

MEMBER ALERT



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BIMCO PUBLISHES RADIOACTIVITY RISK CLAUSE FOR TIME CHARTER PARTIES

Further to Member Alerts of March 17, March 21 and March 29 of this year, the effects of the March 2011 earthquake in Japan, and the ensuing tsunami, continue as Japanese authorities struggle to contain radiation leaking from the Fukushima Daiichi nuclear power facility. Although the advisories issued by the relevant authorities indicate that the level of radioactivity in the region surrounding the plant is low and unlikely to increase to levels dangerous to humans, the situation nonetheless remains very serious.

In recent weeks, your Managers have received several inquiries regarding both existing charter parties and prospective ones regarding shipments to and from Japanese ports. In the aftermath of the nuclear disaster, owners and charterers alike have begun to reexamine their respective rights and obligations under such fixtures. Concerns about the safety of the crew, the cargo, and the vessel itself have prompted parties, particularly owners, to ask whether and to what extent they may reject otherwise legitimate voyage orders for the vessel to call at Japanese ports or simply transit through or near Japanese territorial waters.

However, because traditional charter party clauses may not adequately respond to this situation, the parties' options may be limited, or even worse, unclear. Also, a number of homespun "radiation clauses" have begun circulating in the market. As a general rule, these clauses tend to favor the drafter and often give one party overly broad rights, often without any valid justification. Depending on the circumstances, the other party may have little meaningful opportunity to reject these onerous terms.

To address this perceived inequity and provide a more balanced solution, BIMCO recently issued a standard Radiation Risk Clause for Time Charter Parties. In broad terms, the clause succinctly addresses an owner's right to refuse to call at any port, or transit any waters, that may expose the vessel, her crew, or cargo to dangerous levels of radiation as determined by a competent authority.

If owners validly exercise this right of refusing to send the vessel to such areas, charterers are obligated to issue alternative orders and must indemnify owners against claims by holders of the bills of lading for any associated delays caused by waiting for the alternative orders and/or for performance of the alternative voyage. And, as with the BIMCO Piracy Clause for Time Charters, the vessel is to remain on-hire during any time lost waiting for or as a result of such orders. Radioactive surveys performed at owners' request are to be at charterers' time and expense, and again the vessel remains on-hire during any screening of the vessel for radiation by port authorities.

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The background and full text of the Radioactivity Clause, as well as some answers to frequently asked questions, can be found at www.bimco.org., and is attached to this Member Alert for convenience and ready reference.

Members are encouraged to include this clause in any long term fixtures, as well as in any time charter trip voyages where it is anticipated that the vessel will be calling at ports in the northwest Pacific Ocean or sailing through waters near Japan so as to avoid any ambiguity as to how such situations, associated risks, liabilities and expenses will be allocated.



BIMCO

SPECIAL CIRCULAR

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BIMCO Radioactivity Risk Clause for Time Charter Parties

Background

BIMCO has been monitoring the impact on international shipping trading to and from Japan following the catastrophic and tragic earthquake and tsunami that struck the north-east coast on 11 March. For owners with existing contractual commitments to load or discharge cargoes in Japan or for those contemplating trade to Japanese ports, one of the major concerns has been the perceived potential risk to the crew, vessel and cargo of exposure to harmful levels of radiation from the Fukushima nuclear plant. The advice from the nuclear authorities in Japan and also the International Atomic Energy Authority suggest that the level of radioactivity outside the Excluded Area surrounding the Fukushima nuclear plant is very low and unlikely to increase to levels which may present the threat of harm to humans. However, the situation at the nuclear plant remains serious and therefore owners contemplating sending ships to the north-east coast of Japan need to remain vigilant. BIMCO strongly recommends that owners consult with local port agents to assess the current situation.

In response to the on-going situation at the Fukushima nuclear plant, a number of home-made “radiation clauses” have begun to circulate the market which contain provisions that are generally framed very much in favour of the party that drafted them. BIMCO is aware that some of these clauses give sweeping rights to owners to deviate from Japanese port calls almost on a whim and without any objective determination of risk. Such clauses are most likely being rejected out of hand by charterers. It is response to these home-made clauses that BIMCO has drafted a standard Radiation Risk Clause for Time Charter Parties. What we hope to achieve is a balanced contractual solution that addresses the potential risk of exposure to high levels of radioactivity based on thresholds established by competent authorities.

