SANCTIONS CLAUSE FOR CONTAINER VESSEL TIME CHARTER PARTIES 2021

Overview

The sanctions landscape for the container trade has grown increasingly complex over the past decade. To provide the container industry with a bespoke contractual solution that addresses the practical and commercial realities of the liner trade BIMCO has developed a Sanctions Clause for Container Vessel Time Charter Parties 2020.

CLAUSE | RESTRICTIONS AND SANCTIONS | CONTAINER | TIME CHARTER

BIMCO Sanctions Clause for Container Vessel Time Charter Parties 2021

BIMCO strongly recommends that parties read the guidance notes carefully before using this clause.

(a) For the purposes of this Clause:

"Sanctioning Authority" means the United Nations, European Union, United Kingdom, United States of America or any other applicable competent authority or government.

"Sanctioned Party" means any persons, entities, bodies, or vessels designated by a Sanctioning Authority.

"Sanctioned Cargo" means any cargo, with respect to that cargo's voyage, in which a Sanctioned Party has an interest or the loading, carriage, or the discharging of which is sanctioned or prohibited by a Sanctioning Authority.

(b) Owners warrant that at the date of this Charter Party and throughout its duration they, the registered owners, bareboat charterers, intermediate disponent owners, managers, the Vessel and any substitute are not a Sanctioned Party.

(c) Charterers warrant that at the date of this Charter Party and throughout its duration they and any subcharterers are not a Sanctioned Party.

(d) If at any time either party is in breach of subclause (b) or (c) above then the party not in breach may terminate and/or claim damages resulting from the breach.

(e) Charterers shall not carry Sanctioned Cargo that they know or should have known is a Sanctioned Cargo.

(f) The Charterers shall indemnify and hold the Owners harmless against all claims, costs, losses, and fines or penalties, arising out of the carriage of Sanctioned Cargo, unless such Sanctioned Cargo is found to have been secreted in containers by or with the complicity of the Master, officers and/or crew without the knowledge of the Charterers or the Charterers' agents.

BACKGROUND

International sanctions regimes are constantly changing with new restrictions being added and new persons and entities being listed. A violation of sanctions restrictions can have severe consequences and in the worst cases can lead to parties being listed as sanctioned parties. Therefore, carefully worded sanctions clauses in charter parties and other contracts are vital for internationally trading companies to help them manage, allocate, and mitigate their sanctions risk and to enable them to continue to do business while remaining compliant with the various sanctions regimes.

The BIMCO Sanctions Clause for Container Vessel Time Charter Parties 2021 is intended to address two scenarios: (1) transactions with a "Sanctioned Party" and (2) voyages involving a "Sanctioned Cargo".

In the first scenario, the clause is intended to address the risk that one of the parties—either the owners or charterers (or the third parties for which they are responsible)— to the transaction is, or becomes sanctioned. In this scenario the innocent party has the right to terminate the charter party and claim damages. The second scenario is where the charterers carry sanctioned cargo that they know or should have known is either prohibited, or that could render either party subject to designation (a "Sanctioned Cargo") and in these scenarios, charterers agree to an indemnification provision, but the clause does not provide for a termination right.

The clause is intended as a template for general application. As with any standard clause it may need to be amended to address specific sanctions regulations and the bespoke risks arising out of them as identified by the parties. Due to the complexity of the subject, it is recommended that parties act cautiously and obtain legal advice before amending the clause to ensure that they fully understand the consequences of any amendments.

Drafting team

The BIMCO Sanctions Clause for Container Vessel Time Charter Parties 2021 has been developed by a team comprised of owners, charterers, P&I clubs and legal experts. BIMCO is grateful to the following individuals for assisting us with this important project:

- Mr Alan Mackinnon, UK P&I Club (Chairman)
- Mr Frank Sanford and Ms Amelie Acena, MSC
- Ms Ewelina Andrzejewska and Mr Jeff Nielsen, A.P. Møller - Mærsk A/S
- Mr Mark Church, North P&I
- Mr Michael Wester, German Shipowners' Association
- Ms Michelle Linderman, Crowell & Moring, UK
- Mr David (Dj) Wolff, Crowell & Moring, US

BIMCO secretariat support was provided by Grant Hunter, Head of Contracts & Clauses and Nina Stuhrmann, Manager, Contracts & Clauses.

Guidance Notes

The following guidance notes are intended to provide some background to the thinking behind the BIMCO Sanctions Clause for Container Vessel Time Charter Parties 2021. These notes explain the scope of each provision and clarify how the clauses are intended to operate and the way they allocate risk between the parties. If you have any questions about the clause that we have not answered in these notes, please contact us at contracts@bimco.org and we will be happy to assist.

Subclause (a) sets out the definitions of terms used throughout the clause.

