

Decoding Green Shipping in Contracts: A Closer Look at BIMCO EU Emissions Trading System Clauses for Voyage Charterparties

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I. INTRODUCTION

Despite playing a vital role in the economy of the European Union (EU) and being recognized as one of the most energy-efficient modes of transportation, the shipping sector significantly contributes to global emissions of greenhouse gases (GHGs).¹ In 2018, international shipping emissions reached 1,076 million tons of carbon dioxide (CO₂),² representing approximately three percent of total global emissions caused by human activities.³ The situation appears even worse at the EU level, as shipping accounts for thirteen percent of emissions from transport.⁴ In this respect, the maritime industry faces mounting pressure to embrace environmentally friendly practices and comply with increasingly stringent regulations from the International Maritime Organization (IMO) and the EU. In response to this challenge, the EU has come to the forefront.⁵ The EU Emissions Trading System (EU ETS),⁶ established in 2005 and the world's largest carbon market, was expanded on January 1, 2024, to include the previously exempted maritime transport sector.⁷ This expansion marks a significant step in combating climate change by implementing a “cap and trade” mechanism to reduce emissions.⁸

1. Paul Balcombe et al., *How to Decarbonise International Shipping: Options for Fuels, Technologies and Policies*, 182 ENERGY CONVERSION & MGMT. 72, 72–88 (2019); *Maritime Transport in EU Emissions Trading System (ETS)*, EUR. COMM'N, https://climate.ec.europa.eu/eu-action/transport/reducing-emissions-shipping-sector/faq-maritime-transport-eu-emissions-trading-system-ets_en.

2. *Reducing Emissions from the Shipping Sector*, EUR. COMM'N, https://climate.ec.europa.eu/eu-action/transport/reducing-emissions-shipping-sector_en.

3. Shiyu Deng & Zhifu Mi, *A Review on Carbon Emissions of Global Shipping*, 1 MARINE DEV. 4 (2023).

4. ELLEN J. EFTSTØL, *The Proposed Extension of the EU-ETS to Shipping: BIMCO's ETS Allowances (ETSA) Clause for Timecharter Parties 2022 Filling a Legal Gap*, in PROTECTING MARITIME OPERATORS IN A CHANGING REGULATORY AND TECHNOLOGICAL ENVIRONMENT 321, 322 (Lia Athanasiou ed., Nomiki Bibliothiki 2023).

5. Anastasia Christodoulou & Kevin Cullinane, *The Prospects for, and Implications of, Emissions Trading in Shipping*, 26 MAR. ECON. & LOGISTICS 168, 171 (2024).

6. *EU Emissions Trading System*, EUR. COMM'N, https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets_en.

7. *Scope of the EU ETS*, EUR. COMM'N, https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets/scope-eu-ets_en (stating that the EU ETS covers emissions from maritime transport in the European Economic Area, consisting of EU member states, Iceland, Liechtenstein, and Norway).

8. Generally, “cap and trade” refers to a government regulatory program designed to limit or cap emissions of certain pollutants, particularly carbon dioxide, from industrial activity. These systems establish an emissions cap for specific pollutants, allocate permits among companies, and allow permit trading. This approach incentivizes emissions reductions while providing flexibility for businesses. The EU ETS—discussed further in the next section—extends

Recognizing the need for support within the industry, the Baltic and International Maritime Council (BIMCO), the leading global shipping association, has proceeded with issuing new ETS standard clauses tailored to ensure ETS compliance and address the potential contractual challenges.⁹ In 2022, BIMCO introduced an ETS clause for time charters, emphasizing the owner's monitoring obligations and the charterer's duty to transfer monthly allowance.¹⁰ This clause has already been widely used. As with the time charter clause, the voyage charter clauses aim to shift the costs of emissions allowances onto the voyage charterer.

With the development of three voyage charterparties clauses, it is worth noting that it is unusual for BIMCO to propose three clauses for the same issue. BIMCO aims to effectively handle the responsibilities of owners and charterers under voyage charters. Therefore, the purpose of this Article is to present and evaluate these new clauses. In terms of structure, Part II provides a brief overview of the ETS system and its extension to shipping is discussed. Part III of the Article then shifts to its core focus by analyzing BIMCO's EU ETS voyage charterparty clauses. Part IV provides a discussion of possible directions for the future. Part V briefly concludes.

