

Navigating Through Corruption:

An Analysis of Anti-Corruption Criminal Laws in the Port Setting and the BIMCO
Anti-Corruption Clause for Charter Parties

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1 Introduction

“Remember that time is money.”¹ There may be no industry where this quote is more applicable than international shipping. Any delay in an ocean-going ship can result in tremendous financial loss to its owner, the charterer, and all others involved. Accordingly, such parties make substantial efforts to minimize delay at every port of call. Although some delays are completely unavoidable, others are purely artificial. One such example, which is the focus of this paper, occurs when a corrupt port official demands a small “facilitation payment” in order to routinely process an incoming ship or cargo. Failing to make such payment can result in substantial delay. On the other hand, making the payment might violate the criminal laws of one or more States. In order to address these issues, The Baltic and International Maritime Council promulgated and approved the *BIMCO Anti-Corruption Clause for Charter Parties* (the “BIMCO Clause” or “Clause”) in 2015.²

The BIMCO Clause will serve as a basis for this paper’s discussion of the issue of port bribery and facilitation payments. This paper will first briefly examine the problem and effects of corruption in today’s global economy, both generally and in the context of shipping/ports. It will then discuss public efforts to fight corruption by addressing important anti-corruption conventions and legislation with global impact. In particular, differentiating facilitation payments from conventional bribes will be a major topic. The paper will next detail which States may have jurisdiction to enforce their applicable anti-corruption criminal laws in any given situation. Finally, should a ship be demanded to make an illegal payment, the BIMCO Clause contains procedures that the parties will be contractually bound to follow. These provisions will be discussed and compared with alternatives contained in private charter party clauses.

2 Situation / Context / Problem

2.1 Corruption and Bribery (Defined)

“Corruption” can be defined as “the abuse of power for private gain” and can involve officials from the lowest-level civil servants to those at the highest levels of government.³ Corruption

¹ Benjamin Franklin, *Advice to a Young Tradesman*, [21 July 1748], 3 THE PAPERS OF BENJAMIN FRANKLIN, 304-308 (Leonard W. Labare ed., Yale Univ. Press 1961).

² BIMCO, BIMCO Anti-Corruption Clause for Charter Parties, BIMCO Special Circular No. 7, 7 Dec. 2015, available at https://www.bimco.org/contracts-and-clauses/bimco-clauses/anti_corruption_clause (emphasis added) (attached hereto as Appendix A) [hereinafter BIMCO Clause].

³ Transparency International, What is Corruption?, <http://www.transparency.org/what-is-corruption> (last visited 17 Aug. 2017).

includes acts such as bribery, embezzlement, trading in influence, and abuse of functions.⁴ Most relevant to the focus of this paper is *bribery*. Many legal and technical definitions of “bribery” are found in anti-corruption conventions, legislation, and contracts throughout the world, several of which will be discussed in this paper. For general purposes, however, “bribery” can be defined as “the offering, promising, giving, accepting or soliciting as an inducement for an action which is illegal, unethical or a breach of trust.”⁵

2.2 Scope of Corruption and Bribery

The United National General Assembly has found that corruption is “a *transnational* phenomenon that affects *all* societies and economies”.⁶ The Organisation for Economic Co-operation and Development (OECD) has likewise described the problem as “a widespread phenomenon in international business transactions, including trade and investment”.⁷ Transparency International annually scores, based on expert opinion, the perceived level of public corruption in States worldwide from zero (highly corrupt) to 100 (very clean).⁸ In 2016, 176 States were evaluated, with the highest score being 90 and the lowest being ten.⁹ Globally, the average score was 45 (for all States) and 54 (for G20 States). Only 31 percent of all States and 42 percent of G20 States scored 50 or better.¹⁰ It is widely accepted that States perceived to have the highest levels of corruption are generally the ones least economically developed and the most politically unstable.¹¹ For example, the average score in the 2016 Index for States categorized as “least developed”¹² was 28.8.¹³ Only three scored

⁴ See United Nations Convention Against Corruption, G.A. Res. 58/4, Annex, arts. 15-19 (31 Oct 2003), available at https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf [hereinafter U.N. Convention].

⁵ Transparency International, Anti-Corruption Glossary: Bribery, <http://www.transparency.org/glossary/term/bribery> (last visited 17 Aug. 2017).

⁶ U.N. Convention, *supra* note 4, Preamble (emphasis added).

⁷ Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions, OECD, Negotiating Conference, 6 (21 Nov. 1997), available at http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf [hereinafter OECD Convention].

⁸ Transparency International, *Corruption Perceptions Index 2016* 3, available at http://files.transparency.org/content/download/2089/13368/file/2016_CPIReport_EN.pdf.

⁹ *Id.* at 7.

¹⁰ *Id.*

¹¹ Robert Bailes, *Facilitation Payments: culturally acceptable or unacceptably corrupt?*, 15:3 BUS. ETHICS: A EUR. REV. 293, 294 (July 2006); Grant Follett, *Facilitation Payments: Facilitating poverty?*, 40 ALTERNATIVE L.J. 123, 123 (2015).

¹² Forty-seven States are considered “least developed countries”. United Nations Committee for Development Policy, Development Policy and Analysis Division, Department of Economic and Social Affairs, *List of Least Developed Countries (as of June 2017)*, available at https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/ldc_list.pdf.

above the global average while only one scored 50 or higher.¹⁴ Although there is a correlation between poverty and perceived corruption, some commentators admit that “concrete links” are difficult to demonstrate.¹⁵

As to the scope and extent of *bribery* in particular, the OECD published its Foreign Bribery Report in 2014 which analyzed 427 reported and enforced cases of illegal bribery occurring between 1999 and 2013.¹⁶ Over 60 percent of the cases involved bribes made by large organizations of 250 or more employees while only 4% were from small or medium enterprises.¹⁷ Agents, including local agents, were used in 41 percent of cases.¹⁸ Unlike the Transparency International Perceived Corruption Index results, nearly half of the reported bribes were made to officials in States with high to very-high levels of human development.¹⁹

2.3 Corruption in Shipping Industry

Shipping has been described as being “exposed to more levels of corruption than any other industry”²⁰ and as one of the most “high risk” industries to be affected by anti-corruption legislation.²¹ Of the 427 cases analyzed in the 2014 OECD report, fifteen percent involved the “transportation and storage” sector.²² Furthermore, customs officials accepted eleven percent of all reported bribes – the second highest of all categories of officials – and maritime officials accepted two percent of all bribes.²³ As to purposes of bribes connected to shipping, the report shows that twelve percent of all reported bribes were for customs clearance and six

¹³ Two States considered “least developed countries” were not scored in the 2016 Index: Equatorial Guinea, Kiribati, Tuvalu, and Vanuatu. *See Corruption Perceptions Index 2016, supra* note 8.

¹⁴ *Id.* at 4-5.

¹⁵ Follett, *supra* note 11 at 123.

¹⁶ OECD, *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials* 8 (OECD Publishing) (2014), available at <http://dx.doi.org/10.1787/9789264226616-en>.

¹⁷ *Id.* at 21. It seems plausible that bribes involving larger enterprises are more likely to be publicly reported and enforced (and therefore considered in the Report) than those involving smaller enterprises.

¹⁸ *Id.* at 29.

¹⁹ *Id.* at 8, 29. It seems plausible that cases of bribery discovered in States with high human development and low poverty may be more likely to be publicly report and enforce the offense than those States with less human development and higher poverty.

²⁰ Sam Chambers, *TRACE: ‘Shipping exposed to more corruption than any other industry’*, Splash24/7, 21 April 2015, <http://splash247.com/trace-shipping-exposed-to-more-corruption-than-any-other-industry>.

²¹ Philip Rose & Emma Humphries, *Shipping and Corrupt Practice: Intertanko Presentation* 8, Norton Rose, 14 June 2011, https://www.intercargo.org/pdf_public/norton%20rose%20bribery%20act%20presentation%20june%202014.pdf.

²² *OECD Foreign Bribery Report, supra* note 16 at 21-22. “Transportation and storage” is tied with “construction” and only exceeded by “extractive” (nineteen percent of cases). *Id.*

²³ *Id.* at 23-24. Twenty-four categories were considered with State-owned or controlled enterprises dominating at 27 percent. *Id.*

percent for licenses or authorizations.²⁴ A study focusing on two ports in Africa found that bribes were made to customs officials, stevedores, scanner agents, port police/security agents, documentation clerks, and shipping planners.²⁵

Generally, the more corrupt ports are found in States with higher levels of poverty.²⁶ Notably, Nigerian customs has been described as the “most corrupt agency in the world.”²⁷ There is significant opportunity for corruption due to somewhere between 79 and 100 signatures being required to clear any single shipment.²⁸ In the ports of Durban, South Africa and Maputo, Mozambique, a study found the respective probabilities of making a bribe to be 36 percent and 53 percent.²⁹ Likewise, there is significant corruption in several States in Latin America.³⁰ Within Europe, Odessa, Ukraine is known to be corrupt, and instances of corruption have been detected in the ports of Genoa and Barcelona.³¹

There appear to be a few reasons why corruption is noticeable in the shipping industry. First and foremost is geography and the fact that is that shipping is a global business.³² As a result, any single shipment may involve several jurisdictions and stakeholders, thereby increasing the opportunity for commission of corrupt acts.³³ Second, a level of corruption and bribery is a social norm in some parts of the world with significant economic consequences to those who do not acquiesce.³⁴ Finally, it has been noted that the shipping industry does not have a

²⁴ *Id.* at 32.

²⁵ Sandra Sequeira & Simeon Djankov, *On the Waterfront* 10 (December 2008), available at https://www.cgdev.org/doc/events/2.10.09/Sequeira_Corruption.pdf.

²⁶ Follett, *supra* note 11 at 123.

²⁷ Ships & Ports, *Nigeria Customs most corrupt agency in the world*, 19 Sept. 2016, <http://shipsandports.com.ng/nigeria-customs-most-corrupt-agency-in-the-world-nagaff>.

²⁸ Turloch Mooney, JOC.com, *Nigeria ramps up anti-corruption efforts*, 28 June 2016, http://www.joc.com/regulation-policy/import-and-export-regulations/international-importexport-regulations/nigeria-ramps-port-anti-corruption-efforts_20160628.html.

²⁹ Sequeira & Djankov, *supra* note 25 at 3.

³⁰ See generally Control Risks, *Corruption in Latin American Ports*, available at <https://www.controlrisks.com/~media/Public%20Site/Files/Reports/Corruptioninlatinamericanports.pdf> (last visited 17 Aug. 2017).

³¹ Control Risks, *Corruption in European Ports*, available at <https://www.controlrisks.com/~media/Public%20Site/Files/Reports/Corruption%20in%20European%20Ports.pdf>, (last visited 17 Aug. 2017).

³² Rohit Mahajan et al., Deloitte, *Fighting corruption in the Maritime Industry* 4, (July 2015), available at <https://www2.deloitte.com/content/dam/Deloitte/in/Documents/finance/in-fa-fighting-corruption-in-maritime-industry-noexp.pdf>; Chambers, *supra* note 20.

³³ Mahajan et al., *supra* note 32 at 4.

³⁴ Ole Anderson, *Maersk Line: Shipping hit hard by widespread corruption*, ShippingWatch, 9 May 2012, <http://shippingwatch.com/articles/article4644243.ece>.

“mature anticorruption culture.”³⁵ Anti-corruption policies and tools, such as the BIMCO Clause, are relatively new efforts to combat the problem.

2.4 Forms of Corruption in Shipping

Corruption in the shipping industry can take many forms at all stages of commercial activity. Some examples of corrupt acts not to be discussed in detail in this paper are far removed from interaction with port officials. These include illegally purchasing letters of credit, making illicit payments to marine surveyors, and procuring contracts through bribery.³⁶ Acts more closely linked to port operations include tariff evasion/under invoicing and making illegal payments in connection with smuggling or for the overlooking of irregularities or procedural requirements.³⁷

2.5 Facilitation Payments (Defined)

The focus of this paper is on “facilitation payments”. Facilitation payments are known by many names: “petty corruption”; “coffee money”; “grease payments”; “speed money”; and “oiling the wheels”.³⁸ A facilitation payment can be distinguished from conventional bribery due to two important qualities: (i) the payment is small; and (ii) in exchange for the payment, the payer receives nothing more than he is otherwise already entitled to under the law.³⁹

2.6 Facilitation Payments in Shipping Industry (Context and Scope)

In the port and shipping context, facilitation payments often consist of cash or in-kind “gifts”, such as cigarettes or alcohol, and are made to port and customs officials in order for them to process a ship and cargo in the normal course of business and in accordance with local laws and regulations.⁴⁰ In certain ports, local officials often explicitly demand facilitation payments or may otherwise expect them. Intertanko, an association of independent tankers,

³⁵ Chambers, *supra* note 20.

³⁶ Mahajan et al., *supra* note 32 at 5-6.

³⁷ *Id.*

³⁸ Follett, *supra* note 11 at 123.

³⁹ *Id.*

⁴⁰ Kevin Cooper et al., INCE & Co, *The Bribery Act and the shipping industry: complying with a zero tolerance approach to facilitation payments in an imperfect world*, 21 May 2012, <http://www.incelaw.com/fr/knowledge-bank/the-bribery-act-and-the-shipping-industry-complying-with-a-zero-tolerance-approach-to-facilitation-payments-in-an-imperfect-world>.

reported that facilitation payments were requested eleven percent of the time during port-state control.⁴¹

Should a ship refuse to meet a demand or otherwise fail to make payment, there could be significant consequences.⁴² These may include delays, costs, and fines.⁴³ It is even possible that the crew will be threatened.⁴⁴ A typical result of a ship being unfairly targeted is delay of entry into port.⁴⁵ One well-known example is from 2009 in a Ukrainian Black Sea port where a tanker that refused to make a USD 600-facilitation payment was fined USD 12,000 for “failing” a ballast water test even though the ship was in compliance. Due to the economic costs of leaving port to exchange ballast water, the ship paid the fine.⁴⁶

2.7 Local Port Agents

When making a port call, it is standard practice for a ship owner to contract with a local agent to organize, oversee, and coordinate all aspects of the call,⁴⁷ most notably inward and outward clearance of the ship, cargo operations, and husbandry.⁴⁸ These include arranging for berthing, tugs, stevedores, etc.⁴⁹ In total, there are over 130 separate operations the local agent may need to handle.⁵⁰ The port agent is expected to have strong relationships and contacts with local officials and service providers as well as expertise in local laws, rules, regulations, and procedures.⁵¹ In summary, “the agent is the conduit for all information exchanged between the vessel and the shore.”⁵²

In ports where making facilitation payments (or bribes) are standard practice, a ship owner’s local agent is naturally the one to arrange and carry out the payment. Often the owner or charterer will never explicitly instruct the agent to make payment and may not otherwise be

⁴¹ *Corruption in European Ports*, *supra* note 31.

⁴² Anderson, *supra* note 34.

⁴³ Gard, *Compliance with anti-corruption legislation*, 30 Aug. 2016, <http://www.gard.no/web/updates/content/21761310/compliance-with-anti-corruption-legislation->.

⁴⁴ Mahajan et al., *supra* note 32 at 6.

⁴⁵ Gard, *supra* note 43.

⁴⁶ *Corruption in European Ports*, *supra* note 31.

⁴⁷ FONASBA, *The Role, Responsibilities and Obligations of the Ship Agent in the International Transport Chain* 6, available at <https://www.fonasba.com/wp-content/uploads/2012/10/Role-of-Agent-Final1.pdf>.

⁴⁸ FONASBA-BIMCO, Agency Appointment Agreement, cl. 3 (2017), available at <https://www.bimco.org/-/media/bimco/contracts-and-clauses/contracts/sample-copies/sample-copy-agency-appointment-agreement.ashx>.

⁴⁹ FONASBA, *supra* note 47 at 7.

⁵⁰ *Id.* at 9.

⁵¹ *Id.* at 9.

⁵² *Id.* at 6.

aware of any details of the transaction. Furthermore, the local agent may not even itemize the expense on the owner's invoice but instead incorporate the cost into his commission. If the agent's invoice is higher than it should otherwise be, a prudent ship owner may be able to determine if the agent has made one or more payments on his behalf.

2.8 Comparison of Conventional Bribes and Facilitation Payments

Many argue that facilitation payments do not actually constitute corruption⁵³ and distinguish them from "real bribes".⁵⁴ For example, in 2001, BP P.L.C. ("BP") and Unilever N.V. both admitted before a committee of the U.K. House of Commons that, at the time, they had practices of making facilitation payments but also stated that they would "never offer, solicit or accept a bribe in any form."⁵⁵ A common argument in support of such a position consists of two related parts. First is the idea that facilitation payments are simply "expressions of local customs, traditions, and societal norms."⁵⁶ For example, practices of gift giving among business partners exist in States including China, Japan, and Russia.⁵⁷ The second part of the argument is that, as a practical matter, such local customs and norms must be adhered to in order for international businesses to operate.⁵⁸ It is further argued that if one international business refuses to conform to a local custom of making facilitation payments, then there are others that will fill the void and agree to comply.⁵⁹

The drafters of the BIMCO Clause clearly appreciated that facilitation payments differ from other forms of bribery and corruption and must be addressed in charter parties very carefully and precisely. As to conventional bribery, the explanatory notes state that "[t]he shipping industry fully supports international efforts to eradicate bribery and corruption. Bribery, such as a payment to obtain a contract or other commercial advantage, must never be condoned."⁶⁰ As to situations involving demands for facilitation payments, the explanatory notes recognize they are "more difficult".⁶¹ Although the drafters of the BIMCO Clause did not, as a matter of policy, explicitly condemn facilitation payments like they did for conventional bribes, they

⁵³ Follett, *supra* note 11 at 123.

