



BIMCO

SPECIAL CIRCULAR

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BIMCO Piracy Clause for Time Charter Parties 2009

Introduction

In March 2009 BIMCO published its Piracy Clause for Time Charter Parties. The Clause was drafted in response to industry demand for a comprehensive contractual provision dealing with rights, obligations, responsibilities, liabilities and costs related to piracy under a time charter. The framework for the Clause was the well established CONWARTIME 2004 War Risks Clause – one of the few standard War Risks Clauses in widespread use that actually refers to piracy. BIMCO's primary objective in drafting the Piracy Clause was to consolidate into a single provision the contractual position of the parties in relation to the threat of piracy. The Clause addressed the owner's obligation to follow charterers' orders; the right to refuse to proceed if the risk to the vessel and crew is adjudged to be too great; the allocation of costs for additional security measures and insurances if the owners agree to proceed through a risk area; and the effect on hire if the vessel is detained by pirates.

Background to the revision

While there was little in the Clause to unsettle the established position reflected in many standard forms of time charter in respect of the issues referred to above, the reaction to the Clause from the industry was that it was perceived as being slanted in favour of the owners. The perception stemmed from the express provision in the Clause that if the vessel were to be detained by pirates then it remained on hire throughout the period of detention. Many charterers felt that with ships being held by Somalian pirates often for two or three months, this made the Clause too onerous towards them. However, there is a generally held belief that, even without the BIMCO Piracy Clause, the position under many standard time charter forms in respect of whether detention by pirates is an off-hire event, is that unless there are express words making it an off-hire event then it isn't one - and therefore the ship will remain on hire. Many charterers also appeared to overlook the fact that the bar was set at a very high level in terms of the master or owners making a "reasonable judgement" that the vessel was at risk in order to trigger the right to refuse charterers' orders and request an alternative voyage – it applies restrictively.

The measure of a successful BIMCO clause is that it comes into widespread and common usage in the industry through broad acceptance by parties. Primarily because of the concern by many charterers regarding the open ended off-hire provisions, the Piracy Clause for Time Charter Parties has not been successfully incorporated into charter parties – often leaving this important issue poorly addressed. For this reason, in June 2009, the Documentary Committee decided that an early review of the Clause should be undertaken to address the concerns expressed by end-users.

The revision

The resulting revision process has taken many months to conclude, with the Working Group responsible for the task taking carefully into account the many and often diverse views of

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Documentary Committee members and others who contributed with comments. The basic principles established in the original Piracy Clause are still enshrined in the revised edition. The key change, however, is the introduction of a 90 day cap on the payment of hire should the ship be seized by pirates.

Are you properly covered?

As with all charter party clauses that deal with potential deviations, both owners should always check with their P&I insurers to verify that any contractually agreed deviation does not in any way prejudice their P&I cover. There are no hard and fast rules in respect of whether a P&I Club will deem a deviation to be reasonable (and therefore covered) and it is often determined on a case by case basis. Similarly, charterers should check with their insurers to verify that they are properly covered in respect of any indemnities they are required to provide to the owners under the Piracy Clause.

Summary of changes

The revised BIMCO Piracy Clause for Time Charter Parties retains the owners' right to avoid risk areas where there is a sufficient real danger of pirate attack to their vessel and to allocate the costs both for when the owners exercise their right under the clause not to follow charterers' orders and also when they agree to proceed through such areas. It is important to emphasise that the clause is intended to be used restrictively. It is not sufficient for the master or owner to refuse charterers' orders simply because of a general risk of pirate attack to shipping. The assessment of risk by the master must be made on the basis of his own vessel taking into account its characteristics, such as speed and freeboard, and other factors such as time of transit and additional security measures.

One of the key changes to the Clause, as mentioned above, is the placing of a cap on hire if the vessel is detained by pirates. The former open exposure for Charterers was one of the main reasons for the Clause being perceived by some sections of the industry as being more favourable to owners.

Another notable amendment is the broadening of the scope of the definition of piracy for the purposes of the Clause. The original definition used in the first edition was felt to be too narrow in its application if the Clause was to be used to address piracy globally and not just in the Gulf of Aden. The definition in sub-clause (a) now extends to acts of "violent robbery". This change has been made to encompass armed robbery from vessels in Nigerian waters by politically motivated "brigands" – who by virtue of the political aspect to their crime would normally fall outside the conventional definition of piracy.

The following explanatory notes provide a background guide to the intention behind the BIMCO Piracy Clauses for Time Charter Parties:

Sub-clause (a) has been amended to reflect the way in which voyage orders are issued; namely, that charterers do not have to obtain the owners' or masters' prior written approval before issuing orders that would take the vessel through a potential risk area. The starting point of the revised Clause is that the charterers have issued orders and on the basis of those orders the owners/master has to judge whether the risk to the vessel and crew in complying with those orders is acceptable.

