Greentech & Shipping Forum
EU Rules & Contracts

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Introductory remarks

- Shipping under the spotlight-
- Disproportional focus: more limited environmental impact compared to land industries
- Global commitment to GHG emission reduction
- To have in mind the larger picture: sustainability-driven debate
- It goes beyond emissions and climate change: addressing more general environmental, eco and corporate sustainability issues
- It advocates a holistic approach, dismantling the path-dependent compartments of various eco sectors

Introductory remarks

- Two main messages to keep in mind:

- 1st: Need for legislative action

✓ *EU value and legal system failed to achieve full potential due to lack of MS' commitment - A new horizontal tool/look is needed to review institutions, organization of entities and working methods – pluri-disciplinary approach"*

✓ *Non-inclusion of transport undermining the need of coherence & interaction.*

- 2nd: Need to reconsider corporate decisions

✓ *"Shareholder primacy" widely contested as best means by which decision making can serve the broader goal of advancing overall social welfare.*

What is the present situation?

- 2023 : a crucial year for emission control
- Developments at both int'l and European level
- IMO- Existing vessels: as from 1.1.2023

✓ Technical (EEXI) & operational requirements (CII)

✓ CII: Rating on a scale between A to E as from 2024 - IEEC certificate

- EU level: proactive action – in line with IMO

✓ More ambitious targers – to enhance monitoring (MRV)

✓ To introduce market-based measures – "Fit for 55"

EU ETS Mechanism

- ✓ 18.12.2022: political Agreement between Council & Parliament (amending Dir 2003/87- ETS)
- ✓ Revised proposal - Feb. 2023
- ✓ To implement ETS for Shipping from 2024
- ✓ Final adoption expected within May 2023
- ✓ If Shipping left outside the scope, the EU's reduction targets very difficult to be attained.
- ✓ From 2013, Commission had started preparing the field
- ✓ "Polluter pays" principle: to internalize societal costs from undesirable behavior of eco undertakings

EU ETS patterns

- Leading role of positive law – regulators' driven market
- Despite extension to increase environmental impact, still regional scope – competitive (dis)advantage
- Other countries: UKA, KAU
- 3 key points: *cap on emissions, annual reduction of caps, surrender allowances*
- one EUA = 1 tone CO2
- General allowance ≠ No specific Shipping Allowance
- EUA: financial product regulated by MIFID II- buy/spot/forward options
- Reactive "self-regulation" by the industry – fair distribution of risks

EU ETS patterns

- Need to coordinate the trading mechanism with commercial practice
- ✓ 2 crucial elements: "responsible party" – "allocation of allowances"
- ✓ Art. 2 par 2 (v): responsibility on the shipping co
- ✓ Defined as "the *shipowner* or any other organization or person, such as the *manager or the bareboat charterer*, that has assumed the respo for the operation of the ship […]"
- ✓ In line with MRV – facilitates monitoring duties

- ✓ What about the role of the "commercial operator"?
- ✓ Entity determining the cargo and the route/speed of the vessel
- ✓ Issue sent back to the national law

EU ETS patterns

- Para 20 Preamble- art.3gaa of the revised proposal:
- ✓ *MS should provide in national law a statutory entitlement for the shipowner to be reimbursed by the operator for the costs arising from the surrender of allowances*
- ✓ +
- ✓ *Corresponding access to justice to enforce the entitlement.*

- No further obligation upon national authorities to ensure or control such clauses
- It would increase administrative costs

EU ETS patterns

- Allowances' mechanism: Short transition time is designed
- Readjusted scheme of reduction:
  - 40% in 2024
  - 70% in 2025
  - 100% in 2026
- 100% emissions for intra-EU/EEA trade
- 50% for incoming/outcoming calls
- 50% for transshipment container ports less than 300nm
- 100% for offshore ships from 2027
- Initially CO2 emissions- progressively methane/nitrous oxide (2026)
- 78,4 m more EUAs, linear reduction factor 4.3% from 2024, 4.4% from 2028 – 3.5% more for MS with many SC- auction by MS
- Exclusion of small islands, public service obligations etc…

EU ETS patterns

- Logistics of risks' distribution are left to the freedom of contract
- Regulatory & contractual aspects distinct, although interrelated
- From a regulatory point of view, SC must hold sufficient EUAs and surrender them to the Administrative Authority
- Regardless of the existence of a charterer
- MRV report must be submitted until March 31st, 2024 for all ships under its control
  - **1850 Greek Vessels / 295 Shipowners subject to MRV**

- SC must surrender corresponding EUAs until September 30th, 2025 the latest.

EU ETS patterns

✓ 2022 ETS - Emission Trading Scheme Allowances Clause – Time charters + *Ad hoc* clauses

- To (re)allocate costs and responsibilities for obtaining, transferring, surrendering GHG emissions allowances
- Monitoring and reporting on the owner
- Allowances to be provided and paid by the Charterer
- Right to offset, in case of off-hire
- Owner entitled to suspend performance until Emission Allowances are received, on a 5 days notice – vessel remains on hire
- Useful to clarify trading limits
- Subject to amendment, once the final provisions are adopted
- Effectiveness based on cooperation

EU ETS patterns

- ✓ Better relying on a clause than on national law
- ✓ Proactive (transferring actual EUAs) vs reactive (reimbursing costs)
- ✓ Implied duty of cooperation
- ✓ Without agreement?
- ✓ Overriding indemnity provision always useful
- ✓ To be observed throughout the EU
- ✓ In order to safeguard undistorted competition
- ✓ May not be avoided or bypassed by an opposite contractual clause or a choice of law clause (=a jurisdiction clause)

EU ETS patterns

- ✓ We should not underestimate enforcement implications:
- ✓ Although reallocation of costs is facilitated, mandatory obligations may not be delegated
- ✓ SC (Shipowner) subject to fines and sanctions if EUAs not surrendered
- ✓ 100 € for any EUA not surrendered
- ✓ Expulsion order for repetitive violation or detention by flag State
- ✓ Unseaworthiness? Contributory fault
- ✓ Compensation for further damages not to be excluded.

(Provisory) Conclusions

- System will be tested as from 2024. Will be exported to IMO?
- Major shipping cos already registered in the EU ETS Registry – online system of accounts – NEW MARKET?
- Primary market: E Energy Exchange + Secondary market
- Use of revenues: Finance investments facilitating fuel change. Which fuel?
- Fuel changes presupposes globalization, political consensus & adequate port infrastructure
- Do we need traditional tort liability to enhance the system?
- Business as usual not any more an option - ESG

Thank you for your time & attention!!