Maritime Law Association, Committee on Arbitration and ADR

May 3, 2018

New York, New York

**U.S. PERSPECTIVE ON BIMCO CLAUSES**

 Presenter: Peter Skoufalos

 Brown Gavalas & Fromm LLP

In researching this presentation, it quickly became apparent that the name “Bimco” is not unique to the esteemed organization we know as the Baltic and International Maritime Council. There are, by way of example court cases, “Bimco Trading, Inc.”, “Bimco Industries, Inc.” and “Bimco Iron & Metal Corp.”. “Bimco Industries, Inc.” seems particularly litigious, appearing in about a dozen reported cases.

Another entity, Bimco Trading, Inc*.,* in fact, was a party in a case decided by the U.S. Supreme Court in 1939 in which that Bimco, a construction company, challenged the constitutionality of a Florida statute that required the inspection of all cement imported into the state and the payment for of a fee of fifteen cents per hundred pounds for the inspection. The Supreme Court had little difficulty striking down the Florida statute as violating the U.S. Constitution’s Commerce Clause and the case has since been cited on many occasions involving restrictive state statutes. I assume no relation between our BIMCO and these other entities.

Of course, the BIMCO we are here to discuss this afternoon is a different entity—and one which has received equal if not more attention by U.S courts and U.S. arbitration tribunals.

Indeed, references to BIMCO are legion in U.S. federal court decisions and in the Society of Maritime Arbitration awards that I was able to review courtesy of the unmatched resource we have in the SMA Award Service [**whose latest edition Keith described earlier**]. Much as the judicial principle of *stare decisis* assists in determining the rights of litigants according to precedent, the SMA Award Service also provides parties and arbitrators a published body of arbitration awards that is invaluable in using precedent as a means of promoting uniformity and certainty, where appropriate. This is particularly the case where issues arise out of well-known and industry-recognized maritime contracts—including, most importantly, those generated by BIMCO’s Documentary Committee.

I think the main point to be made at the outset is that the frequency with which BIMCO contracts and other BIMCO publications are cited by our courts and arbitral tribunals truly reflects the critical role BIMCO plays in maritime commerce in the U.S. and worldwide. It also reflects the high regard with which BIMCO’s documentation and opinions is held. Our courts and arbitral panels largely accept BIMCO contract forms, bulletins, advisories and calendars as reflecting best practices as determined by a deliberative body that has the industry’s best interests in mind.

The judicial and arbitral deference give to BIMCO documents is not at all surprising since BIMCO informs us that its Documentary Committee “is the largest and oldest of all the BIMCO committees.” According to BIMCO, over 60 people attend a meeting of the Documentary Committee on a twice yearly basis, with participants from across the shipping industry, including: shipowners, ship operators, representatives from P&I Clubs and national shipowner and shipbroker associations. Other international maritime organizations enjoy observer status at these meetings, including the International Group of P&I Clubs, the International Chamber of Shipping, INTERTANKO, FONASBA and our own Maritime Law Association.

And there is a wide audience for the output of the Documentary Committee: BIMCO represents approximately 65 percent of the world’s tonnage

This diversity, I think, largely underlies the important mission of BIMCO—As one commentator has put it: “BIMCO aims to create a sense of a maritime community with a shared legal and economic destiny” despite the geographic, linguistic, political and cultural differences of its membership. This is largely accomplished through its standardized approach to contract documents and BIMCO’s Bulletins, explanatory notes, circulars, press releases and, as you will see, even by its much-referenced Holiday Calendar.

Of course, just as one size does not fit all, one form does not always work in all commercial circumstances—and this is recognized by BIMCO. Thus, BIMCO’s standardized contracts can be and often are easily revised and supplemented by parties to fit particular needs. Although, as you will see, courts and arbitrators are not always pleased by the parties’ efforts in changing the standardized form.

By way of example, my research has found references to the following BIMCO materials in reported cases and arbitration awards: GENCON charter parties; the BALTIME form; WRECKFIXED; WRECKSTAGE; WRECKHIRE; OREVOY; Mediterranean Iron Ore form; Baltimore Berth Grain Charterparty (Form C); SHIPMAN; BIMCO Charter Party Guarantee; SUPPLYTIME; HEAVYCON; TOWCON; Conlinebooking 2000; BIMCO Standard Law & Arbitration Clause; BIMCO Riverports Clause; BIMCO ISPS Clause for voyage and time charters; BIMCO laytime definitions; BIMCO’S Holiday Calendar and assorted bulletins and port advisories. Even BIMCO’s published explanatory notes for these contract forms are often referenced to assist a court or panel in contract construction.

