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## Emission Trading Systems – BIMCO Publishes Four New Clauses

The inclusion of shipping in the EU ETS from 1 January 2024 has brought into focus its practical and contractual implications. In response to the need to find a contractual solution, BIMCO has released a suite of three voyage charter party clauses and a clause for BIMCO's ship management contract.

These clauses add to the already published *BIMCO Emission Trading Scheme Allowances Clause for Time Charter Parties 2022*. The latest clauses from BIMCO have been drafted to address emission trading systems (ETS), including the EU ETS, and the allocation of cost and responsibility in a voyage charter context and a ship management context respectively.

### The BIMCO Clauses

#### 1. ETS – SHIPMAN Emission Trading Scheme Allowances Clause 2023

##### *Purpose of the clause*

This clause is applicable to ship management contracts and is designed to allocate the cost and responsibility for obtaining, transferring and surrendering emission allowances for ETS between an owner and a ship manager. Published as a standalone clause so it can be used with the BIMCO SHIPMAN 2009 contract, it will be incorporated into the updated BIMCO SHIPMAN contract due for publication in 2024.

The clause caters for two situations: (i) that the owners are the party responsible for compliance under and ETS or, alternatively, (ii) that the managers are the responsible entity for compliance under the ETS.

##### *Managers as the Responsible Entity*

##### (i) Position under the EU ETS

Where the parties choose that the managers are to be the responsible entity for compliance with the EU ETS, Regulation (EU) 2023/2599 requires that a signed document, which clearly indicates that the

managers have been mandated by the ship owners to be responsible for compliance with the EU ETS, is to be provided to the relevant administering authority. In circumstances where such a document cannot be provided, then the ship owner will be considered as the responsible entity for EU ETS obligations. It is, therefore, important that any ship owner who chooses to pass on the responsibility for compliance with the EU ETS to the ship manager ensures that an express mandate has been given in accordance with Regulation (EU) 2023/2599. Notably, BIMCO provides a health warning at the start of the clause to highlight this issue in respect of the EU ETS and its implications to the clause.

(ii) Transfer of allowances from owners to managers

Where the ship manager has responsibility for compliance, subclause (b)(iii) provides that the owners are to transfer emission allowances based on the ship manager's written estimate for the ensuing month, and there is a running reconciliation of allowances for previous months and an adjustment for any previous shortfall or excess.

It is left to the parties to insert the timescale within which owners are to transfer the emission allowances. When agreeing this timescale, consideration should be given to any timescale agreed between owners and their charterers pursuant to an ETS clause in the charter party.

BIMCO's explanatory notes to the clause state that where the *BIMCO Emission Trading Scheme Allowances Clause for Time Charter Parties 2022* has been incorporated into the charter party, then the time for transfer of allowances in subclause (b)(iii) of the *ETS – SHIPMAN Emission Trading Scheme Allowances Clause 2023* would need to be at least 45 days after receipt of the managers' written request, so that the two clauses are aligned. Should the ETS clauses within a ship management contract and a charter party not be aligned, then the owners may potentially be required to transfer the allowances to the ship manager before receiving the same allowances from their charterers. Owners should be mindful of this when agreeing ETS clauses both up and down the charter party chain to limit their exposure, taking into consideration any possible time extensions permissible under the charter party. Conversely, ship managers may be looking to agree a shorter time frame to limit their exposure.

(iii) Financial security

As an alternative to owners transferring the emission allowances, subclause (b)(vi) provides that the parties may instead agree financial security, but the form and nature of such security would need to be separately negotiated.

*Termination*

There is also an option, under subclause (d), to terminate the ship management agreement with immediate effect, and upon giving notice, if either party fails to comply with any of its obligations under the clause. This may offer comfort to both owners and ship managers given the potential consequences to the other party of a breach of the EU ETS. For example, if the ship manager breaches their obligations it could lead to owners having their ship(s) banned from EU ports, or if the owners breach their obligations it could result in a considerable credit risk for the ship manager.

## **2. ETS – Emission Scheme Freight Clause for Voyage Charter Parties 2023**

One of three BIMCO ETS clauses for voyage charters, the *ETS – Emission Scheme Freight Clause for Voyage Charter Parties 2023* includes in the freight rate the costs arising from the surrender of emission allowances for a voyage. The purpose of the clause is that the charterers will pay the owners for the emission allowances required for the voyage, in keeping with the ‘polluter pays’ principle. Responsibility remains with owners for compliance with the emission scheme and for surrendering the emission allowances.