It is not our intention to create a clause which potentially undermines the absolute need for reliable shipping services to provide humanitarian aid and support essential to the rebuilding process in Japan. The objective of the clause is to provide a measured response to the situation and to clarify where the parties to a time charter stand contractually in respect of trading to areas which may potentially place the vessel, crew and cargo at risk of exposure to high levels of radiation. Owners are strongly recommended to consult with their P&I Clubs before contemplating any “deviation” from the ordered voyage.

Availability

The full text of the BIMCO Radiation Risk Clause for Time Charter Parties can be found at the end of this Special Circular. The Clause can also be downloaded free of charge from the Documentary/BIMCO Clause section of the BIMCO website (www.bimco.org) and, for subscribers to the *idea* online charter party editor, from the Clause Manager.

Frequently asked questions

In drafting the Radiation Risk Clause BIMCO has carefully taken into account a number of commonly raised questions regarding radiation risk:

1. *What bearing does this Clause have on the safe port warranties in a time charter?*

The intention behind the BIMCO Radioactivity Risk Clause in relation to a time charter safe port warranty is that it should not undermine the safe port warranty or shift the balance more in favour of one party. The prospective or actual safety or un-safety of a particular port is very much based on sound and reliable facts. What the BIMCO Clause attempts to do is to reflect the existing position under a time charter by making it clear that an owner cannot simply refuse an order to proceed to a port or place at potential risk of harmful radioactive contamination unless the danger of harmful levels of radiation is substantiated by competent authorities. If owners refuse to proceed without a sound factual basis for refusal, they risk being in breach of contract. Similarly, charterers cannot give an order to proceed to a port or place if the facts indicate that it is or may become unsafe due to radiation. It works both ways.

What the BIMCO Clause provides is a clear focus on what may constitute a “danger” to the vessel and crew in the context of harmful radiation and emphasises to the parties that they must establish the facts before acting. The Clause is intended to work with the safe port warranty of a time charter by adding clarity thus helping the parties avoid a potential breach of charter.

2. *Do we need a Radioactivity Risk Clause at all?*

It is important that BIMCO takes a measured response to this situation. Some media reports of the accident at Fukushima have undoubtedly exaggerated and dramatized the risk of contamination by radiation from the nuclear plant. As a result of these media reports some parties have felt the need to incorporate some form of protective wording in their charter parties – fuelled, no doubt, by the reaction of crews to the sometimes alarmist media reports about the situation in Japan and also because of the nuclear risk exclusion in H&M and P&I Club policies.

BIMCO’s original reaction to the situation was to leave it to the provisions of existing time charter parties to deal with issues of safe ports and cargoes. While BIMCO still firmly believes that most standard forms of time charter party provide the parties with adequate protection in respect of this situation, we recognise that there is a need to provide the industry with a measured and reasonable wording to combat the proliferation of “home-made” radioactivity clauses.

If BIMCO does not produce a radioactivity clause then the “home-made” clauses may obtain a foothold in the industry resulting in potentially unexpected and undesirable results which could have a negative impact on trade to/from Japan.

3. *How great is the risk of radioactive contamination to shipping?*

BIMCO believes that the risk of harmful levels of radioactivity from the Fukushima nuclear plant affecting ports and shipping outside the exclusion zone is very low. This view has been supported by radioactivity reading taken around Japan since the disaster occurred on 11 March. While radiation from the Fukushima accident has been detected around the world, in all cases the levels recorded in 63 surveillance stations worldwide are significantly below the level of background radiation that most people are exposed to in every day circumstances. Notably, as of 27 April, the average level of radiation detected by recording stations around the world has continued to decline. This is due not only to the

measures taken to repair the nuclear facility in recent weeks but also due to the relatively short half-lives of the two main radio elements from Fukushima (iodine-131 (8 days) and Xenon-133 (5.2 days)).

The Japanese authorities with international assistance are continuously monitoring radiation levels in 47 prefectures and also taking samples of the marine environment off the coast of Fukushima.