II. EU ETS

A. *Historic Overview and the Shipping Industry Inclusion*

The EU ETS is defined as a cornerstone of the EU's "Fit for 55" package to combat climate change and is considered a key tool for reducing GHGs cost-effectively.¹¹ The main legal instrument governing the EU ETS is Directive 2003/87/EC on "establishing a system for greenhouse gas emission allowance trading within the Union" (as amended from time to time, the "ETS Directive").¹² Additionally, it is obligatory for the sectors covered by the ETS Directive to participate in the system. As already mentioned, the EU ETS constitutes a "cap and

beyond intra-EU emissions to include those outside the EU; however, analysis of this extraterritorial application is beyond the scope of this article.

9. Mette K. Fraende, *BIMCO Adopts Portfolio of Four ETS Clauses*, BIMCO (Dec. 8, 2023), <https://www.bimco.org/news/priority-news/2023/12/08-four-ets-clauses>.

10. BIMCO, EMISSION TRADING SCHEME ALLOWANCES CLAUSE FOR TIME CHARTER PARTIES (2022), https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/etsa_clause.

11. *Id.*

12. Council Directive 2003/87, 2003 O.J. (L 275) 32 (EC) (emphasis added) (establishing a system for greenhouse gas emission allowance trading within the Union and amending Council Directive 96/61/EC).

trade” system, which stands as the world’s largest and first multicountry emissions trading system.¹³ The “cap and trade” system establishes a maximum limit for total GHGs allowed by covered entities, which decreases over time to reduce overall emissions.¹⁴ Participants can acquire emission allowances within this limit and trade them among themselves. The capped availability of allowances ensures their value.¹⁵ Precise measurement, reporting, and verification of emissions are crucial for the effective functioning of the EU ETS.

Historically speaking, the Kyoto Protocol, adopted in 1997,¹⁶ could be seen as the harbinger of the EU ETS as it introduced legally binding emissions reduction targets for thirty-seven industrialized countries and highlighted the need for policy instruments to meet these targets. This led to the development of the EU ETS. A green paper presenting initial ideas was published in March 2000, followed by the adoption of the ETS Directive in 2003 and the system’s launch in 2005.¹⁷

Phase 1 (2005-2007) of the EU ETS focused on learning and preparation for Phase 2, covering CO₂ emissions from specific industries, providing most allowances for free, with a penalty of EUR40 per ton of CO₂ for non-compliance.¹⁸ It established a carbon price, enabled free trade in allowances, and developed emissions monitoring infrastructure. However, oversupply led to zero prices by 2007.

Phase 2 (2008-2012) coincided with the first Kyoto Protocol commitment period. It featured a lower cap on allowances, the inclusion of new countries and gases, increased penalties for non-compliance to EUR100 per ton of CO₂, and the introduction of auctions.¹⁹ Despite reductions in allowance caps based on actual emissions, the 2008 economic crisis led to a surplus of allowances and depressed prices.

Phase 3 (2013-2020) introduced significant reforms, including an EU-wide emissions cap, auctioning as the default allocation method, harmonized allocation rules, expanded sectors and gases covered, and the

13. *Development of EU ETS (2005-2020)*, EUR. COMM’N, https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets/development-eu-ets-2005-2020_en.

14. Council Directive 2003/87, art. 3(e), 2003 O.J. (L 275) 32.

15. EFTESTØL, *supra* note 4, at 324.

16. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 162.

17. *Development of EU ETS (2005-2020)*, *supra* note 13; Council Directive 2003/87, *supra* note 12.

18. *Id.*

19. *Id.*

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establishment of the New Entrants' Reserve to fund renewable energy and carbon capture technologies.²⁰

Notably, the allocation process was, in the beginning, decentralized with each member state being responsible for suggesting its own national cap, which was subject to approval by the European Commission. This situation incentivized members to set high caps (i.e. to surrender the corresponding amount of allowances).²¹

In relation to the maritime sector, a proposed amendment, outlined explicitly in Article 3(g)(a), introduces a phased approach for shipping companies to comply with the obligation to surrender allowances, starting in 2024. The schedule is as follows:

- (a) For the year 2024, companies are required to surrender allowances equivalent to forty percent of their verified emissions.
- (b) For the year 2025, the requirement increases to seventy percent of verified emissions.
- (c) Starting from 2026, companies must surrender allowances corresponding to one hundred percent of their verified emissions, continuing annually thereafter.

Further, in cases where the surrendered allowances fall short of the verified emissions from maritime transport for the years 2024 and 2025, the system will cancel an equivalent amount of allowances instead of auctioning them, as outlined in Article 10. This provision aims to cap and limit allowances, ensuring the system accounts for any shortfall between verified emissions and surrendered allowances each year.