In circumstances where a breach of the charter party by charterers results in the vessel releasing more emissions than anticipated, subclause (c) allows owners to recover from charterers “any costs arising from the surrender of [these] Emission Allowances”. Arguably, this wording could be taken to mean costs over and above the allowance costs themselves. An example of such a situation may be where the vessel is detained due to charterers’ breach of the charter party.

## **3. ETS – Emission Scheme Surcharge Clause for Voyage Charter Parties 2023**

Under the *BIMCO ETS – Emission Scheme Surcharge Clause for Voyage Charter Parties 2023*, the costs of surrendering emission allowances for the voyage are paid by charterers to the owners by way of an Emission Scheme Surcharge. Responsibility remains with owners for compliance with the emission scheme and for surrendering the emission allowances.

The parties are to insert at subclause (a) a mutually agreed amount for the Emission Scheme Surcharge, and there is no default amount if subclause (a) is left blank.

The clause also includes an optional subclause (g) which allows for a price adjustment where the spot price for emission allowances changes, rather like how a bunker adjustment factor addresses fluctuations in the bunker market.

If a charterer fails to pay the Emission Scheme Surcharge, subclause (e) stipulates that this is to be treated in the same way as a non-payment of freight.

This clause also includes wording equivalent to subclause (c) of the *ETS – Emission Scheme Freight Clause for Voyage Charter Parties 2023* (although at subclause (d)) and so our comments above in respect of subclause (c) of that clause are repeated here.

## **4. ETS – Emission Scheme Transfer Allowances Clause for Voyage Charter Parties 2023**

This clause, the third of the BIMCO ETS for voyage charter clauses, deals with the transfer of emission allowances.

Under this clause the voyage charterer is to transfer the emission allowances to owners and owners are, in turn, responsible for surrendering the requisite number of emission allowances.

(i) The parties insert the agreed number of emission allowances which are to be transferred by the date on which freight falls due (either in full or first initial payment if payment of freight is by instalment) or within a specified number of days (the default is 14 days) of sailing from the load port, whichever is earlier. If this option is chosen, then the agreed number of emission allowances is not subject to any adjustment.

(ii) The owners notify charterers in writing, by no later than the first day of the laycan, the estimated number of emission allowances for the voyage(s). The allowances are to be transferred by the date on which freight falls due (either in full or first initial payment if freight is payable by instalment) or within a specified number of days (default is 14 days) of sailing from the load port (whichever is earlier). There is an obligation on owners to notify charterers of the actual quantity of emissions allowances for the voyage within a specified number of days (default is 14 days) of completion of discharge of the cargo; where the actual quantity of emission allowances is higher or lower than the estimate provided by owners then any difference is to be transferred by charterers to owners or vice versa. Another point to note is that the clause includes a definition of “voyage(s)” within which the parties insert the named load port(s), discharge port(s) and a ballast port / location. Should the parties fail to do so then the default position is that the “voyage(s)” will mean any voyage(s) or shipment(s) performed by the vessel under the charter party, including any ballast voyage and any laden legs. Therefore, if the parties wish to exclude the ballast port / location, or only include a portion of the ballast leg, then this must be inserted. This is significant as owners’ calculation of the estimated number of emission allowances will be made on the basis of what is defined as the “voyage(s)”.

Subclause (e) also provides that if a charterer fails to transfer the emission allowances then this is to be treated in the same way as a non-payment of freight.

Links to the BIMCO ETS clauses and their guidance notes are below:

- [ETS – Emission Trading Scheme Allowances Clause for Time Charter Parties 2022 \(bimco.org\)](#)
- [ETS – SHIPMAN Emission Trading Scheme Allowances Clause 2023 \(bimco.org\)](#)
- [ETS – Emission Scheme Freight Clause for Voyage Charter Parties \(bimco.org\)](#)
- [ETS – Emission Scheme Surcharge Clause for Voyage Charter Parties \(bimco.org\)](#)
- [ETS – Emission Scheme Transfer of Allowances Clause for Voyage Charter Parties \(bimco.org\)](#)

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Source of Information: The NorthStandard P&I Club