It has also been the case that parties will occasionally solicit opinions from BIMCO during the course of arbitration proceedings to advance a particular position before a panel. Unsurprisingly, parties armed with capable counsel, will often draw completely different conclusions from BIMCO’s advice.

What follows is a survey of various SMA arbitration awards and court cases, which may be of interest because BIMCO played some role in the decision-making. However, this is only a small sampling of the total number of cases that merely reference BIMCO contracts as the contract form that the parties have relied on and which courts and panels simply refer to “BIMCO-approved” contracts, recognizing the wide acceptance in the industry of the BIMCO contract template.

**SMA Arbitrations**

Needless to say, SMA Arbitration panels regularly consider BIMCO contracts and materials. However, I was personally surprised at how often the BIMCO Holiday Calendar has figured in the panels’ decision-making. On the other hand, time is money and laytime and demurrage disputes can often turn on what BIMCO describes as a holiday.

Another thread we can see in some of the awards I reviewed is the parties’ distressing habit of mucking up the tried-and-true language of BIMCO-approved contracts through the addition of rider clauses, many of them picked up from so-called pro forma charter agreements the parties may have concluded in the past.

\*\*\*For example, in one award, in which the panel had to resolve a dispute over the meaning and intent behind two rider clauses, the panel lamented the parties’ **“inelegant drafting”** in which “**often contradictory and confusing**” rider clauses were appended to the BIMCO GENCON FORM. In this particular case, the panel first determined which party bore principal drafting responsibility (in this case, the owner) and concluded that “**any possible ambiguities encountered by the panel would have to be construed against Owner in favor of Charterer.** No. 4089

\*\*\*The issue in another award centered “on which day the cabled NOR took effect, considering that Saturday December 9, 1989 was alleged to have been declared a "Free Saturday" in the port of Constanza under Rumanian law. The vessel owner actually contacted BIMCO in Copenhagen and obtained a copy of the 1989 **BIMCO Holiday Calendar**, which was introduced into evidence. BIMCO proffered the opinion that indeed the NOR tender was operational as of Saturday morning December 9 at 08:00. Charterer took a diametrically opposite view of the Holiday Schedule and argued that the BIMCO calendar clearly states that a "Free Saturday", December 9th, is a day upon which notice of readiness cannot be tendered, and argued that the panel should reject BIMCO’s opinion.

In resolving the dispute, the panel noted that the charter party was **“poorly edited and contains a number of contradictions which, had they been addressed during the negotiations, would have made the panel's task a lot easier.”** The panel then turned to the wording in the BIMCO 1989 holiday calendar.” Unfortunately, the panel in this case also found some ambiguity in the BIMCO calendar. However, it concluded that a sentence stating "Notice of readiness cannot be tendered on these days (meaning the assorted holidays listed on top), nor on Free Saturdays, unless otherwise provided for in the contract” governed and ruled for the charterer.

One arbitrator, dissenting, argued that the panel should have deferred to BIMCO’s opinion which he believed concluded “in no equivocal terms” that the Friday night tender was operative from 0800 the following Saturday, "irrespective of whether it was a "Free Saturday". As he noted: “**What could be more decisive as to the interpretation of this page than to have the author itself verify exactly what it means?”,** and that it was **“quite arrogant”** for the panel majority to fail to heed “what the author says he is conveying.” Nevertheless, even the dissenting arbitrator acknowledged that “there seems to be some lack of clarity between the first two sentences” of the BIMCO Calendar and urged that “hopefully maybe Bimco will make their distinction a little clearer in a future edition of this helpful booklet.” No. 2800