⁵⁴ Bailes, *supra* note 11 at 295.

⁵⁵ Follett, *supra* note 11 at 123; Bailes, *supra* note 11 at 295.

⁵⁶ Bailes, *supra* note 11 at 295.

⁵⁷ *Id.* at 296.

⁵⁸ *Id.* at 295-97. When BP announced a plan to publish all facilitation payments made in Angola, the national oil company sent a letter warning of the consequences. *Id.* at 296.

⁵⁹ *Id.* at 296.

⁶⁰ BIMCO, Explanatory Notes, BIMCO Special Circular No. 7, 7 Dec. 2015, available at https://www.bimco.org/contracts-and-clauses/bimco-clauses/anti_corruption_clause [hereinafter BIMCO Notes].

⁶¹ *Id.*

didn't endorse them either. Instead, without expressing such an opinion, the remaining background explanatory notes suggest that they promulgated the BIMCO Clause as a result of the practical realities of a trend towards the criminalization of facilitation payments, a changing corporate culture towards transparency, and the resulting dilemma that ship owners may be faced with in the event of a demand for an illegal facilitation payment.⁶²

2.9 Extortion

Closely related to bribery is extortion. With bribery, both the payer and receiver act culpably in that each receives an unjustified benefit. With extortion, however, the receiver demands payment, often under an explicit or implicit threat to provide substandard treatment to the other party or to put him in a worse state than he currently is in.⁶³ An example could be a corrupt port official demanding a small payment from a ship entering port under the threat of failing port-state control. In such a situation, the payer can be thought of as a victim who is forced to pay for something that he is otherwise entitled to without payment.⁶⁴ Whether succumbing to the demand and making payment constitutes illegal bribery will be discussed below.

2.10 Effects of Corruption

2.10.1 Corruption Generally

In recent years and decades, international bodies and States have, on numerous occasions, individually and collectively condemned corruption and pointed to its negative economic, governance, and cultural effects. For example, the U.N. General Assembly has stated that corruption “undermin[es] the institutions and values of justice and jeopardize[es] sustainable development and the rule of law.”⁶⁵ The effects of corruption are realized by States in which corruption occurs, the citizens of those States, and multinational businesses conducting or desiring to conduct business therein.⁶⁶ A non-exhaustive list of recognized negative effects include “reduction in growth rates, insufficient capital formation, capital diverted towards private profit rather than social good, reduced foreign investment, less efficient public spending structure . . . , reduced tax revenues, loss of economic rationality in public decisions

⁶² *See id.*

⁶³ *See generally* James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. PA.L.REV. 1695, 1698–1700 (1993).

⁶⁴ *See generally id.*

⁶⁵ U.N. Convention, *supra* note 2, Preamble; OECD Convention, *supra* note 7, Preamble.

⁶⁶ Bailes, *supra* note 11 at 294.

and ineffectiveness of international aid programmes”.⁶⁷ As to the effect on businesses, bribes can result in shortsighted business strategies and the realistic possibility of additional future bribes.⁶⁸

2.10.2 Facilitation Payments

At least one commentator has argued that the *effects* of facilitation payments can be distinguished from conventional bribery in three aspects. The first argument is based on the assumption that uncertainty is a major deterrent of foreign investment. Unlike conventional bribes that cannot be accurately predicted, facilitation payments are small, predictable, and can be incorporated into a business model even if they add up to fiscally significant amounts of money over time. Second, facilitation payments, by definition, do not result in unfair advantages but only give payers what they are already entitled to. Therefore, unlike with bribes, there is no economic-distorting misallocation of resources resulting from decisions based on bribes instead of market conditions and worthiness of competing firms. Finally, unlike with bribes, facilitation payments serve as a mechanism that may actually allow for foreign investment and economic activity that would otherwise be prevented due to corruption.⁶⁹

The counter argument is that facilitation payments are often *de minimis* to firms paying them, especially large multinational ones. At the same time, however, they are of financial significance to lower-level public officials in developing States. In other words, facilitation payments provide a financial incentive to public servants to accommodate those willing to make payment, which is often to the detriment of those unwilling or unable to pay.⁷⁰

2.10.3 Shipping Industry

When analyzing the effects of corruption in international shipping, unique aspects of the industry must be taken into account. This is especially true in regards to facilitation payments. For example, while international businesses may, at some level, “compete” with individual citizens for the limited time and resources of public officials, this is less likely to be the case with ports. Most port and customs officials have very specialized roles, including port-state control/safety inspections, cargo inspections, and customs clearance. These are not

⁶⁷ *Id.* at 294.

⁶⁸ *Id.* (emphasis added).

⁶⁹ Follett, *supra* note 11 at 124-25.

⁷⁰ *Id.* at 125-26.

services that average citizens or local businesses often directly rely on. Any negative effects on the local population would likely be less pronounced and more indirect.

An empirical study of over 1,300 shipments in two competing ports in Africa, Durban and Maputo, provides enlightening results as to effects of bribery specific to shipping.⁷¹ Overall, bribes increased total shipping costs for a standard container by fourteen percent while increasing compensation of port officials by up to 600 percent.⁷² Additionally, the study noted three primary effects: diversion; congestion; and reduced port revenues. First and foremost, in response to known (or relatively higher) corruption, ships will tend to divert to less-corrupt ports.⁷³ Likewise, shippers will take “longer” land routes to those less corrupt ports even in light of higher land transportation costs.⁷⁴ The second effect, congestion, is a direct consequence of diversion. As firms divert from the most corrupt ports, the alternate ports become more congested, resulting in an imbalance.⁷⁵ Finally, the study concludes that port corruption and bribery result in diminished revenues to ports.⁷⁶ Based on the average tariff rate, the study showed a five-percentage point reduction in revenue due to corruption.⁷⁷ In conclusion, “bribe payments at ports are not just a transfer of surplus between a private agent and a bureaucrat. Instead, bribes distort firms’ shipping choices, generate deadweight loss in the economy, and reduce tariff revenue for the government.”⁷⁸

3 Anti-Corruption Initiatives

3.1 Foreign Corrupt Practices Act (United States)

The first major legislative and public effort to combat foreign corruption was in 1977 when the United States Congress adopted the Foreign Corrupt Practices Act (“FCPA”).⁷⁹ This was in response to investigations demonstrating that hundreds of U.S. companies had been paying

⁷¹ Sequeira & Djankob, *supra* note 25.

⁷² *Id.* at 1.

⁷³ *Id.* at 4, 29-30.

⁷⁴ *Id.* at 4.

⁷⁵ *Id.* at 30-31.

⁷⁶ *Id.* at 4, 31.

⁷⁷ *Id.*

⁷⁸ *Id.* at 31.

⁷⁹ Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977), as amended; 15 U.S.C. § 78dd-1 *et seq.* available at <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/fcpa-english.pdf>.

millions of dollars to overseas officials to secure new business.⁸⁰ The operative anti-bribery sections of the FCPA read as follows:

“It shall be unlawful for [any person subject to the FCPA] . . . to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an *offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value* to . . . any *foreign official* . . . in order to assist such [person] in *obtaining or retaining business* for or with, or directing business to, any person”⁸¹

As emphasized, the three primary elements are: (i) a payment (or offer, promise, or authorization); (ii) to a foreign official; and (iii) for unfair business purposes. Each will be examined in turn. The statutory exception for facilitation payments will then be addressed.

3.1.1 Payment

A qualifying act can be the actual making or authorization of a payment but may also be a mere offer, promise, or authorization to do so.⁸² The broad language of the statute allows for many forms of payment, with cash being the most obvious and prominent.⁸³ Other examples may include sports cars, fur coats, country club memberships, and extravagant travel and entertainment.⁸⁴ Smaller gifts, especially a pattern of them, can also be illegal. It is important to emphasize, however, that the size of the gift is not decisive. Instead, the critical issue is whether, through the gift, there is intent to influence a foreign official. With that policy in mind, small gifts generally do not violate the FCPA when made for the limited purpose of gratitude. Such examples may include reasonable meals or taxicab fares as they are unlikely to influence a public official.⁸⁵ In other words, gifts are not prohibited, but bribes disguised as gifts are.⁸⁶

⁸⁰ U.S. Dept. of Justice, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* 3, 14 Nov. 2012, available at <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf> FCPA Guide [hereinafter FCPA Guide].

⁸¹ 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (emphasis added).

⁸² 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a); See generally FCPA Guide, *supra* note 80 at 14-16.

⁸³ FCPA Guide, *supra* note 80 at 15.

⁸⁴ *Id.* at 15-16.

⁸⁵ *Id.*

⁸⁶ *Id.* at 16.

3.1.2 Foreign Official or Other Qualifying Person

In order to violate the FCPA, the payment must be made to a “foreign official” (or other similar person).⁸⁷ “Foreign official” has been defined broadly in the statute to include, among others, the lowest-level civil servants, the highest-ranking public officials, and employees of State-owned enterprises.⁸⁸ In the context of port corruption, public port employees and customs officers would certainly qualify.

3.1.3 Unfair Business Purposes

In order to constitute an illegal bribe under the FCPA, the payment must be made “to assist . . . in *obtaining or retaining business* for or with, or directing business to, any person.”⁸⁹ This is known as the “business purpose test”. The clearest example that meets the requirement is a payment in order to obtain or retain a government contract. Other unfair advantages include favorable tax treatment, exceptions to otherwise required licenses, and prevention of competitors from the market.⁹⁰ In the port context, a payment to admit a ship or cargo that would otherwise not be allowed would qualify as an unfair business purpose. As an example, Panalpina World Transport (Holding) Ltd., a Swiss freight forwarding and logistics firm, along with related parties, admitted in 2010 to having paid over USD 27 million, in violation of the FCPA, to officials in several States in order to circumvent import rules and regulations.⁹¹

3.1.4 Exception for Facilitation Payments

Facilitation payments are specifically addressed in the FCPA as follows:

“[The prohibition against making a payment] shall not apply⁹² to any *facilitating or expediting payment* to a foreign official, . . . the purpose of which is *to expedite or to secure the*

⁸⁷ The FCPA does not prohibit payments to foreign *governments*, as opposed to foreign *officials*. FCPA Guide, *supra* note 80 at 20.

⁸⁸ See 15 U.S.C. §§ 78dd-1(f)(1)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A); FCPA Guide, *supra* note 80 at 20.

⁸⁹ 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (emphasis added).

⁹⁰ FCPA Guide, *supra* note 80 at 12-13.

⁹¹ U.S. v. Panalpina World Transport (Holding) Ltd., Crim. No. 4:10-cr-00769 (S.D. Tex., 4 Nov. 2010); SEC v. Panalpina, Inc., Civ. No. 4:10-cv-4334 (S.D. Tex., 4 Nov. 2010).

⁹² Facilitation payments are excepted from the scope of the general rule as opposed to being an affirmative defense. FCPA Guide *supra* note 80 at 111 n. 159.

*performance of a routine governmental action by a foreign official*⁹³

The scope of the exception for facilitation payments is narrow and only covers payment for acts that are both *routine* and *non-discretionary*.⁹⁴ Examples include payments for processing visas or business licenses, providing police services, processing/forwarding mail, supplying public utilities, and scheduling inspections.⁹⁵ As most “routine government action” is conducted by lower-level government officials, eligible facilitation payments will generally be made to such persons.⁹⁶ Sizes of qualifying facilitation payments tend to be low as large payments tend to suggest improper influence.⁹⁷

Port and customs officials generally have nondiscretionary duties to process an incoming ship and its cargo. This may include port-state control for the ship and completion of necessary inspections and paperwork for cargo. In the narrow case of a ship owner or charterer making a small payment to an official, whether in the form of cash or cigarettes/alcohol, for the sole purpose of ensuring that the official carries out his required duty and processes the ship and/or cargo according to local law, such payment should fall into the facilitation payment exception. In the case, however, that a payment is made to ensure that the ship or cargo is granted entry when it otherwise should not be admitted under the law, such payment would not be protected by the exception.

3.2 The OECD Convention

The next major effort to combat public corruption and bribery was the 1997 Convention on Combatting Bribery of Public Officials in International Business Transactions (the “OECD Convention”).⁹⁸ The OECD Convention, largely influenced by and modeled after the FCPA, only targets *active* bribery. In other words, this convention targets those making bribes to public officials and does not address public officials accepting bribes.⁹⁹

⁹³ 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b). The original language regarding facilitation payments was replaced with this language in 1998. Pub. L. No. 105-366, 112 Stat. 3302 (1998).

⁹⁴ FCPA Guide, *supra* note 80 at 25.

⁹⁵ *Id.* at 111 n. 162; U.S. v. Kay, 359 F.3d 738, 750-51 (5th Cir. 2004).

⁹⁶ Kay, 359 F.3d at 750-51.

⁹⁷ H.R. Rep. No. 95-640, at 8.

⁹⁸ OECD Convention, *supra* note 7 at 6-13.

⁹⁹ OECD, *Commentaries on the Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions* ¶ 1 (21 Nov. 1997), available at http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf [hereinafter OECD Commentaries].

3.2.1 Article 1, Paragraph 1 – Anti-Bribery Provision

Article 1, Paragraph 1, the operative anti-bribery provision, reads as follows:¹⁰⁰

“Each [State] shall take such measures as may be necessary to establish that it is a *criminal offence* under its law for any person intentionally to *offer, promise or give any undue pecuniary or other advantage*, whether directly or through intermediaries, to a *foreign public official*, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, *in order to obtain or retain business or other improper advantage* in the conduct of international business.”¹⁰¹

The criminal act must first involve an “offer, promise or gi[ft of] any undue pecuniary or other advantage”. Likewise, such offer, promise, or gift must be made to a “foreign public official” or third-party intermediary. “Foreign public official” is broadly defined in Article 1, Paragraph 4 to include a vast array of officials and persons performing public functions as well as quasi-government officials of State-owned enterprises.¹⁰² Finally, the purpose of the offer, promise or gift must be “to obtain or retain business or other improper advantage”.¹⁰³ The content of this language clearly includes government contracts but also encompasses much more. The official commentary states that “[o]ther improper advantage’ refers to something to which the company concerned was not clearly entitled, for example, an operating permit for a factory which fails to meet the legal requirements.”¹⁰⁴

3.2.2 Facilitation Payments

The OECD Convention language indirectly addresses facilitation payments while the commentary directly addresses them. First, the actual language of Article 1, Paragraph 1 provides that the offer, promise, or gift must be made “in order to obtain or retain business or other *improper* advantage”.¹⁰⁵ As discussed above, “improper” means something to which the person “was not clearly entitled”.¹⁰⁶ In the case of true facilitation payments, this

¹⁰⁰ The provision only provides a standard of what should be transcribed in national legislation and does not mandate specific details. ¶ 4.

¹⁰¹ OECD Convention, *supra* note 7, art. 1(1) (emphasis added).

¹⁰² *Id.* art. 1(4).

¹⁰³ *Id.* art. 1(1).

¹⁰⁴ OECD Commentaries, *supra* note 99, ¶ 5.

¹⁰⁵ OECD Convention, *supra* note 7, art. 1(1) (emphasis added).

¹⁰⁶ OECD Commentaries, *supra* note 99, ¶ 5.

requirement will not be met as the payer will receive nothing more than he was already entitled to under the law. Although some argue that this clause by itself is sufficient to conclude that the OECD Convention does not require the criminalization of facilitation payments,¹⁰⁷ the official commentary affirmatively provides for this:

“Small ‘facilitation’ payments do not constitute payments made ‘to obtain or retain business or improper advantage’ within the meaning of paragraph 1 and, accordingly, are also not an offence. . . . Other countries can and should address this corrosive phenomenon by such means as support for programmes of good governance. However, criminalization by other countries does not seem a practical or effective complementary action.”¹⁰⁸

The commentary is quite explicit that that member States are not bound to criminalize foreign facilitation payments.¹⁰⁹ Accordingly, the payment of a small sum of money or gift to a port or customs official to ensure a ship and cargo are processed in accordance with local law, is not an act that the OECD Convention requires to be criminalized.

3.3 The U.N. Convention

Approximately 25 years after the FCPA and six years after the OECD Convention, the United Nations General Assembly adopted the United Nations Convention against Corruption (the “U.N. Convention”). While the OECD Convention primarily covers bribery of foreign public officials, the U.N. Convention is much more comprehensive and, in addition, addresses a host of other forms of corruption including public sector hiring, public procurement management, private sector bribery, embezzlement, money laundering, and obstruction of justice.¹¹⁰

¹⁰⁷ See generally Follett, *supra* note 11 at 123-24.

¹⁰⁸ OECD Commentaries, *supra* note 99, ¶ 9.

