

## Which Clauses

Since the tragic events of 11th September, the Managers have received various questions from Members wanting to know whether the terrorist attacks in the United States and subsequent events may affect chartering contracts. Everyone recognises that answers to such questions very much depend on the actual situation at the relevant time and place, something that is entirely outside a Member's control.

But Members can exercise some control over the clauses they agree in their contracts.

Inserting clauses that meet an existing situation will not change that situation. Whether a Member is an owner or charterer, if the clauses anticipate and clearly provide for the events faced, they should both reduce the possibility of disputes arising and better protect the Member's position in such disputes.

Individual Members have raised issues regarding various clauses. None affects Members' cover under the Rules, but some may be of interest to the membership as a whole. This issue of SOUNDINGS focuses on the most significant general issues raised.

In summary, when negotiating charterparties, Members should consider including, where appropriate,

- a wide definition of "war risks" that includes "acts of terrorism"
- provision for cancellation and/or termination in clearly defined circumstances
- provision for the stoppage of traffic in canals and waterways
- provision for payment of additional war risk premiums and crew bonuses
- liberty to comply with instructions given by governments or war risks insurers and with UN/EU Restrictions

## War Risks Clauses

Most charterparty forms include war risk clauses, to deal with specific situations that may affect or interfere with performance of the contract. The printed NYPE 1946 form, however, does not contain any war risk clauses, although the NYPE 1993 form does. If using the NYPE 1946 form, or any other form that does not contain war risks clauses, Members should add war risk clauses to the printed form.

For general use, Members should refer to BIMCO's "Forms of Approved Documents", which include standard war risks clauses for time and voyage charterparties. The clauses are CONWARTIME 1993 and VOYWAR 1993 respectively.

These clauses were drafted following the Gulf War of 1990/91 and the imposition of UN / EC sanctions against Iraq "to reflect the contemporary conditions of the World". The clauses are more up-to-date than other war risk provisions. For example, they specifically include "acts of terrorists" as well as actions by "any person, body, terrorist or political group" in the definition of "war risks". Most other war risks clauses contain narrower definitions.

Members should also avoid war risks clauses that have become out of date. The Chamber of Shipping War Risk Clauses 1 & 2 (1936) are, perhaps, the most obvious example of clauses that should be avoided. These clauses, and the reasons they should be avoided, are discussed in more detail overleaf.

## Cancellation

Some commonly used charterparty forms include provisions giving the parties to the contract the option to cancel in the event of war between two or more named countries. The CONWARTIME 1993 and VOYWAR 1993 clauses do not include such provisions; BIMCO recommends a separate War Cancellation Clause.

Many war cancellation clauses give the parties the option to cancel in the event of war between any of the Permanent

Members of the UN Security Council (naming France, the People's Republic of China, Russia, the UK and the USA). It may be appropriate to add the countries of the ship's flag or the parties' principal places of business. If a ship is chartered to trade exclusively in one area, it may be appropriate to add the countries relevant to that trading area.

Some clauses still refer to the USSR. This reference could cause confusion if republics formerly part of the USSR became involved in war. Members should ensure that war cancellation clauses refer to Russia, rather than to the USSR.

## Canals and Waterways

The stoppage of canal traffic or the closure of canals may affect performance of voyage charters or time charter trips, as well as longer-term time charters. Many Members will recall the problems that followed the closure of the Suez Canal in 1967. The Stoppage of Canals and Waterways Clause 1968 (CONWAY) clause provides for the stoppage of traffic in canals and waterways generally. There are also clauses to cover stoppages in the Panama and Suez Canals (PANSTOP and SUEZSTOP respectively). All three clauses can be found in BIMCO's "Forms of Approved Documents".

## Additional War Risks Premiums

Performance of a charter may require the ship to enter areas that the owner's hull and machinery, war risks or other underwriters (such as the owner's P&I Club) have made subject to additional premiums because of war risks. Members will have noted that, since 11th September, war risks trading warranties have been amended. In time charters, a charterer may have a variety of employment possibilities over an extended period of time. Provision is normally made for the owner to pay the costs of war risks insurance, with the charterer reimbursing the owner for any additional premium that the owner's war risks underwriters require because the charterer has ordered the ship into a given area.

