

The BIMCO Cargo Fumigation Clause



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Most charterparties do not specifically address the risks and costs arising from cargo fumigation operations. It is unsurprising, therefore, that from time to time, following cargo fumigation, the charterer and owner are forced to confront the issue as to who is responsible for the time, cost and other liabilities that arise. A new BIMCO clause has thankfully clarified the issue.

BIMCO clause

The Baltic and International Maritime Council (BIMCO) Cargo Fumigation clause (the BIMCO clause), introduced on 15 September 2015, provides clear allocation as to the responsibilities, risks and costs arising from cargo fumigation operations on board ships.

The introduction of the BIMCO clause is particularly welcomed since no international regulation or model clause has, until now, addressed these issues.

A further reason to welcome the introduction of the BIMCO clause is its adoption of the non-binding recommendations of the International Maritime Organization (IMO), which set out the best practices and procedures for safe cargo fumigation operations¹. This can mitigate the risk of fire and explosion that accompany cargo fumigation, such as the explosion in on board the *MV Theofylaktos* at Rio Grande Outer Anchorage, Brazil, in December 2012².

The BIMCO clause is tailored to the dry bulk sector (both bagged and free-flowing agricultural cargoes) and is confined to issues of cargo fumigation only. It can be adapted for both voyage and time charter-parties.

Observations on the BIMCO Clause

The full text of the BIMCO clause may be found on [BIMCO's website](#). Material extracts from the BIMCO clause appear below.

Option to fumigate

(a) The Charterers shall have the option to fumigate the cargo in the Vessel's holds in port and/or at anchorage and/or in transit. Such fumigation shall be performed always in accordance with IMO Recommendations on the Safe Use of Pesticides in Ships applicable to the Fumigation of Cargo Holds, MSC.1/Circ.1264 (IMO Recommendations) and any subsequent revisions³.

The onus is on the charterer to declare to the owner whether it wishes to exercise its option to fumigate the cargo. The fumigation may be carried out in port or while the ship is in transit.

The cargo fumigation operations shall be performed pursuant to the IMO Recommendations. In the event that local regulations are in conflict with the IMO Recommendations, the [BIMCO Special Circular](#) suggests that the IMO Recommendations should take precedence, except where the local regulations apply a stricter regime.

Throughout the fumigation operations, the master's right to intervene where he considers that the vessel's safety

The example below is not untypical

- Five days are allowed for loading (laytime);
- Four days and four hours are used, i.e. 20 hours saved (despatch);
- 12 hours are subsequently used for fumigation.

In the absence of a specific contractual provision, which party ought to bear the cost and time incurred for cargo fumigation?

may be compromised remains intact.

Charterers' costs and expenses

(b) Fumigation shall be at the Charterers' risk and responsibility. Any costs and expenses incurred in connection with or as a result of such fumigation, including but not limited to gas detection equipment, respiratory protective equipment and crew training, shall be for the Charterers' account. The Charterers shall indemnify the Owners for any liabilities, losses or costs arising out of or resulting from cargo fumigation.

(c) If local authorities or IMO Recommendations require the crew to be accommodated ashore as a result of fumigation ordered by the Charterers, all costs and expenses reasonably incurred in connection thereto including, but not limited to, transportation, accommodation and victualling shall be for Charterers' account.

The above paragraphs make plain that the costs and expenses of the fumigation operation are for the charterer's account. The charterer shall also indemnify the owner in respect of liabilities, losses or costs resulting from cargo fumigation.

The costs and expenses typically incurred when fumigation operations are carried out when the ship is in port, examples of which are described at para (c) above, are to be borne by the charterer, provided they are reasonably incurred.

Disposal for charterers' account

(d) At the discharging port or place all fumigant remains, residues and fumigation equipment shall be removed from the vessel as soon as possible and disposed by the Charterers or their servants at Charterers' risk, responsibility, cost and expense in accordance with MARPOL Annex V or any other applicable rules relating to the disposal of such materials.

The charterer is responsible for the removal and disposal of fumigant remains, residues and fumigation equipment.

Loss of time

Under paragraph (e), loss of time resulting from cargo fumigation would typically be for the charterer's account. Paragraph (e)(i) is tailored for time charterparties whilst paragraph (e)(ii) applies to voyage charterparties.

Time charterparty:

**(i) All time lost to the Owners in connection with or as a result of fumigation performed in accordance with sub-clause (a) shall be for Charterers' account and the vessel shall not be off-hire.*

According to paragraph (e)(i), the ship remains on hire during fumigation operations.

Voyage charterparty:

**(ii) All time lost to the Owners in connection with or as a result of fumigation performed in accordance with sub-clause (a) prior to commencement of laytime and/or after cessation of laytime or time on demurrage shall be considered as detention and shall be compensated by Charterers at the demurrage rate stipulated in the Charter Party. Any unused laytime shall be deducted from such detention, in which case any despatch payable shall be reduced accordingly.*

**Sub-clauses (i) and (ii) shall apply to time charter parties and voyage charter parties, respectively.*

In the voyage charterparty scenario, paragraph (e)(ii) provides that if fumigation is performed prior to the commencement and/or after cessation of laytime or time on demurrage, time lost to the owner is to be treated as detention and compensated for by the charterer at the applicable demurrage rate.

1 See also [Standard Cargo Bulletin, March 2011, page 17](#), which sets out some guidelines when carrying out cargo fumigation operations.

2 See [Report of the Marine Safety Investigation Unit of Transport Malta \(Report No.: 21/2013\)](#).

3 Full circular is available on the [MPA website](#)

Evidence as to the condition of cargo

(f) The exercise by the Charterers of the option to fumigate the cargo under this Clause shall not be construed as evidence as to the condition of the cargo at the time of shipment, and the Master or the Owners are not to clause bills of lading by reason of fumigation only.

By this clause, the owner agrees not to clause bills of lading simply by reason of the fact that fumigation is to be/has been carried out.

Conflict of provisions

(g) In the event of a conflict between the provisions of this Clause and any implied or express provision of the Charter Party, this Clause shall prevail to the extent of such conflict, but no further.

This provision prevents conflicts with other provisions within the subject charterparty, by giving precedence to the BIMCO clause.

Conclusion

Returning to the scenario on the previous page, it would seem that, if the BIMCO clause were incorporated into the (voyage) charterparty, the issue may be resolved as follows:

- Five days are allowed for loading (laytime)
- Four days and four hours are used, i.e. 20 hours saved (despatch)
- 12 hours are used for fumigation

The 12 hours for fumigation will 'count' and therefore the despatch (payable by the owner to the charterer, depending on the terms of the charter) will be reduced from 20 hours to only 8 hours.

The adoption of the BIMCO clause is to be welcomed. Its adoption will bring about greater certainty in the allocation of risks and obligations between charterers and owners in the hope of reducing the number of disputes that arise from fumigation operations.

