

BIMCO's Centennial – A Retrospective

By

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INTRODUCTION

BIMCO is an international direct entry shipping association comprising shipowners, brokers, agents, P&I clubs and national associations of shipowners and shipbrokers. Related entities with an interest in shipping, such as law firms, banks and insurance companies, can also become BIMCO members, but that does not alter the fact that BIMCO is and will continue to be, first and foremost, an international shipowners' organisation.

The organisation is the world's largest private shipowners' body measured both in number of members and tonnage. BIMCO is unique among other international shipowners' organisations in that it encompasses all segments of the shipping industry, be it dry cargo, tanker, container or offshore.

Non-political Organisation

BIMCO's Rules state that BIMCO is a "non-political" organisation. The exact meaning of this statement is perhaps slightly unclear as one could probably say that it is difficult not to be political if you want to take an active part in shipping-related policy questions.

In spite of BIMCO being a large organisation that can put forward weighty arguments on behalf of its many members, it does not wish to act as a political pressure group. Just the opposite, BIMCO wishes to take part in the maritime policy debate in a constructive way by contributing with the considerable body of knowledge, expertise and experience that it possesses. With the assistance of its members and industry-wide contacts, BIMCO often has the opportunity to provide published facts to either support or rebut political initiatives that may affect the shipping industry in one way or another. BIMCO believes that it will best serve the interests of its members and the wider industry through positive engagement with the relevant administrations on shipping matters, rather than through conventional lobbying techniques.

Practical Service Organisation

Assisting members with advice and information and providing products or services that assist them in their daily tasks is very important to BIMCO and on which it places great emphasis.

BIMCO's core activities clearly demonstrate the nature of the organisation. BIMCO informs; it gives advice; it develops standard documentation for the maritime industry; and it educates. All these services have evolved in a democratic process through BIMCO's 100 years of existence.

Information

To give just a few examples of the variety of information available – BIMCO provides port information and flag state related information; it provides information on safety and security (for instance, maintaining a database that provides easy reference to world ports and their current ISPS compliance status); and it provides details about the carriage of at least 130 different commodities.

Advice

BIMCO gives advice on contractual issues related to the carriage of goods by sea. Being the recognised leader in the development of standard contracts for the maritime industry, BIMCO possesses considerable experience in giving advice on contractual matters in connection with charter parties, bills of lading and other forms of contract. BIMCO also gives advice on technical

matters relating to the loading and discharging of cargoes and matters relating to the vessel's construction.

Documentation

This is the activity that BIMCO is, perhaps, best known for. Having been engaged in documentary work from since almost its inception, BIMCO today offers a huge variety of standard shipping forms covering different areas and aspects of shipping. The fact that BIMCO is able to provide documents ranging from traditional charter parties to repair contracts and naval exercise contracts for use by NATO, is an indication of BIMCO's wide ranging expertise and strength. Due to its large membership, BIMCO is able to call on the necessary expertise to engage in almost any project related to shipping.

It bears mention that BIMCO is currently engaged in one of the most prestigious and high-profile documentary projects ever, which is the development of a Standard Newbuilding Contract. The project of developing a Standard Newbuilding Contract came about following a request from owners within BIMCO's own membership to develop such a contract and partly as a result of discussions at the tripartite* meetings when it had been suggested that the development of a modern standard shipbuilding contract might fit neatly within the overall objective to enhance shipbuilding standards in the industry.

As a result, BIMCO has set up a large Sub-committee involving Shipowner, Yard, Class and Insurance representatives. The aim is to produce, within two years, a standard contract that will be applicable to all ship types and in all jurisdictions. In addition, it will serve as a benchmark for the key provisions that should be contained in any shipbuilding contract and will facilitate negotiation.

Education

Today BIMCO offers a wide variety of courses as part of its educational programme ranging from advanced and specialised courses under the heading of BIMCO MASTER CLASS WORKSHOPS, to basic courses for shipping trainees under the auspices of the BIMCO Summer Shipping School. Well educated and trained shipping professionals are essential to enhance the effective, economic and yet safe shipping practices to the benefit of our society as a whole. BIMCO takes pride in offering its expertise and knowledge and thereby raise the level of education within the maritime sector.