¹⁰⁹ In 2009, the OECD’s Council for Further Combating Bribery of Public Officials in International Business Transactions *recommended* that the member States regularly review their internal policies regarding foreign facilitation payments and “prohibit or discourage” their use. It further *urged* all States to ensure that their public officials are aware of all local anti-bribery laws with the goal of “stopping the solicitation and acceptance of small facilitation payments.” While significant, this clearly falls short of an agreement among OECD States to *prohibit* facilitation payments. OECD, *Recommendations of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* 20, 22 (26 Nov. 2009), available at http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

¹¹⁰ U.N. Convention, *supra* note 4, arts. 7, 9, 21, 22, 23, 25.

3.3.1 Foreign Bribery

Most relevant to the topic of this paper is Article 16 which addresses bribery of foreign public officials.¹¹¹ The controlling language reads as follows:

“Each State Party *shall adopt* such legislative and other measures as may be necessary to establish as a *criminal offence*, when committed intentionally, the *promise, offering or giving* to a *foreign public official . . .*, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, *in order to obtain or retain business or other undue advantage* in relation to the conduct of international business.”¹¹²

Article 16 largely contains the same elements as those found in the OECD Convention and the FCPA in regards to the payment, to whom the payment is made, and the purpose of the payment. Specifically, there must be a “promise, offer or gif[t]”, to a “foreign public official”, “in order to obtain or retain business or other undue influence.”¹¹³ Furthermore, the term “foreign public official” is defined similarly to its counterpart in the OECD Convention and includes all types of public officials and those executing public functions.¹¹⁴

3.3.2 Facilitation Payments

Facilitation payments are not specifically addressed in the U.N. Convention. It is, however, critical to note that Article 16 requires that an otherwise improper promise, offering or gift be made “in order to obtain or retain business or other *undue* advantage.”¹¹⁵ This language is nearly identical to that found in the OECD Convention, with “undue” having been substituted for “improper”. Furthermore, although “other undue advantage” is not defined in the U.N. Convention, it should arguably be interpreted in the same way as “other improper advantage” in the OECD Convention.¹¹⁶

¹¹¹ The language of Article 15 requiring the criminalization of domestic bribery largely mirrors that of Article 16 for foreign bribery. *Art. 15.*

¹¹² *Art. 16(1)* (emphasis added). In addition to *requiring* that members States implement laws criminalizing the making of a bribe to a public official, it also *recommends* that member States consider implementing acts which would make it a criminal offense for a foreign public official to receive such a bribe. *Art. 16(1).*

¹¹³ *Art. 16(2).*

¹¹⁴ *Art. 2(b).*

¹¹⁵ *Art. 16(2).*

¹¹⁶ Follett, *supra* note 11 at 124.

Unlike with the OECD Convention, there is no official commentary to the U.N. Convention explicitly addressing facilitation payments. The *travaux préparatoires* suggest, however, that most State delegations to the U.N. Convention wanted to exclude the phrase, “in order to obtain or retain business or other undue advantage”, while other delegations insisted that such qualification be included.¹¹⁷ Notwithstanding the fact that there is not an affirmative allowance for facilitation payments, the inclusion of the term “undue” results in an absence of a prohibition.¹¹⁸ Had this term been excluded, the Convention would demand that member States adopt criminal legislation prohibiting foreign facilitation payments. Instead, like the OECD Convention, the member States are free to decide this issue for themselves.

3.4 Bribery Act 2010 (United Kingdom)

In 2011, the Bribery Act 2010 (“UKBA”) became effective in the United Kingdom and has been labeled as “the most draconian anti-corruption legislation in the world”.¹¹⁹ The UKBA is comprehensive and contains several (and potentially overlapping) criminal bribery offenses. It covers active and passive bribery, both domestically and abroad.¹²⁰

3.4.1 Bribery of Foreign Public Officials

The first offense to be discussed is that specifically relating to foreign public officials. The operative language is found in Section 6 and reads as follows:

“(1) A person (“P”) who bribes a foreign public official (“F”) is guilty of an offence if P’s intention is to influence F in F’s capacity as a foreign public official.

(2) P must also intend to obtain or retain—
(a) business, or
(b) an advantage in the conduct of business.

(3) P bribes F if, and only if—
(a) directly or through a third party, P offers, promises or gives any financial or other advantage—
(i) to F, or

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Cooper et al., *supra* note 40.

¹²⁰ Ministry of Justice, *Guidance about procedures* ¶ 10, March 2011, available at <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>. [hereinafter UKBA Guidance]; *E.g.* Bribery Act 2010, 2010 c., 23, §§ 1, 2, 6, (Eng.), available at http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf.

- (ii) to another person at F’s request or with F’s assent or acquiescence, and
- (b) F is neither permitted nor required by the written law applicable to F to be influenced in F’s capacity as a foreign public official by the offer, promise or gift.”¹²¹

Although structured in a slightly different way, Section 6 contains the same basic elements as those in the FCPA, the OECD Convention, and the U.N. Convention: (i) an offer, promise, or gift; (ii) to a foreign public official; and (iii) to obtain to retain business or an advantage. Similarly, “foreign public official” is broadly defined in the Act to include all persons holding public positions or fulfilling public functions.¹²²

3.4.2 Facilitation Payments

A critical departure from the policies of the FCPA, OECD Convention, and U.N. Convention is found in Section 6(2)(b). This sub-section provides that simply “an *advantage* in the conduct of business”¹²³ must be intended to be obtained or retained. The word “advantage” is not qualified by a term such as “improper” or “undue”. Accordingly, the scope of the UKBA is much broader and includes all situations where payment is made to a foreign official in exchange for any advantage. Most importantly, the language is broad enough to encompass facilitation payments. Specifically, a payment to a public official to fulfill a duty that the payer is entitled to under law, such as an inspection of cargo for purposes of customs clearance, would be considered an “advantage”. The official Guidance publication to the UKBA expressly states that there is no exception for facilitation payments.¹²⁴

3.4.3 General Bribery

In addition to the specific offence of *foreign* bribery in Section 6, the UKBA also contains a general prohibition of active bribery, not limited to foreign public officials, in Section 1.¹²⁵ The two cases are as follow:

“(1) A person (“P”) is guilty of an offence if either of the following cases applies.

(2) Case 1 is where—

¹²¹ Bribery Act 2010, *supra* note 120 § 6(1)-(3).

¹²² § 6(5).

¹²³ § 6(2)(b).

¹²⁴ UKBA Guidance, *supra* note 120 ¶ 45.

¹²⁵ Bribery Act 2010, *supra* note 120, § 1. Article 2 contains the general passive bribery offense. § 2.

- (a) P offers, promises or gives a financial or other advantage to another person, and
 - (b) P intends the advantage—
 - (i) to induce a person to perform improperly a relevant function or activity, or
 - (ii) to reward a person for the improper performance of such a function or activity.
- (3) Case 2 is where—
- (a) P offers, promises or gives a financial or other advantage to another person, and
 - (b) P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.”¹²⁶

In each case, there must be an offer, promise, or gift of a financial advantage to another person. Case 1 covers the situation where the payer intends the advantage to induce the other person to improperly perform a “relevant function or activity” or reward the person for improper influence.¹²⁷ In the alternative, Case 2 applies when the payer knows or believes that mere acceptance of such an advantage by the payee would result in improper performance.

Depending on the facts concerning a bribe or facilitation payment made to a foreign public official, such an act could violate both UKBA Sections 1 and 6.¹²⁸ The primary difference is that Section 1 requires that the payment be accompanied with improper performance or the intent to induce it. The official Guidance to the UKBA notes that, in the context of foreign public officials, it is often difficult to delineate the precise functions of the foreign public official. This could make proving actual improper performance or intent to induce it very difficult for the prosecution. Accordingly, such a requirement is absent from Section 6.¹²⁹

3.4.4 Extortion

A facilitation payment affirmatively initiated by a payer is illegal under the UKBA. Likewise, capitulating to a demand for a facilitation payment under threat from a foreign

¹²⁶ §§ 1(1)-(3).

¹²⁷ UKBA Guidance, *supra* note 120, ¶ 17. Improper influence occurs when the payee does not fulfill the expectation that he will act in good faith, impartially, or in accordance with his position of trust. *Id.* ¶ 18. This is based on the reasonable expectations of a person in the United Kingdom. Bribery Act 2010, *supra* note 120, § 5(1); UKBA Guidance, *supra* note 120, ¶ 19.

¹²⁸ UKBA Guidance, *supra* note 120, ¶ 44.

¹²⁹ *Id.*, ¶ 23.

public official also appears to violate the act.¹³⁰ The official Guidance provides as follows: “It is recognized that there are circumstances in which individuals are left with no alternative but to make payments in order to protect against loss of life, limb or liberty. The common law defense of duress is very likely to be available in such situations.”¹³¹ In the port context, however, the vast majority of threats have consequences that are merely economic (e.g., perishing cargo) and do not strictly affect “life, limb or liberty”. The policy set forth in the official Guidance suggest that making a payment to avoid such threats of economic hardship, however major, would violate the UKBA.¹³²

4 BIMCO Clause – Introduction

On 24 November 2015, BIMCO announced the approval and launch of the BIMCO Clause. The drafting of the Clause was a joint effort by a team of lawyers and practitioners from across the world. The result was a “clearly-worded” clause that is purely voluntary but also applicable in any jurisdiction worldwide. Inherent in the drafting of the Clause was the goal of a “workable alternative” to already-existing anti-corruption clauses found in private charter parties. In particular, the Clause requires compliance with anti-corruption laws and calls for a procedure in which the owner and charterer shall resist a demand for an illegal bribe or facilitation payment. It then provides the contractual procedure and consequences if the effort to resist should fail.¹³³ The result under the BIMCO Clause is much different than under alternative clauses, especially the “zero tolerance”¹³⁴ clauses largely drafted and utilized by petroleum charterers.

The ensuing sections of this paper will review and analyze the substantive terms of the BIMCO Clause. This will include presenting the results under both the Clause’s plain language and in the context of relevant public anti-corruption law as well as general maritime and contract law. Finally, the terms of the Clause will be compared with alternative private clauses that are or have been promoted by BHP Billiton Ltd. (“BHP”),¹³⁵ BP P.L.C.,¹³⁶

¹³⁰ This situation is not as relevant under the FCPA as there is an exception for a facilitation payment whether or not it is in response to a demand.

¹³¹ UKBA Guidance, *supra* note 120, ¶ 48.

¹³² William J. Boddy, Lexology, *Payment made under duress: bribery or extortion?*, 13 June 2011, <http://www.lexology.com/library/detail.aspx?g=5da424b3-1183-4320-be82-2ebf7087cf01>.

¹³³ Press Release, BIMCO, 24 Nov 2015, https://www.bimco.org/news/press-releases/20151124_press_release_anti-corruption_clause.

¹³⁴ Grant Hunter, TheBalticBriefing.com, *Corruption and charter party consideration*, 23 July 2015, <http://thebalticbriefing.com/2015/07/23/corruption-and-charter-party-considerations>.

¹³⁵ BHP anti-corruption clause (attached hereto as Appendix B) [hereinafter BHP].

Cargill, Inc. (“Cargill”),¹³⁷ The Maritime Anti-Corruption Network (“MACN”),¹³⁸ Morgan Stanley,¹³⁹ RWE AG (“RWE”),¹⁴⁰ and Royal Dutch Shell plc (“Shell”).¹⁴¹

5 Sub-Clause (a)(i) – Applicable Anti-Corruption Legislation

BIMCO sub-Clause (a)(i) provides that each party shall “comply at all times with *all applicable anti-corruption legislation*.”¹⁴² The official commentary notes that the Clause is “designed for worldwide trading[,] is not linked to any specific legal system, [and] aims to encompass any laws or regulations to which the parties are subject under their own national legislation or legislation in the country or jurisdiction where they are operating.”¹⁴³ Accordingly, with any given charter party that incorporates the Clause, it is critical to identify all anti-corruption legislation that applies to either or both parties, including national criminal legislation.¹⁴⁴ Before identifying specific legislation of interest, however, it is important to first understand the various bases of jurisdiction under which States may impose their anti-corruption laws in the port context.

5.1 Bases for Jurisdiction

In the international law context, the term “jurisdiction” means the “power of a sovereign to affect the rights of persons, whether by legislation, by executive decree, or by the judgment of a court.”¹⁴⁵ Alternatively, the term “describes the power of a State under international law to exercise its authority over persons and property by use of municipal law.”¹⁴⁶ Such laws can certainly include prohibitions on committing crimes such as bribery. In the context of

¹³⁶ BPTIME Time Charterparty, Additional Clauses 24-25 (Feb. 2001), *available at* <https://www.sec.gov/Archives/edgar/data/1483934/000119312510060061/dex103.htm> (attached hereto as Appendix C) [hereinafter BP].

¹³⁷ Cargill anti-corruption clause (attached hereto as Appendix D) [hereinafter Cargill].

¹³⁸ Anti-corruption Clauses for Charter Parties, Maritime Anti-corruption Network (January 2014) (attached hereto as Appendix E) [hereinafter MACN].

¹³⁹ Anti-Corruption Representation, Morgan Stanley (June 2010) (attached hereto as Appendix F) [hereinafter MS].

¹⁴⁰ Compliance, Anti-Corruption and Sanctions clause, RWE (attached hereto as Appendix G) [hereinafter RWE].

¹⁴¹ Bribery Clause, Shell (attached hereto as Appendix H) [hereinafter Shell].

¹⁴² BIMCO Clause, *supra* note 2, § (a)(i) (emphasis added).

¹⁴³ BIMCO Notes, *supra* note 60, Commentary Sub-clause (a).

¹⁴⁴ *Id.*

¹⁴⁵ BEVAN MARTEN, PORT STATE JURISDICTION AND THE REGULATION OF INTERNATIONAL MERCHANT SHIPPING § 2.1 (Springer International Publishing Switzerland 2014).

¹⁴⁶ Z. OYA ÖZÇAYIR, PORT STATE CONTROL § 3.1 (Informa Professional 2004) (2001). The five bases for jurisdiction are the territorial, nationality, protective, passive personality, and universality principles. § 3.2.

international shipping, multiple States may be able to assert jurisdiction of their laws. Particularly relevant are (i) port-state jurisdiction, (ii) flag-state jurisdiction, and (iii) extraterritorial jurisdiction.¹⁴⁷ Each will be addressed in turn.

5.2 Port-State Jurisdiction (Explained)

In the context of port corruption, the State in which the port is located and in which the corrupt act occurs may always assert jurisdiction. One of the five internationally-accepted bases for jurisdiction, including criminal jurisdiction, is the “territorial principle”. Simply put, this principle provides that a State has the powers to adopt and enforce laws necessary to properly govern within its borders.¹⁴⁸ In the context of criminal law, it provides that a State has jurisdiction to prescribe criminal acts and adjudicate offenses committed in its own territory.¹⁴⁹ Therefore, when entering a State’s territory, a foreign national becomes subject to and submits himself to that State’s laws and jurisdiction.¹⁵⁰

Port-state jurisdiction is the assertion of jurisdiction on ships visiting ports within its territory¹⁵¹ and is simply a special case and extension of territorial jurisdiction.¹⁵² Ports and harbors have long been recognized as being under the territorial jurisdiction of the States in which they are located.¹⁵³ Furthermore, due to significant economic and commercial interests, global logistics, the transfer of goods and persons, and other effects on port communities, States have taken a special interest in asserting its port-state jurisdiction.¹⁵⁴

There was a period when the question remained unanswered as to whether a foreign-flagged ship and onboard foreign nationals entering a port State were fully subject to the port State’s territorial jurisdiction. Specifically at issue was whether port States maintained jurisdiction over certain “internal affairs” or the “internal economy” of a foreign-flagged ship, including

¹⁴⁷ The governing law of the charter party is distinct from “applicable anti-corruption legislation”. BIMCO Notes, *supra* note 60, Commentary, Sub-clause (a).

¹⁴⁸ MARTEN, *supra* note 145, §§ 2.1.1., 2.3.2.

¹⁴⁹ See ÖZÇAYIR, *supra* note 146, § 3.2(i). It is well accepted that criminal jurisdiction is inherently territorial. Peter D. Clark, *Criminal Jurisdiction Over Merchant Vessels Engaged in International Trade*, 11:2 J. MAR. L. & COM. 219, 221 (1980).

¹⁵⁰ MARTEN, *supra* note 145, § 2.1.1.

¹⁵¹ G.P. PAMBORIDES, INTERNATIONAL SHIPPING LAW § 3.1 (Ant. N. Sakkoulas Publishers 1999).

¹⁵² MARTEN, *supra* note 145, §§ 2.1.1, 2.3.2; Ademuni-Odeke, *An Examination of the Basis for Criminal Jurisdiction over Pirates Under International Law*, 22 TUL. J. INT’L & COMP. L. 305, 311 (2014).

¹⁵³ MARTEN, *supra* note 145, § 2.3.2. UNCLOS specifically provides that the sovereignty of a State “extends beyond its land territory and internal waters [and includes its] territorial sea[s]. United Nations Convention on the Law of the Sea, art. 2(1), 10 Dec. 1982, 1833 U.N.T.S. 3, available at http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf [hereinafter UNCLOS].

