

BUNKERSPOT

CLEARING THE AIR

SHIPPING'S ROLE IN
EMISSIONS TRADING

INSIDE:

UKRAINE CONFLICT
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HYBRID PROPULSION
AMMONIA BUNKERING

Setting off to offsets

Steve Simms of Simms Showers takes a deep dive into the carbon offsetting space and reflects on the risks and opportunities the European Union's Emission Trading System might present to bunker suppliers

Since 2012, Tesla has made \$1.7 billion selling carbon emission credits, almost more than the company has made selling electric cars¹. So, might bunker traders, brokers and suppliers now start selling carbon and other greenhouse gas (GHG) emission credits, offsets or allowances to make as much or more than they do selling fuel?

To date, in the maritime industry using GHG offsets, credits or allowances has been voluntary. However, as a part of its 'Fit for 55' package – the target, to reduce net greenhouse gas emissions by at least 55% by 2030 – the European Parliament is expected in 2022 to adopt legislation including waterborne shipping emissions into its compulsory Emissions Trading System (ETS).

Traders including KPI OceanConnect, Minerva Bunkering, Trefoil Trading, Vitol Bunkers and World Fuel Services have since at least 2021 sold GHG emission credits, offsets or allowances to help customers reduce their fleet's combined GHG emissions. Combining the sale of offsets purchased on the world market along with conventional bunkers makes the fuel sold effectively carbon neutral. This enables bunker traders', suppliers' and brokers' customers to offer carbon neutral services as an option to their shipper-customers.

This article addresses the legal issues that bunker traders, brokers and suppliers should consider as they sell, or consider selling GHG offsets, credits or allowances. Because of shipping's upcoming inclusion in the ETS – and also because of increasing customer demand – knowledge and availability of GHG offsets, credits or allowances will be a central part of bunker transactions. This will be immediately for customers with vessels sailing within, to and from countries which are part of the ETS, but also for other customers as they consider their fleet GHG emissions.

THE CONTINUING PUSH FOR GHG EMISSIONS REDUCTION

Carbon credits, offsets or allowances are created through compulsory government 'cap and trade' programs (of which the ETS is the world's largest), or through voluntary programs where, for example, a certifying organisation issues a certificate which confirms investment in a project (reforestation, for example) that offsets carbon emissions elsewhere. Voluntary credits, offsets or allowances are created through programs which reduce or eliminate emissions. When carbon is produced by burning a fossil fuel, the corresponding amount of credit, offset

or allowance is 'retired', basically, cancelled out by the amount of carbon production.

Whether the credit, offset or allowance is to meet compulsory or voluntary needs, the market and potential opportunity for bunker traders, suppliers and brokers in it, is significant. The world carbon trading market in 2021 grew 164% to \$851 billion². In contrast the world marine fuel market was much smaller, \$109.6 billion in 2020³.

GHG emissions reduction of course continues to be the bunkering industry's first priority. Encouragement (if that's the right word) continues to come from the IMO and European Union, but it also continues from major ship owning and chartering customers, banks (the Poseidon Principles), and large cargo shippers like Amazon, IKEA and Unilever (the Clean Air Task Force).

GHG emissions reduction overall, however, requires a range of approaches. New vessels may be more efficient and be able to consume lower GHG-producing fuels as an alternative to 'conventional' bunkers, but owners and charterers can't reduce GHG emissions as quickly from the older vessels in a fleet consuming 'conventional' bunkers. These vessels for at least the next decade will continue to make up most of the world fleet.