"Sanctioning Authority" - The purpose of this definition is to identify the authorities that can impose sanctions restrictions, such as prohibitions on particular trades and activities or listing persons or entities who, or entire territories that, are subject to sanctions restrictions. Such authorities may have jurisdiction over the parties or the proposed activity or may be able to impose penalties or other restrictions on the parties, regardless of a territorial or other nexus to the jurisdiction of the sanctioning authority.

The definition specifies the principal authorities that have imposed sanctions. Among these is the United Nations, which promulgates Security Council Resolutions that require all member states to impose sanctions consistent with such Resolutions. The United States (US) is included because almost all transactions in US dollars trigger US sanctions jurisdiction and many of the US's sanctions regulations otherwise have global effect. The European Union (EU) and United Kingdom are included, as both maintain comprehensive sanctions schemes and nationals of and companies domiciled in these jurisdictions are required to comply with sanctions regulations worldwide. Although the UK sanctions regime currently adheres to the EU regime, it also includes several additional measures. It is likely that the differences between UK and EU sanctions will widen post-Brexit.

The definition also includes a catch-all provision covering sanctions imposed by "any other applicable competent authority or government", which is intended to capture any other authority that would be relevant to the charter party at issue. For example, this would include the Monetary Authority of Singapore (MAS) for a charter concluded in Singapore. Parties are free to amend this definition to include the names of any other authorities or governments who might impose sanctions specific to the fixture and/or relevant to the parties.

The purpose of listing specific authorities and governments is to provide certainty that the clause will be effective in situations where sanctions with extraterritorial effect are imposed by a sanctioning authority that places one of the parties either in breach of such sanctions or at risk of being listed as a sanctioned party if they continue to perform their obligations under the charter party.

Likewise, the reference to "other applicable competent authority or government" is intended to ensure the clause is equally effective where sanctions are imposed by an authority or government that is not specifically listed. Given the global application of this clause, it is impossible to list all potentially relevant authorities for any charter. The parties are free to either list additional authorities that are relevant to their specific situation, or to leave it general and capture any applicable authority, which can be helpful where a long term fixture is agreed and new sanctions restrictions are imposed post agreement that affect the parties.

BIMCO Recommendations

There may be situations where countries impose sanctions that directly conflict with those of other countries and consequently both parties have the right to operate this clause. For example, certain Russian and Chinese sanctions regulations conflict with those of the US and EU. Also, the EU maintains blocking regulations that conflict with certain extraterritorial aspects of US sanctions. BIMCO recommends that in the event of a potential conflict of laws, the parties seek legal advice under both jurisdictions to understand the potential conflicts before exercising any rights under this clause.

Likewise, BIMCO recommends that 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.

"Sanctioned Party" - This defines the persons, bodies, entities, and vessels who are the subject of sanctions. It is intended to capture the parties that are specifically identified by a Sanctioning Authority on a sanctions list, i.e., the persons, bodies, entities and vessels with whom the parties are prohibited from interacting. This could include, for example, being identified on the US list of "Specially Designated Nationals and Blocked Persons" ("SDN List") or the EU's Consolidated List of Persons, Groups and Entities Subject to EU Financial Sanctions ("EU Consolidated List").

This definition is also intended to capture those persons, entities, bodies, or vessels that are effectively subject to the same restrictions because of their corporate affiliations. For example, it would include those entities or vessels deemed by the US to be SDNs by reason of the fact that they are directly or indirectly owned 50 percent or more in aggregate by one or more persons on the SDN List even though that entity is not itself listed. It would similarly include those entities or vessels deemed by the EU to be designated by reason of the fact that (1) they are directly or indirectly owned more than 50 percent by an entity or person that is designated or (2)that entity or person has a majority interest in it or (3) that are "controlled" by designated entities.

"Sanctioned Party" would also capture other persons designated by Sanctioning Authorities on lists of sanctioned persons that are not subject to comprehensive or asset-freezing sanctions. These "limited" list-based sanctions operate to restrict only some, but not all, transactions with the Sanctioned Party and are best exemplified by the US and EU "sectoral" sanctions schemes. As written, the non-listed party may exercise its rights under this clause where the other party is subject to sectoral sanctions, even though the transaction itself may not be prohibited within the scope of the limited sanctions. If the parties wish the definition to be limited to those subject to comprehensive or asset-freezing prohibitions (e.g., those persons on the US SDN List, the EU Consolidated List, or other local equivalent), the wording will need to be suitably amended. The following definition could be used: "Sanctioned Party" means any persons, entities or vessels designated by a Sanctioning Authority as being subject to comprehensive or asset-freezing sanctions or with whom the parties may not interact within this Charter Party by virtue of such designation.

The definition is not intended to capture those who are identified by a Sanctioning Authority on public lists of persons that are not subject to sanctions. For example, it would not include those identified on the US "oligarch list" or vessels enumerated in the annex to UN Security Council resolutions or US maritime advisories or related guidance or alerts, unless those individuals or vessels were separately also subject to sanctions.