¹⁵⁴ MARTEN, *supra* note 145, §§ 2.1.1, 2.3.3.

criminal acts of foreign nationals on board, when in the port State.¹⁵⁵ Largely decided in the context of violent criminal acts among foreign national crew members, two lines of thought emerged – the Anglo-American view and the French/European view.¹⁵⁶ Adopted by both the United Kingdom¹⁵⁷ and the United States¹⁵⁸, the Anglo-American view provides that a port State has absolute jurisdiction over foreign vessels in port and those on board.¹⁵⁹ The competing French/European view provides that a port State has jurisdiction over the internal affairs of a ship only when the event touches or disturbs the interests of the port State.¹⁶⁰ Although the Anglo-American approach may be more widely accepted today,¹⁶¹ it has been pointed out that the differences between the two views are minimal in that those States adopting the Anglo-American view often voluntarily refrain from exercising its jurisdiction in most internal matters whereas those States adopting the French/European view tend to more broadly categorize events as “port disturbances”.¹⁶²

In the context of port bribery and facilitation payments, a ship owner or charterer who, while in port, makes payment to a local official in violation of the laws of that port State, is subject to criminal sanctions under that State’s jurisdiction. If the act occurs on land or on the dock, the port State clearly has jurisdiction. If, however, the act occurs on the ship (e.g., after a public officials boards the ship), the port State should likewise have the same authority and jurisdiction whether adhering to the Anglo-American view or the French/European view since an illegal payment to a port official would arguably affect the immediate operation of the port.

5.3 Port-State Jurisdiction (Examples)

In light of the foregoing, it is critical that both ship owners and charterers be aware of applicable anti-corruption laws in the port States in which calls will be made. As conventional bribery is nearly universally prohibited at the domestic level,¹⁶³ the more interesting issue is the legality of facilitation payments. Additionally, local extortion laws and defenses should be examined as a facilitation payment payed in response to an illegal demand and corresponding threat may be legal.¹⁶⁴ While it is not practical or useful for this paper to

¹⁵⁵ MARTEN, *supra* note 145, § 2.4.

¹⁵⁶ Clark, *supra* note 149 at 230-34.

¹⁵⁷ Regina v. Cunningham, (1859) Bell Cr. Cas 72 (Eng.).

¹⁵⁸ Wildenhus’ Case (Mali v. Keeper of Common Jail), 120 U.S. 1 (1887).

¹⁵⁹ Clark, *supra* note 149 at 231-33.

¹⁶⁰ *Id.* at 233.

¹⁶¹ PAMBORIDES, *supra* note 151, § 3.2.

¹⁶² MARTEN, *supra* note 145, § 2.4.4.3.

¹⁶³ Philip M. Nichols, *Are Facilitating Payments Legal?*, 54:1 VA. J. OF INT’L L. 127, 135 (2013).

¹⁶⁴ *Id.* at 136; Lindgren, *supra* note 63 at 1698.

exhaustively detail all laws around the world, Nigeria and China serve as useful examples. Nigeria is an example of a State with a high level of corruption.¹⁶⁵ China, on the other hand, is an example of a State with several of the world's busiest ports and tremendous volumes of activity.¹⁶⁶

5.3.1 Nigeria

Nigeria, like most States, long ago banned bribery of its public officials. A 1998 analysis of Nigeria's laws concluded, however, that although facilitation payments could seemingly have violated both the then-existing Criminal Code and the Code of Conduct for Public Officers, a series of exceptions as well as court precedence suggested that facilitation payments were actually legal.¹⁶⁷ Subsequent to this analysis, however, a new civilian government, constitution, and anti-corruption laws have replaced those existing under the former order.¹⁶⁸ In particular, the Corrupt Practices and Other Related Offenses Act now provides as follows:

“Any person who offers to any public officer . . . an inducement or reward for- . . .

(b) Performing or abstaining from performing or aiding in procuring, expediting, delaying, hindering or preventing the performance of any official; or . . .

([d]) showing or forbearing to show any favour or disfavor in his capacity as such officer.

shall . . . be guilty of an offence”¹⁶⁹

Based on the language of subsections (b) and (d), it appears that facilitation payments to local Nigerian officials are criminal. In furtherance of this policy, Section 60 specifically prohibits the admission of any evidence demonstrating that any such payment or gratification is customary.¹⁷⁰ Finally, there is no clear defense in regards to a payment being made to meet an extortionary demand. While practical enforcement of this law may not exist, this does not

¹⁶⁵ Ships & Ports, *supra* note 27; *Corruption Perceptions Index 2016*, *supra* note 8 at 5, 10.

¹⁶⁶ World Shipping Council, Top 50 World Container Ports, <http://www.worldshipping.org/about-the-industry/global-trade/top-50-world-container-ports> (last visited 17 Aug. 2017). Seven of the top ten and thirteen of the top thirty busiest container ports are in China. *See id.*

¹⁶⁷ Nichols, *supra* note 163 at 135.

¹⁶⁸ *Id.* at 137.

¹⁶⁹ Corrupt Practices and Other Related Offenses Act 2000, § 18, 2000 Act No. 5 (Nig.), *available at* <http://icpc.gov.ng/wp-content/uploads/downloads/2012/09/CORRUPT-PRACTICES-ACT-2010.pdf>.

¹⁷⁰ § 60.

change the fact that facilitation payments are nevertheless criminal.¹⁷¹ Accordingly, should this law be violated in connection with a charter party containing the BIMCO Clause, the Clause would be triggered even in the absence of a realistic possibility of local enforcement.

5.3.2 China

Bribery is illegal under Chinese law. The law, however, does not allow for an act to be prosecuted absent other conditions being met. In particular, the aggregate payments to a single government official must equal at least RMB 10.000. Notwithstanding the foregoing, any such act(s) can be prosecuted if payments are made to more than three officials, cause significant damage to the Chinese State, or are made to the Communist Party. Accordingly, it is very difficult to determine whether any single facilitation payment is legal.¹⁷²

5.4 Flag-State Jurisdiction (Explained)

Ocean-going ships sail worldwide and on the high seas where no State has sovereignty.¹⁷³ As “[t]he absence of any authority over ships sailing the high seas would lead to chaos[,]”¹⁷⁴ a system has developed where all ships must fly the flag of one State and be subject to the laws and jurisdiction of that State.¹⁷⁵ Enforcement of anti-corruption laws is not usually what comes to mind in this context. Typically, one of the more-prevalent roles of the flag State is “flag-state control”.¹⁷⁶ The jurisdiction of the flag State, however, is much broader than technical and operational matter. The United Nations Convention on the Law of the Sea provides that the flag State has “jurisdiction under its internal law over each ship flying its flag and its *master, officers and crew* in respect of administrative, technical and *social* matters concerning the ship.”¹⁷⁷ More generally, it is well accepted that the flag State has jurisdiction over persons on board.¹⁷⁸

The jurisdiction of the flag State over a ship *sailing on the high seas* is exclusive.¹⁷⁹ For purposes of payments to port and customs officials, however, this is not particularly relevant

¹⁷¹ Nichols, *supra* note 163 at 137.

¹⁷² *Id.* at 137-39.

¹⁷³ UNCLOS, *supra* note 153, art. 89.

¹⁷⁴ JOHN N.K. MANSELL, FLAG STATE RESPONSIBILITY § 1.2 (Springer 2009).

¹⁷⁵ UNCLOS *supra* note 153, art. 92(1); MANSELL, *supra* note 174, § 1.2.

¹⁷⁶ MANSELL, *supra* note 174, § 1.4; *E.g.* UNCLOS, *supra* note 153, arts. 94, 217(4).

¹⁷⁷ UNCLOS, *supra* note 153, art. 94(2)(b) (emphasis added).

¹⁷⁸ JÖRN-AHREND WITT, OBLIGATION AND CONTROL OF FLAG STATES 15-17 (Lit Verlag 2007).

¹⁷⁹ UNCLOS, *supra* note 153, art. 87; *See generally* WITT, *supra* note 178 at 4-11.

as payments are not made or arranged under such conditions.¹⁸⁰ When a ship is in port, however, there is concurrent jurisdiction between the port State and the flag State.¹⁸¹ In other words, although the port State gains jurisdiction when a ship enters port, the flag State's jurisdiction over the ship and its crew/passengers continues uninterrupted. Accordingly, the flag state has jurisdiction to enforce its criminal laws, including anti-corruption legislation, while the ship is in a foreign port,

Notwithstanding the foregoing, some flag States choose to not always extend the full reach of their flag-state jurisdiction over crimes committed on board ships. It is therefore necessary to determine this for each flag State on a case-by-case basis.¹⁸² For example, the extent of criminal jurisdiction of the United States is statutory¹⁸³ but has been specifically extended to include crimes on board its ships.¹⁸⁴ Likewise, since 1867, crimes committed aboard British ships have been subject to U.K. law.¹⁸⁵

In the case of a payment made to a port official, determining whether the laws of the flag State are "applicable", within the meaning of the BIMCO Clause, will likely be a consequence of where and how the payment is made. There are at least three possibilities: (i) the official boards the ship to complete the transaction with the agent; (ii) the agent disembarks the ship to complete the transaction with the port official on shore; or (iii) a local shipping agent completes the transaction with the port official on shore.¹⁸⁶ Flag-State jurisdiction only extends to acts committed on board a ship.¹⁸⁷ Therefore, the flag State would have jurisdiction over scenario (i) but not over (ii) or (iii).¹⁸⁸ In situation (i), the flag State can have jurisdiction even if it has implemented a general practice to defer to the port

¹⁸⁰ It is conceivably possible for a payment to be arranged, whether by radio or otherwise, in violation of the laws of the flag State while the ship is on the high seas and therefore give rise to flag-state jurisdiction over the offense. This, however, is not likely how such arrangements are made and will not be further discussed.

¹⁸¹ See WITT, *supra* note 178 at pp. 10, 15-17; Clark, *supra* note 149 at 222.

¹⁸² See generally Clark, *supra* note 149 at 225-27.

¹⁸³ U.S. v. Hudson, 11 U.S. (7 Cranch) 32 (1812); WITT, *supra* note 178 at 226-27.

¹⁸⁴ 18 U.S.C. § 7(1).

¹⁸⁵ WITT, *supra* note 178 at 226.

¹⁸⁶ Facilitation payments are commonly made by contracted local shipping agents on behalf of the principal and with the costs imputed back to the principal. Sequeira & Djankob, *supra* note 25 at 9.

¹⁸⁷ See UNCLOS, *supra* note 153, art. 27; WITT, *supra* note 178 at 15-17.

¹⁸⁸ As previously discussed, scenarios (ii) and (iii) would certainly over be within the scope of port State's territorial jurisdiction and, as will be discussed, could also be within the scope of other States based on jurisdiction on nationality or extraterritorial jurisdiction. For example, Sweden asserts extraterritorial jurisdiction over all acts committed by an officer or crew member of a Swedish-flagged ship in connect with official duties. Swedish Criminal Code, Chapter 2, Section 3(1). NGCPC, *infra* note 224, § 12(2).

State.¹⁸⁹ For example, the policies of the United States and the United Kingdom are to assert jurisdiction over such crimes only after the port State has declined jurisdiction.¹⁹⁰ Under Swedish law, there must be specific government approval prior to prosecution.¹⁹¹

Pursuant to the language of the BIMCO Clause, it is insignificant whether any anti-corruption legislation will not be enforced, for example due to a decision by a flag State to defer prosecution of an illegal payment to the port State. Instead, it is only important that the anti-corruption legislation be “applicable”.¹⁹² As discussed above, so long as the flag State has, though its own laws, (i) extended its jurisdiction to criminal acts committed on board its flagged vessels and (ii) made such payment illegal, then the laws of the flag State should be considered “applicable” for purposes of the BIMCO Clause.

5.5 Flag-State Jurisdiction (Examples)

In light of the foregoing, it is critical that ship owners and charterers alike be aware of applicable anti-corruption legislation of the flag State of the ship being chartered. While it is not practical or useful for this paper to exhaustively detail the laws of all flag states around the world, focusing on the largest ones would be beneficial. In 2015, the top ten ship registries (by number of vessels and deadweight tonnage) were Panama, Liberia, Marshall Islands, Hong Kong, Singapore, Malta, Bahamas, Greece, China, and Cyprus.¹⁹³ With regard to the OECD Convention, Greece is the only of the foregoing that is a signatory.¹⁹⁴ As to the U.N. Convention, on the other hand, all except Hong Kong have ratified or acceded to it.¹⁹⁵ Accordingly, those who own or charter ships flagged in such States should carefully monitor specific details of implementation. With Panama, for example, “there is a perception that [it] should more effectively implement the convention[.]”¹⁹⁶

¹⁸⁹ See generally Clark, *supra* note 149 at 230-34. It is accepted that a flag State consciously deciding to not exercise its authority is within the bounds of its sovereignty. MANSELL, *supra* note 174, § 1.2.

¹⁹⁰ Clark, *supra* note 149 at 230-34. U.S. v. Flores, 289 U.S. 137 (1933); U.S. v. Rogers, 150 U.S. 264 (1893); U.S. v. Reagan, 453 F. 2d 165 (6th Cir. 1971), cert. den., 406 U.S. 946.

¹⁹¹ SPC, *infra* note 263, § 2:5, second paragraph.

¹⁹² BIMCO Clause, *supra* note 2, § (a)(i).

¹⁹³ Lloyd’s List, Flag State 2015: Top 10 Ship Registers, <https://www.lloydslist.com/ll/static/classified/article506818.ece/binary/Flag-worldfleet-final2.pdf> (last visited 17 Aug. 2017).

¹⁹⁴ See OECD, Ratification Status as of May 2017, <http://www.oecd.org/corruption/oecdantibriberyconvention.htm> (last visited 17 Aug. 2017).

¹⁹⁵ UNODC, Signature and Ratification Status, <https://www.unodc.org/unodc/en/corruption/ratification-status.html> (last visited 17 Aug. 2017).

¹⁹⁶ U.S. Dept. of State, *Panama 2017 Investment Climate Statements Report*, 29 June 2016, available at <https://www.state.gov/e/eb/rls/othr/ics/2017/wha/270086.htm>.

5.5.1 The Marshall Islands

The Marshall Islands has fully criminalized bribery of foreign officials. The operative language reads as follows:

“A person . . . is guilty of bribery . . . if the person, whether in the Marshall Islands or elsewhere, directly or indirectly promises, confers or agrees to confer a benefit upon a foreign public official or an official of an international organization as an inducement to, or reward for, or on account of:

- (a) Obtaining or retaining business or other undue benefit in international business;
- (b) Taking action or refraining from acting in a manner that breaches an official duty[.]”¹⁹⁷

The elements and structure of the foregoing offense are similar to and those of the OECD Convention and the U.N. Convention. In particular, it is important to note that the benefit to be obtained in exchange for the payment must be “undue”. Consistent with the interpretation of the two conventions, this qualification supports the conclusion that foreign facilitation payments do not violate the laws of the Marshall Islands. Finally, it is critical to note that the Marshall Islands has chosen to fully utilize flag-State criminal jurisdiction by making the foregoing bribery law applicable and enforceable if the offense “occurs on any vessel belonging in whole or in part to the Republic or any citizen thereof, or any corporation created by or under the laws of the Republic, when such vessel is within the admiralty and maritime jurisdiction of the Republic.”¹⁹⁸

5.6 Extraterritorial Jurisdiction (Explained)

Extraterritorial jurisdiction is simply a State’s exercise of jurisdiction outside of its territorial limits.¹⁹⁹ When prescribing and enforcing extraterritorial laws, States must rely on at least one of the following principles: nationality, protective, passive personal, and universality.²⁰⁰ Each will be addressed.

¹⁹⁷ 31 MIRC Ch. 1 § 240.1(3) (Marsh. Is.), available at http://rmiparliament.org/cms/images/LEGISLATION/PRINCIPAL/2011/2011-0059/CriminalCode2011_1.pdf. A similar offense against bribery of Marshall Islands officials also exists. § 240.1(2).

¹⁹⁸ § 1.03(1)(h).

¹⁹⁹ Kate Lewins, *Jurisdiction over prosecution of criminal acts on cruise ships* 3, 18 Jan. 2013, available at http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=spla/crimes%20at%20sea/subs/sub001.pdf.

²⁰⁰ MARTEN, *supra* note 145, §§ 2.1.2, 2.1.3.

5.6.1 Nationality Principle

The *nationality principle* allows States to prosecute the acts of its nationals, whether committed inside or outside its geographic limits, based solely based on nationality.²⁰¹ In other words, the State's law "follows" its nationals.²⁰² Although every State has such powers to prescribe its laws to nationals outside of its territory, not every State has chosen to do so.²⁰³

In the context of port bribery and facilitation payments, "applicable anti-corruption legislation", within the meaning of the BIMCO Clause, could include anti-corruption legislation under the laws of the State of the nationality of the master, crew, or other person making such bribe or payment. Accordingly, it is critical to determine whether the laws of the State of the payer's nationality make such an act illegal when committed outside of the State's territorial limits. If such laws are applicable abroad, then the BIMCO Clause would be triggered.