'Some 95% of the value of the world carbon market is in the largest global, compulsory (compliance) carbon trading market, the ETS'

THE COMPULSORY MARKET: THE ETS, AND CAP AND TRADE

For trade under the ETS 'cap and trade system' are European Union Allowances (EUAs). Each EUA 'offsets' one metric ton (2,204.6 pounds) of CO₂. Under a cap and trade system, the governing authority sets a ceiling ('cap') of carbon that can be emitted by an operation (factory, power plant, and under the ETS applied to the marine industry, ship). Under a traditional cap and trade program, if emissions exceed the cap, the operation must buy EUAs (or other certified carbon offsets, which can include credits from the Kyoto Protocol's Clean Development Mechanism or Joint Implementation schemes) on the open market to offset that excess. EUAs initially become available, under the historic operation of the ETS, by allocation.

Each operation is allotted a certain number of EUAs up to its emissions cap. The operation 'retires' its EUAs to match the amount of CO₂ it emits. But, if it uses fewer of its allotted EUAs, it can bank them for later needs or sell them on the open market. This gives an operator an incentive to emit less carbon. The ETS (and other compulsory, cap and trade programs) lower the cap over time. This gives a further incentive to investment in lower-emitting operations. The lower the overall 'cap', the more expensive EUAs become since there are fewer available for trade.

Some 95% of the value of the world carbon market is in the largest global, compulsory

(compliance) carbon trading market, the ETS. Present proposals are that the ETS is to include all vessels of 5,000 gross tons and above, transiting within, to or from the 27 EU member states. Once vessel owners, managers and charterers are included in the ETS, as from 1 January 2023 (as currently proposed), they will have to purchase certain increasing numbers of EUAs – giving bunker traders, suppliers and brokers opportunities to assist with these purchases.

THE VOLUNTARY MARKET

The trading volume for voluntary carbon credits/offsets and allowances is much smaller, USD \$473 million in 2020⁴, but projected to reach USD \$700.5 million in 2027⁵.

Generally, an offset or credit compensates for an activity which causes emissions, or enables emissions to be reduced. Voluntary credits can be purchased to support cessation or reduction activities anywhere in the world. Voluntary credits generally are cheaper because they cannot be used in compliance markets; they also are not a part of a 'cap' scheme so their number is effectively unlimited, linked only to the number of authentic emissions stopping or reducing projects. Typically, the reason to purchase voluntary offsets is to meet voluntary customer emission reduction commitments. The purchase of voluntary offsets allows customers to participate in a direct way in particular efforts they would want to identify with, for exam-

ple, reforestation, public transit development, or the production of non-emitting fuels.

A challenge with voluntary credits, however, can be their authenticity. There has been an unfortunate history of some programs sold for voluntary credits which produced no emission cessation or reduction benefit. Non-governmental organisations (NGOs) including Gold Standard, Verified Carbon Standard, Climate Action Reserve, American Carbon Registry, Plan Vivo and The Climate, Community & Biodiversity Alliance have developed tools which evaluate and certify voluntary offset programs so that, generally, certification by one of these NGOs confirms that the voluntary credit/offset offered is legitimate.

Still, however, if a bunker trader or supplier chooses to buy and re-sell voluntary credits/offsets, or a broker chooses to be involved in the sale, the trader, supplier or broker should conduct due diligence inquiry about the program or project offering the credit/offset.

The certification, purchase and use of credible, voluntary credits/offsets requires the use of carbon offset registries. These reliably identify who owns an offset credit, and define who bears the risk if an offset project fails. An offset registry tracks projects and credits, as well as the retirement of those credits, assigning a serial number to each. This reduces potential fraud from multiple sales of the same credit. A credible registry also will have ready information that identifies offset projects, and a way to trace each credit back to its associated project.

The registry also will have standards which clearly designate the entity which originally owned the offset credits, and which details who is responsible for replacing credits that any failed project should have produced. For example, if a forest fire consumes trees planted for an offset project, the registry should detail who will pay to re-plant the trees or otherwise replace the failed credits. Responsibility could include, for example, insurance to replace the credits of a failed project.

Due diligence prior to the purchase of any voluntary credit or offset would include determination of responsibility for the continued viability of the associated project. The project, to be of high quality, must provide for the removal of additional emissions, and not overestimate the emissions it offsets. The project should be permanent (not, for example, for trees planted only to be cut down after the offsets are sold). Only one entity must be selling the credits from the project, and the project must not, for the sake of emission elimination or reduction, cause social or environmental harms.

