



BIMCO

SPECIAL CIRCULAR

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Stowaways Clause for Time Charter Parties 2009

Background

BIMCO's original Stowaways Clause for Time Charter Parties was introduced in 1993 to clarify the allocation of responsibility between the owners and the charterers for costs incurred as a result of stowaways. Recently published reports from P&I clubs indicate that after a steady decline in recent years, the number of stowaways is again on the increase as a result of the economic climate. Vessels are vulnerable to persons attempting to board the vessel illegally at virtually all ports, although the risk is highest in ports where the ISPS Code has not been implemented properly.

From a contractual perspective stowaways can expose owners to fines, delays, repatriation costs or even costs incurred in connection with the detention of stowaways in cases where a genuine request for political asylum has been made by them. These costs, such as those arising in connection with detention on board, victualling and repatriation of stowaways, are normally recoverable by the owners from their P&I Club subject to a deductible and when incurred by the owners in discharging their obligations towards, or making the necessary arrangements for, stowaways or refugees.

Whilst it is the owner that has the practical problem of dealing with stowaways on board, the question that arises is whether the owners' P&I club can recover any of the costs from charterers. In order therefore to apportion the liability more equally in the case of chartered vessels, and in particular time charters where it is the charterer who is in control of the vessel's employment, BIMCO developed the original Stowaway Clause for Time charter Parties with a view to emphasise the role and responsibility of the charterers when ships were sent to places known for problems with stowaways to ensure that stowaways could not gain access to the cargo. Owners would have a duty to search for stowaways and to take steps to remove them.

This Clause has now been revised by the Forms of Approved Documents (FAD) Working Group in response to members' concern that the previous wording did not always adequately address current stowaway situations. It was felt that the Clause could be phrased more clearly in respect of the allocation of responsibility and liability for costs for stowaways.

Revision

The Clause has been shortened considerably and is now a simple two sub-clause structure, which clearly divides the responsibility for stowaways between owners and charterers based on the method of gaining access to the vessel, whereas previously the charterer's responsibility for stowaways was limited to those gaining access by concealing themselves in the cargo.

Furthermore, while owners are usually covered by their P&I club for costs in connection with stowaways, this Clause gives the Club a recourse claim against the charterers.

Sub-clause (a) places responsibility on the charterers for stowaways that board the vessel by hiding in containers or other goods, including stowaways who gain access to the vessel by any means related to the cargo operation – not just by hiding in containers or other goods. The additional wording is intended to cover access to the vessel by stowaways hiding in, for example, cargo grabs or other lifting gear in respect of all cargo shipped, not only that shipped by the charterer himself. This is to provide for the practical difficulty often encountered by owners that unless a stowaway is actually found hiding in cargo it is difficult to prove how access to the vessel was gained – thus leading to disputes with charterers.

The due diligence requirement in the old Sub-clause (a)(i) has been removed and has been replaced by a strict liability, i.e. that stowaways gaining access to the vessel through cargo operations amounts to a breach of charter by the charterers irrespective of whether the Charterers have exercised due diligence to avoid it. It was felt that the due diligence requirement caused too much uncertainty in terms of under what circumstances the charterers would be liable for stowaways, in addition to the fact that there is likely an implied term that the charterers will not allow uninvited persons on board the vessel.

The FAD Working Group has not detailed in the text methods used in discovering stowaways, such as enhanced searches using dogs on the basis that liability is strict and it is for the parties to take whatever measures they feel necessary to comply with their obligations under the Clause.

Sub-clause (a) clearly spells out that the charterers are liable for the consequences of their breach of charter. The charterers are obliged to indemnify the owners – and wording has been drafted to cover the sorts of claims, costs, losses, fines and penalties that an owner might be exposed to in resolving a stowaway situation. As referred to above, whilst the practical responsibility for dealing with stowaways always rests with the owners, their P&I Club covers them for the costs thereof; the Clubs will generally have a recourse action against the charterers if it can be proved that they were responsible for the stowaways gaining access to the vessel. This position is detailed in the Clause.

The indemnity provision is also intended to deal with the consequences of deviation and having to return to the port where the stowaways boarded the ship, whether due to the owners' or the charterers' breach.

The old Sub-clause (a)(iii) dealing with the arrest of the vessel has been consolidated into the new wider Sub-clause (a), which now requires the charterers to place the owners in funds to put up bail or security. The final sentence of Sub-clause (a) makes it clear that the vessel is to remain on hire for any time lost due to stowaways as a result of the charterers' breach.

In order to balance the Clause, Sub-clause (b) is the reciprocal of (a) and deals with the owners' responsibility for stowaways who gain access to the vessel by means other than hiding in cargo or through the cargo operation. If the owners are responsible, the vessel will be off hire for all time lost due to stowaways.

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The full text of the Stowaways Clause for Time Charter Parties 2009 is set out below. 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**.

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Stowaways Clause for Time Charter Parties 2009

(a) If stowaways have gained access to the Vessel by means of secreting away in the goods and/or containers or by any other means related to the cargo operation, this shall amount to breach of charter. The Charterers shall be liable for the consequences of such breach and hold the Owners harmless and keep them indemnified against all claims; costs (including but not limited to victualling costs for stowaways whilst on board and repatriation); losses; and fines or penalties, which may arise and be made against them. The Charterers shall, if required, place the Owners in funds to put up bail or other security. The Vessel shall remain on hire for any time lost as a result of such breach.

(b) Save for those stowaways referred to in sub-clause (a), if stowaways have gained access to the Vessel, all expenses, including fines or penalties, shall be for the Owners' account and the Vessel shall be off hire for any time lost.

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