

BIMCO Sanctions Clause For Voyage Charter Parties 2020 - Explanatory Notes

The following explanatory notes are intended to provide some background to the thinking behind the BIMCO Sanctions Clause for Voyage Charter Parties 2020. If you have any questions about the clause that we have not answered in the explanatory notes, please contact us at contracts@bimco.org and we will be happy to help.

Subclause (a) sets out the definitions of terms used throughout the clause.

“Sanctioned Activity”: the definition is widely cast and is intended to cover all activities contemplated by the performance of the charter party which may become the subject of sanctions restrictions imposed by a Sanctioning Authority.

“Sanctioning Authority”: the purpose of this definition is to identify the authorities that can impose sanctions restrictions (such as imposing prohibitions on particular trades and activities or listing persons or entities who are subject to sanctions restrictions such as freezing of assets) and who either have jurisdiction over the parties or the proposed activity or who might be able to impose penalties or other restrictions on the parties. The definition lists the principal authorities and governments that have imposed sanctions. It also includes a catch-all provision covering sanctions imposed by “any other applicable competent authority or government”, which is intended to capture any other authority that would be relevant to the charter party at issue. Parties are free to amend this definition to include the names of any other authorities or governments who might impose sanctions specific to their fixture.

The purpose of listing specific authorities and governments is to provide certainty that the clause will be effective in situations where sanctions with extra-territorial effect are imposed by a sanctioning authority that places one of the parties either in breach of such sanctions or at risk of being listed as a sanctioned party if they continue to perform their obligations under the charter party.

Likewise, the reference to “other applicable competent authority or government” is intended to ensure the clause is equally effective where sanctions are imposed by an authority or government that is not specifically listed.

There may be situations where countries impose sanctions which directly conflict with those of other countries and consequently both parties have the right to operate this clause. BIMCO recommends seeking legal advice before exercising any rights under this clause in such a situation.

BIMCO recommends that parties should seek legal advice on whether they are obliged to comply with specific or extra-territorial sanctions before operating the clause to avoid the risk of wrongfully withdrawing from contractual obligations.

“Sanctioned Party”: this defines the persons and entities who are the subject of sanctions. It is intended to capture persons, entities, bodies, or vessels that are specifically identified by a Sanctioning Authority on a sanctions list, such as the United States (US) list of “Specially Designated Nationals and Blocked Persons” (“SDN List”) or the European Union’s (EU) Consolidated List of Persons, Groups and Entities Subject to EU Financial Sanctions (“EU Consolidated List”). This definition is also intended to capture those persons, entities, bodies, or vessels that are effectively subject to the same restrictions because of their corporate affiliations. For example, it would include those entities or vessels deemed by the US to be SDNs by reason of the fact that they are directly or indirectly owned 50 percent or more in aggregate by one or more persons on the SDN List even though that entity is not itself listed. It would similarly include those entities or vessels deemed by the EU to be designated by reason of the fact that they are directly or indirectly owned more than 50

percent by an entity or person that is designated or that entity or person has a majority interest in it or that are “controlled” by designated entities.

“Sanctioned Party” would also capture other persons designated by Sanctioning Authorities on lists of sanctioned persons that are not subject to comprehensive or asset-freezing sanctions. These “limited” list-based sanctions operate to restrict only some, but not all, transactions with the Sanctioned Party and are best exemplified by the US and EU “sectoral” sanctions programs. Under this clause, the non-listed party may exercise its rights under this clause where the other party is subject to sectoral sanctions even though the transaction itself is not prohibited. If the parties wish the definition to be limited to persons on the SDN List, the EU consolidated list, or other local equivalent, the wording will need to be suitably amended.

Subclause (b) owners’ warranty - Under this subclause the owners give a continuing warranty throughout the life of the charter party for themselves and for the listed third parties that they are not a Sanctioned Party. This protects the charterers during the contract as owners are best placed to know whether there have been any changes in their ownership structure which might result in sanctions.

Subclause (c) charterers’ warranty - Under this subclause the charterers give a continuing warranty during the charter party for themselves and the listed third parties. As with the owners, the charterers are in the best position to obtain information about the parties and carry out due diligence to ensure that no sanctioned persons or entities are involved. The charterers are the ones with access to the information necessary to determine whether their counterparties, such as subcharterers, shippers, receivers, and cargo interests are Sanctioned Parties and are therefore in the best position to make a representation throughout the life of the charter party.

Subclause (d) consequences of breach of warranty – This subclause gives the innocent party the right to terminate the charter party and/or claim damages if the other party is in breach of its warranty under subclauses (b) and (c).

Subclause (e) sanctioned person or activity involved - This subclause gives the owners the right to cancel the charter party before commencement of loading if a Sanctioned Activity or a Sanctioned Party is involved.

If the voyage or loading operation has commenced the owners have the right to refuse to proceed and may discharge the cargo if charterers do not nominate another port.

Other than under subclause (d), the owners are not entitled to claim damages or claim for any costs related to the discharge of the cargo when cancelling the charter party.

Subclauses (f), (g) and (h) are compliance, indemnification and incorporation provisions that are commonly found in other clauses published by BIMCO.