



COMITE MARITIME INTERNATIONAL

THE GOTHENBURG DECARBONISATION DISCUSSION PAPERS

GREEN CONTRACTS DISCUSSION PAPER



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NOTE FROM THE CHAIR OF THE INTERNATIONAL WORKING GROUP ON MARITIME DECARBONISATION

When the Comité Maritime International was founded in 1897, the transition from wind to steam was not yet complete. We are now on the cusp of a third energy transition, and decarbonisation is one of the most significant challenges of our era.

The maritime industry has increasingly become aware of the role it's called upon to play, mostly as a result of regulatory initiatives of the International Maritime Organisation and the European Union.

Overwhelmingly, attention is focused on the technical aspects of alternative fuels and energy efficiency, and on the policy ramifications, especially as those inform the regulatory environment.

This International Working Group was set up a year ago on a simple premise: maritime law has been largely absent from the decarbonisation debate, despite its unquestionable importance as a foundation of the entire edifice of maritime trade. And central in any discussion regarding maritime law is the CMI. It has been an honour and a privilege to chair this IWG, which brought together colleagues from several maritime jurisdictions.

The work of the IWG was presented at the CMI Colloquium in Gothenburg in May 2024 and is summarised in three Discussion Papers ("The Gothenburg Decarbonisation Discussion Papers"), which cover three separate, but related, areas: "*Green Fuels*" (on issues of civil liability for non-hydrocarbon fuels), "*Green Contracts*" (an outline of some contractual adaptations that decarbonisation may require) and "*Green Vessels*" (introducing definitions as to "readiness" of ships to consume new fuels).

This Note accompanies the Gothenburg Decarbonisation Discussion Paper on "*Green Contracts*". The decarbonisation journey requires contractual adaptations. Indeed, it seems inevitable that certain age-old notions of maritime law will need to be reconsidered, in view of the imperative of reducing GHG emissions. For example, performing voyages with utmost despatch, or the very principle of seaworthiness, which may need to be expanded to something akin to "greenworthiness". The Green Contracts Discussion Paper outlines some of the issues.

Comité Maritime International [aisbl/ivzw](https://www.cmi.be)

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The Gothenburg Decarbonisation Discussion Papers represent the first phase of IWG's work. The second phase will include more detailed analysis, involving – as and where appropriate – associations and organisations that can work with the CMI to address the issues identified.

I am grateful to the members of the IWG for their time and efforts, and to the members of the Steering Committee (Jolien Kruit, Neil Henderson and Charles Debattista) for their support and dedication.

London, July 2024

Haris Zografakis

Partner, Stephenson Harwood LLP

Chair

CMI International Working Group on Maritime Decarbonisation

**COMITE MARITIME INTERNATIONAL
INTERNATIONAL WORKING GROUP
ON MARITIME DECARBONISATION**

GREEN CONTRACTS WORKSTREAM

DISCUSSION PAPER¹

1. The purpose of this Discussion Paper is to present to the CMI Colloquium in Gothenburg this year the current intentions of the IWG on Maritime Decarbonisation with regard to future work in the particular context of Green Contracts. The Discussion Paper has been produced by a small group of experts, whose names appear at its end, in contracts for the carriage of goods by sea and for the sale of such goods. This group is one of three “workstreams” in the IWG, chaired by Haris Zografakis of Stephenson Harwood. The other two workstreams have looked at decarbonisation from the perspective of Green Fuels and Green Vessels.

2. It will cause no surprise that the IWG has organised three workstreams. A move as close to 0% carbon as possible in shipping has obvious implications for the development of greener fuels and for the construction and sale of vessels. The groups working on those two workstreams have explored what changes those developments may require or suggest in the context of regulations and contracts regarding, say, bunker supplies, pollution, warranties in the construction and sale of ships. Within such a greener shipping space, however, the actual *users* of ships also need to acclimatise the contracts under which those ships are used to make those contracts reflect the new realities, opportunities, and rights and obligations presented by a greener environment in commercial shipping.

