

# Liquefaction – the legal aspect

What are the rights and the duties of the Master – and the owner – when carrying a cargo where there is a risk of liquefaction?



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**O**n 25 July 2012, BIMCO published its 'Solid Bulk Cargoes that Can Liquefy Clause for Charter Parties'. [See box at end.]

The clause has been issued to help ensure the safe transportation of solid bulk cargoes, which is a particular issue in the case of cargoes prone to liquefaction or combustion. The clause clearly sets out the rights and obligations of the parties and should help avoid arguments between the parties. In some parts, the clauses merely state the obligations of the parties at law, and in other parts it goes further and allocates risk and expense when there are issues with the water content of a cargo.

We discuss in this article the legal obligations of the parties, the arguments that can arise if a bulk cargo is alleged to be unsafe, and how the BIMCO clause can resolve these issues.

## Parties' obligations

The primary obligation of charterers is to nominate and present for loading a cargo that is safe for transportation.

This may be expressly stated in the charterparty, although not always. If it is not expressly stated, there is a fallback position under English law which provides that dangerous cargoes may only be transported if owners have sufficient notice of the character of the cargo to enable them to take precautions to safely carry it.

## What is a 'dangerous' cargo?

The charterparty may state whether the cargo is 'safe' or 'dangerous'. This may also be agreed by incorporation of The Hague or Hague-Visby Rules, which specifically prohibits the shipment of certain types of dangerous goods.

Further, English law broadly defines dangerous goods to include goods which 'as a result of their inflammable, explosive, corrosive, noxious or other properties are likely to cause personal injury or physical damage to the ship or other cargo'.

Subject to agreement between the parties, if charterers tender a cargo that, by virtue of its water content or combustibility will jeopardise the safety of the crew, vessel or cargo, it is very likely that they will be in breach of the above warranty of safety.

## Cargo information

Whether the cargo is 'dangerous' or not, charterers have an obligation under chapter VI of the International Convention for the Safety of Life at Sea, 1974 (SOLAS) and Section 4 of the International Maritime Solid Bulk Cargoes (IMSBC) Code to provide the owners, master or owners' agent with certain information about the cargo. This includes (but is not limited to):

- Bulk cargo shipping name;
- Cargo Group e.g. Group A – Cargoes which may liquefy;
- IMO class of the cargo;
- UN number;
- Total quantity of the cargo;
- Stowage factor;
- Self-heating properties of the cargo;
- Need for trimming and trimming procedures;
- Likelihood of shifting and the angle of repose;
- A certificate on the Transportable Moisture Limit (TML) of the cargo.

For certain cargoes, there are additional notice requirements under the International Maritime Dangerous Goods Code (IMDG).

It is imperative that charterers supply the information required by these conventions so that owners are aware of the risks (if any) associated with carrying that specific cargo and can either prepare the vessel and brief the master and crew accordingly, or decline to carry the cargo. The IMSBC is mandatory and applies to all solid bulk cargoes whether or not they are specifically named in its schedules.

If charterers do not provide this information to the owners, it will be difficult for the charterers to defend a claim by the owners in the event that the cargo causes loss or damage to the crew, owners or other cargo, unless it can be shown that the owners already had it. It is therefore in the interests of both charterers and owners to comply with the IMSBC and/or IMDG.

## Claims

Unfortunately, unsafe cargoes are sometimes loaded and claims can arise between the parties.

If the cargo is discovered to be dangerous, owners

could have a claim for delay in the event that the vessel cannot sail or discharge the cargo at the load port, whether or not it has been loaded. This could be a claim for hire (and bunkers) under a time charter, or demurrage/damages for detention under voyage charter. It could also be a claim for market losses in the event the vessel is discharged after its redelivery date.