\*\*\*In another award in which the 1985 version of the BIMCO Holiday Calendar played a central role, the charterer argued for the suspension of laytime for one day due to the birthday of Thomas Gleason who led the U.S. International Longshoremen’s Association for 24 years. Noting that the meaning of the word "holiday" determined the outcome of the dispute, the panel 1st noted that the term was nowhere defined in the Charterparty. Turning to the BIMCO holiday calendar, the panel noted that that the calendar actually listed Mr. Gleason’s birthday as a longshore holiday, but not as a “holiday”—a distinction that the majority of the panel deemed important. In any event, the charter did not reference the BIMCO Holiday calendar. The panel then turned to NY State law, as the law of the forum, for a definition of “holiday” and determined that it was defined as “each day appointed by the President of the United States or by the governor of this state as a day of general thanksgiving, general fasting and prayer or general religious observance." The panel noted that Mr. Gleason's birthday was not found among the named days in the NYS statute and further noted, pointedly, that Mr. Gleason's birthday cannot be said to be a “day of general thanksgiving, general fasting and prayer or general religious observance." Certainly the longshoremen would have begged to differ. In any event, the charterer was ordered to pay the additional day of demurrage. No. 2868

\*\*\*In another award, a single arbitrator was asked to consider whether the charter’s SHEX clause prevented demurrage from accruing from Jan. 2-4, days that the charterer claimed to be holidays in Japan. Both parties relied on the BIMCO Holiday Calendar to support their respective positions. The Calendar stated: "Japan: General Holidays January 2, 3, and 4. New Year Holidays, no cargo work at major ports including those listed, but these are not official national holidays."

In resolving the dispute, the arbitrator reviewed the Preface to the BIMCO Calendar, which he described as “enlightening”. That clause stated:

*"Where discrepancies arise between what is stated in the Holiday Calendar and actual experience, either about holidays or working hours, members are recommended to approach the BIMCO Secretariat. It is, however, not unusual that in order to avoid any doubt as to what shall be considered holidays under the charterparty, charterers and owners agree to be guided by the BIMCO Holiday Calendar."*

The preface then goes on to suggest a charter clause incorporating the BIMCO Holiday Calendar.

The arbitrator indicated that he would have welcomed a clarification from the BIMCO Secretariat. Nevertheless, he believed that “A full reading of the preface gives one the sense that BIMCO is quite aware of various judgments (i.e. M.V. BLUESTONE, SMA No.2868), where the BIMCO Calendar has been an issue, and alerts members to clarify matters at the time of contracting.” Since the charterer failed to do so, the arbitrator treated January 2, 3, and 4 as local holidays under a trade union agreement and not as National Holidays. No. 3540

\*\*\*In yet another award involving the BIMCO Holiday Calendar in the context of a dispute over laytime and demurrage, the Owner recognized that October 12, 1993 was listed as a holiday in Brazil in the BIMCO Holiday Calendar, but argued that it should count as laytime because the attitude towards this day is "casual"—suggesting that people go to the beach, some shops remain open and vessels work in the port. Furthermore, the Owner argued that the BIMCO Holiday Calendar contained mistakes, that it was not necessarily an authority and that an insertion in the Charter Party of a specific reference to the BIMCO Holiday Calendar was needed for the day to be excepted from laytime.

The Panel rejected the owner’s contention, finding that the relevant day is listed as a General Holiday in Brazil in the BIMCO Holiday Calendar for 1993, and there could be no doubt that it is a major holiday in Brazil. The panel went on to say that while not “perfect”, the BIMCO Holiday Calendar is the best guide available for Holidays around the world and is accepted as an authority in the shipping community unless it can be convincingly contradicted by official information from local authorities. No. 3190

\*\*\*In a more recent arbitration, the issue was framed as “whether the BIMCO Holiday calendar takes precedence over local labor practices in the Port of New York on Good Friday”. Reflecting the nuanced approach taken by BIMCO, the single arbitrator noted that the BIMCO Holiday Calendar does not list Good Friday as a holiday in the State of New York. However, it is well known in chartering circles that cargoes of scrap loaded in New York Harbor are actually loaded at piers in the State of New Jersey, for which the BIMCO Calendar clearly lists Good Friday as a holiday.” Consequently, owner’s demurrage claim failed.