3. Neither would it be right to assume that such contractual adaptations are a matter for the future. While further developments are needed in the areas of fuels and ships, decarbonisation is already with us: carbon efficiency. Through regulatory pressure (including, but not limited to the IMO and the EU), the existing fleet must reduce its carbon footprint today. The era of energy efficiency has already begun, and this has immediate contractual repercussions. Thus, for example, are warranties as to speed and consumption fit for the purpose of energy efficiency today, and will they be geared towards the same objectives once greener fuels are used on greener ships? Again, are

¹ The authors are the following members of the Comité Maritime International’s International Working Group on Maritime Decarbonisation: Charles Debattista, Alexandra Couvadelli, Helen Barden, Daniel-Luc Farrugia.

laytime and demurrage clauses in voyage charterparties and in sale contracts appropriate in a world where the urgency of arrival is replaced by today's imperative of carbon efficiency and when tomorrow's fuels and vessels put a premium on environmental considerations?

4. The dual nature of the contractual challenge of decarbonisation (immediate reduction in carbon intensity and the fitness for purpose for tomorrow's Green Fuels and Green Ships) means that the work of *this* workstream, Green Contracts, must progress in parallel with that of the Green Fuels and Green Vessels.
5. We should like to stress that the finished product of the workstream on Green Contracts will *not* take the form of draft clauses for use in charterparties, bills of lading or sale contracts. The world of international trade already has the benefit of many organisations, on international and on the national planes, whose upfront task it is precisely to draft such clauses. Moreover, many of the major commodity and chartering players already have enormous experience in drafting their own carriage and sale contracts – and it would be presumptuous for us to tread where commercial entities will want to lead in order to safeguard their interests and that of international trade. The finished product of the Green Contracts workstream would, rather, be more in the nature of an agenda suggesting the direction in which the (further) drafting of contract clauses might helpfully point, having regard to the overall objective of a greener shipping environment in the context of the proposals emanating across the piece from the Green Fuels and Green Vessels workstreams.
6. The Green Contracts workstream has identified four classes of contract which, in the view of our group, will need to be considered as we move together towards the greener shipping environment which is the objective of the IWG. These classes of contract are:
 - [a] Time and Voyage Charterparties;
 - [b] insofar as the Rules are regularly incorporated in whole or in part into charterparties, the Hague-Visby Rules;
 - [c] Bills of Lading (encompassing container bills, bulk bills and charter bills);
and
 - [d] sale contracts.
7. We list below particular aspects of such contracts or instruments which immediately obviously would require re-visiting in a greener commercial shipping environment. We stress again:

- [i] that we are not seeking to propose draft clauses, but to identify the concepts which may need to be considered to underpin any such re-drafts undertaken by others; and
- [ii] that the areas we list below are not set in stone, given that other areas might need to be looked at as well.

Time and Voyage Charters

Time charterparties

8. In a time charterparty there is usually an obligation around delivery of the vessel in a "good" or "efficient" condition and then an ongoing obligation to maintain the ship in a something like "a thoroughly efficient state". In a greener world, we would expect that "good" or "efficient" in this context will garner a new or wider meaning. We are entering a world where vessel efficiency is in particularly sharp focus and to understand a vessel's efficiency, data is key. Will a vessel be capable of being termed "efficient" if it does not have the requisite sensors on board to gather the necessary data? Will the ability to connect to shore power become a standard expectation? These are just a couple of preliminary questions that spring to mind; however, what is clear is that a vessel considered "efficient" now is unlikely to be considered "efficient" in a few years' time, without change being made.
9. The concept of "due despatch" or "utmost despatch" is a common notion found in charterparties. However, in a "greener" world, is there a place for such a concept, or should it be changed or broadened in some way? Optimising a vessel's efficiency, whether to reduce emissions or to reduce fuel costs due to the high cost of future fuels, may include operational changes such slow steaming, giving orders in compliance with the Ship Energy Efficient Management Plan (SEEMP), or taking a more efficient route. In addition, we cannot forget that such operational changes also have other positive environmental consequences such as reducing underwater radiated noise and lowering the risk of whale strikes. Such operational changes may be driven by regulation (take the IMO's MARPOL and the provisions for a Carbon Intensity Indicator, or the EU Emissions Trading System, for example), or by a company's own net zero/environmental agenda, or, most likely, both. The utmost or due despatch obligation will often work against such an environmental or "greener" agenda – and needs therefore to be revisited.
10. Speed and consumption warranties are found in most time charterparties, and in some voyage charterparties. There are a few reasons why the traditional view of a speed and consumption warranty may need re-thinking in a greener context. First, eco speeds are very often un-warranted and yet we find more ships being ordered at eco speeds for

