

Subject: NEW NYPE 2015 – A Charterer’s Perspective**Circular to Assureds (no 004 2015)****Introduction**

On 15 October, the "NYPE 2015" time charterparty form¹ was issued jointly by BIMCO, the Association of Ship Brokers and Agents (ASBA) and the Singapore Maritime Foundation (SMF). This was the first revision to the NYPE form since 1993, with that version not being universally adopted and use of the 1946 version of the form with extensive rider clauses still being commonplace. BIMCO will obviously hope for wider take-up of this new version.

The release of the form is stated to follow extensive and detailed consultation with the shipping industry and BIMCO note that: *“Careful account has been taken of the interest of Owners and Charterers together to create a more balanced agreement than in previous versions of the charter”*. The new form also takes into account a number of legal and commercial changes that have taken place since NYPE 1993 was produced.

Thus it is now relevant to ask if it offers a better option for Charterers than a heavily extended NYPE 1946 form charter with bespoke rider clauses? We will attempt to answer this question in this briefing but of course it is not possible to provide specific guidance or to cover every clause in the new form and Assureds should consider the specifics of each potential charter when deciding on which wording to use.

(A) Features of the new NYPE 2015

Since the NYPE 1946 each version of this document has increased in size, the 1946 version was originally printable on two pages (although Rider Clauses would ordinarily make it considerably longer). The 1993 version was 12 pages in length and the new 2015 version totals 32 pages. At this length it is 2.6 times longer than the 1993 version and 16 times longer than the 1946 version. The accompanying BIMCO Guidance Notes also run to 32 pages!

The reason for the significant increase in size of the NYPE is down to the incorporation of ever increasing numbers of rider clauses into the main body of the contract, many of which are BIMCO standard clauses or are based on them. The intention seems to be that the new charter will be used with only very minimal extra rider clauses.

¹ [View](#) a proforma of the new NYPE 2015
Page 1 of 9

Key features of the new NYPE 2015 include:

- Choice of trip or period charter;
- Optional Not Always Afloat But Safely Aground (NAABSA) provision;
- Choice of cargo readiness at delivery port or first load port;
- Obligation on owners/charterers to restrict further employment immediately prior to delivery/re-delivery that might delay the ship;
- Owners to provide and maintain Certificates of Financial Responsibility for oil pollution as required at the start of the charter period;
- Detailed bunker provisions for period and trip charter options covering quantities and prices; bunkering operations and sampling; quality and liability; fuel testing; and low sulphur fuels;
- Updated and clarified hire payment provisions relating to grace period, suspension and withdrawal;
- Detailed and clarified speed and performance clause; and
- Broad choice of law and arbitration options – New York/US law; London/English law; Singapore/Singapore or English law; or a free choice agreed by the parties.

(B) BIMCO Clauses – previous Charterers Club Guidance

Many of the new clauses are, or are based on, BIMCO's standard clauses.

BIMCO standard clauses are sometimes perceived in the market to be more "Owner friendly" and this, for the most part, is the Club's view. In this regard the Club has already issued a number of Circulars/E-Bulletins to Assureds concerning certain clauses critiquing their contents and in some cases providing revised wordings. They should be read together with this briefing.

We provide below a list of some of the clauses more pertinent to Charterers (and where available the corresponding Club Circular with a hyperlink to the Circular included). We also comment further on selected clauses below in section (F):

	SUBJECT OF CLAUSE	NYPE 2015 CLAUSE	CLUB CIRCULAR RELATING TO SIMILAR PROVISION
1.	NAABSA	1(d)	002 2012
2.	Hold cleaning / residue disposal in accordance with MARPOL	10(b)	001 2014
3.	Non-lien clause	23	007 2014
4.	Inter Club Agreement Sept 2011	27	008 2011
5.	International Maritime Solid Bulk Cargoes (IMSBC) Code	29	009 2012
6.	Hull fouling	30	005 2013
7.	Electronic bills of lading	32	006 2014
8.	War Risks Clause Conwartime 2013	34	002 2014
9.	Slow steaming for voyage charters	38	010 2012

10.	Piracy 2013	39	002 2010
11.	Stowaways	42	003 2010
12.	ISM/ISPS Codes	44/45	
13.	Sanctions	46	007 2010
14.	EU Advance declaration	50	001 2011
15.	Ballast water exchange regulations	51	

(C) Not all clauses are the same as past BIMCO versions

Note while the majority of the clauses are the standard BIMCO clauses that have already been considered, caution is still required as some are not exactly the same.