4. *Should the ship's master be the judge of whether radiation levels are harmful?*

Establishing what constitutes a harmful level of radiation and what actions should be taken, is the result of careful analysis. In line with World Health Organisation guidance, BIMCO believes that only competent authorities who have conducted a careful analysis of the emergency situation are in a position to recommend what public health measures should be taken – such as taking shelter or, in extreme circumstances, evacuation. BIMCO does not believe that the master of a ship is appropriately trained or equipped to make such an analysis and decision. We are aware that some owners have provided their ships with radioactivity measuring devices such as handheld Geiger counters. However, without the necessary analytical and interpretive expertise and the appropriate test environment it is likely that the results produced by these “domestic” devices could be misleading. A subjective judgement by a ship's master based on the readings from such a device not to proceed with a voyage as ordered by charterers could easily lead to a dispute with owners facing a potential breach of contract.

For this reason BIMCO is of the view that for the avoidance of disputes only a competent authority with the necessary expertise to make an objective analysis of the level of radiation should determine what constitutes a harmful level of radiation for any given area.

5. *What does “determined by a competent local, national or international authority to be harmful to human health” actually mean?*

It means an authority such as the Japanese Nuclear Safety Administration (NISA), the Japanese Ministry of Education, Culture, Sports, Science and Technology (MEXT), the International Atomic Energy Authority (IAEA) or the World Health Organisation (WHO). Ultimately, it will be a national government decision based on advice from competent authorities who will state that levels of radiation are or may become harmful to health and that public health action is to be taken (for example, to take shelter or to evacuate an area).

6. *Why does the Clause not state a maximum radiation dosage rate not to be exceeded?*

It is difficult to place an exact figure on what minimum level of radiation may be harmful to health because the biological effects of ionising radiation varies with type and energy and the exposure period. Although annual maximum recommended dosage rates for the general public are established internationally by the IAEA/WHO, it is less clear what “safe” dose is acceptable for infrequent or short term exposure.

According the World Health Organisation (WHO), radiation health consequences depend on exposure which is dependent on a number of factors including the amount and type of radiation released from the nuclear reactor; weather conditions, such as wind and rain; proximity to the nuclear plant; and the amount of time spent in the irradiated areas. The WHO has advised that the actions of the Japanese

Government in response to the accident are in line with existing recommendations for radiation exposure.

7. *Which competent authority should be referred to and what if the competent authorities disagree on harmful dosages?*

There are international guidelines in respect of radiation exposure levels and organisations such as the International Atomic Energy Authority and the World Health Organisation are working closely with the Japanese authorities to assist in monitoring radiation levels and verifying that the Japanese authorities are acting in accordance with internationally agreed procedures. For the above reason we think that it is unlikely that an authority would give a determination contrary to the advice of the others.

8. *If the radiation level in an area is harmful to human health then surely the vessel should not in any circumstances go there, or if already in the area should leave immediately - so why give the master/owners a provision requiring a decision to proceed/not proceed?*

There still needs to be a decision making process because a national government may have to take into account distance and weather factors into any decision to issue a public health advice. It may be that the government advice is for people to take shelter or other precautionary measures in a certain area for a prescribed period of time – which could be relatively short. For a vessel in port or passing through an affected area at the time the government issues such an advice, it may be acceptable simply to batten down the vessel and then afterwards, as a precautionary measure, wash down the vessel.

9. *What about cargoes, empty containers and bunkers – how do we deal with the risk of these things being contaminated by radiation?*

The Clause contains a specific provision dealing with cargo, empty containers and bunkers (sub-clause (c). Here the issue is not so much the presence of radiation levels harmful to human health, but to levels of radiation in cargoes, empty containers and bunkers which may compromise an owners' hull and machinery insurance and P&I cover – because such policies as a matter of practice contain nuclear risk exclusion clauses.

If an owner is in any doubt about the presence of radioactivity in cargo, empty containers or bunkers, they should, before loading, carry out a radiation survey performed by a suitably qualified independent surveyor.

The presence of radiation levels in excess of normal expected “background” radiation levels may result in the owners' P&I and hull and machinery insurance cover not responding to liabilities, losses, costs and expenses arising directly or indirectly from damage caused by radiation from the cargo, empty containers or bunkers.