5.6.2 Protective, Passive Personal, and Universality Principles

The *protective principle* provides jurisdiction to a State over acts or offenses that are committed outside of its territory when they have negative effect on the "security, integrity[,] vital economic interests",²⁰⁴ or the "political independence" of the State.²⁰⁵ The key component is that such offense must actually be against the State itself and not merely against one or more of its nationals.²⁰⁶ Historical examples of are crimes involving immigration, currency, and mail fraud.²⁰⁷ The *passive personal principle* gives extraterritorial jurisdiction to a State based on the nationality of the victim.²⁰⁸ It allows the State to punish foreign nationals for acts that took place outside of its geographic boundaries.²⁰⁹ The *universality principle* has a very narrow scope and grants jurisdiction to any State to prosecute crimes that are universally condemned, such as piracy.²¹⁰

²⁰¹ § 2.1.2; ÖZÇAYIR, *supra* note 146, § 3.2(ii).

²⁰² MARTEN, *supra* note 145, § 2.1.2.

²⁰³ Clark, *supra* note 149 at 220. For example, both the American and British courts have found that they have such power, but that their criminal laws are, by default, territorial unless specifically made applicable internationally. *Id.*

²⁰⁴ ÖZÇAYIR, *supra* note 146, § 3.2(iii).

²⁰⁵ Clark, *supra* note 149 at 221-22.

²⁰⁶ MARTEN, *supra* note 145, § 2.1.3.

²⁰⁷ Clark, *supra* note 149 at 221-22.

²⁰⁸ ÖZÇAYIR, *supra* note 146, § 3.2(iv). This is distinguished from the protective principle in that a national of the State, rather than the State as a political entity, is the victim of the extraterritorial act.

²⁰⁹ Clark, *supra* note 149 at 221.

²¹⁰ MARTEN, *supra* note 145, § 2.1.3.

5.7 Extraterritorial Jurisdiction (Examples)

In light of the foregoing, ship owners and charterers should be aware of potentially-applicable anti-corruption laws with extraterritorial effect, especially the most far-reaching ones. While it is not practical or useful for this paper to exhaustively detail such laws around the world, of most prominence are the FCPA and UKBA. The extraterritorial anti-bribery laws of three Scandinavian States will also be discussed.

5.7.1 United States (Foreign Corrupt Practices Act)

The FCPA, as previously discussed, targets bribery of public officials outside the United States and contains a narrowly-tailored exception for qualifying facilitation payments. The primary anti-bribery provisions consist of three parallel statutes, each applicable to a specific set of persons: (i) issuers (and their officers, directors, etc.) of securities registered under U.S. securities laws;²¹¹ (ii) “domestic concerns”, including U.S. nationals and business entities formed under the laws of the U.S. or a state in the U.S. (and their officers, directors, etc.);²¹² and (iii) other foreign nationals while in the territory of the U.S.²¹³ Accordingly, with both territorial and extraterritorial effect, the FCPA utilizes and is based on several of the principles of jurisdiction.

5.7.2 United Kingdom (Bribery Act 2010)

5.7.2.1 Territorial or “Close Connection” Requirement

The UKBA provides for extensive jurisdiction, with application inside and outside of the United Kingdom. For both general bribery (Section 1) and bribery of foreign public officials (Section 6), the UKBA has jurisdiction over all acts committed inside the United Kingdom as well those committed outside of the territorial limits by person[s] with a “close connection with the United Kingdom”.²¹⁴ Those with a “close connection” generally include U.K. nationals and legal entities existing under U.K. law.²¹⁵

²¹¹ 15 U.S.C. § 78dd-1.

²¹² § 78dd-2.

²¹³ § 78dd-3.

²¹⁴ Bribery Act 2010, *supra* note 120, § 12(1)-(3); UKBA Guidance, *supra* note 120, ¶ 15.

²¹⁵ Bribery Act 2010, *supra* note 120, § 12(4).

5.7.2.2 Commercial Organizations

The UKBA also provides for additional and broader extraterritorial jurisdiction over “commercial organisations”. Applying only to legal entities (i.e., not natural persons), Section 7(1) provides that a commercial organization will be guilty of an offense if a person associated with the organization commits bribery on behalf of and for the benefit of the organization.²¹⁶ Unlike the offenses in Sections 1 and 6, however, jurisdiction is not limited to only those committed within the territory and those with a “close connection” to the U.K. Instead, any legal entity formed under the laws of the U.K. or conducting any business therein is subject to UKBA enforcement regardless of whether the payment took place inside or outside the territorial limits.²¹⁷

Section 7(2) provides the organization (but the underlying person who commits the act) an affirmative defense if it had “adequate procedures” in place to prevent bribery.²¹⁸ The Ministry of Justice has issued an official publication containing guidance as to what “sufficient procedures” include.²¹⁹ Generally, the following six items are necessary: (i) that the procedures be proportionate to the bribery risks the commercial organization faces; (ii) that top-level management be committed to an anti-bribery policy and culture; (iii) that the organization periodically assess its bribery risks; (iv) that the organization acts diligently when selecting those who will act on its behalf; (v) that the anti-bribery policies be properly communicated throughout the organization and that personnel be trained; and (vi) and that the policies be regularly monitored and reviewed.²²⁰ Rather than abruptly stopping facilitation payments, it appears the goal of this office is to phase them out and for businesses to begin taking proactive steps towards this goal.²²¹ At least one expert believes only businesses with an endemic of making facilitation payments will be prosecuted anytime in the near future.²²²

5.7.2.3 Applicability

The parties to a charter party containing the BIMCO Clause should be intimately aware of the terms of the UKBA if any person has a close connection to or either party carries on any

²¹⁶ § 7(1).

²¹⁷ § 7(3)(b); UKBA Guidance, *supra* note 120, ¶ 16.

²¹⁸ Bribery Act 2010, *supra* note 120, § 7(1).

²¹⁹ § 9(1); UKBA Guidance, *supra* note 120.

²²⁰ UKBA Guidance, *supra* note 120 at 20-31.

²²¹ Cooper et al., *supra* note 40.

²²² Mark Sands, Operationalriskandregulation.com, *Facilitation payment charges unlikely under Bribery Act*, 22 Dec. 2010, <http://www.risk.net/risk-management/operational-risk/1933202/bribery-act-unlikely-see-firms-pursued-facilitation>.

business in the United Kingdom. In every case, any payment, including a facilitation payment, will violate the act. Although the U.K. authorities may choose not to prosecute the office, this is of no legal significance for purposes of triggering the BIMCO Clause.

5.7.3 Scandinavia

The Scandinavian States have, in accordance with their obligations as members of the OECD Convention and the U.N. Convention, largely implemented conforming anti-corruption criminal legislation with extraterritorial effect. Not generally having as far-reaching connections to international firms as the larger economies of the United States and the United Kingdom, their legislation is therefore not as widely applicable as the previously-discussed FCPA and UKBA. In the shipping industry, however, the Scandinavian States are traditional seafaring nations with significant ship-owning interests. Accordingly, in the context of the BIMCO Clause, this legislation is extremely relevant should a ship owner or charterer have a connection to any of them. The ensuing analysis will focus on the Norway, Denmark, and Sweden as these are the three Scandinavian States with the most shipping activity.

5.7.3.1 Norway

Norway's primary anti-bribery legislation is found in The General Civil Penal Code, Section 276a.²²³ It reads as follows:

“Any person who . . .

b) *gives or offers* any person an *improper advantage in connection* with a position, officer or assignment shall be liable to a penalty for corruption.

Position, office or assignment in the first paragraph also mean a position, office or assignment in a *foreign country*.”²²⁴

²²³ Prior to joining the OECD Convention, Norway's anti-bribery legislation was limited to GCPC § 128. To comply with the convention, the existing language was amended to explicitly apply to foreign officials. In 2003, § 276a was adopted while § 128 was amended so as to be limited to threatening (vs. bribing) public officials. Act No. 79 of 4 July 2003 (Nor.); OECD, *Norway: Phase 2 Report ¶ 1* (2004), available at <https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/31568595.pdf>.

²²⁴ The General Civil Penal Code, Act of 22 May 1902 No. 10, as amended, § 276a, first and second paragraphs (Nor.), available at http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf (emphasis added) [hereinafter NGCPC].

5.7.3.1.1 Elements

The elements of Section 276a cover active bribery and are largely in line with the requirements of the OECD Convention and the U.N. Convention.²²⁵ The first element is that the payer must either “give” or “offer”. The preparatory works clarify that “promise” was intentionally excluded as the Ministry of Justice determined that “promise” would have no independent significance from “offer”.²²⁶ It is likewise the official position that a payer agreeing to a solicitation from an official would constitute an “offer”.²²⁷ Next, the gift or offer must be an “improper advantage”. Although not explicit in the plain language, the Norwegian authorities have taken the position that an “improper advantage” can be pecuniary or non-pecuniary;²²⁸ the preparatory works address in detail what makes an advantage “improper”.²²⁹ The gift or offer must be “in connection with a position, officer or assignment”. The term “position, officer or assignment” is broader than “public official” and results in the inclusion of private officials.²³⁰ Paragraph 2 explicitly provides application to foreign officials.²³¹ Finally, the critical link between the gift or offer and an act or omission of the official is made by requiring that the gift or offer be made “in connection with” the duties of the official.²³²

5.7.3.1.2 Facilitation Payments

In respect to the legality of facilitation payments, whether made to officials in Norway or abroad, it is the position of the Norwegian government that they are barred as any ordinary bribe.²³³ Specifically, facilitation payments are considered “improper” within the meaning of Section 276a.²³⁴ This was confirmed by the Ministry of Foreign Affairs in its 2007 brochure, *Say No to Corruption – It Pays*, stating that “all forms of corruption are prohibited by Norwegian law” and that “[f]acilitation payments, i.e. payments for services to which one is

²²⁵ Related sections include Section 276b regarding “gross corruption” and Section 276c regarding “trading in influence”.

²²⁶ *Norway: Phase 2 Report*, *supra* note 223, ¶ 83.

²²⁷ ¶ 83.

²²⁸ ¶ 85. It also can be something with no independent value such as an honor. *Id.*

²²⁹ ¶ 86.

²³⁰ ¶ 88.

²³¹ NGCPC, *supra* note 224, § 276a, second paragraph.

²³² ¶ 93.

²³³ ¶ 86.

²³⁴ Some authorities have indicated that certain payments may not be punishable or should not be punished. OECD, *Norway: Phase 3 Report* ¶ 33, note 31 (2011), available at <https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Norwayphase3reportEN.pdf>.

already entitled without paying extra, are also a form of corruption.”²³⁵ Notwithstanding the foregoing, it is important to note that this was only a position of the then-current Government and that any developments in case law should be tracked.²³⁶ Notwithstanding the foregoing, the preparatory works provide an example that if a person was forced to make an otherwise illegal payment for the purpose of having his passport returned or to being allowed to exit the country, then such payment should not be punishable. Accordingly, under Norwegian law, there may be some instances where facilitation payments are legal, especially in response to extortionary demands.²³⁷

5.7.3.1.3 Jurisdiction

The criminal jurisdiction of the General Civil Penal Code is broad and utilizes many principles of jurisdiction.²³⁸ Norway has jurisdiction over all criminal acts, including bribery under Section 276a, within its national borders,²³⁹ on Norwegian-flagged ships on the high seas,²⁴⁰ and by all crew and passengers on Norwegian-flagged ships regardless of the ship’s location.²⁴¹ As to Norwegian crimes committed abroad by Norwegian nationals or persons domiciled in Norway, Norway has chosen to exercise jurisdiction only over certain enumerated offenses, one of which is Section 276a.²⁴² Likewise, with respect to crimes committed abroad by non-Norwegians, Section 276a is explicitly listed as a crime Norway will have jurisdiction to enforce.²⁴³

5.7.3.2 Denmark

Denmark’s anti-bribery prohibition is found in Section 122 of the Criminal Code and reads as follows:

²³⁵ Norwegian Ministry of Foreign Affairs, *Say No to Corruption – It Pays!* 7 (2008), available at <http://www.regjeringen.no/en/dep/ud/dok/veiledninger/2008/neitilkorrupsjon.html?id=49938>; *Norway: Phase 3 Report*, *supra* note 234, ¶ 32.

²³⁶ *Norway: Phase 2 Report*, *supra* note 223, ¶ 87.

²³⁷ See Simonsen Vogt Wiig, New BIMCO anti-corruption clause, 25 Jan. 2016, <http://svw.no/aktuelt/aktuelt/2016/januar/new-bimco-anti-corruption-clause/>.

²³⁸ *Norway: Phase 2 Report*, *supra* note 223, ¶ 140.

²³⁹ NGCPC, *supra* note 224, § 12(1).

²⁴⁰ § 12(1)(d).

²⁴¹ § 12(2).

²⁴² § 12(3)(a). All crimes contained within Chapter 26 (fraud, breach of trust, and corruption) are also included. § 12(3)(a).

²⁴³ § 12(4)(a).

“Any person who *unlawfully*²⁴⁴ grants, promises or offers some other person exercising a Danish, foreign or international public office or function a gift or other privilege in order to induce him to do or fail to do anything in relation to his official duties shall be liable”²⁴⁵

5.7.3.2.1 Elements

The first element is that the payer must “grant”, “promise”, or “offer”. The Danish authorities have confirmed that the term “grant” covers the same actions as the term used in the OECD Convention, “give”.²⁴⁶ Next, the law requires that there be a “gift or other privilege”. Although the Danish term “fordel” may be better translated as “advantage” than “gift”, the *travaux préparatoires* confirm that such gain does not have to be strictly financial.²⁴⁷ Although the language of Section 122 does not explicitly cover offenses committed through intermediaries, the law on complicity set forth in Section 23 provides for such result.²⁴⁸ As to the next element, Section 122 specifically includes “foreign” and “international” public officials in addition to Danish ones.²⁴⁹ Finally, the grant, promise, or offer must “induce” the public official to affirmatively make or omit from making an action in connection with his official duties.²⁵⁰ Importantly, Danish authorities have taken the position that it is immaterial whether the action or omission breaches any duty of the official.²⁵¹

5.7.3.2.2 Facilitation Payments

The legality of facilitation payments is not fully resolved in that Section 122 provides that the payer must act “unlawfully”. The Authorities have stated that the better translation of the Danish term “uberettiget” may be “unduly” or “unjustifiably”.²⁵² Nevertheless, the *travaux préparatoires* provide that “it cannot be precluded that in some countries such very special

²⁴⁴ Also translated as “unduly”.

²⁴⁵ Danish Criminal Code, Act No. 126 of 15 April 1930, as amended, § 122 (Den.), available at <https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/37472519.pdf> (emphasis added) [hereinafter DCC]. Section 122 was amended by Act No. 228 of 4 April 2000 to comply with requirements of the OECD Convention.

²⁴⁶ OECD, *Denmark: Review of Implementation 2* (2000), available at <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2018413.pdf>.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 4.

²⁴⁹ *Id.* at 5.

²⁵⁰ *Id.* at 6.

²⁵¹ *Id.* at 5.

²⁵¹ *Id.* at 6.

²⁵² *Id.* at 25.

conditions may prevail that certain token gratuities will fall outside the criminal scope in the circumstances although they would be criminal bribes if they had been given in Denmark.”²⁵³ In response to concerns that this exception may apply even in situations where the foreign public official breaches his duties, Denmark’s Ministry of Justice issued a publication entitled, “How to Avoid Corruption”, which contains the following statement: “Paying sums of money in connection with international business relationships for the purpose of making public employees *breach* their duties will always be undue and thus constitute a criminal offense.”²⁵⁴ With ongoing concerns as to the scope of the exception found in the *travaux préparatoires*, Danish officials have stated that the exception will be narrowly interpreted.²⁵⁵ At this time, however, there is no case law to support such a position.²⁵⁶ Developments should be monitored.

5.7.3.2.3 Jurisdiction

Denmark exercises criminal jurisdiction, including violations of Section 122, in its territory²⁵⁷ and over its nationals.²⁵⁸ As to jurisdiction over acts of Danish nationals committed abroad, jurisdiction is more limited than that of other States. Specifically, the act must also be criminal in the State where it is committed (i.e., dual criminality requirement).²⁵⁹ Consistent with the protective and passive personal principles, Denmark has jurisdiction over certain extraterritorial acts by foreign nationals that affect Denmark.²⁶⁰ This jurisdiction, however, is also limited in that foreign bribery is not one of the enumerated crimes subject to this jurisdiction.²⁶¹ In conclusion, the reach of Section 122 is not as broad as the anti-bribery laws of other States. Nevertheless, those who are Danish nationals or are utilizing Danish-flagged ships should be keenly aware of the law.

²⁵³ *Id.* at 3.

²⁵⁴ Danish Ministry of Justice, *How to Avoid Corruption* 6 (2008), available at http://jm.schultzboghandel.dk/upload/microsites/jm/ebooks/andre_publ/corruption.pdf.

²⁵⁵ OECD, *Denmark: Phase 3 Report* ¶¶ 37-38 (2013), available at <https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Norwayphase3reportEN.pdf>.

²⁵⁶ ¶ 38.

²⁵⁷ DCC, *supra* note 245, § 6; OECD, *Denmark: Phase 2 Report* ¶ 188 (2006), available at <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/36994434.pdf>.

²⁵⁸ DCC, *supra* note 245, § 7(1); *Denmark: Phase 2 Report*, *supra* note 257, ¶ 189.

²⁵⁹ DCC, *supra* note 245, § Section 7(1); *Denmark: Phase 2 Report*, *supra* note 257, ¶ 189.