Due diligence by the trader, broker or supplier involved with the credit/offset sold has three additional benefits. First, it gives credibility for the sale, because the customer can receive credible information about what is not only a credit/offset, but potentially a public/customer relations benefit for the customer, through association with an environmentally- and socially-beneficial project. Second, it avoids embarrassment to the customer or the seller who might have otherwise have bought or sold credit/offsets from a failed, underperforming or fraudulent project. Third and overall, proven due diligence supports a good re-sale price to the customer for the credit/offset, and avoids disputes about whether the credit/offset was what it was represented to be and whether the customer must pay for it as agreed.

FIT FOR 55 AND FUEL EU: COMPULSORY OFFSETS COME TO BUNKER BUYERS

As a part of its European Green Deal – with the target to reduce net greenhouse gas emissions by at least 55% by 2030 (introduced by the EC last year as ‘Fit for 55’) – last September the European Parliament enacted the beginnings of legislation which is expected to lead the inclusion of waterborne shipping emissions in the ETS.

The overall effect of these and other pending proposals is to put the requirement for compliance with the ETS on the entities ‘responsible for paying for the fuel

consumed by the ship’ – the customers of bunker traders, suppliers and brokers.

This presents opportunities for traders, suppliers and brokers to assist their customers with the purchase of necessary credits, again within the ETS system.

In the first legislative step toward including shipping within the ETS, on 16 September 2020 the European Parliament amended the EU’s Monitoring, Reporting and Verification (MRV) requirements for reporting vessel carbon dioxide (CO₂) emissions. MRV requirements had been in place from January 2018, but the change was to make new MRV pro-

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visions ‘apply from 1 January 2022 to the issue and allocation of allowances in respect of greenhouse gas emissions from ships arriving at, within, or departing from ports under the jurisdiction of a Member State covered by Regulation (EU) 2015/757 of the European Parliament and of the Council.’

The amendments expanded the definition of the ‘company’ which must report emissions to put the requirement on the entity which pays for the fuel the ship consumes:

the shipowner or any other organisation or person such as the manager; **the time charterer or the bareboat charterer, which has assumed the responsibility for the commercial operation of the ship from the shipowner and is responsible for paying for fuel consumed by the ship**⁶.

(Emphasis added.) The defined ‘companies’ ‘shall carry out that monitoring and reporting within all ports under the jurisdiction of a Member State and for any voyages to or from a port under the jurisdiction of a Member State.’¹⁷

Ships, of course, are frequently time chartered for relatively short periods, and ‘companies’ (bunker trader, supplier and broker, customers buying the fuel

the ship consumes) frequently change. The MRV requirements now are that:

‘2. Where there is a change of company, the previous company shall submit to the Commission and to the authorities of the flag State concerned, **on the day of the completion of the change or as close as practical to the day of the completion of the change and no later than one month thereafter**, a report covering the same elements as the emissions report but limited to the period corresponding to the activities carried out under its responsibility. The new company shall ensure that each ship under its responsibility complies with the requirements of this Regulation for the remainder of the reporting period following the change.’

⁸The amendments (on “Reduction of emissions”)⁹ continue that:

1. Companies shall linearly reduce the annual CO₂ emissions per transport work by at least 40% by 2030 as an average across all ships under their responsibility, compared to the average performance per category of ships of the same size and type as reported under this Regulation.

2. Where, **in a given year**, a company fails to comply with the annual reduction referred to in paragraph 1, **the Commission shall impose a financial penalty**, which shall be effective, proportionate, dissuasive and compatible with a market-based trading emission system, such as the EU ETS. Payment of the excess emissions penalty shall not release the company from its obligation under paragraph 1 for the period until 2030. In the case of companies that have failed to comply with the emission limits laid down under this Article, the provisions of Article 20(3) and 20(4) [which can be fines, or exclusion of trading] shall apply.

