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BIMCO's CII Clause for Time Charters: Towards a New Era of Climate Drafting

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Abstract:

BIMCO's CII clause for time charters marks a significant change in the way that BIMCO has traditionally drafted compliance clauses for environmental regulations. The CII clause includes many mechanisms recently employed in the contractual integration of net zero targets into commercial agreements. Like climate clauses, the BIMCO CII clause is underpinned by a cooperative norm for the achievement of collaborative data sharing and green performance.

Introduction

At the Marine Environment Protection Committee's (MEPC) 76th session in June of 2021, the International Maritime Organisation (IMO) adopted amendments to MARPOL Annex VI, introducing mandatory goal-based technical and operational measures to reduce the carbon intensity of international shipping. These include the Energy Efficiency Existing Ship Index (EEXI);¹ the enhanced Ship Energy Efficiency Management Plan (SEEMP);² and an operational Carbon Intensity Indicator (CII) rating scheme. The new energy efficiency requirements will come into force on 1 January 2023 and will affect a number of activities undertaken by shipowners and charterers. The EEXI employs the same methodology as its predecessor, the Energy Efficiency Design Index (EEDI), yet is applicable to existing ships presently falling outside the EEDI regulations.³ The CII measures energy efficiency in grams of CO₂ emitted per cargo-carrying capacity and nautical mile to determine a ship's annual rating ranging from A to E.⁴ These changes also coincide with the European Union's (EU) 'Fit for 55' proposed package which will include FuelEU Maritime,⁵ a proposal to drive the demand for clean fuels coupled with an obligation to use on-shore power,⁶ and will also see shipping included in the EU Emissions Trading Scheme.⁷

To assist the industry in navigating these complex standards relating to decarbonisation, the Baltic and International Maritime Council (BIMCO) has released three clauses including the 'EEXI Transition

¹ MEPC.328(76) (adopted 7 October 2022) Amendments to MARPOL Annex VI (2021 revised MARPOL Annex VI) implementing EEXI and associated guidelines and/or any subsequent amendments.

² Approved SEEMP needs to be kept onboard from 1 January 2023.

³ MEPC.334(76) (adopted on 17 June 2021) 2021 Guidelines on Survey and Certification of the Attained Energy Efficiency Existing Ship Index (EEXI).

⁴ MEPC.339(76) (adopted on 17 June 2021) 2021 Guidelines on the Operational Carbon Intensity Rating of Ships (CII Rating Guidelines, G4).

⁵ Proposal for a Regulation of the European Parliament and of the Council on the use of renewable and low-carbon fuels in maritime transport and amending Directive 2009/16/EC (COM/2021/562) final.

⁶ The FuelEU maritime proposal used the European Parliament resolution of 27 April 2021 on technical and operational measures for more efficient and cleaner maritime transport (2019/2193(INI)) as a starting point. The 2019 resolution considers slow steaming as a key operational and propulsion measure.

⁷ Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union, Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading scheme and Regulation (EU) 2015/757 (COM/2021/551) final.

Clause For Time Charter Parties 2021',⁸ 'ETS - Emission Trading Scheme Allowances Clause For Time Charter Parties 2022',⁹ and most recently, the 'CII Operations Clause For Time Charter Parties 2022'.¹⁰ Whilst the EEXI Transition Clause and the ETS Clause are aligned with traditional approaches to apportioning the responsibility for environmental compliance between charterer and owner in time charters, BIMCO's CII clause marks a new direction in charterparty clauses – one that recognises that charterparties require cooperative norms for achieving green shipping.¹¹ This may very well be due to the nature of the CII regulations themselves, but is also in keeping with a wider debate on the role of contract law and the use of contracts in advancing sustainability goals.¹² This Article will provide an analysis of the BIMCO CII Clause to illustrate how it marks a significant departure from traditional BIMCO environmental compliance clauses and reflects a new era of climate drafting

As a starting point, the first section of this Article will outline the problems associated with traditional time charters in achieving energy efficiency. The scope of this Article is limited to an analysis of time charters as the standard form agreements which most notably create a situation of 'split incentives' in the context of minimising airborne emissions.¹³ This initial discussion will also elucidate how recent environmental compliance clauses have fitted themselves neatly within the traditional allocation of owners' and charterers' duties so that the problem of split incentives is in fact exacerbated by adherence to new environmental regulations. The second section of this Article will analyse the compatibility of the BIMCO CII clause with emerging drafting practices that include the uptake of climate clauses and the establishment of green norms in maritime contracts. This Article supports a fundamental premise that standard form agreements are key instruments for business norm creation,¹⁴ particularly in an international sector where standard forms comprise sources of transnational private law.¹⁵ As such, drafting heavyweights such as BIMCO are well placed to develop contractual tools that achieve greater collaboration between parties in meeting climate change targets.

I) Split Incentives and Environmental Compliance Clauses

The frameworks employed to categorise the barriers to energy transitions identify that market failures inhibit the implementation of energy efficiency technology because traditional 'neoclassical

⁸ BIMCO, EEXI Transition Clause for Time Charter Parties 2021 https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/2021_eexi_transition_clause#:~:text=Definitions,comply%20with%20the%20new%20regulations accessed 15 December 2022.

⁹ BIMCO, Emission Trading Scheme Allowances Clause For Time Charter Parties 2022 https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/etsa_clause accessed 15 December 2022.

¹⁰ BIMCO, CII Operations Clause For Time Charter Parties 2022 <https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/cii-operations-clause-2022> accessed 15 December 2022. As far back as 2011, BIMCO released slow steaming clauses which can also assist actors in negotiating speed reduction under time charters and voyage charters.

¹¹ 'Green shipping' is a term used by the author to denote efforts in the sector aimed at minimising the environmental outputs of shipping. It is a narrower concept than 'sustainable shipping', yet is broad enough to consider more than climate change impacts caused by emitting CO₂ into the atmosphere.

¹² Larry Dimatteo, 'Right to a clean environment: Role of contracts and contract law' (2019) 1 *Revija Kopaonické škole prirodnog prava* 37 -58.

