

SPECIAL CIRCULAR

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BIMCO Designated Entities Clause

Background

Lists of internationally proscribed persons and entities prohibited from engaging in trade, commerce or financial transactions, are increasingly being used as a means of preventing funds and supplies reaching individuals and organisations whose aims and activities represent a threat to society at large. The resulting need for caution in business transactions has encouraged the appearance of market-inspired clauses to protect the interests of legitimate undertakings. However, the complexities of the issues mean that such clauses might have unintended implications and impose far-reaching obligations.

BIMCO, working in close cooperation with the International Group of P&I Clubs, has therefore developed the Designated Entities Clause for Charter Parties to address the issue of dealings with prohibited persons or entities. It should be noted that the new provision is distinct from the BIMCO Sanctions Clause for Time Charter Parties which applies to sanctions imposed against a state.

Summary of main features

The Clause applies in respect of persons or entities (including designated vessels) whose activities are restricted or prohibited and are identified under United Nations Resolutions, European Union laws and regulations or by the United States of America. The Clause sets out a requirement for owners and charterers respectively to warrant that they are not designated entities and, where used for a voyage charter, charterers' warranty extends to cargo interests. The warranty continues throughout the currency of the charter party.

Lists of designated persons and entities are liable to be updated and amended at frequent intervals; details are publically available and, as appropriate, can be monitored. In the event that a party is, or becomes, identified as a designated person or entity, or a designated vessel, the Clause provides flexibility for the innocent party to act as necessary in the circumstances. It is assumed that, in most cases, guidance will be requested from regulatory authorities but, where this is not available, the charter party can be terminated forthwith or any offending cargo on board discharged.

The Clause contains the customary liberty and indemnity provisions. However, while owners and charterers each undertake to indemnify the other for any breach of warranty, this is unlikely to be enforceable where one of the two contracting parties is or becomes designated and, therefore, no longer able to receive or make any payments. Nevertheless, the provision could have effect where, for example, a breach is attributable to charterers' cargo interests.

In contrast to international agreement on designated entities, some states apply their own anti-blocking or similar legislation to counter the effects of a boycott or other targeted action affecting their trading interests. The Clause therefore includes a provision that parties shall not be required to break their own laws. This is a potentially difficult area and legal advice is likely to be needed in the event of tension between regulatory obligations.

The Clause has been drafted as a single provision for both time and voyage charter parties. It can also be used, with modest amendment, in contracts of affreightment.

Detailed provisions

Sub-clause (a) sets out the scope, basis and application of the Clause to restrictions or prohibitions against persons, bodies and vessels ("designated entities") imposed by the United Nations, European Union and the United States of America;

Sub-clause (b) sets out respective, and continuing, party warranties that neither is in breach of sub-clause (a). In the case of a voyage charter party, charterers additionally warrant on behalf of shippers, receivers and cargo interests. In all cases, owners warrant that the nominated vessel, or any substitute, is not a designated vessel;

Sub-clause (c) sets out the approach to be followed in the event that one of the parties is found to be, or to have become, a designated entity. If this occurs, the innocent party is likely to seek guidance from, and follow instructions or advice given by, a flag state or other regulatory body. Where such assistance is not forthcoming, the charter party may be terminated immediately or, according to circumstances, cargo may be discharged;

Sub-clause (d) is a standard provision to make it clear that anything done or not done under the Clause is not a deviation;

Sub-clause (e) addresses the position where a party's compliance with regulatory provisions is a breach of or offence under that party's national law;

Sub-clause (f) while this is a standard indemnity provision, its application will be limited where loss or damage results from the party at fault being or becoming a designated entity; and

Sub-clause (g) is a standard provision to ensure contractual consistency in a charter party chain.

Availability

The full text of the Designated Entities Clause is set out below. It is available to download free of charge from the Chartering/Clauses section of BIMCO's website at www.bimco.org and is also available to users of BIMCO's online charter party editing system, IDEA·2, via the Clause Manager.

BIMCO DESIGNATED ENTITIES CLAUSE FOR CHARTER PARTIES

- (a) The provisions of this clause shall apply in relation to any sanction, prohibition or restriction imposed on any specified persons, entities or bodies including the designation of specified vessels or fleets under United Nations Resolutions or trade or economic sanctions, laws or regulations of the European Union or the United States of America.
- (b) Owners and Charterers respectively warrant for themselves (and in the case of any sublet, Charterers further warrant in respect of any sub-charterers, shippers, receivers, or cargo interests) that at the date of this fixture and throughout the duration of this Charter Party they are not subject to any of the sanctions, prohibitions, restrictions or designation referred to in Sub-clause (a) which prohibit or render unlawful any performance under this Charter Party or any sublet or any Bills of Lading. Owners further warrant that the nominated vessel, or any substitute, is not a designated vessel.
- (c) If at any time during the performance of this Charter Party either party becomes aware that the other party is in breach of warranty as aforesaid, the party not in breach shall comply with the laws and regulations of any Government to which that party or the Vessel is subject, and follow any orders or directions which may be given by any body acting with powers to compel compliance, including where applicable the Owners' flag State. In the absence of any such orders, directions, laws or regulations, the party not in breach may, in its option, terminate the Charter Party forthwith or, if cargo is on board, direct the Vessel to any safe port of that party's choice and there discharge the cargo or part thereof.
- (d) If, in compliance with the provisions of this Clause, anything is done or is not done, such shall not be deemed a deviation but shall be considered due fulfilment of this Charter Party.
- (e) Notwithstanding anything in this Clause to the contrary, Owners or Charterers shall not be required to do anything which constitutes a violation of the laws and regulations of any State to which either of them is subject.
- (f) Owners or Charterers shall be liable to indemnify the other party against any and all claims, losses, damage, costs and fines whatsoever suffered by the other party resulting from any breach of warranty as aforesaid.
- (g) Charterers shall procure that this Clause is incorporated into all sub-charters, contracts of carriage and Bills of Lading issued pursuant to this Charter Party.

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