²⁶⁰ DCC, *supra* note 245, § Section 9; *Denmark: Phase 2 Report*, *supra* note 257, ¶ 188.

²⁶¹ *Denmark: Phase 2 Report*, *supra* note 257, ¶ 192.

5.7.3.3 Sweden

Sweden's anti-bribery prohibition is found in Chapter 17, Section 7 of the Swedish Penal Code and reads as follows:

“A person who, to

1. an employee,
2. a [qualifying public official],
3. a [qualifying foreign official],²⁶² or
4. a [qualifying person who] exercises public authority in a foreign state,

gives, promises or offers a bribe or other improper reward, whether for himself or any other person, for the exercise of official duties, shall be sentenced for bribery”²⁶³

5.7.3.3.1 Elements

The elements for bribery contained Chapter 17, Section 7 are consistent with the general structure of the OECD Convention and the U.N. Convention. A “person” is limited to mean a natural person and not to mean a legal person such as a business entity.²⁶⁴ The next element requires a gift, promise or offer of a “bribe or other improper reward”. A “reward” is simply any benefit, whether tangible or intangible.²⁶⁵ Next, the person to whom the bribe must be made can be any person falling into an enumerated list, which includes most, but not all, categories of foreign officials.²⁶⁶ Finally, the bribe must be “for the exercise of official duties”. Swedish authorities have advised this includes both affirmative acts and omissions.²⁶⁷

²⁶² The list is found in the Swedish Penal Code. SPC, *infra* note 263, § 20:2.

²⁶³ Swedish Penal Code, § 17:7 (Swe.), available at <http://www.government.se/contentassets/5315d27076c942019828d6c36521696e/swedish-penal-code.pdf> [hereinafter SPC].

²⁶⁴ OECD, *Sweden: Review of Implementation* 3 (1999), available at <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2389830.pdf>. Although only legal entities cannot commit crimes under Swedish law, certain fines may be assessed under SPC § 36:7. *Id.* at 7-8.

²⁶⁵ *Id.* at 3-4.

²⁶⁶ The categories are found in Chapter 7, subsections 7(2)-7(4) and as may incorporate Chapter 20, subsection 2(1) and 2(6), as applicable. *Id.* at 4-5.

²⁶⁷ *Id.* at 5.

5.7.3.3.2 Facilitation Payments

In regards to facilitation payments, the term “reward” is qualified by “improper”, similar to the language found in the OECD Convention and U.N. Convention. This suggests that some facilitation payments may be legal. Furthermore, Swedish authorities have advised that the commentary to the OECD Convention, including Comment 9 specifically excluding facilitation payments as bribery, can be used to interpret the language of the Swedish offense.²⁶⁸ On the other hand, the authorities have also advised that facilitation payments are indeed criminalized and would be enforced on a case-by-case basis.²⁶⁹ Accordingly, case law and other developments should be closely monitored.

5.7.3.3.3 Jurisdiction

Sweden exercises criminal jurisdiction pursuant to the Swedish Penal Code, Chapter 2. This includes jurisdiction over criminal acts within the Swedish territory,²⁷⁰ on Swedish vessels or by officers or crew thereof in connection with their duties,²⁷¹ and over Swedish nationals outside of Sweden.²⁷² As to its extraterritoriality jurisdiction based on the nationality principle, there are two additional requirements: (i) that the act also be criminal in the State where it was committed (i.e., dual criminality requirement); and (ii) that the act in the foreign State be punishable by more than a fine.²⁷³ Finally, of great significance is the fact that Sweden does not have criminal jurisdiction over legal entities, whether organized in Sweden or elsewhere, so long as the act was committed abroad.²⁷⁴ Accordingly, Sweden may not be able to enforce such laws against Swedish legal entities who act though non-Swedish nationals outside of Sweden.

5.8 Applicable Anti-Corruption Laws Limited to “legislation”.

It is worth briefly noting that the BIMCO Clause provides that the parties shall “comply at all times with all applicable anti-corruption *legislation*.”²⁷⁵ The selection of the term “legislation” could be limiting. “Legislation” can be defined as “[t]he law so enacted” or

²⁶⁸ *Id.* at 3-4.

²⁶⁹ *Id.* at 44.

²⁷⁰ SPC, *supra* note 263, § 2:1.

²⁷¹ § 2:3(1).

²⁷² § 2:2.

²⁷³ *Id.*; Sweden: *Review of Implementation*, *supra* note 264 at 13-14.

²⁷⁴ OECD, *Sweden: Phase 3 Report ¶¶ 79-82* (2013), available at <http://www.oecd.org/daf/anti-bribery/Swedenphase3reportEN.pdf>.

²⁷⁵ BIMCO Clause, *supra* note 2, § (a)(i) (emphasis added).

“[t]he whole body of enacted laws.”²⁷⁶ The term “enacted” clearly distinguishes “legislation” from judicially-created law, such as the common law. “It has been said to be ‘merely misleading’ to speak of *judicial legislation* There is no equivalent to the authoritative text of a statute”²⁷⁷ Therefore, a breach of judicially-created law, including common law, would likely not trigger the BIMCO Clause. For example, although recently repealed by the UKBA,²⁷⁸ common law bribery in the United Kingdom would be such a case.”²⁷⁹ An example of more-encompassing language is found in the Shell clause: “Owners and charterers . . . shall (a) comply with the applicable laws, rules, regulations, decrees, and/or official government orders”²⁸⁰

5.9 Comparison with Private Charter Party Clauses

The use of the term “applicable legislation” in BIMCO sub-Clause (a)(i) makes reference to and results in the applicability of the legislation of all States with valid jurisdiction. The contractual requirements are therefore no more or no less strict than those set by public law. None of seven private clauses being analyzed take this pure approach. Instead, they fall into three distinct categories.

The Cargill and Morgan Stanley clauses are most similar to the BIMCO Clause in that each refers to “applicable anti-corruption laws” and contains related warranties and representations.²⁸¹ These two clauses, however, contain additional independent warranties and representations as to described acts comprising elements nearly identical to those found in public anti-bribery legislation.²⁸² This results in significant redundancy.

The second group of clauses, BHP, MACN, RWE, and Shell, also refer to “applicable laws” or “applicable anti-corruption laws” and contain corresponding representations and warranties to comply with them.²⁸³ All four (except the RWE clause) contain redundant representations

²⁷⁶ BLACK’S LAW DICTIONARY 982 (9th ed. 2009).

²⁷⁷ *Id.*

²⁷⁸ Bribery Act 2010, *supra* note 120, § 17(1)(a).

²⁷⁹ See generally Omar Qureshi & Joe Smith, CMS Cameron McKenna LLP, *A guide to existing bribery and corruption offenses in England and Wales* 3, (April 2010), available at <https://www.scribd.com/document/282736722/A-Guide-to-Existing-Bribery-and-Corruption-Offenses>.

²⁸⁰ Shell, *supra* note 141, § (a).

²⁸¹ Cargill, *supra* note 137, §§ 64(a), (b)(i); MS, *supra* note 139, §§ 1, 2(A).

²⁸² Cargill, *supra* note 137, § 64(b)(ii); MS, *supra* note 139, § 2(A).

²⁸³ BHP, *supra* note 135, §§ 27(A), (B)(I); MACN, *supra* note 138, § 1; Shell, *supra* note 141, § (a); RWE, *supra* note 140, § 1.3. Interestingly, the RWE Clause appears to contractually require the parties to comply with the FCPA, the UKBA, as well as certain European Union and United Nations law. RWE, *supra* note 140, § 1.3.

and warranties like those found in the Cargill and Morgan Stanley clauses.²⁸⁴ The significant difference with this second group of clauses is that each explicitly addresses facilitation payments and contains special terms relating to them. Under the BHP and Shell clauses, the making of a facilitation payment is explicitly barred²⁸⁵ whereas the MACN and RWE clauses grant certain rights to a ship owner in the event of a demand for a facilitation payment.²⁸⁶

The clause promoted by BP is the most unique. It is brief and contains two main parts. The first part is a reference to BP's Code of Conduct and requires the owner, as a third party, to "act consistently with and adhere to [the Code's] principles".²⁸⁷ Notably, the referenced Code of Conduct requires compliance with anti-corruption laws and does not allow facilitation payments.²⁸⁸ The second part of the BP clause specifically addresses facilitation payments and simply provides that neither party shall make them or require the other party to do so.²⁸⁹

6 Sub-Clause (a)(i) – Internal Anti-Corruption Procedures

BIMCO sub-Clause (a)(i) also provides that each party shall "have *procedures* in place that are, to the best of its knowledge and belief, designed to *prevent* the commission of any *offense* under such legislation by any member of its organization or by any person providing service for it or on its behalf[.]"²⁹⁰ Focusing on employees and agents, the commentary provides that such procedures should include internal policies with high and strictly-enforced standards of conduct as well as due diligence and background checks when selecting new agents and contractors.²⁹¹ Similar requirements are contained in the MACN, Shell, and RWE clauses.²⁹²

6.1 Corruption Detection and Prevention Procedures

Outside sources can provide the needed guidance as to what substance and details should be included in a business's internal anti-corruption policy. OECD has published good-practice guidelines designed to *detect* and *prevent* bribery of foreign officials. It recommends that internal procedures include the following: (i) anti-bribery commitment at highest levels of

²⁸⁴ BHP, *supra* note 135, § 27(B)(II); MACN, *supra* note 138, § 2; Shell, *supra* note 141, § (b).

²⁸⁵ BHP, *supra* note 135, § 27(B)(III); Shell, *supra* note 141, § (a).

²⁸⁶ MACN, *supra* note 138, § 4; RWE, *supra* note 140, §§ 1.7-1.8.

²⁸⁷ BP, *supra* note 136, § 24.

²⁸⁸ BP, *BP: Code of Conduct* 4, <http://www.bp.com/content/dam/bp/pdf/about-bp/code-of-conduct/bp-code-of-conduct-english.pdf> (last visited 17 Aug. 2017).

²⁸⁹ BP, *supra* note 135, § 25.

²⁹⁰ BIMCO Clause, *supra* note 2, § (a)(ii) (emphasis added).

²⁹¹ BIMCO Notes, *supra* note 60, Commentary Sub-clause (a); BIMCO Clause, *supra* note 2, § (a).

²⁹² MACN, *supra* note 38, § 8; Shell, *supra* note 141, § (c); RWE, *supra* note 140, §§ 1.4-1.5.

management; (ii) clear corporate policies; (iii) expectation of compliance for all personnel; (iv) oversight and reporting procedures; (v) specific measures to address gifts, facilitation payments, etc.; (vi) policies for third-party contractors, distributors, etc.; (vii) financial and accounting procedures; (viii) personnel training; (ix) positive reinforcement for compliance; (x) discipline for violation; (xi) compliance guidance and confidential reporting; and (xii) periodic reviews and updates to policies.²⁹³ Likewise, the guidelines discussed earlier in regards to “adequate procedures” under UKBA Section 7(2)²⁹⁴ may provide guidance to meet the contractual requirements under BIMCO sub-Clause (a)(i). Form/model policies are also available with an example being the International Organization for Standardization (ISO) 37001 Anti-Bribery Management Systems Documentation.²⁹⁵

6.2 Example Bribery Policies of Major International Ship Owners and Charterers

International ship owners and charterers, like most major commercial organizations doing business worldwide, have adopted internal policies relating to corruption, bribery, and facilitation payments. Two of the largest ship owners, A.P. Moller–Maersk Group and CMA CGM S.A., serve as good examples. Maersk has a “zero tolerance” policy regarding bribes and is striving to reduce and eliminate facilitation payments.²⁹⁶ In 2014, after significant effort and taking hard stances, Maersk achieved its goal of no facilitation payments along the Suez Canal.²⁹⁷ CMA CGM likewise has a policy condemning bribes and has also implemented a separate “gifts policy” that must be strictly followed by all personnel before making or receiving any gift or benefit.²⁹⁸ As to charterers, BP and Exxon Mobil Corporation (“Exxon”) provide good examples. BP has a strict policy against making or accepting any bribes or facilitation payments.²⁹⁹ It also has separate policies in place for due diligence and gifts/entertainment.³⁰⁰ Exxon has implemented a comprehensive anti-corruption compliance

²⁹³ OECD, *OECD Good Practice Guidance on Internal Control, Ethics, and Compliance* 30, 30-32, available at http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf. See also OECD, *OECD Guidelines for Multinational Enterprises* 39, 39-41, available at http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

²⁹⁴ UKBA Guidance, *supra* note 120 at 20-31.

²⁹⁵ International Organization for Standardization, Anti-bribery management systems ISO 37001:2016(en) § 1, available at <https://www.iso.org/obp/ui/#liso:std:65034:en>.

²⁹⁶ Tan Yi Hui, Maersk, When zero means zero, 9 Oct. 2014, available at <http://www.maersk.com/en/the-maersk-group/about-us/publications/maersk-post/2014-4/when-zero-means-zero>.

²⁹⁷ *Id.*

²⁹⁸ CMA CGM, *Code of Ethics* 15, <https://www.cma-cgm.com/static/Communication/Attachments/CMA%20CGM%20-%20Code%20of%20ethics.pdf> (last visited 17 Aug. 2017).

²⁹⁹ BP: *Code of Conduct*, *supra* note 288 at 20.

³⁰⁰ *Id.* at 16, 20.

program³⁰¹ and has specific policies regarding interaction with government officials, gifts/entertainment, and third-party agents/contractors.³⁰² As to facilitation payments, Exxon does not have a zero-tolerance policy but instead has adopted a general rule that the making of a facilitation payment will be considered only in rare circumstances and can be approved only by Exxon's internal legal department after a finding that "the payment would be legal under all applicable laws."³⁰³ Exxon likewise has a policy against its third-party agents and contractors making facilitation payments while carrying out work for Exxon.³⁰⁴

7 Sub-Clause (a)(ii) – Record Keeping

Sub-Clause (a)(ii), provides that each party shall "make and keep books, records, and accounts which in reasonable detail accurately and fairly reflect the transactions in connection with this Charter Party."³⁰⁵ In particular, the commentary provides that all payments and gifts, along with the circumstances pertaining to them, should be properly recorded.³⁰⁶ This is consistent with the accounting and reporting requirements of the OECD Convention,³⁰⁷ good practice recommendation from OECD,³⁰⁸ the FCPA,³⁰⁹ and the internal policies of many international businesses.³¹⁰

The seven private clauses being compared in this paper vary significantly in regards to record requirements. The RWE clause is the only one that, like the BIMCO Clause, simply requires that the parties maintain records.³¹¹ The MACN and Shell clauses take this a step further by

³⁰¹ ExxonMobil, *Exxon Mobil: Anti-Corruption Legal Compliance Guide* 12 (Rev. 2014), <http://cdn.exxonmobil.com/~media/global/files/other/2015/anti-corruption-legal-compliance-guide.pdf>.

³⁰² *Id.* at 4-13.

³⁰³ *Id.* at 11.

³⁰⁴ *Id.*

³⁰⁵ BIMCO Clause, *supra* note 2, § (a)(ii).

³⁰⁶ BIMCO Notes, *supra* note 60, Commentary, Sub-clause (a). The actual language of the provision is not limited to corruption/bribery/facilitation context but applies to "the transactions in connection with [the] Charter Party." BIMCO Clause, *supra* note 2, § (a)(ii). Other provisions of a charter party or applicable background law may provide that records be required for other aspects. *E.g.* The Norwegian Maritime Code, Act of 24 June 1994 No. 39, as amended, § 133 (Nor.), *available at* <http://folk.uio.no/erikro/WWW/NMC.pdf>; Ship Safety and Security Act, Act of 16 Feb. 2007 No. 9, as amended, §§ 19(b), 20(c), 33(e), 37(c) (Nor.), *available at* <https://www.sjofartsdir.no/contentassets/a7a1a5cc4998405286e99c6fbccc5c8a/ship-safety-and-security-act.pdf>.

³⁰⁷ OECD Convention, *supra* note 7, art. 8(1).

³⁰⁸ *OECD Good Practice Guidance*, *supra* note 293, § A(7); *OECD Guidelines for Multinational Enterprises*, *supra* note 293, § VII(2).

³⁰⁹ 15 U.S.C. §§ 78m(b)(2)(A). This applies to applicable issuers of securities. *Id.*

³¹⁰ *E.g.*, *BP: Code of Conduct*, *supra* note 288 at 20; *Exxon Mobil: Anti-Corruption Legal Compliance Guide*, *supra* note 301 at 4, 5, 12.

³¹¹ RWE, *supra* note 140, § 1.6.3.

providing inspection and auditing rights to the other party.³¹² The BHP clause is similar but only requires the *owner* to maintain records and only grants inspection rights to the *charterer*.³¹³ The issue is not addressed in the BP, Cargill, and Morgan Stanley clauses.

