

FAQ - Anti-Corruption Clause

Questions	Answers
Why is there only reference to the Master and Owners, and not crew ?	Generally speaking, it will most often be the ship's master who is confronted directly by port officials and others demanding "facilitation" payments – and the master is the owners' official representative on board the ship. If a crew member is approached with a demand, they would most likely refer the demand to the master anyway.
To what extent were Charterers involved in drafting and agreeing to the clause?	There was a charterers' representative on the drafting team. In addition, several members of the drafting team are members of the Maritime Anti-Corruption Network (MACN). MACN has a number of members who are major charterers. MACN supports BIMCO's initiative to develop this clause and promotes its use among its members.
Sub-clause (a)(i): It prescribes "zero tolerance". The meaning of "applicable anti-corruption legislation" is unclear	The clause does not prescribe "zero tolerance". It refers to "applicable anti- corruption legislation", which may or may not prescribe zero tolerance. As far as the Sub- committee is aware, the UK Bribery Act is presently the only legislation that requires zero tolerance, and the UK Bribery act is only applicable to acts committed in the UK / parties based in or working out of the UK. For a German-based party, German legislation will apply, and in general local law will apply wherever the ship is. We cannot have a clause that is modeled on one particular jurisdiction.

	<p>Even without express wording to this effect, the parties to a charter party will have to comply with applicable rules and regulations, including applicable anti-corruption legislation. This is what is required by legislators and authorities throughout the world.</p>
<p>Sub-clause (a)(ii): Creates a major administrative complication</p>	<p>The clause does not require anything more than generally accepted accounting practices. Proper recording of any payments made or gifts provided, along with the circumstances in which they were made or provided, is an essential part of a company's procedures for resisting demands for facilitation payments. If the circumstances and the steps taken to resist are set out, this will protect companies far better than keeping quiet and attempting to "hide" payments and gifts in their accounts. This provision is not, however, essential to the clause and can be deleted if this facilitates adoption.</p>
<p>Sub-clause (b): It is not clear how far-reaching this obligation is in legal terms. There should be a more descriptive procedure.</p>	<p>Notification is required if it appears to the Master or the Owners that meeting a demand may breach applicable anti-corruption legislation. This requires a concrete assessment by the Master/Owners of each demand. If one or both parties to the charter party are subject to the UK Bribery Act, then demands for small facilitation payments (including cigarettes or liquor) would have to be reported. If German law applies such demands would not have to be reported.</p> <p>A more descriptive procedure would, in the Sub-committee's opinion, increase the administrative burden and deprive the Master/Owners of the flexibility they need to deal with each situation. Our recommendation is that suggested steps be set out in the explanatory notes. This will be helpful. If they are outlined in the clause the Master/Owners will have to follow these or risk being in breach.</p>

Sub-clause (c): Adds considerably to administrative burden without positive effect.	We do not understand this comment. The clause allows the Master and the Owners to reject a demand without risking off-hire or laytime/time on demurrage not counting. This is an owner-friendly provision.
Sub-clause (e): Creates a vicious circle of self-imposed punishment.	Because of the way sub-clause (e)(ii) is worded the reality is that only parties that are subject to the UK Bribery Act will be able to exercise the termination right. This is the only legislation that may make one party liable for a breach by the other party. An owner who has a valuable time charter with a charterer that is subject to the UK Bribery Act should therefore reject any demand for facilitation payments and follow the procedure prescribed in sub-clause (c), which will ensure that hire continues to be payable.
Sub-clause (f): The clause does not draw a distinction between unconscionable bribery and extortion.	(f) will only apply to unconscionable bribery, such as making a payment to obtain the charter party or contract. The provision will not be triggered by demands for facilitation payments.
The adoption of the clause in its present form is premature.	<p>Large corporations have developed unbalanced contractual terms and conditions with far-reaching rights to terminate a contract without any regard to the pressures on the shipowner to make a facilitation payment. If BIMCO does not publish an alternative to this, such draconian clauses will become the industry norm and this will be greatly to the disadvantage of owners. The draft BIMCO clause is considerably better-balanced and more favorable to owners than the clauses presently in circulation.</p> <p>The 65 members of the Maritime Anti-Corruption Network (MACN) put their own work on a clause on hold pending publication by BIMCO of an anti-corruption clause. They are now urging BIMCO to adopt the clause and will no doubt proceed with their own clause if the clause is turned down by the DC once again.</p>

<p>The clause should be discussed with expert lawyers from well-known international law offices.</p>	<p>The Sub-committee consists of 5 lawyers with extensive international experience. We have also discussed on an informal basis with a London lawyer from a well-known firm of solicitors. He confirms that the clause as drafted does not conflict with the UK Bribery act. He also confirms that there is a possibility (albeit a remote one) that the termination right may be misused by a charterer who is subject to the UK Bribery Act. I have commented on this before – Owners with a long term time charter with a charterer who is subject to English law should invoke the notice procedure of the clause and refuse any demand for facilitation payments.</p>
<p>The clause should be based upon the International Chamber of Commerce (ICC) Anti- Bribery Clause</p>	<p>The ICC Clause does not address the zero tolerance aspect of the UK Bribery Act in that it permits, or appears to permit, a series of minor breaches before “remedial” action is required. Such a clause would conflict with the UK Bribery Act and could therefore not be used by parties subject to the Act. It also does not address the special problems faced by shipping in relation to demands for facilitation payments in ports.</p>