We highlight two examples:

a. Non-Lien Clause – Clause 23 – Club Circular 007 2014

Interestingly from a Charterer's perspective Clause 23 is not the full BIMCO Non-lien clause referred to in Circular no. 007 2014, but is a slightly slimmed-down version of the NYPE 1993 Clause 23 Lien.

1993 NYPE Clause 23:

[...]

The Charterers will not directly or indirectly suffer, nor permit to be continued, any lien or encumbrance, which might have priority over the title and interest of the Owners in the Vessel. The Charterers undertake that during the period of this Charter Party, they will not procure any supplies or necessities or services, including any port expenses and bunkers, on the credit of the Owners ~~or in the Owners time~~.

The words "or in the Owners time" have been deleted in the NYPE 2015, however, this is in part because bunkering, the quality of the bunkers and their testing is covered in depth by the 98 lines of clause 9.

b. Slow steaming (Clause 38) – Club Circular 010 2012 (for Voyage Charters)

The first sentence of paragraph (f) is materially different in the NYPE 2015 to BIMCO's standard slow steaming clause, both of which we set out below:

BIMCO clause:

The Charterers shall ensure that the terms of the bills of lading.... or other documents evidencing contracts of carriage issued by or on behalf of the Owners provide that compliance by Owners with this Clause does not constitute a breach of the contract of carriage.

NYPE 2015:

The Charterers shall procure that this Clause be incorporated into all sub-charters and contracts of carriage issued pursuant to this Charter Party.

Clearly while both the BIMCO slow steaming standard clause and the clause in the NYPE 2015 broadly set out to achieve the same goal they are not the same and have different implications for Charterers.

Thus Assureds should not assume that all BIMCO clauses are the same.

(D) An Up-to-Date & Complete Charter?

One advantage of the new NYPE 2015 is that it is quite up-to-date in terms of including clauses to deal with many of the new issues that have arisen over recent years including slow steaming, piracy, Marpol V, COFR, liquefying cargoes, electronic Bills of Lading, sanctions, North American and EU advance notification clauses etc.

Thus if Charterers do use this form there is perhaps less chance of important issues such as these being missed. However the flip-side of this is that clauses on such key issues are often updated and by including so many clauses in the body of the form the NYPE 2015 form may quickly become out of date. Whereas, it may be easier to update rider provisions. Additionally, a Charterer may be better off leaving out some of these new clauses, particularly those which attempt to vary the common law position to the benefit of the Owners as explained in section (F).

Further, the format of the charter may lull charterers into thinking all issues are covered when in fact there are important items not covered in the new charter (one example being bribery and corruption). It should also be noted that certain clauses (e.g. clause 16 cargo exclusions) require additions as only a handful of cargoes are excluded. Thus the new NYPE 2015 must not be treated as a complete charter and must be carefully reviewed in the same way as any other new form.

For its part the Club suggests that Assureds' own specific rider terms may be more appropriate for their business and the particular risks they face, having been developed over time, but that they could use the NYPE 2015 form to cross-check/ensure their own terms are up-to-date and extend to cover all relevant issues dealt with in the NYPE 2015 form.

(E) Risk of "Double Coverage"/Confusion

One obvious risk connected with the new form is retention/use of existing rider clauses in addition to those contained in NYPE 2015. This could cause a "clause clash" whereby although the two clauses are similar they are not the same which may lead to confusion about which terms apply. Assureds should look to set out which terms prevail in such circumstances (normally this will be the specific rider clauses).

As already highlighted, the other obvious risk is that during negotiation experienced Charterers agree to a clause that sounds familiar to one that they always use (e.g. slow steaming) but do not realise that is not exactly the same.