As mentioned above, the scope of the definition of piracy under the Clause has been broadened to include violent robbery. It is worth noting that this Clause applies whether or not the risk of piracy attack was known at the time the charter was concluded or occurred afterwards. This contrasts with the approach under the CONWARTIME War Risks Clause which is intended to apply only if such risks arose after the charter was concluded and was therefore not contemplated by the parties.

Sub-clause (b) has been amended to reflect the changes made to sub-clause (a) removing the previous prior written approval requirement. Sub-clause (b) now emphasizes that it deals with what should happen if the owners and/or master do not agree to proceed through the risk area. In such instances the owners are obliged to notify the charterers of their decision without delay and the charterers must thereafter provide alternative voyage orders. The charterers must indemnify the owners against any claims from bill of lading holders caused by the change of orders. This indemnity applies not only during the performance of the alternative voyage but also during the period following the owners declaration that the vessel will not proceed as ordered and the time the charterers issue new orders. Charterers should note that the provision of this indemnity will require extended cargo cover (to cover potential deviation claims from bills of lading holders),

Sub-clause (c) provides for the situation when the Owner agrees for the vessel to pass through the risk area. In sub-clause (c)(i) wording has been added to clarify that re-routing can take place within the risk area, rather than only encompassing an entirely different route. A further change made to sub-clause (c) in respect of the indemnity which has now been qualified to avoid the potential risk to charterers of double insurance – i.e., that the charterers would not only have to insure their own risk under the indemnity but would also have to meet the owners' insurance costs. To this end the amendment at the end of sub-clause (c) adds the phrase "save to the extent that such claims are covered by additional insurance as provided in sub-clause (d)(iii)"

Sub-clause (d) allocates various costs that may be incurred when passing through a risk area. The additional costs for additional personnel and for preventive measures to reduce the risk of pirate attacks are for the charterers' account. However, the word 'reasonable' has been added for consistency with "reasonable preventive measures" in sub-clause (c).

The industry has questioned whether the term "additional insurance" is meant to include kidnap and ransom (K&R) insurance packages. This was never the intention of the drafting group as K&R insurance is felt to be a supplementary insurance and not part of the conventional insurances normally taken out by a ship owner. In theory a ship owner should be covered for piracy risks by his hull and machinery and war risks insurance (increasingly this risk is being moved to war risks insurance where an additional premium can be charged). The reference to "additional insurance" is intended to refer to extra insurance cover required by underwriters in addition to existing insurances in order to proceed with the voyage. The words "additional insurance" has been deleted from sub-clause (d(i)) and "or additional insurance cover is necessary" has been added to the insurance provisions in sub-clause (d)(iii) to clarify this.

It is worth noting that insurance "calls" are no longer referred to in this sub-clause as such calls should not be passed on to charterers because they are not necessarily related to the actual voyage but are raised at a later date.

Sub-clause (d)(iv) is new and has been introduced to deal with how and when payments under the Clause to the owners by the charterers should be effected.

Sub-clause (e) previously covered the issue of whether the vessel remains on hire if attacked, seized and detained by pirates. The Sub-clause now deals only with attacks on the vessel by pirates. If the vessel is seized by pirates following a successful attack then Sub-clause (f) applies. The reference to "time lost" if attacked refers to delays that may result due to deviation to avoid the attack or repairs to the vessel following an armed attack.

Sub-clause (f) deals with seizure of the vessel by pirates. It provides a cap on the charterers' exposure to hire payments in the event of seizure.

It is important to note that the vessel does not go off-hire after 90 days. The charterers' obligations towards the vessel remain intact throughout the period of detention – it is only that the obligation to pay hire is suspended for the period after 90 days in detention has lapsed until the vessel is released. This is an important distinction – it is a cap on hire alone. The 90 days cap

represents a “sharing” of the risk of the consequences of detention and is intended as a starting point for negotiations between the parties. Loss of hire insurance is readily available to cover extended periods, so the parties should seek to reach an agreement on what they feel represents a fair apportionment of loss of hire cover.

Another important aspect of the revised draft is that a provision has been added to the effect that if the vessel as a result of being detained by pirates misses her redelivery date, the charterers are not liable. The sub-clause makes it clear that while a vessel will have to complete her contractual voyage if she has cargo on board (even if the charter period has expired, or will expire before the voyage ended), the charterers will not be liable for late redelivery. Again, this was felt to be an issue that addresses a potential imbalance in the first edition of the Clause because the issue was not addressed.

Throughout the entire period of seizure, the owners are obliged to keep the charterers closely informed of efforts made to have the vessel released.

Sub-clause (g) is new in the revised edition and provides, in line with the War Risks Clause, the owners a protection from a claim of unjustifiable deviation provided the vessel has complied with the provisions of the clause. An overriding provision has been added as a final sentence to ensure that in the event of a conflict between the provision of the Piracy Clause and other provisions in the charter party, the Piracy Clause will prevail.