Moving on now from the BIMO Holiday Calendar--

\*\*\***Explanatory notes and BIMCO commentary** have featured in several awards involving a SHIPMAN agreement. In one of those cases, the issue was whether post-termination wind-down services for a further three-month period after termination of the original contract were governed by the original contract. The panel relied on the BIMCO explanatory note to the SHIPMAN contract to conclude that they were. No. 3891 + No. 3870

\*\*\*In a 2013 Award, involving a WRECKFIXED 99 contract, the Panel also considered BIMCO’s published explanatory notes in trying to resolve whether the salvor’s failure to recover all of the deck equipment excused payment of any amounts under the "No Cure, No Pay" contract provisions. Ultimately, however, the panel found little guidance in the explanatory notes on that specific issue and based its ruling on other grounds. No. 4210

\*\*\*In come cases, owner-solicited opinions from BIMCO have been introduced into evidence, and were considered by the arbitrators, on issues as varied as export bans in Russia (No. 3389) and applicable tariffs in Dar Es Salaam (No. 2212).

\*\*\*In a 1982 award, a BIMCO opinion was cited by the vessel owner on the question of whether it was the custom of the trade at the port of Philadelphia for the owner to pay for a Clerk and a number of Longshoremen employed as hatchmen. Although the award does not make clear the extent to which it relied on the BIMCO opinion, the panel denied the owner’s claim for reimbursement of the charges for employing hatchmen, other than an overtime differential, but allowed the claim for reimbursement for the Clerk’s services.

\*\*\*Of course, it is not always the vessel owner that relies on BIMCO to support a position. In the M/V STRASSFURT arbitration, in which the dispute centered on the manner of calculating the total laytime and the amount of demurrage the vessel incurred at the port of Conakry, the charterer argued that it was clear from BIMCO documentation as to what "official hours" were at Conakry for the period in question. Ultimately, the owner’s demurrage claim was denied.

\*\*\*One arbitrator, cited his own participation as Chairman of the negotiating meeting held in New York which was called to agree on what became the "NORGRAIN 1973" charter, in construing the meaning of a “SHEX, even if used” clause in the CP. He noted that in attendance were BIMCO representatives, representatives of Grain Exporters, and FONASBA, the International Shipbroker Federation.

\*\*\*In another award, the Panel rejected that it was the custom and practice for a charterer to negotiate separately for the privilege of loading deck cargo when trading on the New York Produce Form of Time Charter. The statements of BIMCO offered into evidence were said to have coincided with the Panel's own views, and were highly persuasive in the ultimate Award. No. 2102

\*\*\*A disponent owner’s threat to “report the matter to BIMCO” after a charterer failed to pay additional freight after an itinerary change, was noted by the panel. The threat did not prevent the arbitration from going forward and the panel had to render a decision notwithstanding the reporting threat. No. 3300

\*\*\*Occasionally, some arbitrators have relied on BIMCO definitions to support their reasoning. Thus, in an arbitration considering a demurrage time bar clause, in which the owner submitted its demurrage claim on the 90th day where the CP contained a 90-day time bar provision, the issue was framed as whether the parties intended to define the "cut off" date in terms of hours and minutes, (as would be the case in calculating laytime and demurrage) or in a commercial sense, as a final day by which claims were to be presented. The majority held that the final day governed. However, the dissenting arbitrator cited to charter party definitions jointly issued by BIMCO, CMI, and FONASBA to conclude that “it becomes obvious that the maritime industry deals in fractions of days and hours.”

\*\*\* BIMCO’s Riverport(s) Clause was referenced in a recent arbitration in determining whether the Houston Ship Channel was a “river”. The panel noted that the charter party there at issue had a Riverport(s) Clause based on the BIMCO form, which had been introduced only about 3 years prior to the fixture. As the panel noted: “Thus, while it may not be common to describe the HSC as a river, or Houston as a "Riverport", that may be due to the relative newness of the type of clause now under scrutiny. It follows that the absence of precedent identifying the HSC as a river ought not to be accepted as persuasive evidence that the Riverport(s) Clause does not apply to the HSC. The better test is to consider the purpose of the Riverport(s) Clause, which leads to the conclusion the clause was intended to apply to the HSC.”