Both parties will be aware that, once on board, it can take weeks or even months to discharge a cargo, eg customs formalities may be difficult to obtain; the vessel may have to go to the back of the berthing queue; some load ports do not have the equipment to discharge or to receive the cargo or storage facilities. Accordingly, these claims can be significant. It is unfortunately often necessary for costs such as stevedoring, berth charges or storage to be paid in the interim, in circumstances where charterers may refuse to pay hire, or money for demurrage or detention has not been received.

If the vessel sails, and subsequently capsizes or is lost, owners will have claims in respect of any loss of life and compensation payable to the families of the deceased, hull and machinery, salvage, and potentially significant liability if there is any pollution damage caused by escaped bunkers. This is the worst case scenario, but unfortunately, it happens relatively frequently, especially when bulk cargoes have liquefied due to high water content.

### Waiver

There are of course arguments that charterers can employ to seek to avoid liability.

One possible argument is that by loading the cargo, the Master has waived owners' rights to bring a claim in respect of the transportation of that cargo and/or accepted the risks associated with the particular cargo.

Whether these arguments will succeed depends on the facts and what was discussed and agreed. Subject to that position, English law provides that unless the master consents to the shipment of dangerous cargo with knowledge of its nature and character, he does not waive owners' rights under the charterparty.

Whether the owners, master or owners' agent had sufficient knowledge of the nature or character is a matter of fact and depends on what information was provided by charterers and what was discussed and agreed between the parties.

The difference between the 'nature' and the 'character' of goods is arguable although it is likely that the former refers to knowledge in relation to the cargo generally (eg some cargoes such as grain or iron ore fines are liable to shift or some seedcakes liable to heat) and the latter to the specific information on the particular cargo being carried (such as the TML or Cargo Group and other information charterers must provide under the IMSBC or IMDG).

If charterers have not provided the required information, owners, the master or owners' agent are unlikely to be found to possess the relevant knowledge and to have waived their rights or accepted the risks by loading the cargo. It is therefore in the interests of both parties for detailed information in relation to the

“ There were a number of serious accidents involving bulk carriers carrying iron ore fines and nickel ore which may have liquefied between 2009 and 2011. Forty-five lives were lost to accidents of this type in 2010 alone. These losses have caused concern at the IMO, leading to calls for a further review and the development of measures to improve safe carriage of cargoes that may liquefy. ”

cargo to be provided to the owners.

The BIMCO clause is thorough and we expect that shipowners who carry solid bulk cargoes will widely incorporate it into their charterparties. It sets out the rights and obligations of the parties and could help avoid arguments, deadlock and delay at the loadport and, in particular, damage to or loss of cargo and crucially the loss of the crew and the vessel. 🌊

### BIMCO clause

The BIMCO clause sets out some of the above obligations at law and will help avoid arguments between the parties in the event that difficulties arise, in particular in terms of where risks and expenses should lie. In summary, the clause provides that:

1. Charterers will ensure the cargo is loaded in compliance with all applicable international regulations including the IMSBC, as described above (clause (a)).
2. Charterers will provide cargo information to the Master (having already provided the information to the owner) or his representative prior to the commencement of loading, including a copy of the certificate of the TML, and a certificate or declaration of the moisture content (clause (b)).
3. Owners will have the right to (i) take samples prior to and during loading; and (ii) arrange for the samples to be tested at an independent laboratory nominated by owners. The above shall be at charterers' risk and expense. Owners will have unrestricted and unimpeded access to the cargo for sampling and testing purposes (clause (c)).
4. Owners will have the right to refuse to load the cargo if the Master in his sole discretion and using reasonable judgment considers that the cargo could jeopardise the safety of the crew, the vessel or the cargo, and require the Charterers to make the cargo safe prior to loading or, if already loaded, to offload the cargo and replace it with a cargo acceptable to the Master, all at the charterers' risk, cost, expense and time (clause (d)).
5. Anything done or not done by the Master or the owners in compliance with this clause shall not amount to a waiver of any rights of the owners (which could otherwise be argued as above)(clause (e)).

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