¹³ Nishatabbas Rehmatulla and Tristan Smith, 'The impact of split incentives on energy efficiency technology investments in maritime transport' (2020) 147 *Energy Policy* 111721; Hannes Johnson and Karin Andersson, 'Barriers to energy efficiency in shipping' (2016) 15 *WMU J Marit Affairs* 79–96.

¹⁴ Ulf Bernitz, 'Commercial Norms and Soft Law' (2013) 58 *Scandinavian Studies in Law* 29-43.

¹⁵ Joanne Braithwaite, 'Standard Form Contracts as Transnational Law: Evidence from the Derivatives Markets Standard Form Contracts as Transnational Law' (2012) 75(7) *Modern Law Review* 0026-7961, 779.

assumptions that define an ideal market are violated'.¹⁶ In decarbonising shipping, the main economic market failures are identified as: 1) imperfect information, 2) adverse selection, 3) split incentives, and 4) principal-agent problem.¹⁷ The first two relate to insufficient information regarding energy efficiency and the performance of technology selection respectively.¹⁸ The problem of 'split incentives' is related to information deficiency in that investors in new technology cannot see how it benefits them and this gives rise to a conflict of interests – i.e. a shipowner invests in energy efficiency yet the charter benefits from the fuel savings.¹⁹ The issue of split incentives also informs the principal-agent problem whereby the charterer (as principal) delegates decision-making regarding technology to the shipowner (as agent) who has no incentive to make the vessel more efficient under a time charter as the owner does not pay for operational costs.²⁰ Although the principal-agent problem applies to the integration of green technology in many contractual relationships, it has taken centre stage in the green shipping conundrum and underpins a number of economic solutions proposed by energy efficiency cost sharing schemes.²¹ The principal-agent problem is also distinctly pronounced in charterparty agreements because such instruments employ traditional and inflexible contractual mechanisms for the allocation of cost and risks. Haris Zografakis, legal advisor to the Sea Cargo Charter, has gone so far as to call these mechanisms for allocating financial cost efficiencies as 'arcane' to the 'uninitiated' and quotes Martin Stopford's characterisation of maritime economics as:²²

'a strict economic regime, which would be immediately recognisable by nineteenth-century classical economists. It is, more or less, the 'perfect' market place at work, an economic Jurassic Park where the dinosaurs of classical economics roam free...'

Zografakis's assessment of the 'environmental paradox' in shipping is critical of the embedded neoliberal contractual foundations of the English common law regime applicable to charterparties that cannot easily accommodate 'new ways of doing'. Whilst the ordinary doctrines and rules of construction apply to charterparties,²³ attempts at proffering modernised interpretations of charterparty duties are hindered by the fact that charterparties have also become highly standardised. For practical reasons, standard forms have further entrenched the duties associated with each party, 'such as bunkering, loading and discharge, or issuing bills of lading and the duty of seaworthiness'.²⁴

¹⁶ Ángeles Longarela-Ares and others, 'The Influence of Economic Barriers and Drivers on Energy Efficiency Investments in Maritime Shipping from the Perspective of the Principal-Agent Problem' (2020) 12 *Sustainability* 7943 <https://doi.org/10.3390/su12197943> accessed 30 November 2022.

¹⁷ Seyed Vahid Vakili and others, 'A Conceptual Transdisciplinary Framework to Overcome Energy Efficiency Barriers in Ship Operation Cycles to Meet IMO's Initial Green House Gas Strategy Goals: Case Study for an Iranian Shipping Company' (2022) 15(6) *Energies* 2098.

¹⁸ Ibid.

¹⁹ Nishatabbas Rehmatulla and Tristan Smith, 'The impact of split incentives on energy efficiency technology investments in maritime transport' (2020) 147 *Energy Policy* 111721; Hannes Johnson and Karin Andersson, 'Barriers to energy efficiency in shipping' (2016) 15 *WMU J Marit Affairs* 79–96.

²⁰ Ángeles Longarela-Ares and others, 'The Influence of Economic Barriers and Drivers on Energy Efficiency Investments in Maritime Shipping from the Perspective of the Principal-Agent Problem' (n 16).

²¹ See George Adamantios Psarros, *Energy Efficiency Clauses in Charter Party Agreements: Legal and Economic Perspectives and Their Application to Ocean Grain Transport* (Springer, ProQuest 2016); Sustainable Shipping Initiative, Save As You Sail <https://www.ssi2040.org/news/call-for-ship-owners-to-join-pilot-of-innovative-save-as-you-sail-technology-financing-model/> accessed 2 December 2022.

²² Haris Zografakis, 'The third pillar: a contractual architecture for maritime decarbonisation' (Gard Insight, 20 October 2021) <https://www.gard.no/web/updates/content/32513672/the-third-pillar-a-contractual-architecture-for-maritime-decarbonisation> accessed 2 December 2022.

²³ *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619; *Wood v Capita Insurance Services Ltd* [2017] UKSC 24.

²⁴ Johanna Hjalmarsson, 'Contracts: time and voyage charterparties and their hybrid forms' in Jason Chuah (ed) *Research Handbook on Maritime Law and Regulation* (Elgar, 2019) 208.

Furthermore, there is a small pool of charterparty standard forms to choose from, with the classic and most prevalent time charterparty form existing in three iterations: NYPE46, NYPE93 and NYPE2015.²⁵ Despite having more suitable revised iterations of the NYPE form, the NYPE46 remains the most widespread, reflecting the inert and conservative nature of the shipping market in adopting new standard agreements.²⁶

It therefore comes as no surprise that BIMCO's approach to integrating environmental compliance into time charters has been through suggested boilerplate clauses that fit neatly within the traditional contract law architecture of apportioning responsibility between owner and charterer. As a result, the problem of split incentives in the principal-agent relationship is exacerbated through yet another regulatory requirement that parties will try to shift responsibility for as opposed to meaningfully negotiating.