Some earlier SMA Awards, perhaps show slightly less deference to the authority of BIMCO:

\*\*\*In a 1991 award, the panel held that “the beliefs of Lloyds List, BIMCO, various insurance entities and other pundits have no standing in this proceeding.” The award does not specify precisely what position these so-called pundits had taken, but the issue in that case was whether Saudi Customs letters were reliable evidence of the outturn quantities of the cargo at issue.

\*\*\*In a 1962 award, the panel was tasked with determining how to measure the owner’s claim for hire. Noting that in determining the period for which hire was due, “a finite quantity measurable by a standard unit, the mean solar day” had to be used and that “a point in time of commencement and a point of termination must be determined. Both such points in time must be fixed and not subject to variation.” The vessel owner argued that local time at the place of delivery and re-delivery should apply, citing the position advocated by BIMCO. However, the panel disagreed stating that “In this time and age, it is anachronistic to consider the industry bound by the 1962 self-serving statement of the BIMCO, an Owner's association, advocating the application of the local time at both ends as a hit or miss averaging system.”

I would now like to turn to a review of various court cases, but I hope the above review was of interest in terms of the important role that BIMCO has played in resolving disputes heard in NY maritime arbitrations—both historically and in more recent instances.

**Court Decisions**

Turning now to court decisions,

\*\*\*In 2007, BIMCO actually intervened as a party—demonstrating it would appear that BIMCO will put its money where its mouth is where it believes a substantial industry interest will be served. In *United States v. Massachusetts*, 493 F.3d 1 (1st Cir. 2007), the United States sued the State of Massachusetts to enjoin enforcement of provisions of the Massachusetts Oil Spill Prevention Act, [Mass. Gen. Laws ch. 21, §§ 42](https://advance.lexis.com/document/searchwithindocument/?pdmfid=1000516&crid=13b52156-504d-487f-bfc1-b311d9fb8bb9&pdsearchwithinterm=bimco&ecomp=5g85k&prid=9247eea6-f35b-43bf-8eba-81cdc9755e4e), based on the doctrine of preemption—specifically, by the Ports and Waterways Safety Act of 1972, [33 U.S.C.S. § 1221 et seq.](https://advance.lexis.com/document/searchwithindocument/?pdmfid=1000516&crid=13b52156-504d-487f-bfc1-b311d9fb8bb9&pdsearchwithinterm=bimco&ecomp=5g85k&prid=9247eea6-f35b-43bf-8eba-81cdc9755e4e) The United States District Court for the District of Massachusetts permanently enjoined the challenged provisions. The Commonwealth appealed. Several industry groups -- the American Waterways Operators, the International Association of Independent Tanker Owners, the Chamber of Shipping of America, and BIMCO -- intervened on the side of the United States. The Court of Appeals vacated the lower court’s injunction because the district court had not applied the correct analytical model for resolving federal-state regulatory conflicts.

*As the 1st Circuit noted: “The questions here do not turn on whether the state or the federal regulations best protect Buzzards Bay and the sensitive waters of Massachusetts from oil spills, given the costs imposed by regulation. Making such determinations is not the role of a federal court.*

*Our question is whether the district court erred in concluding, as a matter of judgment on the pleadings, that the PWSA left no room for the state government to enact these state statutory provisions. The district court erred in entering permanent injunctions, as well as in entering judgment for the United States, at this stage in the proceedings.”*

Subsequent proceedings in the district court found “that the law of preemption … leaves the last word under Federal law regarding the formulation of regulations to control vessel traffic, to enhance vessel safety and to decrease environmental hazards in Buzzards Bay to the Coast Guard. Congress has explicitly authorized the Coast Guard to do so through its rule making process.”

\*\*\*In a 2011 decision out of the E.D. of Louisiana, the court considered the enforceability of Clause 4, the “Law + Jurisdiction” clause of the BIMCO Conlinebill 2000 Bill of Lading, which provides for exclusive jurisdiction in the courts and in accordance with the law and place where the Carrier has his principal place of business—in this case, the Netherlands. The cargo claimant opposed enforcement of the clause on several grounds, including that the parties had failed to specify the carrier’s principal place of business on the box provided on the front of the bill, and that the clause was unreasonable under the Supreme Court’s test in the *Bremen* case. The vessel interests argued that irrespective of what appears in a box on the front of the B/L, the clause was mandatory, exclusive and unambiguous, and not conditioned on whether information is actually filled in the box on pg. 1.