(F) Selected Clauses of interest

We highlight some examples of new clauses which may be of particular interest to charterers in addition to the points raised in earlier Club Circulars which we do not repeat here. However we would stress that this is only a brief snapshot of selected provisions, and Assureds should carefully consider all clauses in the charter and ensure they meet their needs and the requirements of the particular ship and trade prior to fixing.

Delivery (clause 2)

Please note there is no extension of cancelling clause contained in the charter due to submissions made by charterers' representatives who thought this omission necessary given the NYPE 2015 can apply to time trip charters where such a provision may not be appropriate. This may favour Charterers' position.

Redelivery (clause 4)

Clause 4(b) provides that, after an approximate notice of redelivery is given, Charterers may only employ the vessel up to the notified date. This is favourable to Owners as the standard position under English law is that where a Charterer provides an approximate notice of redelivery that is marked without guarantee they can employ the ship to a later date provided this is within the last permitted date for redelivery under the charter.

Owners to Provide - COFR Clause 6(b)

It should be highlighted that if COFR cover is unavailable or the cost increases significantly over the course of the charter the parties are obliged to discuss the same but absent agreement ports that require COFR are to be excluded. Charterers may view this as a concern in a longer-term time charter context.

Charterers to Provide (clause 7)

We note the previous NYPE 1993 clause has been amended so charterers now have to pay for customary as well as compulsory pilotages.

Hire Payment (including Withdrawal and Damages) (clause 11)

In the event that charterers fail to pay hire within the "grace period" of three banking days, NYPE 2015 entitles owners to withdraw the vessel and terminate the charter. In addition, if owners suffer a loss as a result of the early termination of the charterparty (such as future lost earnings due to falling market rates), they can claim damages from charterers to cover the remaining period of the charter. Alternatively, Owners may suspend the services at any time when hire is outstanding (they do not need to wait for expiry of the grace period), without liability for the consequences and without prejudice to their liberty to withdraw the vessel upon expiry of the grace period.

The intention was that the new wording would reflect the position at law, following the decision in *The Astra*², in which clause 5 of NYPE 1946 (charterers' obligation to make punctual hire payments) was found to be a condition of the contract, any breach of which would entitle owners to terminate and claim damages for their resulting loss. However, this aspect of the *Astra* decision (which was *obiter* and therefore not binding on other judges) no longer represents the current state of the law, after the judge in *Spar Shipping AS v Grand China Logistics Holding (Group) Co., Ltd*³ declined to follow *The Astra* in this respect and found that the obligation in the NYPE form to pay punctual hire was not a condition⁴. Accordingly, whilst the new provision provides certainty on the parties' respective obligations, it erodes charterers' positions as compared to the current common law, and charterers would be advised to reject or amend this wording where commercially possible.

Clause 11 is also no longer restricted to delays in payment "*due to oversight, negligence, errors or omissions on the part of Charterers or their bankers*", so that Charterers now have three banking days in which to rectify the position, irrespective of the reason for the failure. Thus this also improves Owners' position.

Speed and Consumption (clause 12)

One of the key additions to the new NYPE form is a detailed speed and consumption clause, providing improved clarity and certainty on issues that would previously have been included in the riders.

This appears a relatively charterer-friendly clause. Charterers can now rely on a performance analysis conducted by their chosen weather routing company. Clause 12 does not expressly require that this service be an independent one, but sub-clause (e) provides that in the event of a disputed claim, the matter be referred to "*an independent expert or alternative weather service*" to be mutually agreed. This is designed to reduce the time and cost involved in performance claims. However, there is no mechanism dealing with the situation where the parties fail to agree on the identity of an expert or weather service, and in those circumstances the dispute would presumably still need to be referred to arbitration, potentially using a single joint expert appointed by the Tribunal.

However, more negatively for charterers, claims for underperformance are expressly limited to compensation for time lost and/or additional fuel consumed. Clause 12 also allows owners to set off fuel costs saved against time lost and vice versa.

The clause is also of course very generic as it may have to apply to many different ship types/trades. Given the importance of bunker consumption/costs on charterers in the present market, the Club suggests that a more bespoke clause focusing on the particular trade/vessel may be preferable.