Nothing in today's world is free of all radiation and therefore the sub-clause has to refer to some sort of benchmark for acceptable radiation levels, above which the owners can refuse to load the cargo/accept the bunkers. The sub-clause refers to “normal background radiation levels” as the benchmark which we assume is the same benchmark that a cargo radiation surveyor would use. Specific reference is made to the background levels for the area in which the vessel is located because such levels are known to vary around the world.

10. *What about radioactive ballast water – should the charterers indemnify the owners against the potential consequences of contamination due to exchanging ballast water?*

An owners' P&I Club will not provide cover for liabilities, losses, costs or expenses caused by contamination or damage by radioactive ballast water. However, P&I Clubs do not generally provide cover for damage or contamination caused by ballast water anyway, so we see no reason to deviate from the usual provision of a time charter party in this respect.

11. *Should the charterers reimburse the owners for the cost of any preventive measures?*

We have thought about what “preventive measures” a shipowner might take that could result in a cost that could be passed on to the charterers. We have not identified any items that would be relevant under a time charter party.

12. *Some ports are now screening vessels for radioactivity – should the clause provide for delays due to this screening?*

We are aware that a number of ports have introduced screening of vessels coming from Japan – although they say that it is just a routine procedure. Japanese ports have also introduced a screening process for vessels departing the country. The Clause makes provision for screenings to ensure that the vessel is not placed off-hire if any delay occurs. We are aware that a ship coming from Japan has recently been refused entry into China. We believe this to be a one-off event - a “knee-jerk” reaction in the early days following the nuclear accident - where there was no substantive evidence of radiation contamination to support such a rejection. Therefore no provision has been made in this respect.

The full text of the BIMCO Radioactivity Clause for Time Charter Parties follows:

BIMCO Radiation Risk Clause for Time Charter Parties

- (a) The Vessel shall not be obliged to proceed or required to continue to or through or remain at, any port, place, area or zone, or any waterway or canal (hereinafter "Area") which may expose the Vessel, her cargo, crew or other persons on board the Vessel to danger from levels of ionizing radiations from or contamination by radioactivity from any nuclear fuel, nuclear waste or from the combustion of nuclear fuel, or the radioactive, toxic, explosive or other hazardous or contaminating properties of any nuclear installation, reactor or other nuclear assembly or component thereof (hereinafter "Radioactivity") determined by a competent local, national or international authority (including but not limited to the International Atomic Energy Authority and the World Health Organization) to be harmful to human health.
- (b) If in accordance with sub-clause (a) the Owners decide that the Vessel shall not proceed or continue to or through or remain in the Area they must immediately inform the Charterers. The Charterers shall be obliged to issue alternative voyage orders and shall indemnify the Owners for any claims from holders of the Bills of Lading caused by waiting for such orders and/or the performance of an alternative voyage. Any time lost as a result of waiting for or complying with such orders shall not be considered off-hire.
- (c) The Vessel shall have liberty to comply with all orders, directions, recommendations or advice of competent authorities and/or the Flag State of the Vessel in respect of arrival, routes, ports of call, destinations, discharge of cargo, delivery, or in any other way whatsoever.
- (d) The Charterers warrant that they shall not load cargoes and/or empty containers and/or supply bunkers that have levels of Radioactivity in excess of normal background radiation levels for the Area. The Owners, at their discretion, may arrange for a radioactive survey by an independent qualified surveyor, at the Charterers' cost, expense and time. If the level of Radioactivity in the cargoes, empty containers and/or bunkers is determined by the surveyor to exceed normal background levels, the Owners shall have the right to refuse to load such cargoes, empty containers and/or bunkers.
- (e) Any delays arising out of measures taken by port authorities to screen the Vessel for radiation either in the countries affected by Radioactivity or at subsequent ports of call shall be for the Charterers' account. Any time lost as a result of complying with such screening shall not be considered off-hire.
- (f) If in compliance with this Clause anything is done or not done, such shall not be deemed a deviation, but shall be considered as due fulfilment of this Charter Party. 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.

Source: documentary@bimco.org