B. Breakdown of EU ETS

1. Scope of Application and Allowances Obligations

As of January 1, 2024, the scope of the EU ETS has been expanded to encompass CO₂ emissions from all large vessels, defined as those with a gross tonnage of 5,000 or more, that transport cargo and/or passengers and enter EU ports, irrespective of the flag under which they operate.²² Shipping companies must now ensure that their fleets comply with the

20. *Id.*

21. Joseph Kruger et al., *Decentralization in the EU Emissions Trading Scheme and Lessons for Global Policy*, 1 REV. OF ENVTL. ECON. & POL'Y 112, 116 (2007); Richard Schmalensee & Robert N. Stavins, *Lessons Learned from Three Decades of Experience with Cap and Trade*, 11 REV. OF ENV'T ECON. & POL'Y 59, 69 (2017).

22. Jonas Flodén et al., *Shipping in the EU Emissions Trading System: Implications for Mitigation, Costs and Modal Split*, 24 CLIMATE POL'Y, 969, 970 (2024).

EU ETS regulations, including the obligation to surrender a corresponding number of EU allowances that reflect the total GHGs generated by their fleets in the preceding year.

The EU ETS functions on a route-based framework, which encompasses maritime emissions as:

- (a) one hundred percent of emissions from vessels undertaking voyages that depart from and arrive at ports within the jurisdiction of EU Member States;
- (b) one hundred percent of emissions produced by vessels while docked at or navigating within ports under the jurisdiction of an EU member state, including emissions during berthing and movements within the port;
- (c) fifty percent of emissions from vessels on voyages that depart from a port under the jurisdiction of an EU Member State and arrive at a port outside its jurisdiction; and
- (d) fifty percent of emissions from vessels on voyages that depart from a port outside the jurisdiction of an EU member state and arrive at a port under the jurisdiction of an EU member state.²³

2. Allowances: Definition and Responsibility

The cap is expressed in terms of emission allowances, with each allowance permitting the emission equivalent to one ton of CO₂.²⁴ Shipping operations must limit their greenhouse gas emissions to within their allocated allowances; exceeding this limit may result in stringent fines.²⁵ Moreover, the companies that fall under the EU ETS are obliged to surrender the EU allowances that correspond to their emissions in the Union Registry.²⁶ That means that if a company emits X tons of CO₂ covered under the EU ETS Directive during a reporting period, then that company must buy and surrender X allowances by September 30 of the following year, which is the surrender deadline.²⁷

Moreover, emission allowances can be used only for fulfilling the requirements outlined in the ETS Directive and are transferable.²⁸ Such transferability confers the right to trade these allowances, thus serving as a fundamental prerequisite for the effective operation of the cap and trade

23. *EU ETS—The European Union Emissions Trading Scheme*, BIMCO, <https://www.bimco.org/trending-topics/eu-ets>.

24. *What Is the EU ETS?*, EUR. COMM'N, https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets/what-eu-ets_en.

25. *Id.*

26. *Id.*

27. Council Directive 2023/959, art. 1(21)(c), 2023 O.J. (L 130) 134, 177.

28. Council Directive 2003/87, art. 3(a), 2003 O.J. (L 275) 32, 34.

system. The total volume of allowances, commonly referred to as “the cap” within the EU ETS, is determined by the EU and distributed among its member states.²⁹ Subsequently, allowances can be acquired through a combination of complimentary allocations and those obtained via auction. By way of illustration, in 2021, fifty-seven percent of allowances were subject to auction.³⁰ Member states conduct auctions for their allowances in compliance with the regulations outlined in Chapter II of the ETS Directive and the Auctioning Regulation.³¹ Auctions for emission allowances are conducted on platforms such as the European Energy Exchange AG, serving multiple European countries.³² The highest carbon price in 2022 was EUR98.01 per metric ton.³³ Member states maintain registries for precise allowance tracking, which must be publicly accessible.³⁴

Under Article 3(d)(w) of the Directive, the party responsible for surrendering the allowances is the “shipping company,” which is defined as follows:

The shipowner or any other 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 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.