The pending ETS proposals take MRV reporting as a baseline for each vessel, to include within the ETS 100% of all CO₂ emissions between EU ports, 50% of emissions from non-EU ports to EU ports, and 50% of all emissions from EU ports to non-EU ports. The ETS excludes emissions during voyages between ports outside the EU. The emission calculation proposals, consistent with the past operation of the ETS for other included operations, look only at emission from actual combustion.

Under the Regulations adopted in September 2020, the fuel buyer does the

MRV reporting, but who is responsible for ETS compliance? The European Commission's Final Proposal¹⁰ (ETS Directive), published on 14 July 2021, for including shipping in the ETS stated that ETS compliance was to be by any 'organisation or person' having:

all the duties and responsibilities imposed by the International Management Code for the Safe Operation of Ships and for Pollution Prevention [the ISM Code]. This definition is based on the definition of 'company' in Article 3, point (d) [unamended] of Regulation (EU) 2015/757, and in line with the global data collection system established in 2016 by the IMO.

Generally, those responsible under the ISM Code are vessel owners or operators, not time charterers. The proposal continues, though, that 'in order to ensure that the polluter pays principle is fully respected and to encourage the uptake of efficiency measures and cleaner fuels,' charter provisions ('a binding clause') should require fuel buyers ('the entity that is ultimately responsible for the decisions affecting the CO₂ emissions of the ship') to bear the costs of ETS compliance. As of the date of this article, BIMCO is undertaking the drafting of charter party clauses 'allocating the responsibility of purchasing and surrendering emission allowances.'¹¹

But it is likely that the final ETS legislation will have the same 'company' definition that the MRV regulation has: requiring fuel buyers (as a matter of law, not just contract) to be the ones buying EUAs. The European Parliament's Rapporteur, Member Peter Liese in January, 2022 published these and other proposed revisions to the original 'Fit for 55' Directive.¹²

Most, if not all of Mr Liese's proposals are believed likely to become the final law which the EU adopts later in 2022, including – in a prompt to the IMO – that if the IMO fails to introduce by 2028 a global, emissions-reducing measure similar to the ETS (which could include carbon taxing), then the ETS could be extended to 100% of the world's waterborne shipping emissions (how this would be done is not explained).

The customary terms for marine fuel sales are that the fuel buyer always is responsible for selecting the correct fuel type and quality for the vessel, including as may be required to comply with charter party obligations. Bunker traders, suppliers and brokers should be aware, however, that with the introduction of the ETS, there will be, at the minimum, new charter party clauses requiring their charterer-customers to purchase (and surrender) EUAs.

Assisting customers to comply at a minimum, including for alternative fuels, requires

accurate reporting of fuel lifecycle emissions intensity on bunker delivery notes (BDNs). Suppliers, and through them, traders and brokers, providing any fuel for vessels sailing to a port that the ETS will cover, need to be prepared to provide customers with those accurate BDNs, including those whose charters will require their purchase and surrender of EUAs, and also separate certificates identifying the fuel's production pathway.

At present, there is no proposal to allot EUAs to marine fuel buyers which the ETS will cover. Instead, buyers will need to acquire and surrender EUAs to cover 20% of verified emissions reported for 2023; 45 % of veri-

could offer EUAs as part of a fuel purchase. The customer would specify the required fuel lifecycle emissions intensity, in addition to other ISO 8217 requirements, as well as emissions expected during the voyage. The supplier or trader would then, as a total cost of the fuel, sell EUAs to meet requirements to cover the emissions. With this, the customer 'up front' would have a better idea of its expected fuel costs, than, for example, had it simply purchased the fuel first and been concerned with the vessel going off charter, with the EUA purchase costs.