Collectively

BIMCO is about information, advice, documentation and education. This is what BIMCO is built upon and specialises in. BIMCO is often part of the circulation loop of information within the industry, whether such information comes from bodies such as national or international associations, P&I Clubs and classification societies.

**) Tripartite meetings are held once a year in the Far East between shipowners, yards and class to enhance shipbuilding standards internationally.*

BIMCO'S Objectives

Bearing in mind BIMCO's core activities, what are then our stated objectives:

Facilitating business: BIMCO is very much about keeping its members abreast of new regulations and legislation impacting all aspects of their shipping-related activities and thus facilitating their daily business life.

Harmonising commercial shipping practice: There is no doubt that harmonised commercial shipping practices throughout the world will enhance the effective and economic movement of goods to the benefit of the world trade and consumers. BIMCO contributes greatly to this objective, not least through its wide variety of standard documents covering the various aspects of shipping.

Promoting quality, safety and security: Whereas BIMCO strongly promotes the efficient movement of goods by sea it must not in any way compromise quality and safety. Quality and safety are very high on BIMCO's agenda and the organisation actively supports improvements of standards at sea.

The events that took place on 11 September 2001 put terrorism to the forefront of issues relating to maritime security. However, while BIMCO is doing everything it can to assist governments around the world to minimise the risk of acts of terrorism in the maritime industry, it has not removed BIMCO's focus from the traditional areas of maritime security such as drug-smuggling, stowaways and piracy. BIMCO is very conscious of the fact that crews are often risking their lives to carry out their jobs at sea in certain parts of the world.

International Co-operation

BIMCO works together with other international organisations, in particular the International Chamber of Shipping, Intertanko and Intercargo. Together they form the Round Table of International Shipping Associations which acts as the spokesman for the shipping industry representing almost 90% of the world's total merchant tonnage. In addition, BIMCO has observer status with a number of inter-governmental bodies, such as IMO, UNCITRAL and UNCTAD, where it takes an active part in the development of legislation impacting the maritime industry.

The Future of BIMCO

It was said in conjunction with our centennial celebrations in May that "BIMCO is rooted in history". This is indeed true, BIMCO has proved its longevity, a longevity based upon the provision of a number of practical and tangible services to our members. However, the fact that BIMCO has been in existence for more than 100 years does not mean that it will also exist a hundred years from now. There is nothing to prevent an organisation that is rooted in history from being forward-looking and BIMCO will have to be forward-looking if it is going to continue as a worthwhile and influential membership organisation.

The world is changing and it is changing fast; BIMCO will therefore have to add another pillar to its existing activities of Information, Advice, Documentation and Education, a pillar that was referred to by BIMCO's Honorary President Dr. Helmut Sohmen in his opening speech at BIMCO's Centenary as "argumentation". In his speech, Dr. Sohmen said "*The industry has traditionally enjoyed relative freedom of choice. Official oversight used to be comparatively light. For its part, shipping consistently produced an essential and ubiquitous service. The ready availability of maritime transport has in fact come to be taken for granted – but the leeway given to the maritime*

industry also provided room for those whose sense of responsibility and morality has left something to be desired."

It is beyond any doubt that recent high-profile casualties like the Erika and the Prestige have put the maritime industry under official and regulatory overview that has come to stay. As a responsible international organisation which has as its core function to serve maritime interests across the board, BIMCO must try to ensure that laws and regulations in the maritime industry take proper account of the real nature and practicalities of transport by sea. Thus, BIMCO will have to add another dimension to its scope of activities which is the political dimension – this is what Dr. Sohmen means by "argumentation".

As mentioned earlier, BIMCO does not want to act as a political pressure group. It is not BIMCO's style to seek media headlines and deliver messages in a confrontational way. On the contrary, BIMCO wants to generate less heat and more light by entering into a positive dialogue with politicians and the relevant administrations. It is not that BIMCO has not previously been in contact with administrations and relevant government agencies, but it is clear that with the increasing scrutiny of the maritime business, not least from the EU Commission, BIMCO will have to step up the political dimension of its work.

BIMCO has therefore established a new department within its Secretariat called "Security and International Affairs Department". The department's main task is to provide BIMCO members with advice and guidance on a number of security-related issues and serve as the co-ordination centre within BIMCO in addressing regulatory issues emanating from the European Union, the United States and elsewhere.