2 [2013] EWHC 865 (Comm)

3 [2015] EWHC 718 (Comm)

4 [Read](#) the Club's e-bulletin on the *Astra* decision

Off-Hire (Clause 17)

The exceptions to the scope of the off-hire provision have been extended to cover events for which sub-charterers of the Charterers are responsible, reflecting recent decisions adopted by the English Courts⁵. This favours Owners. On the flip-side there are certain additional off-hire events which may benefit Charterers.

Liens (clause 23) – Club Circular 007 2014

The previous NYPE 1993 clause has been extended to cover sub-hires as well as sub-freights which is expressly stated to cover demurrage and deadfreight due to Charterers or their sub-Charterers (this is in line with recent case law). It is thus wide and offers an owner a powerful enforcement tool/for non-payment.

Solid Bulk Cargoes/Dangerous Goods (clause 29)

The charter includes a provision dealing with IMSBC Code requirements and dangerous cargo and under this clause a Master is entitled to unload cargoes at Charterers' risk and expense if Charterers fail to comply with IMSBC or IMDG requirements. It is suggested that where Charterers are fixing a vessel for a specific bulk cargo which may be dangerous that a bespoke clause dealing with the specific risk/cargo should be considered.

Hull Fouling (clause 30) – Club Circular 005 2013

The Club would highlight the default period for this clause to apply is 15 days whereas 30 days is more common in the market. Thus Assureds should ensure a period is included in the clause.

Sanctions (Clause 46) – Club Circular 007 2010

The clause gives Owners a wide right to refuse orders which in their reasonable judgment may expose the vessel, owners, managers, crew insurers or reinsurers to any sanction or prohibition imposed by any state or governmental organisation. This is very wide and Charterers may wish to restrict the clause. Further please note the Charterers also have to include this clause in any sub-charter.

Ballast Water Exchange Regulations (clause 51)

All time risk and expense is placed on Charterers.

Clause 54 (Law and Arbitration)

It is important to note that if no alternative is indicated, US law and New York arbitration will apply by default, so parties should consider what law and forum best suits their purposes. The default position is both surprising and unhelpful as US

⁵ [Read](#) the Club's e-bulletin on the Global Santosh decision (note this matter has proceeded to the Supreme Court and their decision is awaited).

law/arbitration is not as commonly used as English law with London arbitration or Court.

(G) Conclusion

The latest version of the NYPE is an attempt by BIMCO to create "*a modern NYPE with global appeal*," however, how successful it will be depends on its uptake. That will require buy-in from Owners and Charterers.

On the plus side the format is user-friendly and the charter detailed and up-to-date with many newer BIMCO clauses included. BIMCO have also tried to be more balanced and there have been amendments that are of benefit to owners and charterers such that it improves on the NYPE 1993 form.

However as a general proposition it is suggested the use of a detailed standard charter of this type may be flawed as:

- it is by necessity generic and is not vessel/trade specific. Charterers' current rider clauses should address their specific trade and may thus be more appropriate;
- if the parties use their own riders with this form of charter there are likely to be conflicting clauses/confusion regarding interpretation;
- the new charter will still need to include extra detail/rider clauses; and
- the new charter may quickly become out-of-date and will need updating regularly.

Focusing on the Charterers' position, while the new contract is in parts more charterer-friendly, and is in some ways more balanced than the previous NYPE 1993 Form, overall it is still probably not going to be as charterer-friendly as many Assureds' current contracts. This is in the main because (i) it incorporates many BIMCO terms which the Club has previously expressed concerns about (see section B of this briefing) and (ii) certain of the additions (some of which we have covered here in this briefing) make the charter owner-focused/are to charterers' detriment (see section F of this briefing).

Thus to answer the question posed at the start of this briefing – does the NYPE 2015 form offer a better option for Charterers than a heavily extended NYPE 1946 form charter with bespoke rider clauses? It is suggested the answer is: regrettably not from a Charterers' perspective.

Overall the Club would recommend caution is exercised before the NYPE 2015 form is used by its Assureds. Where the form is used significant amendment and cross-checking with existing terms may be needed to ensure it meets Assureds' specific needs.

Assureds are invited to contact the claims department in London or Shanghai should they have any questions arising from this Circular.

Michael Else and Company Limited, as Managers
Dated London 15 December 2015

E.&O.E.