It should be mentioned that in the event that a voyage was commenced in 2023 but only completed in 2024, shipping companies will need to surrender allowances equivalent to a percentage of the emissions for voyages that are within the scope of the Directive, i.e., voyages that started before but ended after the EU ETS came into force on January 1, 2024, but only for that part of the voyage that took place in 2024.³⁵

29. Council Directive 2003/87, art. 9, 2003 O.J. (L 275) 32, 35.

30. Commission Decision (EU) 2015/1814, art. 2(2), 2015 O.J. (L 264) 1, 3; *EU ETS—Participation in the Auctions and Outlook Secondary Market*, EUR. ENERGY EXCH. AG (Sept. 5, 2024), https://www.eex.com/fileadmin/EEEX/Downloads/Markets/Environmentals/20240905_EU_ETS_-_Participation_in_the_auctions_and_outlook_secondary_market.pdf.

31. Commission Regulation 1031/2010, art. 2, 2010 O.J. (L 302) 1, 10.

32. See *EU ETS Auctions*, EUR. ENERGY EXCH. AG, <https://www.eex.com/en/markets/environmental-markets/eu-ets-auctions>.

33. *EU ETS Price 2022-2024*, STATISTICA, <https://www.statista.com/statistics/1322214/carbon-prices-european-union-emission-trading-scheme>. (last visited Dec. 15, 2024).

34. Council Directive 2003/87, art. 19, 2003 O.J. (L 275) 32, 37.

35. *EU ETS—The European Union Emissions Trading Scheme*, *supra* note 23.

3. Consequences of Non-Compliance

If a shipping company fails to adhere to the specified requirements, such as missing deadlines for surrendering emissions allowances, it may trigger enforcement procedures under Article 16 of the ETS Directive. This Article initially assigns responsibility to member states for establishing penalties—that should be effective, proportionate, and deterrent—concerning infringements of national provisions derived from the Directive.³⁶

Additionally, the Directive mandates a penalty fee of EUR100 per ton of carbon dioxide equivalent emitted for which the responsible entity has not surrendered allowances, alongside the obligation to surrender excess emissions allowances in the following calendar year (Article 16(1)). Moreover, the Directive introduces a “name and shame” sanction, necessitating the publication of the names of non-compliant operators, aircraft operators, and shipping companies (Article 16(2)). As a final measure, the Commission suggests that member states should have the authority to refuse entry to ships under the responsibility of the implicated shipping company, with exceptions for the flag state of the ship, which retains the power to detain it (Article 16(3)).

These measures are contingent upon the shipping company failing to comply with surrender requirements for two or more consecutive reporting periods, with unsuccessful enforcement attempts.³⁷ Furthermore, the shipping company should be granted the opportunity to present its observations before an expulsion order is issued or the ship is detained.³⁸ Upon issuance of an expulsion order, all member states, except the flag state, are required to deny port access to the ship until the allowances are surrendered.³⁹

III. BIMCO VOYAGE CHARTERPARTY CLAUSES

A. *Introductory Points and Allocation of Costs Issue*

BIMCO plays a crucial role in standardizing shipping contracts, providing widely adopted clauses that address regulatory and operational challenges in shipping.⁴⁰ However, before we delve into BIMCO’s contractual arrangements with respect to the voyage charter parties, one

36. Council Directive 2003/87, art. 16, 2003 O.J. (L 275) 32, 37.

37. EFTESTØL, *supra* note 4, at 332-33.

38. *Id.* at 333.

39. *Id.*

40. For more details on BIMCO and its role, see *EU ETS—The European Union Emissions Trading Scheme*, *supra* note 23.

should bear in mind the issue of allocations and the costs that these clauses attempt to solve.

As already mentioned, the EU ETS shipping directive, as well as the MRV Regulation,⁴¹ specify that the “shipping company” is the entity accountable for monitoring and reporting relevant parameters during the annual reporting period.⁴² Historically, this responsibility did not pose a significant challenge, as there were no associated costs with the registration process. However, with the inclusion of shipping in the EU ETS, the obligation extends beyond reporting emissions to also include surrendering allowances.

Typically, the shipowner delegates responsibility for the vessel to a ship management company through a management agreement, wherein the ship management company assumes operational responsibility for the vessel.⁴³ This arrangement allows both the shipowner and the ship management company to be considered responsible shipping companies. However, the ship management company’s responsibilities are typically limited in scope, with commercial operations often being delegated to a third party, the charterer (except in the case of a bareboat charterparty where the charterer assumes both technical and commercial responsibility).⁴⁴

Time charterers generally have a broader range of authority compared to voyage charterers, as they manage the commercial operation of the vessel with varying degrees of control.⁴⁵ Time charterers have more extensive authority, allowing them to utilize the vessel for various purposes and routes, while voyage charterers have a more limited scope of authority due to the pre-agreed voyage and, therefore, the owners under a voyage charter reasonably, as a starting point, expect the charterers to cover the costs.⁴⁶ Despite the charterer being responsible for decisions related to fuel consumption, emissions, and allowance surrender, these factors may not always align with the polluter pays principle. For this reason, the Commission and the EU Council acknowledge this challenge and propose resolving it through contractual agreements,⁴⁷ which seem to