8 Sub-Clauses (b)-(c) – Demand, Resist, and Letter of Protest

The operative portions of the BIMCO Clause are found sub-Clauses (b) and (c) and are designed to apply in the situation when a foreign port official makes a demand for an illegal bribe or facilitation payment. Specifically, these sub-Clauses are triggered when (i) an official or other qualified person; (ii) makes a “demand”; (iii) to the owner or master of the ship; (iv) for “payment, goods, or other thing of value”; and (v) “it appears that meeting such Demand would breach any applicable legislation”.³¹⁴ If the foregoing conditions are satisfied, then the master or owner must notify the charterer as soon as possible. More significantly, both the owner and the charter then become contractually bound to “cooperate to take *reasonable steps* to resist the Demand.”³¹⁵ Such “reasonable steps” will vary based on the situation, location, and resources available and may include assistance from local agents, other port representatives, consulates, and commercial contacts.³¹⁶

Should the parties’ joint effort fail to result in the demand being withdrawn, then sub-Clause (c) allows the owner to issue a “letter of protest”.³¹⁷ A letter of protest formally documents the owner’s complaint and would typically be sent to local port interests unless the master or owner has reason not to (e.g., sending the letter may lead to additional problems).³¹⁸ Nevertheless, the BIMCO Clause requires that the letter be delivered to or copied to the charterer.³¹⁹ The Clause therefore recognizes that both the owner and the charterer have an interest in timely resolving the issue.³²⁰

The collaborative approach of the BIMCO Clause is unlike the procedures found in any of the seven private clauses being analyzed. Those clauses vary substantially in this regard. The BP clause simply requires the owner to notify the charterer if a facilitation payment is actually

³¹² MACN, *supra* note 138, §§ 9-10; Shell, *supra* note 141, §§ (d)-(e).

³¹³ BHP, *supra* note 135, § 27(D).

³¹⁴ BIMCO Clause, *supra* note 2, § (b).

³¹⁵ *Id.* (emphasis added).

³¹⁶ BIMCO Notes, *supra* note 60, Commentary, Sub-clause (b).

³¹⁷ BIMCO Clause, *supra* note 2, § (c).

³¹⁸ BIMCO Notes, *supra* note 60, Commentary, Sub-clause (c).

³¹⁹ BIMCO Clause, *supra* note 2, § (c); BIMCO Notes, *supra* note 60, Commentary, Sub-clause (c).

³²⁰ BIMCO Notes, *supra* note 60, Commentary, Sub-clause (b).

made.³²¹ The Shell clause requires notification to the other party upon receiving a request or demand from an official.³²² This notification, however, appears to be for the purpose of discussing legality rather than resisting the demand and having it withdrawn. Neither the BP Clause nor the Shell clause gives the master or owner the right to issue a letter of protest. On the other hand, however, both the MACN and RWE clauses provide the master with the right to issue a letter of protest immediately upon receiving a demand without any obligation to first resolve or resist.³²³ The MACN clause does not even require a “demand” from an official but allows the master to issue a letter of protest after a mere “request” for payment.³²⁴ Accordingly, in this regard, the BIMCO Clause can be considered a balanced agreement where the contractual language provides a mechanism to resolve the dilemma instead of merely allocating risk.

9 Sub-Clause (c) – Effect of Letter of Protest

BIMCO sub-Clause (c), second sentence provides the contractual result of an owner issuing a letter of protest. First, there will be a presumption that any time lost at the port is a result of resisting the demand. Furthermore, the loss is then allocated to the charterer by providing that the ship will remain on hire (for a time charter) or that the time lost will be allocated as laytime or demurrage, as applicable (for a voyage charter).³²⁵ The reasoning behind this allocation is that ports of call are selected by the charterer whereas the owner merely follows the charterer’s commercial instructions.³²⁶

Both the MACN clause and the RWE clause, the two private clauses that contain procedures for the issuance of letters of protest, largely provide for the same result as the BIMCO Clause.³²⁷ The MACN clause further supports this policy by requiring the charterer to confirm that its schedule will allow for delays for the master and crew to review and resist demands for bribes and facilitation payments.³²⁸ The RWE clause provides some language to the charterer’s benefit, specifically that “[m]aster[] and/or crew must never issue Protests to circumvent legitimate claims of non-compliance in relation to the vessel and/or cargo operations.”³²⁹ Although not explicit in the BIMCO Clause, such a rule can be implied.

³²¹ BP, *supra* note 136, § 25(c).

³²² Shell, *supra* note 141, § (d).

³²³ MACN, *supra* note 138, § 4; RWE, *supra* note 140, § 1.9.

³²⁴ RWE, *supra* note 140, § 1.9.

³²⁵ BIMCO Clause, *supra* note 2, § (c).

³²⁶ *See* BIMCO Notes, *supra* note 60, Commentary, Sub-clause (c).

³²⁷ MACN, *supra* note 138 §§ 5-7; RWE, *supra* note 140, §§ 1.10-1.11.

³²⁸ MACN, *supra* note 138, § 1.8.

³²⁹ RWE, *supra* note 140, § 4.

The BHP, BP, Cargill, Morgan Stanley, and Shell clauses do not provide for letters of protest and therefore also do not specifically allocate any resulting lost time. This is likewise true for charter parties that do not contain any anti-corruption clause. In such cases, the general clause(s) concerning suspension of hire or laytime/demurrage may need to be consulted. The result will often be the same as under BIMCO sub-Clause (c) in that such delay is unlikely to fit into one of the enumerated categories for suspension of hire or exception to laytime.³³⁰

10 Sub-Clause (e) – Termination

Another remedy provided for in the BIMCO Clause is termination.³³¹ Termination can only be exercised when the following conditions precedent are met: (i) the non-terminating party or member of its organization has breached applicable anti-corruption legislation; and (ii) such breach has caused the terminating party to also be in breach of applicable anti-corruption legislation (but not necessarily the same legislation).³³² The official commentary provides that the breach must have been committed by the party to the charter or a direct employee; a third-party agent or contactor, including a local agent, is not eligible.³³³ The commentary also emphasizes that the exercise of the provision is fully optional but that termination must be selected with “undue delay” in order to prevent a party from using a prior breach to later cancel an inconvenient charter.³³⁴

BIMCO sub-Clause (e) was drafted as an alternative to the strict “zero tolerance” policies that had developed within the industry. For example, the Morgan Stanley clause provides the charterer with the right to immediately terminate the charter upon evidence of the owner breaching the clause.³³⁵ Even harsher, the Shell clause provides that either party may terminate the charter not only if the other party has already breached the clause but also when

³³⁰ E.g. BIMCO Uniform Time-Charter, cl. 11 (Rev. 2001), available at <https://www.bimco.org/contracts-and-clauses/bimco-contracts/baltimere-1939-as-revised-2001>; BIMCO Uniform General Charter, cl. 6 (Rev. 1994), available at <https://www.bimco.org/contracts-and-clauses/bimco-contracts/gencon-94>.

³³¹ In the absence of BIMCO sub-Clause (e) or an alternative provision, the rights of the non-breaching party, if any, would be governed by the generally-applicable provisions of the charter party and/or by the applicable background governing laws.

³³² BIMCO Clause, *supra* note 2, § (e).

³³³ BIMCO Notes, *supra* note 60, Commentary, Sub-clause (e). Notwithstanding this explanation, many public anti-bribery laws allow for criminal liability when a qualifying bribe or payment is made through an intermediary. Therefore, by virtue of public law, it appears the principal could therefore breach applicable anti-corruption legislation based on the actions of a third-party and thereby fulfill this requirement.

³³⁴ BIMCO Notes, *supra* note 60, Commentary, Sub-clause (e).

³³⁵ MS, *supra* note 139, § 3.

a breach is imminent.³³⁶ Likewise, the BHP clause gives the charterer the option to withhold further payments if it, in good faith, has reason to believe the owner has breached the clause.³³⁷ Less harsh are the MACN and RWE clauses that provide for a gap period between suspicion of breach and termination. Under the MACN clause, mere suspicion gives the party the right to audit the records of the other, but it cannot actually terminate until the audit concludes there was a breach.³³⁸ The RWE clause, on the other hand, temporarily suspends the charter and grants the accused party with a seven-day period to provide “satisfactory explanation and documentation”.³³⁹

11 Sub-Clauses (d) and (f) – Indemnification and Warranty

The BIMCO Clause contains an indemnification provision in sub-Clause (d), specifically providing that a party who violates applicable anti-corruption legislation will defend and indemnify the other party for any resulting liability or loss.³⁴⁰ The official commentary provides that this provision will be of most use when termination is not available or was not utilized.³⁴¹ The RWE clause contains similar provisions,³⁴² whereas as the BHP clause provides for only one-way indemnification from the owner to the charterer.³⁴³ It is important to remember that even if a charter party does not contain an indemnification clause specific to corruption, it may nevertheless contain an indemnification provision of general applicability.

Finally, sub-Clause (f) contains reciprocal warranties where each party certifies that it has not already breached any applicable anti-corruption legislation in connection with the charter. If it is later determined that this warranty was false, then the non-breaching party may terminate.³⁴⁴ The commentary provides that this is largely included in the clause to ensure that the charter or a contract in connection with the charter was not fraudulently obtained.³⁴⁵ Similar warranties exist in the BHP and Cargill clauses.³⁴⁶ The warranties contained in the

³³⁶ Shell, *supra* note 141, § (e).

³³⁷ BHP, *supra* note 135, § 27(E).

³³⁸ MACN, *supra* note 138, §§ 10-11.

³³⁹ RWE, *supra* note 140, § 1.12.

³⁴⁰ BIMCO Clause, *supra* note 2, § (d).

³⁴¹ BIMCO Notes, *supra* note 60, Commentary, Sub-clause (d).

³⁴² RWE, *supra* note 140, §§ 1.15, 1.17.

³⁴³ BHP, *supra* note 135, § 27(F).

³⁴⁴ BIMCO Clause, *supra* note 2, § (f).

³⁴⁵ BIMCO Notes, *supra* note 60, Commentary, Sub-clause (f).

³⁴⁶ BHP, *supra* note 135, § 27(B)(II); Cargill, *supra* note 137, § (b)(ii);

BP, MACN, Morgan Stanley, RWE, and Shell clauses, on the other hand, are strictly limited to future acts.³⁴⁷

12 Conclusion

Port corruption remains an obstacle for ship owners and charterers involved in international shipping. The past 40 years have brought strict criminal anti-corruption/anti-bribery laws with a more-recent trend towards the criminalization of facilitation payments. Accordingly, interested parties should be aware of and understand all applicable public laws governing bribery and facilitation payments. These include laws of port States, laws of flag States, and certain laws with extraterritorial applicability. While conventional bribery is universally illegal, the making of a facilitation payment will very likely violate the laws of at least one State with jurisdiction. Additionally, should the parties utilize the BIMCO Clause, any such violation may also result in private/contractual consequences. Likewise, the BIMCO Clause lays out a procedure for responding to a demand for an illegal payment and requires the parties to take reasonable steps to resist it. Should the effort fail, the Clause then allocates the financial loss of a resulting delay to the charterer. Overall, the BIMCO Clause largely addresses all aspects of the underlying problem, is applicable worldwide, and provides a reasonable outcome. It is critical that ship owners and charterers be familiar with this area of changing law whether or not they choose to utilize the BIMCO Clause.

³⁴⁷ *E.g.*, BP, *supra* note 136, § 25(a); MACN, *supra* note 138, § 2; MS, *supra* note 139, §§ 1-2; RWE, *supra* note 140, § 1.6.1; Shell, *supra* note 141, §§ (a)-(b).

APPENDIX A – BIMCO Clause

(a) The parties agree that in connection with the performance of this Charter Party they shall each:

(i) comply at all times with all applicable anti-corruption legislation and have procedures in place that are, to the best of its knowledge and belief, designed to prevent the commission of any offence under such legislation by any member of its organisation or by any person providing services for it or on its behalf; and

(ii) make and keep books, records, and accounts which in reasonable detail accurately and fairly reflect the transactions in connection with this Charter Party.

(b) If a demand for payment, goods or any other thing of value (“Demand”) is made to the Master or the Owners by any official, any contractor or sub-contractor engaged by or acting on behalf of Owners or Charterers or any other person not employed by Owners or Charterers and it appears that meeting such Demand would breach any applicable anti-corruption legislation, then the Master or the Owners shall notify the Charterers as soon as practicable and the parties shall cooperate in taking reasonable steps to resist the Demand.

(c) If, despite taking reasonable steps, the Demand is not withdrawn, the Master or the Owners may issue a letter of protest, addressed or copied to the Charterers. If the Master or the Owners issue such a letter, then, in the absence of clear evidence to the contrary, it shall be deemed that any delay to the Vessel is the result of resisting the Demand and (as applicable):

(i) the Vessel shall remain on hire; or

(ii) any time lost as a result thereof shall count as laytime or (if the Vessel is already on demurrage) as time on demurrage.

(d) If either party fails to comply with any applicable anti-corruption legislation it shall defend and indemnify the other party against any fine, penalty, liability, loss or damage and for any related costs (including, without limitation, court costs and legal fees) arising from such breach.

(e) Without prejudice to any of its other rights under this Charter Party, either party may terminate this Charter Party without incurring any liability to the other party if

(i) at any time the other party or any member of its organisation has committed a breach of any applicable anticorruption legislation in connection with this Charter Party; and

(ii) such breach causes the non-breaching party to be in breach of any applicable anti-corruption legislation.

Any such right to terminate must be exercised without undue delay.

(f) Each party represents and warrants that in connection with the negotiation of this Charter Party neither it nor any member of its organisation has committed any breach of applicable anti-corruption legislation. Breach of this Sub-clause (f) shall entitle the other party to terminate the Charter Party without incurring any liability to the other.

APPENDIX B – BHP Clause

27. Anti-Corruption

(A) Anti-corruption laws include those that are implemented in accordance with the Organisation for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the UN Convention Against Corruption and other international conventions, and include, when applicable, the United States Foreign Corrupt Practices Act, the UK Bribery Act 2010 and/or the laws of the countries with jurisdiction over the vessels, ports and/or owners (collectively the “Applicable Anti-Corruption Laws”). Applicable Anti-Corruption laws prohibit the authorisation, offering, or giving of anything of value, directly or indirectly, to a government official to influence official action or to anyone in the private sector to induce a violation of the duty of loyalty that the person owes to his or her employer. Violations of Applicable Anti-Corruption Laws may lead to criminal proceedings, monetary and other penalties and imprisonment.

(B) The Owner represents, warrants and covenants that, in connection with this Contract, neither the Owner nor any of its shareholders, members, directors, contractors, subcontractors

(I) will take, or omit to take, any action that would be in breach or violation of applicable anti-corruption laws;

(II) has authorized, offered, promised or given or will authorize, offer, promise or give anything of value to:

- any “government official” (meaning any person employed by or acting on behalf of a government, government-controlled entity or public international organization, any political party, party official or candidate; any individual who holds or performs the duties of an appointment, office or position created by custom or convention; or any person who holds him/herself out to be the authorized intermediary of a government official) in order to influence official action;

- any other person while knowing or having reason to know that all or any portion of the money or thing of value will be offered, promised or given to a government official in order to influence official action; or

- any person (whether or not a government official) to influence that person to act in breach of a duty of good faith, impartiality or trust (“acting improperly”), to reward the person for acting improperly, or where the recipient would be acting improperly by receiving the thing of value;

(III) will offer, give or authorize any “facilitation payment” to a government official (“facilitation payment” meaning small payments or gifts or anything else of value to a government official to expedite or secure the performance of a routine government action that is ordinarily and commonly performed.

Examples include payments to expedite customs inspections, berthing, the issuing of legitimate visas, licenses or permits, and to connect telephones or other utility services); or

(IV) will receive or agree to accept any payment, gift or other advantage which violates Applicable Anti-Corruption Laws.

(C) If there is any doubt whatsoever as to whether an action, offer, promise or payment is permitted under Applicable Anti-Corruption Laws or this Contract, Owner agrees to consult Charterer prior to taking any such action. Without prejudice to any other part of this Contract, no payment made in breach of this clause may be claimed from the other party.

(D) The Owner will keep and maintain accurate and reasonably detailed books and financial records in connection with its performance under, and all payments made and received in connection with, this Contract. The Charterer and its authorized representatives will have the right to unrestricted access to all necessary books and records of the Owner or any other information in relation to this Contract in order to test compliance with Applicable Anti-Corruption Laws and the representations, warranties and covenants herein. The Owner will provide any information and assistance reasonably required by the Charterer in connection with such an audit.

(E) Without prejudice to remedies referred to elsewhere in the Contract or any rights or remedies available at law or in equity, if the Charterer in good faith has reason to believe that a breach of any of the representations, warranties, or covenants relating to compliance with Applicable Anti-Corruption occurred or is imminent, the Charterer, notwithstanding any other clause of this Contract, may withhold further payments under this Contract until such time as it has received confirmation to its satisfaction that no breach has occurred or is likely to occur. The Charterer has the right to take whatever action it deems appropriate to avoid a violation of Applicable Anti-Corruption Laws, including by requiring such additional representations, warranties, undertakings and other provisions as it believes necessary and the Owner agrees that this Contract will be so amended to include such additional provisions.

(F) The Owner shall defend and indemnify the Charterer against any fine, penalty, liability, loss or damages and for any related costs (including, without limitation, court costs and legal fees) arising directly or indirectly out of the owner's failure to comply with any Applicable Anti-Corruption Laws, or arising out of the owner's causing the Charterer to be in violation of any Applicable Anti-Corruption Law.