In most voyage charters, the owner will factor any additional premium payable into its freight calculation. The parties may, however, contemplate a voyage to an area that is volatile, and agree additional clauses accordingly.

For example, there may be fighting in or around an area so that the additional premium for that area could vary hugely at very short notice. In such cases, provision can be made for the charterer to reimburse the owner for the additional premium that the owner's war risks underwriters require.

## Crew War Risks Payments

Crew war risks payments are generally dealt with in the same way as additional war risks premium. The owner pays the crew's wages, with the charterer reimbursing the owner for and if the owner becomes liable to pay the crew any additional wages or bonus due under the contract of employment for sailing into war risks areas.

Owners should take care to ensure that the trading terms agreed in a charterparty are consistent with the owner's obligations to his crew under the relevant contracts of employment. Otherwise, an owner may be committed to paying additional wages or bonuses to the crew, without being able to recover the payments from the charterer.

## Trading Limits

Time charters invariably include clauses defining the ship's trading limits by excluding certain areas. These limits may simply be a feature of the ship's hull and machinery cover. Owners who are unwilling to trade their ships to areas because of war risks may also exclude these areas from the ship's trading limits.

Disponent owners who sub-charter ships should take care to ensure that the trading limits in any sub-charter reflect those in

the head charter. Otherwise, they may find that they are committed to trade under the sub-charter to a port or place that is excluded under their head charter.

### Other Clauses

Most enquiries received by the Managers have focused on these issues and the provisions of particular clauses. Some enquiries have demonstrated the importance of reviewing the charterparty contract in its entirety once appropriate war risks clauses have been identified. A thorough review often reveals other standard or additional clauses that may conflict with the war risks clauses. For the sake of clarity and to reduce further the possibility of a dispute arising, other potentially conflicting provisions should be deleted.

### TO BE AVOIDED - The Chamber of Shipping War Risks Clauses 1 & 2 (1936)

The previous page of this bulletin points out that the Chamber of Shipping War Risk Clauses 1 & 2 (1936) should be avoided, because they are out of date. This has been noted widely for many years. Surprisingly however, enquiries received from Members in recent weeks indicate that these clauses are still being used. Indeed they remain incorporated into some charterparty forms (e.g. the Baltimore Berth Grain Form C). The clauses may be difficult to

identify. In some charterparties the clauses appear without any title or numbers. In some they appear untitled, but in paragraphs, numbered 1 and 2. The fact the clauses have probably survived unamended for a good number of years may reflect a reluctance to replace them. Reluctance is likely to be increased if, for example, they have also been incorporated into sub-charters or sale contracts. It is fair to assume the clauses have remained in use by default rather than by design.

It is important to make sure which clauses are at issue. There are 1952 Chamber of Shipping Clauses which, though not the most up-to-date, are less problematic than the earlier version. The Chamber of Shipping War Risk Clauses 1 & 2 (1936) can, however, cause major difficulties. Broadly speaking, there are three areas of difficulty.

The clauses reflect the background of experiences from the Spanish Civil War. They are far removed from the conditions and conflicts prevailing early in the 21st century.

Clause 1 focuses exclusively on issues arising from blockaded ports and clause 2 gives liberty to comply with orders of the government of the ship's flag nation or by war risks underwriters. There are no further, more general provisions.

As a result, there are significant omissions. The clauses include no definition of "war risks", contain no cancellation or termination provisions, make no reference to additional war risk premium or to crew war bonus and, finally, give only limited liberties, with no reference to authorities other than the government of the ship's flag.

In contrast to these shortcomings, the VOYWAR 1993 and CONWARTIME 1993 clauses cover a wide range of contingencies and are far better suited for modern world-wide trading conditions.

Members requiring advice or assistance with the wordings of individual clauses should contact the Managers.