41. Commission Regulation 2015/757, art. 4, 2015 O.J. (L 123) 55, 61.

42. See Council Directive 2003/87, art. 3(w), 2003 O.J. (L 275/32)

43. See BIMCO, SHIPMAN 2024, <https://www.bimco.org/contracts-and-clauses/bimco-contracts/shipman-2024>.

44. EFTETØL, *supra* note 4, at 334.

45. *Id.*

46. *Id.*

47. *Id.* at 335; see also Preamble 20 of EU ETS 2021 Proposal.

be the only manner for effectively handling both the owner's and charterer's responsibilities.

In light of the above, BIMCO's new ETS clauses have been formulated to accommodate various emission schemes, including, but not limited to, the EU ETS, ensuring adaptability to potential future schemes. Additionally, it should be mentioned that the subcommittee has developed three clauses for the voyage charterparties that aim at affording shipping stakeholders more flexibility in selecting the most suitable mechanism based on their specific trade and business requirements.

All three clauses share a common foundation, delineated by the charterer effectively paying the owner for the emission allowances required for the voyage, while the owner remains responsible for surrendering/transferring (depending on the clause) the necessary emission allowances in accordance with the applicable emission scheme.⁴⁸ In essence, by incorporating one of these clauses, the owner/shipping company can secure reimbursement from the charterers for the costs associated with emission allowances. This arrangement provides clarity for both parties about the implications of the EU ETS on the voyage. According to the Directive (Article 3(g)(c)), "operation of the ship" encompasses decisions regarding the cargo carried, the route, and the speed of the ship. However, when a ship is operating under a voyage charter, it may not be straightforward to assume that the charters will automatically bear this responsibility.

Ultimately, the primary variables determinants influencing emission allowances costs encompass (i) the estimated quantity of required emissions allowances for the voyage, predetermined prior to embarkation, and (ii) the market-driven fluctuation in the price of emissions allowances.

B. ETS-Emission Scheme Freight Clause for Voyage Charter Parties 2023

The ETS-Emission Scheme Freight Clause for Voyage Charter Parties 2023 (the "Freight Clause") stipulates that all costs that arise from the surrender of emission allowances equivalent to the ship's emissions for the voyage performed under the charterparty are integrated into the freight payable under the voyage charterparty.⁴⁹ Consequently, the

48. See BIMCO, ETS-EMISSION SCHEME FREIGHT CLAUSE FOR VOYAGE CHARTER PARTIES 2023, subclause (d), <https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/ets-emission-scheme-surcharge-clause-for-voyage-charter-parties>.

49. For the full wording of the clause, see ETS-EMISSION SCHEME FREIGHT CLAUSE FOR VOYAGE CHARTER PARTIES 2023, *supra* note 48.

pertinent emission allowances are calculated as a portion of the freight due and thus are quantified in monetary terms.⁵⁰

Furthermore, it is specified that upon receipt of payment of freight in full from the charterers, the owners have no right of recourse against the charterers in relation to the costs stemming from the surrender of emissions allowances.⁵¹ However, this is without prejudice to the owner's right to recover costs for additional emission allowances resulting from the charterer's breach of the charterparty.⁵² It should also be noted that by including these costs into the freight payable under the charterparty, there is a likelihood of their becoming subject to a commission.⁵³ Notably, this clause aims to simplify and rationalize agreements by embedding the agreed-upon cost within the freight, thereby facilitating straightforward identification of the amount corresponding to the emission allowances.⁵⁴

C. ETS-Emission Scheme Surcharge Clause for Voyage Charter Parties 2023

The ETS-Emission Scheme Surcharge Clause for Voyage Charter Parties 2023 (the "Surcharge Clause") deals with all costs arising from the surrender of emission allowances for the voyage by the payment of an emission scheme surcharge to the owners.⁵⁵ That means that parties will agree to a mutually decided amount in the currency of choice to be paid by the charterer to the owner in cash.⁵⁶ In terms of timing, surcharge should be paid (i) on the date of the initial payment of freight (if freight is payable in installments), (ii) on the date the freight is due (if it is a one-off payment), or (iii) within a specified number of days following the ship's departure from the load port.⁵⁷ As per the explanation note, such a surcharge generally is not subject to any brokerage commission (in contrast with the freight clause).

