put the ship manager in a position in which it can fulfil its obligations under the regulation, e.g. reporting (see Sub-Clause b - d “FuelEU Maritime Clause for SHIPMAN 2024”). It is basically clarified that the shipowner who might time-charter its vessel to a third party that decides over fuel consumption, and, thereby, influences the emissions output of the vessel, poses as an information relay for the ship manager.

The shipowner is obliged to provide the ship manager with the required data so that the ship manager is able to take over and fulfil the responsibility under the regulation, which without the ship management agreement, would rest with the shipowner itself anyway.

While the ship manager carries the burden of the regulation and is responsible towards the competent authority, the clause makes sure to define the shipowner's obligations in a detailed fashion to underline that the ship manager is dependent on the shipowner's input to fulfil its responsibilities adequately and secure its position.

In turn, to keep the shipowner informed and for planning purposes, the ship manager is obliged to also provide the shipowner with information, especially on a monthly or per Voyage basis, with the calculated aggregated Compliance Balance of the vessel incurred in the current Reporting Period, as well as the projected Balance, taking into account any banked compliance surplus or advance compliance surplus borrowed from a previous Reporting Period (see Sub-Clause e, g and h "FuelEU Maritime Clause for SHIPMAN 2024").

The ultimate decision making in respect of the banking, borrowing and pooling of the Compliance Balance remains with the shipowner for planning purposes (see Sub-Clause j "FuelEU Maritime Clause for SHIPMAN 2024").

In line with the "polluter pays" principle, the clause thereafter mandates that the shipowner will provide a security to the ship manager to cover the ship manager's potential exposure to a FuelEU penalty for the vessel and, ultimately, will also cover any penalties incurred by the ship manager (see Sub-Clause i, k and l "FuelEU

Maritime Clause for SHIPMAN 2024").

In practice, the ship manager is running the operations of the vessel, but is neither determining its voyage plan nor the type of fuel consumed nor the speed sailed. Hence, the ship manager is not able to influence the amount of emissions produced.

The shipowner, on the other hand, either makes these choices itself or is able to pass the responsibility for these decisions on to the time charterer via the above mentioned "FuelEU Maritime Clause for Time Charter Parties 2024" within the internal relationship.

The "FuelEU Maritime Clause for SHIPMAN 2024" aims to eliminate the gap between the party ultimately responsible and the party that actually makes the relevant decisions. As the ship manager usually does not have a contractual relationship with the time charterer itself, this entails that often the shipowner will be required to pass the responsibility on to the time charterer via the charter agreement (see above).

Finally, the ship manager will receive an additional fee from the shipowner for FuelEU Services, unless already included in the annual management fee (i.e. the latter has factored in the additional fee) (see Sub-Clause m "FuelEU Maritime Clause for SHIPMAN 2024").

If either the fee, a security or a penalty is not paid to the ship manager by the shipowner within ten days of receipt of the ship manager's written request, the ship mana-

ger will be entitled to terminate the entire ship management agreement with immediate effect. This is to allow it to protect its rights and minimise financial risks towards the competent authority in the external relationship if recovery is not materialising within the internal relationship (see Sub-Clause n "FuelEU Maritime Clause for SHIPMAN 2024").

Our "evaluation"

The inclusion of clauses, such as the "FuelEU Maritime Clause for Time Charter Parties 2024" and the "FuelEU Maritime Clause for SHIPMAN 2024" into existing and new contracts will be essential in the long term to meet the requirements of the complex FuelEU Regulation. It will also be the only way to shift responsibility (at least internally) to the actual polluter until the EU regulator decides to change this peculiar regulation that does not reflect the reality of commercial shipping.

The model clauses make it easier to adapt contracts, both in the relationship between shipowner and charterer and between shipowner and ship manager. Even though it is always advisable that the parties tailor their contracts individually – particularly as new additions can impact pre-existing sections in a contract – the BIMCO clauses provide a good starting point. Time will tell which aspects of the FuelEU Regulation require further detailed sub-clauses or amendments to the current model clauses, which are designed to facilitate the daily operation of ships in European waters.



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