The Court rejected all arguments against enforcement of Clause 4 noting that the BIMCO Conlinebill 2000 Bill of Lading “form contract was issued in the carrier’s normal course of business” and in a “standard form” and not made to fit a special case after the fact in order to escape liability. Describing the BIMCO B/L as an “internationally recognized form,” the court rejected the contention that it was a contract of adhesion to be strictly construed against the carrier. Further, the USSC has held that forum selection clauses in form types of contracts are enforceable as long as they satisfy judicial scrutiny for fundamental fairness. The court concluded that the BIMCO Liner B/L is not fundamentally unfair.

The Court also rejected the argument that the U.S Trade, Period of Responsibility Additional Clause of the BIMCO B/L, pursuant to which the US COGSA is made applicable in certain cases, did not preclude applying the forum selection clause since nothing in COGSA prevents parties from agreeing to enforce the obligations of COGSA in a particular forum.

\*\*\*BIMCO contracts have been used to assess whether an agency relationship was formed between parties to a litigation. As one Court noted, “The BIMCO Agreements (SHIPMAN) and ensuing actions taken by [the parties] show acknowledgment, acceptance and control sufficient to establish agency.”

In some court cases, the parties’ contracts are simply referred to as “BIMCO agreements” which the courts appear to accept as an imprimatur of a contract form that is well-tested and accepted.

\*\*\*Thus, in a Florida decision, the court was asked to consider a contract based on Part 1 of the standard BIMCO Uniform Time-Charter BALTIME 1939 form (As Revised 2001). In a fn., the court described BIMCO as the world's largest international shipping association and the BALTIME 1939 form is one of three standard forms used in time chartering and as "well-known" in the charter industry.

\*\*\*A court in a South Carolina acknowledged the consequences of reporting a counterparty’s non-performance to BIMCO. In that case, involving a claim for unpaid freight, the vessel owner threatened to report the charterer to "BIMCO"—which the court described as a shipowner's association. The court noted that “such a report would have a harmful effect on the charterer’s future chartering plans.”

\*\*\*In contrast, reference to BIMCO as a “shipowner’s association” led the court to discount BIMCO’S Recommended Principles in a 1984 decision that considered the meaning of the term “subject stem”. Citing BIMCO, the vessel owner argued that the term meant that "if stem is not granted as required, no other ship can be fixed by charterers before the one initially fixed 'SUBJECT STEM' has received the first refusal to accept the amended dates or quantities." While the court characterized BIMCO’s views as “**legal** authority” for the proposition cited by the vessel owner, the court ultimately characterized these “so-called principles … as essentially promulgated by self-interested vessel owners” and not sufficient evidence of “a present usage or custom of the trade.”

\*\*\*In a NJ Case, the court relied on a BIMCO Bulletin to consider whether a particular contract clause was customarily used in the industry. Quoting from the Bulletin, the court noted that the clause at issue (a notice requirement for quantity claims), was not typically included on the FUELCON contract form drafted by another industry association—the International Bunker Industry Association. The BIMCO Bulletin commented that different notice requirements for quality defects, as opposed to quantity claims, had a rational basis since a longer time period is usually required “to discover that something is wrong with the quality of the Marine Fuels". The Court, in reaching its decision relied, in part, on this commentary.

\*\*\*Finally, membership in BIMCO was invoked by one party as a basis for allowing certain information concerning vessel ownership into evidence over the objection of the other party. In that case, one of the parties argued that evidence contained in a witness affidavit, which described certain ownership information—essentially that two companies were one and the same—and which was obtained from BIMCO sources, should be admitted into evidence. The defendant argued that the information provided in the witness affidavit was obtained in the course and scope of the witness’s business activities and her membership in the same international trade organization that the two alleged alter-ego entities belonged to; i.e. BIMCO. Therefore, it was argued, the information contained in the affidavit was not hearsay, since the information was provided to her through her membership in BIMCO. Ultimately, the court accepted some of the information and documentation proffered in the witness affidavit, but not on the basis of the witness’s BIMCO membership.

I hope you have found this survey of interest in terms of the critical role that BIMCO has played and continues to play in resolving maritime dispute in U.S. Courts and in our maritime arbitrations.