50. *Id.* at subclause (a).

51. *Id.* at subclause (b).

52. *Id.* at subclause (c).

53. *See id.*, explanatory notes.

54. Marie-Anne Moussalli & Ioanna Tsekoura, *BIMCO's New ETS Clauses*, CLYDE & CO., (Feb. 29, 2024), <https://www.clydeco.com/en/insights/2024/02/bimco-s-new-ets-clauses>.

55. BIMCO, ETS-EMISSION SCHEME SURCHARGE CLAUSE FOR VOYAGE CHARTER PARTIES 2023, <https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/ets-emission-scheme-surcharge-clause-for-voyage-charter-parties>.

56. *Id.* at subclause (a); *see id.* at subclause (a), explanatory notes. Note that currency should be included as there is no default if left blank.

57. *See id.* at subclause (a), explanatory notes. If the parties fail to insert a specific number of days, then it is provided that the default shall be fourteen days.

The rest of the architecture of the clause is similar to the freight clause, i.e., once the owner receives full payment of the mutually pre-agreed amount, the charterer is released from its liability for any costs arising from the surrender of the emissions allowance for the voyage performed under the charterparty,⁵⁸ apart from the scenario that additional emission allowances result from the charterer's breach of the charterparty.⁵⁹

It shall be mentioned, though, that non-payment of the surcharge is legally treated as non-payment of freight, meaning that the owners are entitled to take the same actions against the charterers in circumstances where the charterers have failed to pay freight under the charterparty.⁶⁰

Parties can also opt for adding the optional provision of "price adjustment" to protect themselves in the event that the spot price of an emission allowance has changed over time, allowing them to mitigate the risk of agreeing to an emission scheme surcharge.⁶¹

D. Emissions Scheme Transfer of Allowances Clause for Voyage Charter Parties 2023

The ETS-Emission Scheme Transfer of Allowances Clause for Voyage Charter Parties 2023 ("Transfer Clause") deals with the transfer of emission allowances.⁶² Under this clause, the parties have the option to either (i) agree upon the transfer of a specified quantity of emission allowances corresponding to the vessel's emissions during the charterparty to the charterers, to be received into the owners' designated emission scheme accounts,⁶³ or (ii) in the absence of a specified quantity, it is stipulated that the owners must, no later than the first day of the laycan, furnish the charterers with an estimate of the emission allowances pertaining to the vessel's anticipated emissions for the voyage(s).⁶⁴

58. *Id.* at subclause (c), explanatory notes.

59. *Id.* at subclause (d), explanatory notes.

60. *Id.* at subclause (e), explanatory notes.

61. Note that this mechanism refers to a change in the spot price of emission allowances, not an adjustment in the actual quantity of allowances. If parties wish to address the actual quantity, refer to subclause (b) of the *ETS-Emission Scheme Transfer of Allowances Clause for Voyage Charter Parties 2023*.

62. For the full wording of the clause, see BIMCO, ETS-EMISSION SCHEME TRANSFER OF ALLOWANCES CLAUSE FOR VOYAGE CHARTER PARTIES 2023, <https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/ets-emission-scheme-transfer-of-allowances-clause-for-voyage-charter-parties>.

63. *Id.* at subclause (a).

64. *Id.* at subclause (b).

In scenario (ii), a reconciliation mechanism is included in the event of any variance between the estimated and actual quantities of emission allowances. According to this mechanism, the owners are obligated to refund any surplus to the charterers, or the charterers are required to transfer the discrepancy to the owners within a specified timeframe after the owners provide written notice under subclause (b) of the charterparty.⁶⁵ This is also without prejudice to the owner's right to recover costs for additional emission allowances resulting from the charterer's breach of the charterparty.⁶⁶

Furthermore, it is indicated that akin to the Surcharge Clause, failure by the charterers to effectuate the transfer of emission allowances as mandated under the clause will be treated in the same manner as non-payment of freight.⁶⁷

E. Comparison

In summary, this analysis reveals the distinct features and appropriate applications of each clause. The Freight Clause incorporates costs directly into the freight without provisions for price adjustments. This simplicity and certainty make it particularly suitable for single fixtures or scenarios where a fixed cost is desired.