The customer instead could consider as part of its up front fuel choice, whether

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fied emissions reported for 2024; 70% of verified emissions reported for 2025; and 100% of verified emissions reported for 2026 and each year thereafter. So, under the proposal, the 2023 'cap' for marine fuel buyers is 80% reported, verified emissions, 55% for 2024, 30% for 2025 and none for 2026 and thereafter.

This presents a challenge, particularly for time charterers, which might only occasionally be involved with shipments to, from or within ETS countries. Consider, for example, that the time charterer has one shipment into an ETS country. In 2023, the charterer, purchasing fuel, at the end of the charter must under the EU MRV report its emissions, and also buy and retire EUAs or similar to cover 20% of the emissions during the voyage. To pay for the EUAs, the charterer might either build the charge (along with the other operational costs, including bunkering) into its freight rates, or attempt to impose a surcharge for the EUAs later on its customers.

OPPORTUNITIES AND FACTORS FOR TRADERS, SUPPLIERS AND BROKERS

It must ultimately be for the customer to determine what fuel it orders. But, since the EUA cost will be an overall cost of the fuel, suppliers and traders, including through brokers,

to use a higher priced (including alternative) fuel with a lower emissions intensity (so having to purchase fewer EUAs), or use a lower priced fuel (HSFO, combined with a scrubber) which, bought along with EUAs, might present an overall lower fuel cost than the higher priced fuel.

Consequently, for price-competitiveness as well as customer service, bunker traders, suppliers and brokers should at least be aware of customers' considerations of EUAs, but also be prepared to offer them as a part of an overall bunkering price. The EUAs could be acquired at the time of the sale, but trading in them also presents opportunities (and risks) for the supplier or trader.

The volatility of pricing for allowances has been a criticism of the EUA (and other cap and trade) systems: for example, from October 2020 to October 2021, the carbon allowance price jumped between €24 and €62 per metric ton; with the Russian invasion of Ukraine, EUA prices in March, 2022 dropped 35% from €95 to €55.¹³ However, at present, carbon allowances and offsets are considered to be underpriced, that is, at prices well under those expected in the next 10 years. One estimate is that carbon offset prices (which include EUAs) could increase as much as 300% by 2029.¹⁴ A 'cap and trade' system also has a built in price increase as the cap decreases

along with the number of allowances. So, even with volatility, all things being equal, one could expect EUA prices to rise as caps decrease.

The profit potential is obvious, just as it is in the bunker or any other market: buy low, sell high. A bunker trader or seller, and broker working with them, packaging EUAs (or other offsets, credits or allowances that might apply) with a bunker sale price, might be able to offer an overall price which is more attractive to a customer (and more financially beneficial to the seller, and broker) than just fuel alone. Just as a trader or supplier might have secured less expensive fuel and profit when fuel prices increase after that, it might also secure less expensive allowances.

If the supplier or trader must buy fuel at a higher price, but holds lower-priced allowances, for example, it can offer a customer a total fuel price (fuel and allotment) which is more attractive to the customer, than buying the fuel and allotments at what may then be the present market price. Again, the customer receives the further benefit of not having to deal later (assuming that the customer has correctly calculated its expected voyage emissions) with the requirement of buying and retiring the allotment at the end of the charter party.

Along with this, traders, suppliers and brokers should be aware of the fueling considerations that customers are likely to be making when they are involved with a voyage to or from an ETS-covered port. The Port of Rotterdam commissioned researchers CE Delft to determine how including shipping in the ETS might affect trade patterns. The March 2022 Delft study¹⁵ concluded that vessel operating customers could reduce their EUA (and thus overall bunkering) costs notably if they either, or in some combination, added an extra port call just outside the EU (so, Brexit could help, after all), called first on a port close to the EU before sailing on to an EU port, used feeder services (with less than 5,000 GT vessels) from non-EU ports (for example, Tangier Med Port to Algeciras), or took some EU ports out of call schedules, and instead used feeder services from the EU to non-EU ports.

