

Maritime



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BIMCO Adopts New Clauses and Contracts

NEW DEVELOPMENT

The Baltic and International Maritime Council's ("BIMCO") Documentary Committee adopted several new clauses and contracts at its recent meeting held on January 25, 2021. Included were: (1) a new charter sanctions clause, (2) a clause promoting transparency and dialogue between owners and charterers, and (3) tug, barge, and floating hotel contracts. Given the prevalence of U.S. sanctions against myriad governmental and private-party actors worldwide, the scourge of the COVID-19 pandemic, and the construction advent of new offshore wind farm structures, each of these clauses and contracts warrant consideration by maritime law practitioners and commercial operators alike.

SANCTIONS CLAUSE FOR CONTAINER VESSEL TIME CHARTER PARTIES 2021

In recognizing the complexity of international sanctions regimes, coupled with the fact that they consistently change as the number of new restrictions continues to increase, BIMCO issued a [sanctions clause](#) for charter parties in the container trade in an effort to assist interested parties in complying with the worldwide sanctions regulations. This new clause was designed as part of an initiative to create a library of sanctions clauses that reflect the individual needs and characteristics of different trades and operations, as well as provide greater understanding of the responsibilities assumed by owners. It is the last step in a triad of sanctions clause updates, which comes more than a year after BIMCO's revised standard sanctions clauses for time and voyage charters. As the various shipping subsectors possess

separate risks associated with different market realities, BIMCO tailored this clause to address the characteristics of the container industry, specifically to address: (1) transactions with a "Sanctioned Party," and (2) voyages involving a "Sanctioned Cargo."

The new clause obligates both owners and charterers to warrant that they are not a sanctioned party, but also obligates the charterer to give a narrower warranty to refrain from knowingly carrying any sanctioned cargo and to indemnify owners from any damages that result from doing so. Oftentimes, neither the vessel owners nor charterers will have any knowledge of the cargo contents beyond what limited information the shipper provides. Though the charterer must exercise the required due diligence to ensure that it abstains from shipping sanctioned cargo, the clause gives any innocent party the right to terminate the charter party and/or claim damages if the other party is in breach of its warranty.

As BIMCO's accompanying guidance notes discuss, the charterer's indemnity obligation was drafted on the "knowingly" or "should have known" liability threshold rather than a strict liability provision.

The obligation's standard requiring knowledge is appropriate in the container context when neither owner nor charterer possess additional information from what the shipper provides. However, the standard should incentivize charterers

to implement robust sanctions compliance screening programs of counterparties, to remain attentive to sanctions risks, and to take the appropriate steps to mitigate those risks. Conversely, if a charterer fails to implement these industry standard processes, then that failure to exercise care could cause the charterer to fall foul of the knowingly standard and subject it to fines and penalties.

Finally, it is noted that a fine line may exist between instances involving a sanctions risk and those in which a breach of sanctions occurred, particularly in the case of extraterritorial U.S. sanctions. BIMCO recommends parties seek legal advice on whether they are obliged to comply with specific or extraterritorial sanctions before operating the clause to avoid the risk of wrongfully withdrawing from contractual obligations.

TRANSPARENCY AND DIALOGUE BETWEEN OWNERS AND CHARTERERS KEY TO CREW CHANGE CHALLENGE

BIMCO received member feedback indicating that in certain trades—notably dry cargo—some charterers push back on vessels that either have had or will have a crew change within 14 days of the proposed date of delivery, or whose owners have scheduled a crew change within a spot charter. In response, BIMCO issued this [transparency and dialogue clause](#), referring to the crew-change crisis as a humanitarian issue caused by national travel restrictions imposed as a result of the COVID-19 pandemic.

Typically, a charterer's short term and spot charter contractual obligations are not conducive to delays. As BIMCO noted, world trade has to flow. It becomes a balancing act to allocate liability between charterers and owners where delays occur through no fault of either party in the COVID environment. BIMCO emphasized the importance of opening the lines of communication between charterers and owners for both sides to attempt to find the best solution for necessary crew changes.

For example, owners should address their crew change plans and procedures with charterers and provide honest estimates concerning the risk of delays. In turn, charterers should understand that owners find themselves in this situation due to circumstances beyond their control. In the end, sustainable transportation depends upon both sides working together to create the most efficient solutions.

TUG, BARGE, AND FLOATING-HOTEL CONTRACTS

BIMCO's Documentary Committee adopted [four new contracts](#), extending its library of offshore industry standard contracts. Specific adoptions included that of ASVTIME—a time charter party for accommodation support vessels—and updates to its ocean towage agreements—TOWCON and TOWHIRE. It also adopted a new edition of its charter party for hiring unmanned barges—BARGEHIRE.

ASVTIME is the first BIMCO-drafted offshore contract designed to meet the needs of two distinct sectors—oil and gas as well as renewables. The contract provides a choice of optional services in addition to accommodation. They included the use of motion compensated gangways, cranes, offshore bunkering, and the use of daughter craft.

With respect to the others, it has been 12 years since the TOWCON, TOWHIRE, and BARGEHIRE standard forms were last updated.

TOWCON's new features included a provision for mid-voyage bunkering on longer tows as well as a mechanism for calculating compensation due to slow steaming or deviation. And, the revised BARGEHIRE clarifies past disputed wording associated with off-hire surveys, repairs, and redelivery. The new editions essentially reflected changes in commercial practice and legal developments.

RECOMMENDATION

Due to legal complexities arising from the constantly changing clauses and contract templates, parties planning to incorporate any of the clauses into their contracts are strongly advised to read the accompanying guidance notes and seek legal advice.

For additional information, please contact:

Keith B. Letourneau
713.632.8609 | kletourneau@blankrome.com

Matthew J. Thomas
202.772.5971 | mthomas@blankrome.com

Zachary J. Wyatte
713.632.8669 | zwyyatte@blankrome.com