In addition, and to facilitate ready access to the EU Commission and other relevant EU institutions and US Government Agencies, BIMCO has engaged so-called EU and US Liaison Officers. The Liaison Officers (Lord Kinnoek for Europe and Rear Adm. Pluta for the US) will assist BIMCO in arranging high level meetings where necessary and represent BIMCO as and when need be. It ought to be mentioned that, prior to Rear Adm. Pluta, Adm. Kime served as BIMCO's US Liaison Officer, resulting in a steady increase of dialogue between BIMCO and US Government Agencies. It may also be mentioned that in July a high level BIMCO delegation involving BIMCO's President and some other BIMCO Officers visited Washington and had a fruitful dialogue with the US State Dept., US Coast Guard and the US Customs and Border Protection Authorities on matters such as the C-TPAT (Customs-Trade Partnership Against Terrorism), Container Security and crew visas in the United States).

It is clear that a relationship between BIMCO and the relevant administrations on the basis of mutual interest and an honest and open exchange of information can have several benefits for all the parties concerned, whether the issues involve drug trading, combating terrorism or stowaways.

BIMCO and UNCITRAL

Introduction

A request has been made for BIMCO to comment on the development of a new Transport Law Regime under the auspices of UNCITRAL. Although it is difficult to do justice to such a complicated project as a tag-on to a general presentation about BIMCO and its activities, I will be

pleased to offer BIMCO's general views on its involvement in the UNCITRAL project and the current Draft Instrument as it stands prior to the forthcoming UNCITRAL Working Group Session in Vienna.

As will be recalled, in response to an invitation from UNCITRAL, CMI agreed at the 1997 Centenary Conference to develop an all-embracing international transport law regime in replacement of the Hague, Hague-Visby and Hamburg Rules. The aim was to close gaps in, and between, regimes and cover issues not already dealt with in the relevant Instruments. Once CMI had completed this drafting work the Instrument would be handed over to UNCITRAL for inter-governmental development as a Convention.

As this work cuts right to the heart of the activity that BIMCO is best known for, which is the development of standard charter parties, bills of lading, waybills and sundry other forms, it will of course be no surprise to you that BIMCO took a great deal of interest in the project from the very outset. Together with industry organisations like ICS, FIATA and the P&I Clubs, BIMCO joined, and actively participated in, the CMI International Sub-committee that had been mandated to devise the framework structure of the new transport law regime.

This was all many man-hours ago, and significant resources have gone into the project if one counts the travelling and other associated costs, so is it not about time that we ask ourselves – are we heading in the right direction with this Instrument?

The BIMCO Perspective

To answer this question from a BIMCO perspective we need to go back in time and recall the overall aim of the entire project. While the Instrument was intended to close gaps in, and between, existing carriage of goods regimes, its overall aim was to prevent the further proliferation of such regimes. It was felt that there was an unhelpful and unwanted proliferation of regimes in the form of the Hague, Hague-Visby and Hamburg Rules (including national variants thereof) which caused disharmony in the important field of maritime transport where unification used to exist. This could not possibly be in anybody's interest and action had therefore to be taken.

While there was general agreement within CMI to move forward and engage in the development of a new transport law regime, BIMCO was not at all convinced of the need for immediate action. BIMCO was, and still is, of the view that the Hague and Hague-Visby Rules, although admittedly not entirely up to date in all areas, generally provide for a balanced and well-tested distribution of liability between ship and cargo. Therefore, and despite the fact that the Rules are not mandatorily applicable for trades governed by charter parties, BIMCO decided at an early stage to incorporate the Hague and Hague-Visby Rules into its charter parties as the governing liability regime. This not only applies to voyage charter parties; recent time charter parties provide for the Hague-Visby Rules as the basis upon which either the owners or the time charterers can seek indemnity from each other as regards third party claims which they have had to honour up front. Accordingly, BIMCO felt that, if anything had to be done, the Hague-Visby Rules should form the backbone of a new transport liability system that would be balanced, clearly worded, easily understood and, above all, leave freedom of contract with the commercial parties where there was no necessity to legislate.

Is this then the way the Instrument is heading? Not really! – and there are various reasons for this.