What this means is that with the ETS covering shipping and fuel-buying customers likely having to buy increasing amounts of EUAs beginning in 2023, they also will be considering the relative cost of bunkering and calling outside the EU. That relative cost will be a function of a number of things (like, for example, the cost of feeder services and trans-shipment), but the consideration will (or should) include the overall cost of fuel, which is the basic fuel cost plus the cost of offsetting EUAs.

An observation about the present ETS is also its focus on CO₂ rather than overall

GHG emissions, including methane emissions. Consequently, there is criticism that the ETS favours LNG-fuelled vessels (which have lower CO₂ emissions but experience methane slip). But as long as the ETS does favour LNG or other 'alternative fuelled' vessels, then customers' further choice may be to operate those vessels in and out of EU ports, or, with dual fuelled vessels, to switch, for example, to a lower CO₂-emitting fuel for EU port calls. Consequently the 'fully equipped' trader, supplier or broker needs to be able to consider the cost and availability of lower CO₂-emitting fuels for vessels calling EU ports, and have those fuels available, along with considering and offering EUAs.

IMPORTANT LEGAL CONSIDERATIONS

Consider the challenges of a 'traditional' bunker transaction. There are claims that bunkers are off-spec or provided in short quantity. There are also customers which might not pay, or pay on time so there is the need to arrest a ship and/or make other recoveries including of legal expenses and interest.

Project those challenges to the sale of marine fuel in terms of GHG emission offsets, credits or allowances (here together, 'offsets'), and that gives a start to the legal considerations of that sale. (An upside, though: 'offsets don't 'spill', so no cleanup costs).

Traders and suppliers considering offering offsets – whether for the expected compulsory ETS market or voluntary market – should have terms addressing potential challenges with offsets.

First, the Terms should define exactly what offsets are being sold. They should define

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EUAs specifically as a subset of the offsets subject to the Terms, which allowances which are required by the ETS. They also should define voluntary offsets as a subset of offsets that are not required by or eligible to satisfy ETS requirements. However, offsets generally can be defined (since this is the standard both between the ETS and most voluntary offset programs) as a unit which offsets one metric ton of CO₂ produced as the result of use by the Buyer's Vessel (the latter is also a typically defined Term of bunker sales terms).

The Terms further should make clear that they govern any sale involving offsets, but that there is no offset sale unless the sale confirmation confirms that. If the transaction involves the BIMCO Bunker Terms (the current version is 2018) then the terms for sale of offsets (along with others, like the choice of law and arbitration or other dispute resolution forum) must be specified on the Election Sheet.

Also, unless the Seller (a defined term in well-written bunker sales terms) wants to (hopefully, successfully) hedge the offset it sells, or holds offsets at a certain price that it will sell (and does not buy on the open market), the Terms should state that the offset price is not set until (at least) the Buyer (again, a defined Term) confirms the sale. That is the point at which the Seller would either buy the offset or reserve it (in its offset account) for the sale. To account for fluctuations, Terms may also state that the Seller reserves the right to charge a different price for the offset than originally quoted.

The Terms further should state that the Seller relies solely on the Buyer's specification of fuel lifecycle emissions intensity and expected emissions, for the determination of the offsets necessary to meet the Buyer's needs. They should also state that the Seller may recommend, but Buyer may not rely on, the offsets including quantity, and for voluntary offsets, projects and quality, that the Seller might recommend, but that the Buyer is required to pay for the offsets after the Seller confirms the sale, within the agreed Terms, including payment date.

In the US, the Federal Trade Commission regulations concerning carbon offset sale (16 Code of Federal Regulations ("CFR") § 260.5 – Carbon offsets) state that:

- (a) Given the complexities of carbon offsets, sellers should employ competent and reliable scientific and accounting methods to properly quantify claimed emission reductions and to ensure that they do not sell the same reduction more than one time.
- (b) It is deceptive to misrepresent, directly

or by implication, that a carbon offset represents emission reductions that have already occurred or will occur in the immediate future. **To avoid deception, marketers should clearly and prominently disclose if the carbon offset represents emission reductions that will not occur for two years or longer.**

(c) It is deceptive to claim, directly or by implication, that a carbon offset represents an emission reduction if the reduction, or the activity that caused the reduction, was required by law.

