ANAVE – Circular de Régimen Interior

Madrid, 1 de julio de 2020
Ref: SMA 59/2020/AB

Asunto: COVID-19: Nueva cláusula modelo de BIMCO para permitir que el buque se desvíe de su ruta para efectuar un cambio de tripulación.

Muy Srs. nuestros:

Como les adelantamos en el Comité Directivo del mes de mayo, el Consejo Marítimo Internacional y del Báltico (BIMCO) ha estado trabajando en la elaboración de una **nueva cláusula modelo** "*COVID-19 Crew Change Clause*" para su uso en pólizas de fletamento, conocimientos de embarque y contratos de transporte, que ha publicado recientemente y que les adjuntamos en un **Anexo**.

Su objetivo es ayudar a los armadores a la hora de negociar sus acuerdos contractuales y coberturas de seguro cuando sus **buques tengan que desviarse de sus rutas planificadas para llevar a cabo los cambios de tripulación** en la situación actual provocada por el COVID-19. No obstante, es muy importante que cada vez que un armador tenga intención de desviarse, informe previamente a su Club de P&I Club para asegurarse de que su cobertura no se va a ver afectada.

La cláusula proporciona al armador la libertad de desviarse de su ruta prevista bajo circunstancias estrictamente definidas. Su uso está destinado a **pólizas de fletamento por tiempo a largo plazo,** en las que el armador no conoce en el momento de suscribirla los puertos de escala en los que el buque va a operar y/o las restricciones de viaje en los países en los que se van a llevar a cabo los relevos. Es específica para el brote actual del COVID-19 y se podría aplicar a una "segunda ola" del virus que se pueda producir en el futuro.

Asimismo, da la opción a los fletadores de contribuir a los cambios de tripulación reduciendo el flete durante el tiempo que dure la desviación de la ruta y compartiendo los costes de combustible.

Muy atentamente,

Manuel Carlier
Director General

COVID-19 CREW CHANGE CLAUSE FOR TIME CHARTER PARTIES 2020

CLAUSE | TIME CHARTER | CORONAVIRUS - COVID-19

BIMCO COVID-19 Crew Change Clause for Time Charter Parties 2020

(a) In addition to any other right to deviate under this contract, the Vessel shall have liberty to deviate for crew changes if COVID-19-related restrictions prevent crew changes from being conducted at the ports or places to which the Vessel has been ordered or within the scheduled period of call. Any deviation under this clause shall not be deemed to be an infringement or breach of this contract, and Owners shall not be liable for any loss or damage resulting therefrom.

(b) Owners shall exercise the right under subclause (a) above with due regard to Charterers' interests and shall notify Charterers in writing as soon as reasonably possible of any intended deviation for crew changes purposes.

(c) Charterers shall procure that subclause (a) shall be incorporated into any and all sub-charter parties, bills of lading, waybills or other documents evidencing contracts of carriage issued pursuant to this Charter Party.

(d) During the period of such deviation the Vessel shall:

(i)* remain on hire, but at a reduced rate of hire of USD ..... per day. In the absence of an agreed amount, fifty per cent (50%) of the hire rate shall apply. The cost of bunkers consumed shall be shared equally between Owners and Charterers.

(ii)* be off-hire and the cost of bunkers consumed shall be for Owners' account.

(e) While the Vessel is at the port of deviation all port charges, pilotage and other expenses arising out of such crew changes shall be for the Owners' account.

**(d)(i) and (d)(ii) are alternatives. Delete whichever is not applicable. In the absence of deletions alternative (d)(i) shall apply.*

EXPLANATORY NOTES

The COVID-19 Crew Change Clause has been drafted in response to the extraordinary circumstances faced by many owners whose crew have had to remain on board during the COVID-19 "lockdown" for periods often extending beyond their contracts of employment. Although travel restrictions are beginning to ease, there are still restrictions in many countries. The clause is designed to give owners the liberty to deviate for crew changes under tightly defined circumstances. It also provides an option for charterers to contribute to the crew change in recognition of the extraordinary cost of making a COVID-19 related crew change and that charterers have a shared interest in having an efficient, rested and well-performing, crew on the ship.