The Surcharge Clause allows owners to claim costs as a separate surcharge, but not strictly as a surcharge, presenting a transparent breakdown of expenses. This approach may be preferred for fixtures arranged well in advance, as it permits adjustments to freight rates based on price index fluctuations.⁶⁸

The Allowances Transfer Clause pertains to scenarios where fixed costs are not agreed upon beforehand but instead involve the transfer of emissions allowances. Under this clause, charterers are required to provide allowances instead of cash. Two options are available: (a) a pre-voyage fixed estimated annual usage quantity or (b) post-voyage determination of emission allowances by the owner, making it suitable when the charterer intends to procure and transfer emission allowances. The alternative offered under this clause ensures emissions allowances correspond to actual emissions, which entails greater complexity.

65. *Id.* at subclause (c).

66. *Id.* at subclause (d).

67. *Id.* at subclause (e).

68. *BIMCO Expands Its ETS Clause Library—Now for Voyage Charters*, GORRISSEN FEDERSPIEL (Jan. 3, 2024), <https://gorrissenfederspiel.com/en/bimco-expands-its-ets-clause-library-now-for-voyage-charters>.

IV. REMARKS AND FUTURE DIRECTIONS

The aforementioned clauses are meticulously drafted and anticipated to serve as foundational elements for ETS clauses in voyage charters across the industry. However, it is critical to recognize that BIMCO clauses are standardized templates that are modified to align with the best interests of the contracting parties. In this context, when incorporating an ETS clause into a voyage charterparty, the parties must carefully consider various factors.

A. *Current Remarks*

First, one should consider the demurrage issues. In shipping law, “demurrage” refers to the charges payable to the shipowner by the charterer for the detention of the vessel beyond the agreed upon period for loading or unloading.⁶⁹ This period, known as “laytime,” is specified in the charterparty. When the laytime is exceeded due to the charterer’s failure to load or unload the cargo within the stipulated time, the charterer is liable to pay demurrage as a form of liquidated damages.⁷⁰ Notably, most use standardized clauses that can be incorporated into charterparties to address demurrage constitute Clause 5 in GENCON 1994⁷¹ and Clause 7 in NYPE 2015.⁷²

Drawing on the prior analysis, it is clear that the three clauses suggest that shipowners are not entitled to seek compensation from charterers for additional costs arising from increased vessel emissions caused by factors beyond the shipowners’ control, such as port congestion. Although demurrage provisions typically cover compensation for delays, the BIMCO clauses do not explicitly address demurrage. As a result, the explanatory notes recommend that contracting parties consider the

69. See, e.g., TERENCE COGHILIN ET AL., *TIME CHARTERS* (2014) (explaining that demurrage is a liquidated sum agreed upon in the charterparty, payable to the shipowner for any delay beyond the stipulated laytime).

70. *Id.*

71. This clause specifies the terms for laytime and demurrage: *GENCON 1994*, BIMCO, <https://www.assagenti.it/Public/doc/4.%20GENCON%201994.pdf> (last visited Nov. 10, 2024) (stating that demurrage shall be paid per running day and pro rata for any part of a running day for all time used in excess of the allowed laytime at the rate stated in Box 22).

72. This clause outlines the duration of the charter and the provisions for demurrage: *NYPE 2015 Time Charter*, SING. MAR. FOUND. (June 3, 2015), <https://www.smf.com.sg/wp-content/uploads/2018/11/22-document-nype-2015-sample-copy.pdf> (stating that if the vessel is detained by the charterers beyond the period agreed, the charterers shall pay for the time so used at the demurrage rate stated in the schedule).

calculation of emission allowances and make necessary adjustments to laytime and demurrage rates in their charterparty agreements.

In situations where the charterer assumes the risk of port congestion, as seen in a port charter arrangement, it is advisable for the parties to consider several strategies to mitigate potential financial impacts; for example, they might increase the demurrage rate to better reflect the cost implications of such delays.⁷³ Alternatively, the parties could implement a “demurrage surcharge” specifically designed to cover the actual costs incurred due to the increased emissions resulting from the delay.⁷⁴ This surcharge would act as a financial buffer, ensuring that the shipowners are adequately compensated for the additional expenses without having to rely solely on the base demurrage rate, which may not accurately reflect the true cost of extended emissions. By proactively addressing these considerations within the charterparty agreements, both parties can achieve a more equitable allocation of costs associated with unforeseen delays and increased emissions, thereby fostering a more balanced and sustainable contractual relationship.

Second, the three voyage clauses empower shipowners to seek damages in the event of a charterer’s breach of the charterparty. This provision is particularly relevant in scenarios where the vessel is detained due to the charterer’s breach, as elucidated in the explanatory notes. BIMCO has introduced a standard clause that mandates shipowners to furnish documentation substantiating their actual losses resulting from the charterer’s breach. However, in practice, shipowners may encounter difficulties in substantiating their claims by merely referencing the disparity between the agreed surcharge and their actual voyage-related costs. This is especially problematic if the surcharge does not accurately reflect the shipowners’ expenses under normal operating conditions (i.e., in the absence of a breach).

