

## Shev Algama: BIMCO Anti-Corruption Clause

### Background

In recent years, there have been significant developments in worldwide anti-corruption legislation. A good example of this under English law is the controversial Bribery Act 2010. The development in anti-corruption legislation has led to a number of anti-corruption rider clauses being inserted into charterparties and other such contracts. These rider clauses invariably favour one party over the other. However, the new BIMCO anti-corruption clause is designed to tackle these imbalances and provide a form, which both owners and charterers will be happy to use.

### Purpose of the clause

The purpose of the new anti-corruption clause is to remove corruption from the shipping industry by providing a contractual platform to avoid corrupt actions. It attempts to balance the interests of owners and charterers, assisting them in working together when facing and resisting demands for illegal payments. When the clause was launched, Angus Frew, the BIMCO General Secretary said:

"BIMCO recognises the importance of a united approach by the shipping industry towards stamping out corruption in the ports and places where the world's merchant fleet trades"

### The clause

Under the clause, if an official demands a facilitation payment from the Master or owner the charterers are to be notified as soon as possible. If the request is not withdrawn, despite taking reasonable steps to refuse the facilitation payment, the Master can issue a letter of protest to the charterers. It will be assumed that any delay to the vessel will be as a result of resisting the demand of payment and time lost will count as laytime/demurrage.

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## What is a facilitation payment?

A facilitation payment is a payment made to facilitate the approval of some type of activity or transaction. In certain jurisdictions these are not considered bribes, but most countries don't make this distinction.

A typical dispute our Members are therefore likely to face is charterers refusing to acknowledge that laytime continues to run whilst their vessel is being delayed due to the Master's refusal to comply with a demand for a facilitation payment. It is important to note that owners will not be able to rely on the clause unless a letter of protest has been issued and therefore it is advisable to issue one as soon as it becomes evident that the illegal demand is not being withdrawn. The Master should ensure that any letter of protest is either addressed or copied to the charterers in order to be protected under the clause.

### Use of the clause

Use of the clause is entirely voluntary. However, parties are encouraged by BIMCO to use this clause in the interest of fairness. Previous rider clauses have been known to be very one-sided, some permitting charterers to terminate a contract despite the pressure on the owners to pay bribes and make facilitation payments.

The clause also applies where the Master is faced with a demand for gifts in kind, such as alcohol or cigarettes which are common in certain jurisdictions. For example, port authorities in certain areas of the world are known for making demands of say 50 cartons of cigarettes and 20 cases of beer in order to receive the necessary clearance. Although these demands may appear "minor", under the anti-corruption clause the Master must refuse to comply with such a demand and, if it is not withdrawn, issue a letter of protest to the charterers in order to ensure that laytime continues to run.

### The effect of the clause

The clause clearly sets out each party's responsibilities when dealing with and resisting demands for facilitation payments. It also obliges both owners and charterers to comply with anti-corruption laws and regulations.

Use of this clause is likely to see owners and charterers work together in situations where facilitation payments are demanded, rather than against each other as has previously occurred.

### Failure to comply

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Under the clause, if either party fails to comply with the relevant anti-corruption legislation then the non compliant party is obliged to reimburse the other party for all fines and losses incurred as a result of the breach. Further, the clause permits the innocent party terminate the charterparty. The usual contractual remedies will still be available to both owners and charterers.

#### **BIMCO Anti-Corruption Clause**

- (a) *The parties agree that in connection with the performance of this Charter Party they shall each:*
- (i) comply at all times with all applicable anti-corruption legislation and have procedures in place that are, to the best of its knowledge and belief, designed to prevent the commission of any offence under such legislation by any member of its organisation or by any person providing services for it or on its behalf; and*
  - (ii) make and keep books, records, and accounts which in reasonable detail accurately and fairly reflect the transactions in connection with this Charter Party.*
- (b) *If a demand for payment, goods or any other thing of value ("Demand") is made to the Master or the Owners by any official, any contractor or sub-contractor engaged by or acting on behalf of Owners or Charterers or any other person not employed by Owners or Charterers and it appears that meeting such Demand would breach any applicable anti-corruption legislation, then the Master or the Owners shall notify the Charterers as soon as practicable and the parties shall cooperate in taking reasonable steps to resist the Demand.*
- (c) *If, despite taking reasonable steps, the Demand is not withdrawn, the Master or the Owners may issue a letter of protest, addressed or copied to the Charterers. If the Master or the Owners issue such a letter, then, in the absence of clear evidence to the contrary, it shall be deemed that any delay to the Vessel is the result of resisting the Demand and (as applicable):*
- (i) the Vessel shall remain on hire; or*
  - (ii) any time lost as a result thereof shall count as laytime or (if the Vessel is already on demurrage) as time on demurrage.*
- (d) *If either party fails to comply with any applicable anti-corruption legislation it shall defend and indemnify the other party against any fine, penalty, liability, loss or damage and for any related costs (including, without limitation, court costs and legal fees) arising from such breach.*
- (e) *Without prejudice to any of its other rights under this Charter Party, either party may terminate this Charter Party without incurring any liability to the other party if:*
- (i) at any time the other party or any member of its organisation has committed a breach of any applicable anti-corruption legislation in connection with this Charter Party; and*
  - (ii) such breach causes the non-breaching party to be in breach of any applicable anti-corruption legislation.*
- Any such right to terminate must be exercised without undue delay.*
- (f) *Each party represents and warrants that in connection with the negotiation of this Charter Party neither it nor any member of its organisation has committed any breach of applicable anti-corruption legislation. Breach of this Sub-clause (f) shall entitle the other party to terminate the Charter Party without incurring any liability to the other.*

**If you have any further questions in respect of this article, please do not hesitate to contact your normal LADC contact at the Club or visit our [LADC webpage](#).**