"Sanctioned Cargo" - This definition is widely cast and is intended to cater for the specific characteristics of the container industry. It is intended to cover all scenarios contemplated for the carriage of cargo on container ships. It is defined as cargo in which a "Sanctioned Party" has an "interest" which should be interpreted in the broadest sense and is intended to include banks, insurers, receivers, terminals and other persons involved in or benefitting from the transport of the cargo and who have an interest in that cargo. This scenario would also include the carriage of any cargo for the benefit of a Sanctioned Party as either the shipping or receiving party. The scope of the definition is limited to the relevant voyage of the cargo. This is intended to reflect the practice that a "voyage" for a container is between two ports along the scheduled route whereas the "voyage" for the ship is the entire port rotation. The definition should only apply to the relevant voyage from one port to the other of the individual cargo where performance of the charter party would be prohibited or sanctioned and not to the entire rotation of the ship.

The definition refers to "sanctioned or prohibited", which is intended to capture two scenarios. The first and more straightforward scenario is when carriage of the cargo is "prohibited" by a Sanctioning Authority. For example, a cargo that is subject to an export control restriction from the country of export to the destination country or to the receiving party (e.g., arms subject to an arms embargo or emerging technology to a party prohibited from receiving such items).

The second scenario is when the cargo is not itself "prohibited", but where carriage of that cargo is "sanctioned" insofar as the act of carrying the cargo could render one or more parties subject to a credible risk of being subject to sanctions (e.g., designated by a Sanctioning Authority). This would capture risks ranging from the risk that the UN Security Council would designate such party arising out of the carrying unauthorised Libyan oil to the risks posed by the US in sanctioning those carrying cargoes in certain sectors from certain countries (e.g., at the time of writing, oil from Venezuela or numerous types of cargoes to or from Iran).

Subclause (b) Owners' warranty - Under this subclause, owners give a continuing warranty during the charter party for themselves and for the listed third parties that they are not a Sanctioned Party. This protects charterers during the term of the contract as owners are best placed to know whether there have been any changes in their ownership structure which might result in sanctions. Owners are also best placed to represent as to the other listed third parties with whom owners would have a direct contractual relationship. To protect their interests, owners may want to consider incorporating a similar clause in any contract they have with one of the listed third parties.

Subclause (c) Charterers' warranty - Under this subclause, charterers give a continuing warranty during the term of the charter party for themselves and their subcharterers. charterers do not warrant for the numerous receivers, shippers or any cargo interest, but are required to represent as to subcharterers with whom they are in the best position to represent (vis-à-vis owners). To protect their interests, charterers may want to consider incorporating a similar clause in any contract they have with subcharterers. /

Subclause (d) Breach of warranties - This subclause gives the innocent party the right to terminate the charter party and/or claim damages if the other party is in breach of its warranty under subclauses (b) and (c). Given the legal, commercial, and reputational risks of continuing to transact with a Sanctioned Party, it was felt appropriate to provide a termination right to the innocent party.

Subclause (e) Carriage of Sanctioned Cargo - This subclause specifies charterers' obligation not to knowingly carry any Sanctioned Cargo. It is not a strict liability provision. The reason for having the qualified obligation is rooted in the main characteristics of the container trade. Due to the number of persons and parties involved on a laden container ship and the limited information provided to charterers as to cargo contents by shippers, the charterers would not be in a position to warrant on a strict liability basis that there is no potential cargo in any of the containers that could be either prohibited or serve as a basis for designation.

Instead, the obligation is drafted on a "knowingly" or "should have known" standard. It therefore is consistent with both the US "knowingly" or "should have known" liability threshold in most sanctions schemes as well as the English law concepts. The "should have known test" would also serve as a defence for the owners if containers with prohibited content were found on board the ship. In practice, the owners would not have any knowledge of the cargo on board in individual containers. Cargo documentation such as bills of lading are issued by the charterer as carrier without the involvement of the owners. Therefore, any potential regulatory enforcement actions would be directed against charterers. The wording of this subclause takes this allocation of liability into account.

The term "carry" is used in relation to Sanctioned Cargo rather than "ship" or "load" because regulators more commonly refer to "carry". Also, in the liner trade, the charterers often issue the bills of lading as "carrier" and therefore the terminology was considered appropriate. It is however important to note that this term is not intended to narrow the application of the clause and it should apply whether or not charterers are carriers under the bills of lading.

Implicit in the second half of this obligation is the expectation of regulators that charterers maintain some form of risk-based compliance scheme to identify and prevent Sanctioned Cargo. This may include carrying out appropriate screening of counterparties; and being alert to sanctions risks and taking suitable steps to mitigate those risks in accordance with guidance issued by the relevant Sanctioning Authorities.

Subclause (f) Charterers' indemnity - The indemnity is independent from a breach of charterers' obligations under this clause and is intended to address situations when the owners face adverse consequences resulting from carrying Sanctioned Cargo.

If litigation is likely to take place in the US we suggest that it would be prudent to add the words "attorney's fees" in the clause to ensure recovery of such fees.

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