Shipowners might suffer financial losses on the agreed surcharge, which may not adequately represent the baseline costs. In such cases, determining the actual losses attributable to delays caused by the charterer’s breach—which result in excessive emissions and necessitate additional emission allowances—requires precise data on the actual bunker consumption during the voyage or delay. This underscores the paramount importance of continuously recording bunker consumption and being able to substantiate the asserted baseline emissions, assuming no breach occurs.

73. FEDERSPIEL, *supra* note 68.

74. *Id.*

To address these challenges, the parties might consider incorporating a liquidated damage clause similar to the demurrage mechanism for losses incurred due to delays.⁷⁵ It should be noted that liquidated damages refer to a predetermined sum agreed upon by the parties to a contract.⁷⁶ This sum, specified within the contract, is payable as compensation by the party that breaches the agreement. It represents a genuine pre-estimate of the losses that the non-breaching party would incur as a result of the breach. Liquidated damages are intended to provide a clear and mutually agreed-upon measure of compensation, thereby avoiding the need for lengthy and potentially contentious calculations of actual damages.

Such a clause would provide a predefined amount payable for each day of delay, thus simplifying the compensation process. Alternatively, the parties could agree upon specific principles for determining the shipowner's claims; for example, they might agree that the costs of any additional emission allowances should be based on the prevailing price at the time of the voyage according to a specified index, rather than on the owner's actual losses, which can fluctuate depending on the timing of the owner's purchases of emission allowances.⁷⁷

By establishing clear and objective criteria for calculating these costs, the parties can reduce disputes and ensure a fair allocation of financial responsibilities arising from delays and increased emissions. This approach not only fosters transparency but also ensures that both parties have a mutual understanding of the economic implications of potential breaches, thereby enhancing the overall stability and predictability of the contractual relationship.

Finally, it is important to note that the standard clauses do not refer to reimbursement of emission allowance costs when the vessel is carrying cargo for more than one voyage charterer.

B. Future Considerations

From a legal point of view, one can argue that the BIMCO EU ETS clauses for charter parties constitute a sound basis for dealing with emissions responsibilities that bring clarity and safety to shipping stakeholders. Operationally, however, these clauses require parties to implement stringent monitoring and reporting practices for ensuring

75. *Id.*

76. Among others, see JOHN F. WILSON, *CARRIAGE OF GOODS BY SEA* (7th ed. 2010). Liquidated damages are contractually stipulated damages that are intended to cover losses resulting from a breach without the need for the injured party to prove actual damage.

77. FEDERSPIEL, *supra* note 68.

compliance with EU ETS, a situation that could end up being cumbersome, especially for smaller operators.⁷⁸

At the end of the day, though, it is true that only case studies of real-world applications can provide helpful insights into how these clauses operate in practice, showing both successes and challenges that need to be dealt with. Of course, as EU ETS continues to evolve (e.g., adding new regulations), the BIMCO clauses may need to be revised. In light of the above, an ongoing collection of industry feedback will be crucial in shaping the future iterations of the above analyzed clauses with a view to ensuring that they will remain effective and relevant.

V. CONCLUSION

As a concluding observation, it is evident that the inclusion of the shipping industry in the EU ETS marks a significant challenge, and, in this respect, the BIMCO EU ETS voyage charterparty clauses represent a substantial step towards addressing existing legal ambiguities within the framework of green shipping contracts and, as a result, fostering environmental responsibility within the maritime sector. In fact, these clauses represent a proactive approach where, by reallocating emissions costs to charterers, they not only address immediate regulatory requirements, but also have the potential to drive long-term investments in sustainable shipping practices. Of course, there are no “one fits all” solutions, meaning that these template clauses constitute the starting negotiating point and may require adjustment to adhere to the needs of the relevant parties. Undeniably, though, the true measure of their success will unfold steadily over time as the shipping stakeholders start using and adapting to these new contractual norms and the broader goals of environmental sustainability.

78. Friederike Hesse, *Up to €1.5m per Year: Understanding Financial Implications of the EU ETS*, SEATRADE MAR. NEWS (Mar. 2, 2023), <https://www.seatrade-maritime.com/opinions-analysis/15m-year-understanding-financial-implications-eu-ets>.