When the IMO strengthened the sulphur content limits for marine fuel as of 1 January 2020,²⁷ BIMCO's industry guidance to meet the new standard was the use of its **BIMCO 2020 Marine Fuel Sulphur Content Clause for Time Charter Parties**.²⁸ Quite mechanically, owners became responsible for warranting that the vessel shall be compliant with 'Sulphur Content Requirements',²⁹ whilst the charterer was tasked with supplying compliant fuel and warranting that bunker suppliers, bunker craft operators and bunker surveyors used by the charterers are also compliant with the requirements.³⁰ If the charterer fails to comply with such provisions, a comprehensive indemnity protects the owner from 'any or all losses, damages, liabilities, delays, deviations, claims, fines, costs, expenses, actions, proceedings, suits, demands arising out' of this failure. Overall, the clause did little to address the problems of supply issues, off-spec fuels (e.g. Houston problem) and engine damage, increased carbon emissions through blended fuels, the negative impacts of alternative compliance mechanisms such as scrubbers, and variations in port state monitoring and enforcement.³¹ Although it would be unfair to argue that a compliance clause between parties should traverse a wide range of economic and scientific implications, it would be fair to say that the clause does little to overcome such problems through any sort of a collaborative agenda. It certainly does not extend to potential innovations beyond traditional allocations of regulatory risk and costs.

²⁵ Ibid.

²⁶ Paul Todd, 'NYPE 2015: Wholesale Reform or an Invitation to Cherry-Pick?' (2016) *Lloyd's Maritime & Commercial Law Quarterly* 306-319.

²⁷ Adopted by Resolution MEPC.320(74).

²⁸ BIMCO, '2020 Marine Fuel Sulphur Content Clause for Time Charter Parties' (2020) <https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/2020-marine-fuel-sulphur-content-clause-for-time-charter-parties> accessed 15 December 2022.

²⁹ 'Sulphur Content Requirements' means any sulphur content and related requirements as stipulated in MARPOL Annex VI.

³⁰ A similar provision appeared in BIMCO's 2005 version of the clause with the intent that charterers exercise care in selecting bunker suppliers; see BIMCO, 'Bunker Fuel Sulphur Content Clause For Time Charter Parties 2005' (2005) <https://www.bimco.org/contracts-and-clauses/bimco-clauses/earlier/bunker-fuel-sulphur-content-clause-for-time-charter-parties-2005> accessed 2 December 2022.

³¹ See Xiaofei Liu, 'The supervision and multi-sectoral guarantee mechanism of the global marine sulphur limit—assessment from Chinese shipping industry' (2022) *Frontiers in Marine Science* 9:1028388; Erik Ytreberg and others, 'Effects of seawater scrubbing on a microplanktonic community during a summer-bloom in the Baltic Sea' (2021) *Environmental Pollution* 291:118251.

Given recent progress in work on sustainable maritime contracts of carriage, energy efficiency as a negotiated term, and major progress in climate clause drafting (which will be discussed in Section 2);³² there was hope that BIMCO would be similarly aligned in meeting the challenge of designing clauses for the IMO's GHG strategy. Yet, BIMCO's EEXI Transition clause for time charterparties released in 2021 is much like its sulphur content transition clauses.³³ Under the clause owners are required to effect any modifications to the vessel prior to the Effective Date – meaning the vessel's next annual, intermediate or renewal survey, whichever comes first, on or after 1 January 2023.³⁴ Notably, BIMCO foresees that ships requiring energy efficiency modifications will probably utilise one of two methods: Engine Power Limitation (EPL) or Shaft Power Limitation (SHAPOLI). EPL involves adjusting the parameters within an engine's control system that enables a vessel to limit its engine power output when the pre-set limit is reached. Whether this requires additional software installation depends on whether the engine is mechanically controlled or electronically controlled. SHAPOLI operates similarly in that it enables a vessel to limit its shaft power output when the pre-set limit is reached. It works by limiting the output power of Controllable Pitch Propeller (CPP) shafts. BIMCO's EEXI transition clause is drafted almost entirely for these methods, whilst obligations for alternative approaches simply require that the owner does the necessary to meet EEXI regulatory standards prior to the Effective Date and subject to the Charterer's prior agreement and approval.³⁵

By endorsing the two methods of EPL And SHAPOLI almost exclusively, BIMCO's indicates that its accumulated technical expertise does not foresee the EEXI standard revolutionising shipping technology. Rather, existing engine technology will be adjusted while charterers and owners can negotiate alternative methods in more detail and how performance will be impacted. It may be better for owners to simply provide notice regarding time and location of such modifications to have the necessary freedom to source available technologies without seeking the charterer's approval. There may also be a practical presumption that drastic technological changes will be for newer vessels that are not yet fixed on the market for chartered voyages. The EEXI clause does not therefore attempt to overcome the issue of split incentives as the owner will carry the cost of engine modifications and will also be responsible for any time lost to the charterer. Furthermore, the impact on warranted speed and consumption will have to be communicated to the charterer in accordance with clause (c)(v), which does state whether the owner is protected from a reduction in hire for amendments to represented speed performance.³⁶

In 2022, BIMCO rose to the challenge of drafting suitable clauses for the inclusion of shipping in Emissions Trading Schemes, particularly the EU's ETS using a 'cap-and-trade' principle, whereby a cap (limit) is set on the total amount of greenhouse gas emissions that can be emitted by entities. Parties are required to hand in allowances equal to their CO₂ emissions (1 allowance = 1 ton CO₂) at the end

³² Ellen Eftestøl-Wilhelmsson and Suvi Sankari, 'Chapter 7: Nudging a behavioural change in maritime carriage of goods – the role of information' in Jason Chuah (ed), *Research Handbook on Maritime Law and Regulation* (Edward Elgar Publishing, Cheltenham, 2019) 170; Ellen Eftestøl-Wilhelmsson E, *European Sustainable Carriage of Goods: The Role of Contract Law* (1st ed, Routledge 2015).

³³ BIMCO, EEXI Transition Clause for Time Charter Parties 2021 https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/2021_eexi_transition_clause#:~:text=Definitions,comply%20with%20the%20new%20regulations accessed 4 December 2022.

³⁴ Clause (b).