efficiency purposes. There is also an inevitable link between the data used to determine efficiency and the use of that data for speed and consumption claims. How does the link work between speed and consumption claims and environmental regulations, e.g. CII and EU ETS?

11. In a “greener” world, will Charterers have the same freedoms when it comes to giving commercial orders to the ship? We are already seeing this questioned in the context of the CII regulations. Will Charterers’ orders be subject to certain environmental considerations, such as in compliance with the SEEMP?

Voyage charterparties

12. In voyage charterparties, there is an obligation to proceed to the loadport with reasonable or due despatch and without deviation. That duty, combined with being “expected ready to load” means that the approach voyage must be timely commenced, so that it can reasonably be expected that the vessel, proceeding normally, will be ready to load at the date specified in the charterparty. Bespoke clauses can be added to charterparties to implement, for example, just in time provisions (see for example the BIMCO Just in Time Arrival Clause 2021). However, in a greener world, should the default position not be to optimise the efficiency of the approach voyage?
13. The laytime and demurrage regime of voyage charterparties does not fit in a greener world. Demurrage incentivises carbon inefficiency and so is directly at odds with minimising carbon intensity, maximising energy efficiency and reducing emissions. Is the demurrage regime quite simply out of date? Should it be replaced with an alternative where both parties are rewarded for efficiency/the benefit of efficiency is shared between the parties?

The incorporated Hague-Visby Rules

14. It is well-known that charterparties routinely incorporate certain parts of the Hague or the Hague-Visby Rules which adopt through such incorporation the nature of contractual riders to standard charterparties. The Rules have benefited from detailed interpretation in the context of contractual relationships governed by bills of lading, to which the Rules apply in many jurisdictions as part of the law applicable to such bill of lading contracts. When the Rules are incorporated into charterparties, however, whether in part or in whole, and where those charterparties exist in the greener era of decarbonised shipping, how will traditional concepts, in common currency in the shipping world for more than a century since the Hague Rules were agreed, fall to be interpreted and applied?

15. Most obviously, for example, will the duty to “handle, stow, carry, keep, care for” the goods operate where goods are carried on a greener vessel using greener fuel? Will newer fuels require different checks to be made to ensure that goods with certain physical properties are not at risk of damage by newer, more eco-friendly fuels? Finally, will the exception of liability for losses caused “in the navigation and management of the ship” look or sound different where vessels make slower progress than might otherwise have been expected because of greener imperatives?
16. Moving from the goods to the vessel itself, what price now the duty of making the ship seaworthy before and at the beginning of the voyage? Does the concept import into the charterparty new duties of providing a “green”-worthy ship? And what will the duty “properly” to “equip and supply” the vessel mean in a greener environment?

