

Circular From GARD

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## Under The Lens – BIMCO's CII Clause For Time Charterparties

The IMO's Carbon Intensity Indicator (CII) rating system for vessels is coming into force next year. It will be used to assess the efficiency with which a ship operates. It is the first carbon regulation from the IMO that is likely to alter the traditional division of responsibilities between owners and time charterers and may significantly change the way vessels are operated. For those less familiar with the CII regulations, see our accompanying article "[The challenges of CII compliance - cooperation is key](#)".

### Introduction to BIMCO CII clause for time charterparties

BIMCO issued a CII clause on 17 November 2022. This clause intends to help owners and charterers contractually navigate and collaborate on compliance with CII as an operational measure. It is quite different in nature to other BIMCO clauses because it has to balance charterers' right to issue employment orders against the need for owners to insist on operational adjustments that might be required to meet the requirements of the CII regulations.

### Key features of the BIMCO CII clause

At its very core, the clause requires collaboration between parties and largely depends on charterers giving voyage orders to owners that allow the vessel to comply with the CII regulations. This is achieved in several ways:

- There is a "good faith" **duty to cooperate and share** findings and data which may assist in monitoring and assessing the vessel's compliance with CII regulations and in planning future voyages, and to share best practices which may enable the vessel to improve its energy efficiency.
- On delivery, owners are obliged to provide charterers with the vessel's Delivery Attained CII, which is defined as the vessel's CII attained from the beginning of the calendar year until the date of delivery into charterers' service.
- It is expected that many vessels will have to **reduce speed** in order to comply with the CII regulations, and the clause aims to address the potential issues arising out of this by imposing two sets of duties on charterers:
  - First, charterers are obliged to operate and employ the vessel "*in a manner which is consistent with the MARPOL Carbon Intensity Regulations*". This may require operational adjustments to be made,

such as issuance of alternative employment orders.

- Second, charterers have an additional duty to not allow the **CP Attained CII** to be worse than the **Agreed CII**, even if it is better than the **Required CII** rating (which is the middle point of CII Rating Level C, as defined in the clause).

Any reduction in speed or change in voyage orders will always be subject to the safety of the vessel, the crew, and operation of the equipment.

- Existing warranties in the charterparty as to despatch, and the vessel's speed and consumption remain in place but owners' obligation to meet these warranties is subject to charterers' obligation to adjust the employment orders to comply with their obligations under the clause.
- If, at any time, the data suggests that the vessel's **Attained CII** is deviating from the **Agreed CII** in the CP, owners are required to give charterers an advance warning. If the trend continues and owners can demonstrate that there is a "reasonable likelihood" of charterers' failing to meet their obligations with regards to the **Agreed CII**, then:
  - Owners can request a written plan for at least the next voyage, to be given within two working days.
  - If owners can "reasonably show" that the proposed plan will result in charterers failing to meet their obligations, owners have to inform charterers of this within two working days. Thereafter, parties are to collaborate to agree within two working days an adjusted employment plan for the next voyage or voyages to bring the CP **Attained CII** in line with the **Agreed CII**.
- Until an adjusted employment plan is agreed, owners are entitled not to follow the existing orders without being in breach, including reducing the vessel's speed. The vessel is to remain on hire throughout.
- There is a further duty on charterers to ensure that the **bills of lading** or other contracts of carriage provide that compliance by owners with the clause does not constitute a breach of that contract of carriage, and charterers are to indemnify owners for any liabilities in excess of those which owners have assumed under the clause. So far, BIMCO has not released CII clauses for use in voyage charterparties or bills of lading.
- Owners' duty is to **exercise due diligence** to ensure that the vessel is fuel and energy efficient, including taking steps to maintain the vessel's equipment, making optimal use of navigation equipment and any additional aids such as weather routing and voyage optimisation. They must comply with the SEEMP and monitor and calculate the actual consumption of the vessel on a daily basis and provide charterers with all relevant data.
- The clause refers to seven different kinds of "CII" measurement – the Agreed CII, CII (as defined in MARPOL), C/P attained CII, Delivery attained CII, Projected attained CII, Required CII, and Predicted CII rating. Each "CII" is intended to address a different concern, and parties need to pay close attention to each of the definitions.
- Owners are entitled to **claim damages** arising out of charterers' breach of the clause.