³⁵ See Clause (b) and (c).

³⁶ See *SK Shipping Europe PLC v (3) Capital VLCC 3 Corp (5) Capital Maritime and Trading Corp (The C Challenger)* [2020] EWHC 3448 (Comm).

of each year.³⁷ Within the cap, the different entities buy allowances which they can trade between themselves. Companies are incentivised to emit less carbon as this will mean that they have spare allowances which can be traded or 'saved' for future needs.³⁸ Under proposed amendments to the EU ETS Directive (COM/2021/551), relevant actors will need to purchase allowances for 100% of the emissions from voyages between EU ports (intra-EU voyages) and 50% of emissions from voyages taking place between an EU port and a third country port (extra-EU voyages), as well as all emissions occurring at berth in an EU port.³⁹

Interestingly, proposed amendments suggests that the ship commercial operator shall pay to the shipping company the 'cost of the amount of allowances matching the emissions of the ship for the duration of any contract with the shipping company on a charter basis',⁴⁰ whilst the mechanism for recovering such sum is suggested as being a contractual one under the law of the Member State. Annex 6 of Proposal (COM/2021/551) states the possibility of a charterer purchasing these allowances and then transferring them to the company, which will then surrender them to the Member State administration. As such, BIMCO has drafted an 'ETS - Emission Trading Scheme Allowances Clause For Time Charter Parties 2022' (hereafter 'ETS Clause') to assist owners and charterers in negotiating this arrangement.⁴¹ Under this clause, '[c]harterers shall provide and pay for the Emission Allowances corresponding to the Vessel's emissions under the scope of the applicable Emission Scheme'.⁴² The shipowner's remedy for the charterer's failure to do so is suspension only.⁴³ Effectively, the transfer of emission allowances works within the existing design of payment for hire, whereby suspension is available upon the owner's giving 5 day's notice.⁴⁴

BIMCO's ETS clause thus embodies a contractual mechanism which gives effect to a market based mechanism and perhaps cannot overcome the inadequacy of the measure itself.⁴⁵ The owner will effectively pass down the responsibility of meeting the ETS requirements to the charterer under a time charter, yet is not absolved from being the responsible party for surrendering the allowances to a Member State. There is very little scope for collaboration in respect of reducing overall emissions, with the only potential for cooperation being to, 'exchange all relevant data and information in a timely manner to facilitate compliance with any applicable Emission Scheme and enable the Parties to calculate the amount of Emission Allowances in respect of the Vessel'.⁴⁶ The ETS clause thus fits perfectly within the paradigm of split incentives because owners will not benefit from energy efficiency as the charterer is responsible to purchasing emission allowances. From a climate standpoint and the perspective of achieving a just transition, it is also highly contentious whether the

³⁷ The price per allowance is not fixed as this will depend on market demand.

³⁸ European Commission, 'Questions and Answers - Emissions Trading – Putting a Price on carbon' (Press Release 14 July 2021) https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_3542 accessed 15 August 2022.

³⁹ COM/2021/551 final (n 7) 16.

⁴⁰ Proposal COM/2021/551 (n 7) proposes to amend Article 3 of Directive 2003/87/EC (the ETS Directive) to include this provision under an Article 3(g).

⁴¹ BIMCO ETS Clause (2022) https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/etsa_clause accessed 5 December 2022.

⁴² Subclause (c)(i) of the ETS Clause.

⁴³ Subclause (d).

⁴⁴ For the importance of stipulating a notice period see *Greatship (India) Ltd v. Oceanografia SA DE CV* [2012] EWHC 3468; and London 17/14, Lloyd's Maritime Law Newsletter (October 2014).

⁴⁵ Harilaos N.Psarafitis, Thalys Zis, Sotiria Lagouvardou, 'A comparative evaluation of market based measures for shipping decarbonization' (2021) 2 *Maritime Transport Research* 100019, 13.

⁴⁶ Subclause (a).

commodification of atmospheric carbon poses any benefits for the environment whilst also entrenching post-colonial disparities.

Although BIMCO's clauses are merely a starting point for negotiation, there is much greater room for reconceptualising the role of contractual clauses in decarbonisation efforts. To view decarbonisation as purely a matter of environmental regulatory compliance fails to acknowledge the barriers that exist within the contract law architecture itself, which deters efforts for greener shipping and juxtaposes the spirit of the regulatory framework itself. This also poses questions about the purpose of contract law and whether it should be used to achieve environmental sustainability when market efficacy is viewed as contract law's primary concern.⁴⁷ Increasingly, these questions are being met with a resounding answer in the affirmative as a number of pressures are being exerted on businesses beyond mere compliance. Increasingly, contract management approaches are recognising that 'business benefits stemming from sustainability and the green economy are considered worth investing in'.⁴⁸ The next section involves a brief discussion of the new era of contractual drafting for achieving environmental sustainability in shipping, comprising both voluntary governance initiatives and specific contractual mechanisms aimed at transitioning the sector. It is argued that BIMCO's CII Clause is reflective of a more modernised approach to green shipping which is underpinned by new norms for cooperation.

II) New Era of Sustainable Shipping contracts: BIMCO's CII Clause

Given the criticisms surrounding the IMO mandate for decarbonisation, many voluntary initiatives have emerged in shipping to promote green values as shared commitments between private actors. The Poseidon Principles for both ship finance and marine insurance, the Sea Cargo Charter, and shipping's inclusion in various green finance frameworks, have all tackled the issues associated with shipping's delay in strengthening its climate ambitions. Specific to chartering, the Sea Cargo Charter has set a 'benchmark for what it means to be a responsible charterer' through four principles: assessment, accountability, enforcement, and transparency.⁴⁹ Signatories will enforce a commitment to climate alignment through the use of a Sea Cargo Charter Clause as a recommended charterparty clause. At the same time, the purpose of contract law is being pushed by the sustainability agenda to recognise that new contractual tools are needed to achieve decarbonisation in various sectors. In this regard, The Chancery Lane Project (TCLP) has published climate clauses for a wide range of business areas that are peer-reviewed by sector experts and then published openly and freely on the TCLP Website.⁵⁰ Specific to chartering, the TCLP has published five climate clauses for the shipping sector as part of its Net Zero Toolkit – all are applicable to voyage and time charters.⁵¹ These clauses are key tools in setting out how parties are to cooperate to achieve decarbonisation in chartering. In providing such tools, the TCLP's aim is aligned with the overarching premise of this Article that the uptake of contractual clauses for green performance or climate alignment can accelerate new sustainable customs in shipping. Here, shipping associations are key actors in utilising the full power of the 'law of standard agreements' to include contractual provisions in charterparty forms that can elevate new business norms centred on green behaviour.⁵² Standard form agreements are, 'generally speaking, the

⁴⁷ See *The Moorcock* (1889) LR 14 PD 64.

