

Soundings

New BIMCO arrest clauses

In recognition of a marked increase in ship arrests, the BIMCO Documentary Committee has developed two clauses which seek to prescribe a fair balance of risk and responsibility between owners and charterers in the event of an arrest.

The clauses, one for time charters and one for voyage charters, will be triggered in a wide range of circumstances, including port state control detention, sanctions-related matters, war risks or restraint and execution of a judgment, but will not apply to illegitimate detentions or seizures by pirates.

Right of termination?

The clauses represent a departure from the common, yet arguably one-sided, approach of allowing the charterer to terminate the charter if the ship is arrested for a few days, even if the owner is not to blame for the arrest.

The time charter clause does not contain a termination option at all. It simply provides for the ship to be off hire, unless the arrest was caused by the charterer, in which case it remains on hire. The ship is only off hire for as long as she is unable to provide the chartered service, so if the arrest does not prevent her from performing certain functions required of her at the time, such as discharging her cargo, then she will be on hire.

The voyage charter version similarly provides for laytime or demurrage to be suspended for the time actually lost, but it also goes a step further by allowing the charterer to terminate the charter if the ship has not been released within 14 days of the arrest, as long as there is no cargo on board. It may be necessary to consider how this clause interplays with any other cancellation provisions in the charterparty and the BIMCO explanatory notes provide some helpful guidance on this point.

Sphere of responsibility

In both clauses, the onus is on the responsible party to take reasonable steps to release the ship, including putting up security. If a third party other than the charterer is responsible, or if the arrest is the fault of neither the charterer nor the owner, then the owner will be responsible for releasing the ship.

Responsibility is determined by a “sphere of responsibility” test. In other words, it will depend on whose side the act

causing the arrest falls to be performed. In line with the typical spheres of responsibility, the owner's matters will include the management of the ship and its crew whilst the charterer will be responsible for matters relating to the employment of the ship.

This is contrary to the test applied in the landmark "Global Santosh" case (NYK Bulkship (Atlantic) N.V. v Cargill International S.A., [2016] UKSC 20), where the Supreme Court required there to be a link between the cause of the arrest and the function performed by the relevant party or its agents. BIMCO has commented that the "sphere of responsibility" test is more in line with market expectations and although it may not always produce a fair result, it is likely to be a less complex and more practical way of allocating responsibility which is hoped will minimise scope for disputes.

Cargo considerations

The voyage charter clause also makes provision for cargo operations in the event of an arrest. In particular, the charterer is given the right to delay loading in order to recognise cases where perishable cargo might be lost or damaged if loaded onto an arrested ship.

Under trip time charters, the parties may wish to consider incorporating sub-clauses (c)(iii) (delaying loading) and (c)(iv) (option to terminate) of the voyage charter clause in order to achieve consistency with any underlying voyage charter party.

The clauses

BIMCO Arrest Clause for Voyage Charter Parties

(a) "Arrest" means the detention, seizure or restraint of the Vessel by order of a Court or government authority. The Owners shall promptly notify the Charterers of any Arrest and keep them informed of the Vessel's status.

(b) In the event of Arrest that is the result of an act, neglect or default of the Charterers, their sub-charterers, servants or agents, or by any other party connected to the employment of the Vessel under this Charter Party, then the Charterers shall take all reasonable steps to release the Vessel, including and without limitation the provision of security. In the event that the Charterers' security is not accepted, Owners may provide security against the provision of counter-security by the Charterers. All time actually lost thereby shall count as laytime or, if the Vessel is on demurrage, as time on demurrage.

(c) In the event of any other Arrest, then

(i) the Owners shall take all reasonable steps to release the Vessel, including and without limitation the provision of security;

(ii) time actually lost shall not count as laytime or, if the Vessel is on demurrage, as time on demurrage;

(iii) provided that the Vessel is ready to load, the Charterers shall have the right to delay loading cargo until the Vessel is released, and time actually lost as a result of Charterers' decision to delay loading shall count as half laytime or, if the Vessel is on demurrage, as half time on demurrage; and

(iv) provided that there is no cargo on board and the Vessel has not been released within 14 days of the Arrest, the Charterers shall have the option to cancel the Charter Party by giving written notice, unless security has been provided.

(d) The responsible party under subclauses (b) or (c) shall indemnify the other party for losses directly arising out of the Arrest that are reasonably foreseeable.

Neither party shall be liable to the other party for any indirect or consequential loss or damage suffered by the other party in connection with the Arrest.

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(c) In the event of any other Arrest, the Owners shall take all reasonable steps to release the Vessel, including and without limitation the provision of security, and should the full working of the Vessel be prevented, the Vessel shall be off-hire for the time thereby lost.

(d) The responsible party under subclauses (b) or (c) shall indemnify the other party for losses directly arising out of the Arrest that are reasonably foreseeable.

Neither party shall be liable to the other party for any indirect or consequential loss or damage suffered by the other party in connection with the Arrest.

Please contact the Managers for further advice in relation to any of the issues discussed above.

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