BIMCO would like to thank the following Documentary Committee members for their valuable assistance in drafting the COVID-19 Crew Change Clause:

- Inga Froysa, Norway
- Ajay Hazari, Hong Kong
- Dan Carr, USA
- John Freydag, Germany
- Nicola Ioannou, Greece
- Peter Eckhardt, Germany
- Philip Stephenson, Standard Club

Title and purpose of the clause - The clause is meant for use in longer term time charter parties, not single voyage or trip time charters. The distinction is important because the use of the clause is predicated on owners not knowing at the time of fixing the places where the ship will be traded by charterers and/or the travel restrictions at the time when the crew changes become due. It is specific to the current COVID-19 outbreak but can also be applied to any subsequent "second wave" of the virus that may occur in the future.

The purpose of the clause is two-fold: firstly, it confers on owners a right to deviate for crew changes which would otherwise be prevented due to COVID-19 restrictions.

Secondly, it provides an option for time charterers to contribute to crew changes by way of reduced daily hire for the duration of the deviation plus an equal share of bunker costs.

Subclause (a) – Many standard forms of time charter contain a contractual liberty for owners to deviate the ship for purposes such as saving life and property and other "reasonable purposes". The concept of a "reasonable deviation" also forms part of the Hague-Visby Rules regime on cargo liability in Article IV(4). What constitutes a "reasonable deviation" must be consistent with the intent of the contract and be expressed in clear terms. To avoid any potential conflict with other provisions in a charter party dealing with deviation, the clause clarifies that the rights conferred are "in addition".

The liberty to deviate under the BIMCO clause is expressly linked to crew changes – but only in circumstances where owners are prevented by travel or other COVID-19 related restrictions from making a crew change at the ports to which the charterers order the ship within the expected duration of the calls. The use of the word "prevent" sets a high threshold for invoking the clause. The fact that a crew change at the ports or places ordered by charterers may be more expensive or less convenient than elsewhere does not give owners the right to invoke the clause.

It is important to note that any deviation under this clause will not be a breach or infringement of the contract. The exclusion of owners' liability for any loss or damage applies only in the context of such deviation and not to other contractual losses or damage.

It is, however, of fundamental importance that on each and every occasion owners intend to deviate they must first inform their P&I Club to ascertain that the deviation will not prejudice their P&I cover. [1]

Subclause (b) – Central to this entire clause is that the industry is dealing with an extraordinary situation that should encourage owners and charterers to work together to resolve the situation for their mutual benefit. As it is likely that deviations for crew changes may take several days to complete, it is vitally important that owners fully inform charterers of their intention to deviate and, in doing so, consider charterers' interests such as cancellation dates for the next employment of the ship.

Subclause (c) – The right to deviate in subclause (a) needs to be carried through the chain of sub-contracts and contracts of carriage so that the shipowners' defences against any claims resulting from the deviation are preserved. Charterers should ensure that subclause (a) is incorporated down the chain of contracts for this purpose. Only subclause (a) is relevant in this respect as the other subclauses relate to an agreement between owners and time charterers only.

Subclause (d) – this subclause provides owners and charterers with the means to apply an agreed contribution by charterers to the extraordinary crew change costs. There are two alternatives: under the first, the ship remains on hire but at a reduced daily rate agreed by the parties. The cost of bunkers during the deviation is shared equally between owners and charterers. Under the second, the ship goes off-hire for the duration of the deviation and owners bear the cost of all bunkers consumed during that period.

It is important for owners and charterers to reach an agreement on whether charterers will contribute to crew changes. To encourage dialogue between the parties and avoid any doubt as to whether the ship will remain on hire or go off-hire, the default position (if nothing is otherwise agreed and stated) is that charterers agree to a 50% reduction in hire and an equal share of bunker costs.

Subclause (e) – The final subclause deals with other costs related to the crew change and spells out that port charges and pilotage and other usual port-related expenses will be for owners' account, in addition to the actual cost of the crew change in terms of travel and accommodation of the joining and off-signing [repatriating] crew.

[1] P&I cover may be prejudiced if the deviation from the contractually agreed voyage would deprive the owner of the right to rely on defences or rights of limitation which would otherwise have been available to him. If the deviation from the contractually agreed voyage to effect such crew changes is not deemed by the applicable law/ jurisdiction to constitute a "reasonable" deviation, the owner will be deprived of his defence under Article IV(4) of the Hague-Visby Rules. However, if sub-clause (a) has been incorporated into the contract of carriage, the owner will have expressly retained his Article IV(4) defence. The P&I clubs will assess the circumstances of the deviation and be able to advise whether additional cover is needed.

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