First: The ambition level of this project has from the outset been very high. At an early stage it was decided that the new Instrument should extend to multimodal transport, while retaining the port-to-port carriage provisions which are still relevant to a number of trades, not least the dry bulk trade.

One can in a way understand the rationale behind the decision to go for a multimodal transport law Instrument. An increasing share of the movement of cargo by sea involves door-to-door transports, and this is certainly the case within the container trade. However, in trying to get it all, there is always the risk that you get nothing at all and one should not ignore the fact that multimodal transport is not a form of transport in its own right; it is a combination of different modes of transport, each with their own characteristics. The draft Instrument does acknowledge this by applying the network liability principle whereby the Instrument will give way to other transport laws where these are compulsorily applicable. In reality, the Instrument does not do much more than what is already documented trade practice in a number of well regarded industry forms such as BIMCO MULTIDOC 95 and COMBICONBILL and also the FIATABILL.

From that perspective, it might have been easier to persuade nations which today are staunch supporters of the Hague-Visby or Hamburg Rules to denounce those conventions if they saw a clear-cut port-to-port Carriage of Goods by Sea alternative, rather than an Instrument that pretends to cover everything.

Second: As already mentioned, huge efforts have gone into this Instrument by the many parties concerned to make it as watertight as at all possible. However, in trying to solve every conceivable problem or issue one can possibly think of (and the new draft Instrument is clearly a reflection of this), there is a price to pay. The price is a convoluted Instrument that is difficult to read and fully understand. The monumental number of cross references in the Instrument probably exceeds anything that has been seen so far in any legislative Instrument. BIMCO has vast experience in the drafting of standard documents for the maritime industry and knows how important it is to provide for clarity. To provide clearly worded and easily understood terms and conditions is one of the core principles in the drafting of standard documentation for the maritime industry. It almost outweighs the principle that a document should be balanced. Balance very much depends on the eyes of the beholder and if the document does not take a middleground approach then the parties will often take this into consideration when negotiating remuneration. If a document is not clearly worded it will notoriously lead to disputes on matters of interpretation and this is what costs time and money. In the name of trade facilitation this should be avoided. It must be the prime target of the draftsmen behind the new Instrument on transport law to avoid a situation where the commercial parties are tempted to run test cases just because the Instrument is convoluted and difficult to understand. The price is also a very comprehensive document that does not confine itself to filling gaps but also legislates in areas that are best left to the commercial parties to deal with. In other words, it compromises freedom of contract. This element is probably the one of greatest concerns to BIMCO and could be very counter-productive to the maritime business as a whole. One should not regulate just for the sake of regulating.

Perhaps one of the most illustrative examples of this was the attempt to include at some stage provisions in the draft Instrument on freight and how freight should be paid. The suggested freight provisions were clearly inspired by what one sees in the container industry insofar as they provided that payment of freight should be paid upon delivery of the goods, unless otherwise specifically agreed. This is in stark contrast to what is common practice in the dry bulk industry, certainly when

it comes to the major bulk commodities like iron ore, grain and coal, where freight is often paid in advance. How freight should be paid is a commercial matter that is best left to the commercial parties to agree among themselves. This was also subsequently appreciated by the UNCITRAL Working Group and the proposed provisions were removed. However, the example is also illustrative of the fact that if the Instrument becomes too detailed, it will crystallise the variances in the different trades and perhaps cause uncertainty. It is highly important that the new Instrument underpins and deals with both the liner and tramp industries in a proper way. Reading the Instrument and knowing the background discussions, one could get the impression that it was made for the liner industry more than anything else.

Conclusion

Although BIMCO was initially somewhat hesitant about the initiative to embark upon a new transport law Instrument as we failed to see a strong need for it, we have taken an active role in the deliberations and development of the new Instrument.

BIMCO fully recognises the huge effort that has gone into this project and would be sad to see those efforts not materialising into a new modern and up-to-date Instrument that will benefit the entire industry engaged in maritime business. However, one thing is to appreciate the effort going into the task and quite another to support the Instrument once it is there.

The ultimate test will come when BIMCO has to decide whether we should stick to the good old Hague-Visby Rules in charter parties as the underlying liability regime. That decision will no doubt depend on whether the Instrument strikes a reasonable balance but, perhaps even more important, on whether or not it restricts unnecessarily the commercial parties' freedom of contract.