Bills of Lading

17. **Container Bills of Lading** provide much room for essential revision in anticipation of the broader integration of greener ships and fuels. Currently, these documents often overlook critical factors such as fuel consumption, emissions reduction, and compliance with environmental standards. Updates will be needed to embed provisions necessitating the use of eco-friendly fuels, conducting thorough environmental impact assessments, and fostering the adoption of green ship technologies. Additionally, there is a movement towards incorporating measures for carbon offsetting to address emissions.
18. **Bulk Bills of Lading** will also need to be looked at in the context of the availability of greener ships and fuels. At present these bills overlook key areas such as fuel efficiency standards, alternative fuel options, and sustainable cargo handling practices. Fuel efficiency, the promotion of alternative fuels like LNG or biofuels, and incentivization of emission-reducing technologies all require a hard look at the existing grammar of bulk bills. Furthermore, clauses may need to be geared towards sustainable cargo handling and storage, alongside measures for managing environmental risks associated with bulk shipping activities.
19. **Charter Bills of Lading** likewise need re-visiting in response to evolving environmental standards. Charter bills currently lack clauses addressing vessel selection, environmental monitoring, and green chartering practices in the context of green chartering practices. Additionally, there is a call for ensuring environmental compliance throughout charter periods and specific provisions for green chartering agreements. Finally, where greener terms are used in charterparties, would some care be needed to ensure to iron out any possible inconsistencies between such incorporated terms and express terms in the charter bill?

Sale contracts

20. The central concepts which will immediately obviously be likely to need close consideration here are two, namely times of arrival and delay; and the obligation to make and tender a reasonable contract of carriage.

Timely arrival

21. It is well-known that international sale contracts come broadly in two shapes and sizes, shipment and arrival contracts. The first group, exemplified in the purely maritime field by the CIF/FOB terms and in the multimodal world by the CIP/FCA terms, impose no obligation on the Seller to guarantee arrival at the intended destination by a particular time – or indeed at all. The second, on the other hand, the “D” terms to use Incoterms 2020 language, *do* impose on the seller the duty to ensure that the goods arrive at their intended destination by a certain date, with risk of loss or damage residing with the seller until that date. If a seller who has chartered a vessel on greener terms than are typical at the moment cannot, as the journey has gone, reach destination on time, what does that do to its arrival obligation under the sale contract? Will arrival dates – and the obligations surrounding them – need to be attenuated in some form so as to reduce exposure under the sale contract to losses or liabilities arising under the charterparty? What happens under the sale contract to the risks of delay in a greener shipping world?

22. Closely related to that issue is another, namely laytime and demurrage clauses. It is well-known that voyage charterers who have sold, whether under shipment or arrival terms, will want to pass to their buyers any liabilities they incur towards owners under their voyage charterparty caused by congestion at discharge ports. However, if charterparties are modified and adapted to a world where carbon intensity and energy efficiency become a priority preferred to fast arrival, quicker NORs and therefore more demurrage), what impact might that have on the incidence of demurrage as between the seller/charterer and the buyer? In essence, how will delay at either end, loading or discharge, be dealt with in greener charterparties and, further down the chain of contracts, in greener sale contracts? Also, who pays now for ballast voyages, whether within the charterparty or a sale context?

23. Finally, this link between charters and sale contracts brings us to the third concept which will clearly need to be explored. Sellers CIF/CIP (or FOB/FCA who have undertaken to the buyer that they will organise the carriage of the goods) are typically under an express or implied duty to tender a “reasonable” contract of carriage. In a greener commercial shipping world, what content will that adjective “reasonable” contain? If a buyer were to face import difficulties in port States setting a premium on

environmental considerations, would that buyer have cause for complaint against the seller (possibly against a falling commodity market) or would the buyer only have cause for complaint if the sale contract had imposed an express duty on the seller in respect of any particular environmental requirement regarding the vessel engaged by the seller? In other words, will we get used to the inclusion of such requirements in sale contracts in the same way we are currently used to terms in sale contracts regarding the age or flag of the vessel engaged?

Conclusion

24. A greener shipping world with greener ships using greener fuels can only work if the important players in international trade, sellers and buyers who charter vessels, are comfortable using charter and sale contracts which respond to the needs caused and expectations raised by environmental considerations.

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