(Emphasis added). Terms should state prominently in bold print that **ANY OFFSET MAY NOT OCCUR FOR TWO YEARS OR LONGER**. Sellers also should assure that any offset is bond fide, that is, truly required.

Sellers need to decide whether they will be directly involved in retiring offsets, or whether it will be the Buyer's responsibility to retire. However, if the Buyer is to retire offsets itself, the Buyer must itself have a registry account; the Seller will transfer the offset to the buyer, on the registry (just like, money is paid from one bank account to another). Buyers may not want to have the administrative burden of establishing or maintaining a registry account, however, and so Sellers may choose to serve as the Buyers' agents to retire offsets. But this undertaking comes with responsibilities that Terms must address.

EUAs are recorded on a single registry, the Union Registry. Like a bank account ledger, the Union Registry records the balance of EUAs held (for example, in the name of the Seller). It also has a record of the operations covered by the ETS Directive (so eventually will list maritime shipping 'companies'), transfers, annual verified CO₂ emissions of covered operations (again, which will be by 'company' – that is, fuel buyers) and annually reconciles EUAs and verified emissions (to confirm that each covered 'company' has retired, or surrendered, enough EUAs to cover its verified emissions quota).¹⁶ So, for the ETS, EUA retirement must be confirmed through the Union Registry.

There are a number of registries for voluntary offsets, but those registries work essentially the same as the Union Registry, including the requirement that a Buyer, to receive title transfer of an offset, as recorded on that registry, must have a registry account. Although voluntary offsets can be traded and retired outside of a registry, as noted earlier to assure integrity of the voluntary offset, Sellers should only trade in offsets kept with a recognised registry.

One of the further reasons that Sellers may want to accept responsibility for offset retirement is that Sellers may want to hold

voluntary offsets in more than one registry account, for example, having accounts both with the Gold Standard and Verified Carbon Standard registries. This allows the Seller more buying and selling opportunities for offsets. Terms should state that the choice of Registry, from which the Seller sells or where it holds offsets is only Seller's.

Again, it will be the Seller which initially is the registered offset owner. As a service to the Buyer, the Terms also should state that the Seller will inform the Buyer of the retirement of the offsets, but that it is the Buyer's responsibility to inform the Seller when the offsets should be retired (which would normally be after completion of a voyage and/or consumption of the fuel that the offset covers). Sellers also will need to be prepared with the necessary administrative backup, internally or contracted out, to administer

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receipt of directions for retiring (surrendering) the offsets and confirming that retirement.

However, since the registry is the entity which ultimately confirms the requisite offset retirement, Terms should make clear that any confirmation from the Seller to the Buyer of surrender/retirement is subject to the registry's formal confirmation.

The use of a registry also helps assure that offsets are not sold multiple times. Sellers in their Terms should consider use of a title retention clause for offsets, just as they do for the actual fuel sold. That is, that the offset does not become the Buyer's property until paid for. This will mean that payment terms should be shorter than, or equal to, the time for which, the offset must be retired.

Sellers will need to be keenly aware of the proposed voyages of their Buyers/customers. That is, if the Buyers' vessels will be sailing in or out of the EU, with the proposed extension of the ETS they must (if buying from the Seller) have qualified EUAs, distinct from any voluntary, non-qualified offsets they might buy to use elsewhere. Yes, EUAs can be voluntarily retired but they will usually be more expensive

than voluntary offsets. So, for a customer with a voyage in part involving the EU (and ETS) and in part other ports, which wants to use offsets for the entire fuel purchase, the Terms should make clear that it also is the customer's sole responsibility to specify exactly what quality and quantity of offsets (EUAs and voluntary offsets) the customer requires.