## Other considerations

This clause prepares the industry for the CII regulations and is a good starting point for contract negotiations. Given the complexity and practical difficulties of complying with the regulations, some parties may use the BIMCO clause as a base for their discussion/negotiations but make changes to suit the needs of a particular

charterparty. When doing so, parties may wish to consider the following non-exhaustive issues during negotiations:

- **Date and duration.** For short-term time charterparties or trip time charters, it may be more useful to agree on the scope of the voyage orders in the charterparty including parameters such as the maximum and minimum speed for the voyage orders instead of relying on this clause. It is also important to consider when the vessel will be delivered under the charterparty – assessment for CII regulations takes place at the end of the calendar year, and parties entering into a charterparty late into the calendar year may consider having a clause detailing the voyage orders for the remaining month(s) of the calendar year and a clause which applies from the commencement of the new calendar year.
- **Vessel's CII Rating on Delivery.** As the Agreed CII will be negotiated at the time of fixing the CP, charterers may wish to request performance data well in advance – and not just at the time when the vessel is delivered into the CP.
- **Warranties.** Charterparty warranties may need to be updated in the future and could include the vessel's delivered CII rating. Performance warranties will also need to be adjusted to take into account any energy efficiency devices installed on board. This would be of particular importance should the breakdown of such devices result in a decrease in the vessel's efficiency and potential increase in the carbon intensity of the voyage.
- **Scheduled maintenance.** Given the importance of the vessel's efficiency in reducing the carbon intensity of each voyage, it may be useful to have an agreed schedule for maintenance of the vessel, such as for hull and propeller cleaning, to be carried out on a regular basis.
- **Third party service providers.** Weather routing and voyage optimisation will likely assist in reducing the carbon intensity of each voyage. Parties should therefore think about the process of appointing a service provider, including an agreement of the service provider, scope of instructions to be given and costs involved. In addition to these service providers, it would also be useful to agree on a third-party specialist who can assess the carbon intensity of the voyages, both before the voyages are carried out and after they are completed, under the charterparty.
- **"Orders Consistent with the CII Regulations"** – This concept is used in the clause but its effect is potentially unclear. There could be circumstances where the vessel's CII trajectory remains within the Agreed CII, but the charterers' economically driven orders to steam at a faster speed might be viewed as "inconsistent" with the spirit of the CII regulations. The parties may wish to expressly provide for which these obligations take precedence.
- **Adjusted Employment Plans** – By imposing tight deadlines, the clause seeks to resolve any disagreements over the extent of operational adjustments promptly. It remains to be seen whether the deadlines will be realistic in practice and what might happen if parties do not find a common ground. The latter point is not addressed expressly in the clause.
- **Sharing of benefits.** Where the vessel enjoys benefits or incentives from port authorities due to the vessel's CII rating, could there be an agreement between parties to apportion and share those benefits? Charterers could also consider whether they should be entitled to credit for trading the vessel in a way that results in an improved CII rating on redelivery, and how to calculate any such credit.
- **Charterparty chains / contracts of carriage.** The CII clause is a clause intended for long term time charterparties. Time charterers who sub-charter the vessel out must take careful steps to align the legal position down the chain. This could require the inclusion of a clause expressly allowing vessels under voyage charterparties to slow steam (or steam at even slower speeds) or take a different route for CII

rating purposes. The same consideration applies for all contracts of carriage, including bills of lading.

- **Reconciling different formulae.** The IMO (and therefore the CII clause) focus on Annual Efficiency Ratio (AER) in ascertaining the carbon intensity of the vessel and the voyages. Charterers who are signatories to the Sea Cargo Charter will be reporting the carbon intensity of their voyages using a different formula, which is the Energy Efficiency Operational Indicator (EEOI). It would therefore be necessary to consider how to reconcile the different formulae and how data can be shared for the purposes of Sea Cargo Charter.

## Conclusion

The way BIMCO's CII clause works is different to any other charterparty clause that is in widespread use, and its approach will be new to many in the shipping market. This cannot be avoided – the clause is simply the result of the CII regulations, which impose a new kind of constraint on vessel operations/trading. The BIMCO clause is of course not the only possible solution, but it is a reasonable starting point, and a good base for parties to use when considering CII issues in the context of a time charter party. It may also be that the industry requires new forms of charterparties to reflect the new constraints on vessel operations/trading.

We expect that it will take some time for vessel owners and charterers to fully understand how the CII regulations will affect their operations, and consequently, if the clause is suitable for their needs. Reducing carbon emissions will not be easy and can only be done cooperatively. The BIMCO CII clause is an attempt to balance charterers' right to issue employment orders against the need for owners to insist on operational adjustments that may be required to meet the requirements of the CII regulations. Only experience will tell whether that balance is met.

Source of Information: The Gard P&I Club