⁴⁸ Suvi Hirvonen-Ere, 'The way of business contracts: How to promote (transport) sustainability and incentivize the green economy via Contract Management' in *Sustainable and Efficient Transport* (Cheltenham, UK: Edward Elgar Publishing, 2019)

⁴⁹ Sea Cargo Charter <https://www.seacargocharter.org/> accessed 15 December 2022.

⁵⁰ TCLP, *Climate Clauses: Transport* <https://chancerylaneproject.org/climate-action-pathways/transport/> accessed 29 June 2022.

⁵¹ TCLP, *Climate Clauses: Transport* <https://chancerylaneproject.org/climate-action-pathways/transport/> accessed 29 June 2022.

⁵² Ulf Bernitz, 'Commercial Norms and Soft Law' (n 14).

most important instrument nowadays for norm creation in business'.⁵³ The following observations on BIMCO's CII clause note how this clause marks a turning point in BIMCO's approach to drafting – one that is aligned with the new era of climate drafting and recognises that new forms are needed to achieve a collaborative agenda. However, there are also a few considerations for greater enhancement of the purport of the CII Regulation.

a) Cooperation as a Norm

The importance of data sharing has gained further momentum with the prevalence of reporting and disclosure requirements for emissions in almost all economic sectors.⁵⁴ For shipping, the CII will be based entirely on data reported by the vessel under the IMO Data Collection System (DCS) and is only achievable with extensive cooperation between owner and charter. As such, the BIMCO CII Clause requires complete cooperation in 'good faith'. Although a doctrine of 'good faith' is not recognised by English contract law, it is accepted that good faith should form a basic principle of all contractual negotiations.⁵⁵ It is also questionable whether good faith is included in the seven principles of EU civil law,⁵⁶ yet 'good faith and fair dealing' is a fundamental principle of the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles).⁵⁷ It is a logical corollary of cooperation for a shared goal that the parties act in good faith. Expressly providing for cooperation in a time charter is not common practice in traditional forms, however modern climate clauses frequently require that parties work together in reducing emissions.

Eddie's Recital which is suggested for energy efficiency clauses in shipping by TCLP, requires the parties to acknowledge their 'common intention' to achieve net zero targets, align themselves with the UNFCCC Paris Agreement, and to promote a just transition to a low carbon economy.⁵⁸ Furthermore, cooperation with both each other and third parties, is a persistent theme in TCLP's Otto's Clause for energy efficiency in chartering.⁵⁹ Interestingly, TCLP notes the opposition of interests in BIMCO's previous clauses dealing with energy efficiency, namely the BIMCO Slow Steaming and Virtual Arrival clauses, which tend 'to be drafted primarily with a view to enable cost savings and to confer rights on the party paying for bunkers only as a result'.⁶⁰ TCLP's Aiden's clause for Fuel Reporting in Charterparties is also premised on cooperation, whereby, 'owners and charterers shall use [[best/ reasonable] endeavours to] [cooperate with a view to using]* bunker fuel with the lowest available

⁵³ Ibid.

⁵⁴ See GHG Protocol, *A Corporate Accounting and Reporting Standard* (2004) <https://ghgprotocol.org/sites/default/files/standards/ghg-protocol-revised.pdf> accessed 7 December 2022.

⁵⁵ William Tetley, 'Good Faith in Contract: Particularly in the Contracts of Arbitration and Chartering' (2004) 35(4) *Journal of Maritime Law & Commerce* 561.

⁵⁶ Norbert Reich, *General Principles of EU Civil Law* (1st ed, Intersentia, 2014).

⁵⁷ Article 1.7 of UNIDROIT Principles states: '(1) Each party must act in accordance with good faith and fair dealing in international trade. (2) The parties may not exclude or limit this duty'.

⁵⁷ UNIDROIT, 'Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts' (2019) <https://www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses> accessed 7 December 2022.

⁵⁸ TCLP, *Eddie's Recital* (2021) <https://chancerylaneproject.org/climate-clauses/climate-recitals/> accessed 7 December 2022.

⁵⁹ TCLP, *Otto's Clause* (2021) <https://chancerylaneproject.org/climate-clauses/energy-efficiency-in-shipping/> accessed 7 December 2022.

⁶⁰ Otto's Clause – Essential Notes and Guidance (2021) https://docs.google.com/document/d/1dYynisoHsLpDjv0QJrxLG1hCHFQvs_xFsJvZGEeE8ds/edit# accessed 7 December 2022.

CO2 Emissions Factor'.⁶¹ Collaboration between parties is therefore a pronounced theme in modern climate drafting for shipping.