BIMCO is confident that the revised Piracy Clause for Time Charter Parties addresses the shortcomings of the first edition and that the new Clause will be welcomed by the industry. The revised Piracy Clause for Time Charter Parties forms part of a suite of three Piracy Clauses issued by BIMCO. The other two Clauses in the suite are for single voyage charter parties and consecutive voyage charter parties/COAs. These additional Piracy Clauses are covered in separate Special Circulars.

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The full text of the Piracy Clause for Time Charter Parties is set out below. To distinguish the revised Clause from the first edition, “2009” has been added to the end of the title of the Clause to indicate the year of amendment. The Clause may also be downloaded free of charge from the BIMCO web site at www.bimco.org and is also available as an additional clause to subscribers of BIMCO’s online charter party editing system, *idea*.

BIMCO Piracy Clause for Time Charter Parties 2009

- (a) The Vessel shall not be obliged to proceed or required to continue to or through, any port, place, area or zone, or any waterway or canal (hereinafter "Area") which, in the reasonable judgement of the Master and/or the Owners, is dangerous to the Vessel, her cargo, crew or other persons on board the Vessel due to any actual, threatened or reported acts of piracy and/or violent robbery and/or capture/seizure (hereinafter "Piracy"), whether such risk existed at the time of entering into this charter party or occurred thereafter. Should the Vessel be within any such place as aforesaid which only becomes dangerous, or is likely to be or to become dangerous, after her entry into it, she shall be at liberty to leave it.
- (b) If in accordance with sub-clause (a) the Owners decide that the Vessel shall not proceed or continue to or through the Area they must immediately inform the Charterers. The Charterers shall be obliged to issue alternative voyage orders and shall indemnify the Owners for any claims from holders of the Bills of Lading caused by waiting for such orders and/or the performance of an alternative voyage. Any time lost as a result of complying with such orders shall not be considered off-hire.
- (c) If the Owners consent or if the Vessel proceeds to or through an Area exposed to the risk of Piracy the Owners shall have the liberty:
 - (i) to take reasonable preventative measures to protect the Vessel, her crew and cargo including but not limited to re-routeing within the Area, proceeding in convoy, using escorts, avoiding day or night navigation, adjusting speed or course, or engaging security personnel or equipment on or about the Vessel;
 - (ii) to comply with the orders, directions or recommendations of any underwriters who have the authority to give the same under the terms of the insurance;
 - (iii) to comply with all orders, directions, recommendations or advice given by the Government of the Nation under whose flag the Vessel sails, or other Government to whose laws the Owners are subject, or any other Government, body or group, including military authorities, whatsoever acting with the power to compel compliance with their orders or directions; and
 - (iv) to comply with the terms of any resolution of the Security Council of the United Nations, the effective orders of any other Supranational body which has the right to issue and give the same, and with national laws aimed at enforcing the same to which the Owners are subject, and to obey the orders and directions of those who are charged with their enforcement;

and the Charterers shall indemnify the Owners for any claims from holders of Bills of Lading or third parties caused by the Vessel proceeding as aforesaid, save to the extent that such claims are covered by additional insurance as provided in sub-clause (d)(iii).

- (d) Costs
 - (i) If the Vessel proceeds to or through an Area where due to risk of Piracy additional costs will be incurred including but not limited to additional personnel and preventative measures to avoid Piracy, such reasonable costs shall be for the Charterers' account. Any time lost waiting for convoys, following recommended routeing, timing, or reducing speed or taking measures to minimise risk, shall be for the Charterers' account and the Vessel shall remain on hire;
 - (ii) If the Owners become liable under the terms of employment to pay to the crew any bonus or additional wages in respect of sailing into an area which is dangerous in the

manner defined by the said terms, then the actual bonus or additional wages paid shall be reimbursed to the Owners by the Charterers;

- (iii) If the underwriters of the Owners' insurances require additional premiums or additional insurance cover is necessary because the Vessel proceeds to or through an Area exposed to risk of Piracy, then such additional insurance costs shall be reimbursed by the Charterers to the Owners;
- (iv) All payments arising under Sub-clause (d) shall be settled within fifteen (15) days of receipt of Owners' supported invoices or on redelivery, whichever occurs first.
- (e) If the Vessel is attacked by pirates any time lost shall be for the account of the Charterers and the Vessel shall remain on hire.
- (f) If the Vessel is seized by pirates the Owners shall keep the Charterers closely informed of the efforts made to have the Vessel released. The Vessel shall remain on hire throughout the seizure and the Charterers' obligations shall remain unaffected, except that hire payments shall cease as of the ninety-first (91st) day after the seizure and shall resume once the Vessel is released. The Charterers shall not be liable for late redelivery under this Charter Party resulting from seizure of the Vessel by pirates.
- (g) If in compliance with this Clause anything is done or not done, such shall not be deemed a deviation, but shall be considered as due fulfilment of this Charter Party. In the event of a conflict between the provisions of this Clause and any implied or express provision of the Charter Party, this Clause shall prevail to the extent of such conflict, but no further.