Sellers also should limit representations, guarantees and warranties concerning offsets, including the warranty of merchantability. This is particularly the case for voluntary offsets, where projects may fail. Terms should state that it is the Buyer's responsibility to confirm the authenticity and actual effect of the offset.

Limitations also should, specifically for offsets, include the time and means (details in writing) within which a Buyer may make any claim associated with an offset sale, and a limitation of all related

damages to the sale price of the offset.

Finally, there is the Terms' matter of collection, and law and forum choice.

Can a Seller arrest a ship for the price of unpaid-for offsets? Arguably they are part of the vessel fuel price, so, if one can arrest for unpaid fuel, one should be able to arrest for the unpaid offset. But, under US maritime lien law (the U.S. Commercial Instruments and Maritime Liens Act, (CIMLA), only 'necessaries' give rise to maritime liens *in rem*. EUAs arguably are 'necessaries' (and might even be considered a statutory charge, which CIMLA also recognise as a basis for *in rem* maritime liens). Voluntary offsets, though, are not 'necessary' (desirable, admirable, but not necessary) for vessel operation. Although a court may not ultimately recognise at least unpaid-for voluntary offsets to support a vessel arrest, for the purpose of increasing Sellers' leverage for recovery, Terms nevertheless should state that all offsets sold are part of the overall fuel price and agreed to be necessary to the vessel operation.

For law choice and forum, the Terms – as should 'standard' bunkering terms – should

specify controlling United States maritime law (CIMLA) and the Seller's sole choice to bring suit in and the Buyer to submit to the jurisdiction and venue of a specific court (for example, the US District Court, Southern District of New York), or any other court of the Seller's choosing, or, also at Seller's sole choice, to initiate arbitration and Buyer respond under certain established arbitral rules (for example, the New York-based Society of Maritime Arbitrators). It should also be made plain that any Buyer claim (or counterclaim) must be brought exclusively in a court, or arbitral proceeding, specified solely by the Seller in response to a claim by the Buyer.

OFFSETS - WILL THEY BE A PERMANENT FIXTURE IN BUNKERING?

Although Tesla has made more than a billion dollars on carbon emission credit sales, Elon Musk recently said that his 'top recommendation, honestly, would be just add a carbon tax... The economy works great. Prices and money are just information... If the price is wrong, the economy doesn't do the right thing.'¹⁷

A carbon tax, non-market-based approach is what the IMO has been advocating. The EU has pressed ahead to include shipping in the ETS, however, because of the Commission's and Parliament's belief that the IMO has not been working fast enough. Yet also pushing back against offsets, credits and allowances and taxation is concern that offsets, credits and allowances lead to profiteering and more pollution. Its what's been called 'the Thunberg effect'

At a carbon-offset panel session [at the November 2021 UN Climate Change Conference in Glasgow], [Greta] Thunberg and other activists stormed out, with the Swedish teenager decrying "greenwashing." She reiterated that criticism in a series of tweets targeting fossil-fuel firms and banks for 'trying to scale up offsetting and give polluters a free pass to keep polluting.'

'Offsetting is often a dangerous climate lie,' she wrote. 'Offsetting risks human rights transgressions and to harm already vulnerable communities. Offsetting is often hypocrisy and it is swirling around at #COP26.'¹⁸

Yet, the ETS system applied to water-borne shipping, is expected to raise billions, at least in the short run, some of which will be directed to clean energy projects, including for shipping.

Whether through the 'Thunberg effect' or market response which, because or despite of credits leads to less emissions, offsets and the like will probably phase out by 2050 or

before. Until then, though, they present a notable opportunity for bunker traders, suppliers and brokers which, one way or the other, will present a 'reformation' of marine fuel sales.

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The opinions and recommendations of this article are his and not necessarily also those of IBIA or SEA/LNG, except if identified specifically as such.

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