Illustrating this marked progression in charterparty clauses, BIMCO's CII Clause contains a duty (subclause b.) premised on good faith for parties to work together to:

- i. *share any findings and best practices that they may identify on potential improvements to the Vessel's energy efficiency; and*
- ii. *collect, share and report on a daily basis any relevant data that may assist the monitoring and assessment of the Vessel's compliance...*

This obligation is repeated where the Charterer's written plan for the vessel's next voyage would fail to meet CII standards, thereby requiring the plan to be adjusted. Cooperative data sharing has been recognised in economic literature as important for reaching agreement on a shared goal for energy efficiency, although within, 'simple strategies such as "providing information" and "sharing knowledge", all to improve energy efficiency, lies a more complicated reality'.⁶² As such, data sharing schemes have been conceived using economic game theory and have also manifested in financial products to overcome the issue of split incentives. In respect of game theory model for data sharing, Psarros argues that in obtaining a competitive advantage through design efficiency improvements, environmental friendliness should be valued by both parties.⁶³ Including energy efficiency as a negotiated term from the inception stages of the chartering process can distribute energy efficiency costs and rewards as well as provide clarity on the rights and responsibilities of the parties.⁶⁴ Overcoming the problem of split incentives requires exchanging complete information and emphasises factors such as the owner's transparency, goodwill, and accurate disclosure of information.⁶⁵

Financial investment schemes for green technology in shipping have also recognised that cooperation for optimal data sharing is key to balance and overcome the high risks associated with new market technologies. Save as You Sail (SAYS),⁶⁶ requires that the owner of a vessel takes out a loan with the finance provider and agrees to a regular fixed SAYS fee with the time charterer on top of their charter rates so that the owner can also benefit from fuel savings. Data sharing and cooperation are key elements of making such a scheme workable. The Self-Financing Fuel-Saving Mechanism (SFFSM) is another financial solution that operates as a tripartite contractual agreement between the financier, the technology partners and the fuel payer.⁶⁷ The SFFSM comprises two key features: 1) a guarantee of fuel savings from the technology vendors, and 2) a refined data collection methodology which continuously monitors equipment to accurately quantify and verify fuel savings.

⁶¹ TCLP, *Aiden's Clause* (2021) <https://chancerylaneproject.org/climate-clauses/fuel-reporting-clause-for-shipping-charterparties-new/> accessed 13 December 2021.

⁶² Josefin Borg & Hannes von Knorring, 'Inter-organizational collaboration for energy efficiency in the maritime sector: the case of a database project' (2019) 12 *Energy Efficiency* 2201–2213, 2212.

⁶³ George Adamantios Psarros, *Energy Efficiency Clauses in Charter Party Agreements: Legal and Economic Perspectives and Their Application to Ocean Grain Transport* (n 21) 52.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.* 53.

⁶⁶ Sustainable Shipping Initiative, *Save As You Sail* <https://www.ssi2040.org/news/call-for-ship-owners-to-join-pilot-of-innovative-save-as-you-sail-technology-financing-model/> accessed 31 August 2022.

⁶⁷ Victoria Stulgis and others, *Hidden treasure: Financial models for retrofits* (The Carbon War Room / UCL Energy Institute, London, UK 2014) 32-33.

Cooperative norms have the capacity to resolve many of the inadequacies in the contractual architecture for time charters in achieving sustainability, particularly insofar as they centre obligations around a common goal as opposed to creating binary interests in environmental matters. Of course, how cooperative norms can be practically implemented requires more than a simple “cooperation” and “data sharing” stipulation. All obligations in the charter form will need to provide certainty on what this means for each duty, or should inform the creation of new duties where appropriate. In order for the incentives envisioned in obtaining a good CII rating, the parties should agree how any “benefits” accruing to the vessel will be distributed. If charterers operate a vessel in such a way that the CII rating is in fact improved on redelivery, a discount or an account credit should be considered. This would also overcome any criticism that BIMCO’s CII clause restricts charterer’s by limiting existing freedoms to operate the vessel in respect of and commercial needs and deadlines.⁶⁸ Nevertheless, BIMCO’s emphasis on cooperation and good faith is aligned with new climate drafting techniques which aim to comprehensively realise the benefits of greener performance for both parties.

b) Advance Warning

In respect of pollution generally, much hinders on predicting future contractual breaches as prevention is always preferable to rehabilitation or other sanctions associated with non-compliance in the prevailing regulatory regime. However, a prospective approach to breach is met with many difficulties given the inadequacies of English contract law with regard to anticipatory breach. Under English law, a promisee may anticipate a promisor’s breach where the promisor, ‘by words or conduct, evinces an intention not to perform, or expressly declares that he is or will be unable to perform his obligations under the contract in some essential respect’.⁶⁹ Such conduct can include previous behaviour by the promisor which would allow the promisee, on a balance of probabilities, to draw an inference that the promisor is likely to commit a breach when the time arrives to perform an obligation under the contract.⁷⁰ This leaves the promisee with two choices: 1) affirm the contract and seek an order of specific performance; or 2) accept the renunciation, after which the contract will be terminated, obligations will be discharged, damages can be sought immediately,⁷¹ and the duty to mitigate will be brought forward to the time at which the anticipatory breach was accepted.⁷² Neither remedy would be suitable in the context of energy efficiency, where the owner needs to maintain tight control over voyage emissions as the owner is ultimately responsible for compliance despite passing many of duties in respect of the vessel’s CII performance to the charterer.

BIMCO’s “Advance Warning” mechanism is therefore an effective way to deal with potential deviations from agreed CII performance. Under subclause (g):

If, at any time, based on the data shared in accordance with this Clause, the trajectory of the C/P Attained CII is deviating from the Agreed CII, the Owners shall give the Charterers advance warning of this.

If a such a deviation continues or the charterer indicates a ‘reasonable likelihood’ of being able to meet their CII obligations, then the owners shall request from the charterers a written plan detailing the charterer’s commercial operation of the vessel upon which the owners can assess whether the

⁶⁸ See Valentina Keys, ‘BIMCO CII Clause Finally Released: Does it make any Sense Of CII?’ (Watson Farley & Williams, 5 December 2022) <https://www.wfw.com/articles/bimco-cii-clause-finally-released-does-it-make-any-sense-of-cii/> accessed 7 December 2022.

⁶⁹ *Mersey Steel and Iron Co Ltd v Naylor, Benzon & Co* (1884) LR 9 App Cas 434; *Bradley v H Newsom Sons & Co* [1919] AC 16; *Brinkibon v Stahag Stahl und Stahlwarenhandels GmbH* [1980] 2 Lloyd’s Rep 556 (CA).

⁷⁰ *Johnstone v Milling* (1886) 16 QBD 460 (CA), 467.

⁷¹ *Synge v Synge* [1894] 1 QB 466; *Lep Air Services Ltd v Rolloswin Investments Ltd* [1973] AC 331, 356.

⁷² *Hochster v De la Tour* (1853) 2 E & B 678.

agreed CII standard will be met.⁷³ Parties may then agree to an adjusted written plan, whilst owners are entitled to take necessary action until such time. These actions include adjusting the vessel's speed and where speed reduction would be insufficient, to require the Charter to instruct the vessel in a manner that would align it with the Agreed CII.⁷⁴ Such actions will not be deemed breaches of the owner's obligations under the charterparty. Similar problems arising from anticipatory breach may still impact on how an owner proves a 'reasonable likelihood' of the charterer not meeting the CII standard.⁷⁵ Anticipatory breach provides a high standard for the justification of a 'firm inference' of breach along with the risk of early notice of termination.⁷⁶ However, as the remedy here is not one giving rise to termination rights, the causal link should not be construed strictly and should rather be interpreted as a convergence of interests in meeting the Agreed CII. Providing the charterer of notice of potential failings to meet the Agreed CII also serves to benefit the Charterer.

These cooperative predictive measures are innovative in not only projecting the likelihood of breach, but to take corrective action so that both parties can still honour their requisite obligations. Such a solution is aligned with an understanding of the doctrine of adequate assurance – not yet recognised by English law. It has been proposed by Beheshti that:

'adequate assurance is a logical corollary of the doctrine of anticipatory breach of contract. Because the latter doctrine is utilised only when a purported repudiation occurs with utmost clarity, it is difficult for the promisee to meet this requirement in situations where promisors exhibit inconsistent conduct. In such situations, the doctrine of adequate assurance can be applied to determine with sufficient certainty whether the promisor intends and is able to perform the contract'.⁷⁷

The doctrine of adequate assurance is accepted by the American Uniform Commercial Code (UCC) § 2-609. Llewellyn, the legal realist who led the drafting of the UCC, was a strong proponent of designing rules which could deal with commercial parties in troubled times and believed that the law is an instrument to achieve social ends.⁷⁸ He aimed to place prevailing norms at the centre of legal rules that are 'clear, sane and safe'.⁷⁹ Therefore in order for the law to attain net zero targets and the 'social end' of sustainability, contractual mechanisms aimed at preventing future breach are not only better for the environment but also more commercially viable for the parties concerned.

c) Performance/Consumption Warranties

Despite the principle of cooperation underpinning the CII clause, there are still some issues that the BIMCO CII Clause is yet to completely overcome. This is because compliance with the IMO's CII regulations are not aligned with customary shipping practices and make significant inroads into the charterer's traditional freedoms to operate the vessel. The first problem which seems difficult to resolve is that of performance warranties. As mentioned above, the owner will not be in breach of its performance warranties where owners have validly invoked subclause (g) to bring the vessel into compliance with the Agreed CII. Charterers cannot therefore rely on any performance warranties to

⁷³ Clause (g)(i)-(ii).

⁷⁴ Clause (g)(iii).

⁷⁵ *Chilean Nitrate Sales Corp v Pansuiza Cie de Navigacion SA (The Hermosa)* [1982] 1 Lloyd's Rep 570, 580.

⁷⁶ *Ibid*; *Gulf Agri Trade FZCO v Aston Agro Industrial AG* [2008] EWHC 1252 (Comm) para [5].

⁷⁷ Reza Beheshti, 'Anticipatory breach of contract and the necessity of adequate assurance under English law and the Uniform Commercial Code' (2018) (2) *Lloyd's Maritime and Commercial Law Quarterly* (0306-2945) 276.

⁷⁸ K Llewellyn, 'Some Realism about Realism-Responding to Dean Pound' (1931) 44 HLR 1222.

⁷⁹ State of New York Law Revision Committee Report, Hearing on the Uniform Commercial Code (1954), 113

try to avoid meeting their obligations under the CII Clause.⁸⁰ This seems to circumvent the problem of the owner being liable for making necessary speed reductions where necessary, yet does not support the idea of energy efficiency giving the vessel a competitive advantage and benefiting the charterer. Nevertheless, any 'existing warranties as to despatch, speed and consumption or to maintain the Vessel's description provided for elsewhere in the Charter Party shall continue to apply to the Charter Party'.⁸¹

For a fixture to be more attractive to a charterer, performance warranties representing a level of energy efficiency and therefore less fuel consumption need to be represented in a reliable manner. This poses an immense problem with newer technologies or energy saving operational measures where data is incomplete.⁸² Furthermore, English case law illustrates that such warranties are, in any event, promissory in nature and would not allow for remedies stemming from misrepresentation as there is an: 'element of swings and roundabouts built into any warranty of future performance, with the possibility that over-consumption in the early period might be compensated later on...'.⁸³ To overcome this, TCLP's Otto's clause for energy efficiency affords the charterer greater protection in the form of an all-encompassing fuel efficiency for: 'losses that are wide ranging in nature and difficult to quantify with precision, including losses related to damage to the climate and the environment, consequential breaches of environmental laws, diminished standing with states, governments and regulators, and/ or damage to that Party's reputation'.⁸⁴ The fuel efficiency fee is therefore an agreed liquidated damages clause which promotes accurate data sharing and gives the charterer terminations rights where technical data is misrepresented by the owner. From a charterer's perspective, it is not ideal for performance warranties to be interpreted as having margins for inaccuracy. Otto's clause allows owners who make innocent representations in respect of performance to rectify the situation upon receiving two days' notice by the charterers. Owners may be reluctant to agree to such a liquidated damages amount, yet it needs to be noted that vessels which can guarantee efficient performance are commercially better for the owner as well as for its CII rating of the vessel in practical terms. BIMCO's principle of cooperation in the CII Clause should arguably be extended to how performance warranties pertaining to energy efficiency are negotiated. An owner may not have complete data with new engine adaptations, but certain parameters coupled with ongoing data sharing needs to be agreed upon. Ultimately, the BIMCO CII Clause needs to find ways to become more attractive to charterers who have responded 'disappointingly'.⁸⁵

d) Customers

The BIMCO CII clause also considers that charterparties operate within a chain of contracts. There is a duty for charterers to ensure that bills of lading, waybills or other documents evidencing contracts of carriage issued by or on behalf of the owners do not impose liability on the owner as a result of CII standards. The charterers are to indemnify the owners from any liabilities that the owners have not

⁸⁰ Subclause (c)(ii).

⁸¹ Ibid.

⁸² See Josefin Borg & Hannes von Knorring, 'Inter-organizational collaboration for energy efficiency in the maritime sector: the case of a database project' (n 62).

⁸³ *SK Shipping Europe PLC v (3) Capital VLCC 3 Corp (5) Capital Maritime and Trading Corp (The C Challenger)* [2020] EWHC 3448 (Comm) para 37.

⁸⁴ Clause 2.1 of Otto's clause.

⁸⁵ Nigel Lowry, 'Charterers face rebuke for 'disappointing' CII clause pushback' (Lloyd's List, 13 Dec 2022) <https://lloydlist.maritimeintelligence.informa.com/LL1143329/Charterers-face-rebuke-for-disappointing-CII-clause-pushback#:~:text=CHARTERERS%20have%20reacted%20%E2%80%9Cdisappointingly%E2%80%9D%20to,according%20to%20some%20shipowning%20sources> accessed 15 December 2022.

assumed under the CII Clause.⁸⁶ This kind of indemnity is not uncommon as a shipowner under a time charter is usually entitled, either by implication of law or by express agreement, to be indemnified by charterer against losses arising from the owner's act of complying with the charterer's instructions.⁸⁷ In the case of the owner not following the charterers order to bring the vessel in line with the CII standard, the owner is thus also protected under this clause from ordinary duties under the bill of lading to proceed with utmost dispatch or not to deviate.⁸⁸ BIMCO has not yet released CII clauses for incorporation of the CII standard and into bills of lading.

Although the CII indemnity provisions for contracts of carriage offer protection to owners, this clause is premised entirely on commercial notions that customers (i.e. holders of a bill of lading) are only interested in speed of delivery. In fact, developments in various sectors are showing that business customers and consumers are increasingly interested in sustainability and are even willing to pay a premium for greener services.⁸⁹ As such, incorporating the CII into a bill of lading and making the customer aware of the CII rating of the vessel could offer a competitive advantage and would align subsequent contractual arrangements with the purpose of the CII regulation – to link the GHG emissions to the amount of cargo carried over distance travelled. As such, customers themselves could benefit from the CII associated with the cargo. If charterers are operating as carriers, they could also benefit from increased freight rates to factor in greener performance. As such, TCLP has drafted Levi's clause which would allow 'a customer to exit a shipping transportation agreement without incurring exit-related liability, unless the incumbent carrier/shipper can match the 'green' improvements of a competitor'.⁹⁰ Levi's clause is drafted with the intention to drive green competition and to incentivise carriers or shippers to improve their green performance. Within the clause, 'Carrier' and 'Shipper' are used interchangeably to represent the party responsible for transporting the goods and can extend to carriers, shipowners or charterers depending on the agreement entered into. This includes bills of lading as a 'contract which wholly or partially contemplates the transportation of goods by sea'.⁹¹ Levi's clause is in fact recommended in the drafting notes to give effect to the CII Regulation.⁹²

Conclusion:

Although this Article does not extend to a comprehensive discussion of the complexities and effectiveness of private regulation in achieving sustainability, it does accept that industry heavyweights such as BIMCO can drive forward the regulatory agenda in way that greater integrates decarbonisation goals into private transactions. BIMCO's previous environmental compliance clauses have been restricted by the traditional common law duties in charterparties, which are cemented by the prominent industry choice of standard forms. The same trend ensued with drafting compliance clauses for airborne emissions, starting with sulphur compliance clauses and more recently illustrated in the EEXI and ETS clauses. On the other hand, BIMCO's CII clause has employed innovations that are consistent with the new age of climate drafting. Climate clauses are pushing the envelope in respect of new cooperative norms, data sharing schemes, preventative tools in avoiding breach, liquidated

⁸⁶ Clause (i).

⁸⁷ *Telfair Shipping Corp v Intersea Carriers SA (The Caroline P)* [1984] 2 Lloyd's Rep. 466.

⁸⁸ Clause (i).

⁸⁹ Simon Kucher & Partners, *Global Sustainability Study 2021* https://www.simon-kucher.com/sites/default/files/studies/Simon-Kucher_Global_Sustainability_Study_2021.pdf accessed 15 December 2022.

⁹⁰ TCLP, *Levi's Clause* <https://chancerylaneproject.org/climate-clauses/green-fuel-requirement-and-termination-for-greener-carrier-or-shipper-maritime/> accessed 14 December 2022.

⁹¹ Levi's Clause – Essential Notes and Guidance https://docs.google.com/document/d/1uPstCsjKzZLDi_9FM4dAGBfNLY2qslv2l1JaywuK0gA/edit# accessed 14 December 2022.

⁹² *Ibid.*

damages for environmental sustainability, and a much deeper integration of net zero targets throughout all aspects of a contract. The purpose of the CII regulation is to incentivise energy efficient transport through a rating scheme and it requires parties to work together through increased collaboration and data sharing. This is reflected in BIMCO's CII clause which is underpinned by cooperative values and provides for 'advance warning' for parties to rectify instances of non-compliance. Parties are encouraged to consistently improve upon existing CII ratings as owners that fail to meet CII regulations will be exposed to potential enforcement action as well as numerous risks surrounding finance, insurance, losing out on commercial incentives, and reputational damage. BIMCO's CII Clause successfully integrates the spirit of the regulation as opposed to viewing it in the traditional way of simply achieving mere minimum compliance. Parties may want to consider more fully realising this spirit through negotiating additional climate clauses in their charterparties. Widescale uptake of such clauses could very well contribute to the emergence of new green and cooperative norms in chartering.