(G) The Owner shall notify the Charterer immediately on becoming aware of any violation by it or its associates of Applicable Anti-Corruption Laws in connection with this Contract. The Owner will promptly take all such steps as may be necessary and/or requested by the Charterer to ensure minimum adverse effect on the Charterer's reputation in the event of a violation.

APPENDIX C – BP Clause

24. BP Ethical Policy Clause

Owners warrant that they, the Managers, Master and crew of the Vessel are aware of Charterers' ethics and business policies, as set out in the BP Code of Conduct, entitled "Our commitment to integrity" (a copy of which is available on www.bp.com), and their application to third party contractors. Owners undertake to ensure that in the performance of their obligations under this Charter, they, the Managers, Master and crew shall at all times act consistently with and adhere to the principles in the BP Code of Conduct.

25. BP Facilitation Payments Clause

(a) The parties hereby agree that in the course of performing their respective obligations hereunder, they shall not make, nor shall they require the other party to make, any facilitation payment.

(b) For the purposes of this clause, a Facilitation Payment means a payment, gift or gratuity, whether in cash or in kind, to any governmental or quasi-governmental officer or other official in any country for the purpose of procuring the provision of any service or level of service which such officer or official is required to provide in the normal course of their employment or duty without such Facilitation Payment being made.

(c) Any such Facilitation Payment, or other departure from the requirements of this Clause, necessarily made to permit efficient or continued trading of the Vessel shall be reported to Charterers in a mutually agreed format.

APPENDIX D – Cargill Clause

Clause 64 - ANTI-CORRUPTION CLAUSE

(a) Anti-corruption laws include those that are implemented in accordance with the Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the UN Convention Against Corruption and other international conventions, and include, the United States Foreign Corrupt Practices Act, the UK Bribery Act 2010 and/or other national the laws relating to bribery and corruption (collectively, the "Anti-Corruption Laws"). Anti-Corruption Laws prohibit the authorisation, offering, or giving of anything of value, directly or indirectly, to a government official to influence official action or to anyone in the private sector to induce a violation of the duty that the person owes to his or her employer. Violations of Applicable Anti- Corruption Laws may lead to criminal proceedings, monetary and other penalties and imprisonment.

(b) The parties represent, warrant and covenant that, in connection with this Contract, neither party nor any of its shareholders, members, directors, officers, employees, masters, crew members, agents, representatives, contractors, subcontractors or affiliates ("Associates"):

(i) will take, or omit to take, any action that would be in breach or violation of applicable Anti- Corruption Laws;

(ii) has authorised, offered, promised or given or will authorise, offer, promise or give anything of value to:

(A) any "Government Official" (meaning any person employed by or acting on behalf of a government, government-controlled entity or public international organisation; any political party, party official or candidate; any individual who holds or performs the duties of an appointment, office or position created by custom or convention; or any person who holds him/herself out to be the authorised intermediary of a Government Official), in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

(B) any other person while knowing or having reason to know that all or any portion of the money or thing of value will be offered, promised or given to a Government Official in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

APPENDIX E – MACN Clause

1. Parties will comply with applicable anti-corruption laws, such as those implemented in accordance with the OECD Anti-bribery Convention, UN Convention Against Corruption and other international anti-corruption conventions.
2. Parties agree that in connection with this charterparty, they will not, and will use best endeavors to ensure that their Associated Persons will not, acting intentionally, promise, offer, give or authorise the giving of, any Improper Payment. An Improper Payment is defined to be an undue advantage to (1) a Government Official, directly or indirectly, for the Official himself or herself or another person or entity, in order that the Official act or refrain from acting in the exercise of his or her official duties in order to obtain or retain business or other undue advantage in relation to the conduct of international business or (2) any other person (whether or not a Government Official) to influence or reward that person for breaching a duty of good faith, impartiality or trust.
3. Parties shall use best endeavors to ensure that Associated Persons undertaking tasks in relation to the charterparty (including disbursements and agency, handling of vessels and cargoes, containers and equipment, harbor authorities, pilots, stevedores, tugboats, surveys, suppliers) abide by applicable anti-corruption laws and by the anti-corruption provisions in this charterparty, including by informing such Associated Persons of their obligations pursuant to applicable anti-corruption laws.
4. If the Master and/or crew are requested to make an Improper Payment or make a Facilitation Payment the Master shall have the right to issue a Protest consisting of, at a minimum, a written notification (email or otherwise) of the known facts. Any Protest issued shall immediately be provided to Owners and Charterers, and shippers or receivers as the circumstances warrant. Masters and/or crew must never issue Protests to circumvent legitimate claims of non-compliance in relation to the vessel and/or cargo operations.
5. It is understood that the refusal to give an Improper Payment or Facilitation Payment may result in false or irrelevant allegations against Owners, Master, crew and/or the vessel and ultimately a delay to the vessel and/or to cargo operations. If the Master issues a Protest in accordance with Paragraph 4, absent clear evidence to the contrary, it shall be deemed that any delay is the result of the refusal to give an Improper Payment or Facilitation Payment.
6. Voyage charters: All time lost due to either Party refusing to make an Improper Payment or Facilitation Payment shall count as laytime or time on demurrage, unless laytime or demurrage has already been excluded for another reason not connected to the refusal to make an Improper Payment or Facilitation Payment.
7. Time charters: Delay as a result of a refusal by or on behalf of the vessel to make an Improper Payment or Facilitation Payment shall not count as time lost for the purpose of any off-hire provision, unless the vessel is already off-hire

for another reason not connected to the refusal to make an Improper Payment or Facilitation Payment.

8. Parties agree to have a policy on Facilitation Payments and will use best endeavors to ensure that neither they nor their Associated Persons will promise, offer, give or authorise any Facilitation Payment.

9. Parties will keep and maintain accurate and reasonably detailed books and financial records in connection with their performance, and all payments made or received, under this charterparty.

10. In the event that any Party reasonably believes that a counterparty has breached the anti-corruption provisions in this charterparty, the suspecting Party shall have the right to audit the other Party and the other Party agrees to cooperate. This audit right shall be limited to payments and transactions in connection with this charterparty.

11. If it is established that a breach of these provisions has occurred, the non-breaching Party may, following written notice to the breaching Party, terminate the charterparty (A) with immediate effect; or (B) once the laden voyage has been completed and cargo discharged if at the time of notification of breach, the laden voyage has not been completed.

12. If there is a conflict between the anti-corruption clauses and any other clause of this charterparty, the anti-corruption provisions shall prevail.

Definitions

Facilitation Payment means a payment or gift or anything else of any value to a Government Official to expedite or secure the performance of a routine government service or action that is ordinarily and commonly performed and that the party is entitled to. Examples include, but are not limited to, payments to expedite or facilitate customs clearance or other inspections, berthing, or the issuance of legitimate visas, licenses or permits. Facilitation payments do not include payments made as a result of a threat to the health or safety of an individual(s).

Government Official or Official means any person working for or on behalf of a government, including in or for a legislative, administrative or judicial office or agency or a government-controlled enterprise; any person exercising a public function, including for a public agency or public enterprise; and any employee or agent of a public international organisation.

Associated Person means employee, manager, agent, sub-agent, representative and/or contractor.

APPENDIX F – Morgan Stanley Clause

1. Owners and Charterers each agree that in connection with the negotiation and performance of this Charter, they and each of their respective offices, directors, employees and any agents acting on their behalf shall comply with all applicable anti-corruption laws in accordance with the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions as implemented in relevant national legislation including the United States Foreign Corrupt Practices Act (FCPA).

2. Owners and Charterers each represent and warrant that they and each of their respective officers, directors, employees and agents acting on their behalf shall not, directly or indirectly:

A. Improperly offer, pay, promise to pay, or authorize a payment of or giving of other things of value to any government official or to any other person while knowing that all or some portion of the money or value will be offered, given or promised to a government official to influence official action, to obtain or retain business or otherwise to secure any improper advantage; or

B. engage in other acts or transactions, in each case if this would be in violation of or inconsistent with any applicable anti-corruption laws.

3. Charterers may terminate this Charter forthwith upon written notice to the Owner(s) at any time there is evidence of the owner is[] in breach of any of the above representations, warranties or undertakings. Owners ensure people who carry out services for them abide by the principles set forth here except [certain] agents that . . . are decided by Charterers.

APPENDIX G – RWE Clause

1. Compliance, Anti-Corruption and Sanctions clause

1.1 Notwithstanding anything to the contrary stated or implied in this Charter Party, it is a condition of this Charter Party that Owners and Charterers will comply with all of their obligations pursuant to this clause.

1.2 In the event of any conflict between the provisions of this clause and any other clause of this Charter Party, this clause shall prevail.

Compliance with laws

1.3 Each party represents and warrants that it will comply in full with all applicable laws and regulations in force at the time of entry into this Charter Party and throughout the duration of this Charter Party and, in particular, that it will not engage in any act or omission which is penalised or prohibited under laws, rules or regulations of the United States of America, the EU, the UN or the United Kingdom.

Anti-Corruption

1.4 Owners represent and warrant that they and the Vessel's managers have a policy in place to prevent the commission of any offence under the UK Bribery Act 2010, the US Foreign & Corrupt Practices Act and/or any applicable equivalent anti-corruption legislation (collectively the "Anti-Corruption Legislation") and that this policy includes procedures which to the best of Owners' knowledge and belief are adequate to prevent any such offence by any member of their or the Vessel's managers organisation or by any person providing services for them or on their behalf, including without limitation the Master and crew of the Vessel.

1.5 Charterers represent and warrant that they have a policy in place to prevent the commission of any offence under the Anti-Corruption Legislation and that this policy includes procedures which to the best of Charterers' knowledge and belief are adequate to prevent any such offence by any member of their organisation or by any person providing services for them or on their behalf.

1.6 Each party represents and warrants that: 1.6.1 to the best of its knowledge and belief, neither it, nor any of its directors, officers, agents or employees will pay, offer, promise, authorise or receive the payment of money or any financial or other advantage, directly or indirectly, to or from:

- (a) any government official, political party or official thereof, or
 - (b) any candidate for political office, or
 - (c) any other person, company or organization
- (collectively, the "Recipient"),

for the purpose of influencing any act or decision of such Recipient in favour of either party, or inducing such Recipient to act in violation of his lawful duty, or rewarding the Recipient for violating his lawful duty in order to obtain, retain or direct business to any person, or to secure any improper business advantage; and

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1.6.2 it conducts (and will continue to conduct) its business in compliance with all Anti-Corruption Legislation to which it may be subject; and

1.6.3 it will make and keep books, records, and accounts which in reasonable detail accurately and fairly reflect the transactions and dispositions of their assets.

1.7 For the purposes of this clause, a "facilitation payment" means a payment of money, goods or other thing of value to any governmental official or other individual in a similar position of authority or influence in any country for the purpose of expediting or securing the performance of a routine service or action. This definition applies even where the payment or other benefit is nominal in amount.

1.8 Charterers confirm that their schedules allow time for Owners and/or the Master to review requests for payments which may be improper and to resist demands for bribes, including facilitation payments.

1.9 If the Master and/or crew are requested to pay any bribe or make any facilitation payment the Master shall have the right to issue a letter of protest. Any letter of protest issued in accordance with this sub-clause shall be copied to Charterers immediately.

1.10 It is understood that where a bribe or facilitation payment has been requested and has been refused by or on behalf of the Vessel, this may result in delay to the Vessel and/or to cargo operations, and that those parties whose requests have been refused may raise false or irrelevant allegations against Owners and/or the Vessel and/or Master and/or crew, and therefore it is agreed that if the Master shall have issued a letter of protest in accordance with sub-clause 1.9 above, in the absence of clear evidence to the contrary it shall be deemed that any delay ensuing is the result of the refusal of a bribe or facilitation payment.

1.11 All time lost as a result of a refusal by or on behalf of the Vessel to pay any bribe or facilitation payment shall count as laytime or (if the Vessel is already on demurrage) as time on demurrage unless laytime or demurrage has already been excluded for another reason not connected to the refusal to pay any bribe or facilitation payment.

1.12 Without prejudice to any of its other rights under this Charter Party, either party may terminate this Charter Party with immediate effect without incurring any liability to the other party if at any time one party believes in good faith that the other party has committed a breach of any Anti-Corruption Legislation, provided that the party seeking to rely on this clause has informed the other party that it considers that there has been a breach of this clause and the other party has not provided a satisfactory explanation and documentation within seven days (during which time the party seeking to rely on this clause may elect to suspend performance of its obligations pursuant to this Charter

Party, such election to be communicated to the other party by way of written notice).

Sanctions

1.13 Charterers agree that Owners shall not be obliged to comply with any orders for the employment of the Vessel in any carriage, trade or on a voyage which, in the reasonable judgement of Owners, will expose the Vessel, Owners, the Vessel's managers, crew, the Vessel's insurers, or their re-insurers, to any sanction or prohibition imposed by any state, supranational or international governmental organisation (collectively "International Trade Sanctions").

1.14 Charterers warrant as follows:

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1.14.1 that the carriage of the cargo to be carried under this Charter Party (the "Cargo") is not prohibited by any International Trade Sanctions, including but not limited to:

(a) the Comprehensive Iran Sanctions, Accountability, And Divestment Act of 2010,

(b) Council Regulation (EU) No 267/2012 concerning restrictive measures in view of the situation in Iran, as amended, updated or replaced from time to time ("Regulation 267/2012"); and

(c) Council Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria, as amended, updated or replaced from time to time;

1.14.2 that the Charterers (as well as the shippers and the receivers of the Cargo) will fully comply with all International Trade Sanctions which apply to Owners and/or Charterers;

1.14.3 that neither they nor any person with any interest in the Cargo (including the shippers, the consignee, any endorsee of the Bill of Lading and the receivers of the Cargo at the port of discharge) are included on any list of prohibited persons under current US, EU and/or UN sanctions legislation; and

1.14.4 that no payment will be made to (or received from) any person included in any list of prohibited persons under current US, EU and/or UN sanctions legislations or to (or from) any other Iranian person, entity or body as that term is defined in Regulation 267/2012.

1.15 Charterers agree to indemnify Owners in full for any claims, losses or damages which Owners suffer as a result of any breach of the above warranties by Charterers or the shippers or the receivers of the Cargo.

1.16 Owners represent and warrant that neither they nor the Vessel have breached, or will breach during the duration of this Charter Party, any International Trade Sanctions.

1.17 Owners agree to indemnify Charterers in full for any claims, losses or damages which Charterers suffer as a result of any breach of the above warranty by Owners or the Vessel.

1.18 In the event that additional sanctions are imposed after the date that any cargo is loaded, which prohibit the voyage for which the cargo has been loaded, or the transportation of such cargo, or any necessary payments or receipt of funds or which include any other restrictions which relate to the cargo or the voyage, Charterers agree that Owners shall have the right to refuse to proceed with the employment and Charterers shall be obliged to issue alternative voyage orders within 48 hours of receipt of Owners' notification of their refusal to proceed. If Charterers do not issue such alternative voyage orders Owners may discharge any cargo already loaded at any safe port (including the port of loading). Charterers to remain responsible for all additional costs and expenses incurred in connection with such orders/delivery of cargo. If in compliance with this paragraph anything is done or not done, such shall not be deemed a deviation.

1.19 Charterers shall indemnify the Owners against any and all claims whatsoever brought by the owners of the cargo and/or the holders of Bills of Lading and/or sub-charterers against the Owners by reason of the Owners' compliance with such alternative voyage orders or delivery of the cargo in accordance with this clause.

FOR VOYAGE CHARTERS

1.20 Charterers also undertake to provide all necessary assistance required (including the provision of a guarantee or other necessary security on behalf of the Vessel, Owners or the Vessel's managers to any authorities or any third parties) in respect of any demands or claims arising from any reason whatsoever including but not limited to pollution, fines, mooring/unmooring/cargo equipment alleged damages, arrests, cargo claims, casualties, collisions, groundings etc, if Owners' P&I Club or Hull & Machinery underwriters refuse to provide the required guarantee/security or refuse to provide insurance cover because of applicable sanctions. All time spent as a result of the refusal of Owners' P&I Club or Hull & Machinery underwriters to provide the required guarantee/security or cover of shall count as laytime or (if the Vessel is already on demurrage) as time on demurrage.

APPENDIX H – Shell Clause

Owners and Charterers (either directly or through any of their affiliates', directors, officers, employees, masters, crew members, agents, managers, representatives or parties acting for or on behalf of them or their affiliates) shall:

(a) comply with the applicable laws, rules, regulations, decrees and/or official government orders, including but not limited to the United Kingdom Bribery Act of 2010 as amended and the United States of America Foreign Corrupt Practices Act of 1977 as amended, or any other applicable jurisdiction, relating to anti-bribery and anti-money laundering and that they shall each respectively take no action which would subject themselves or the other to fines or penalties under such laws, regulations, rules, decrees or orders ("Relevant Requirements");

(b) not make, offer or authorise, any payment, gift, promise, other advantage or anything of value whether directly or through any other person or entity, to or for the use and benefit of any government official or any person where such payment, gift, promise or other advantage would comprise or amount to a facilitation payment and/or violate the Relevant Requirements;

(c) have and shall maintain in place throughout the term of this Charter its own policies and procedures to ensure compliance with this clause, and will enforce them where appropriate;

(d) promptly report to the other party any request or demand for any payment, gift, promise, other advantage or anything of value received by the first party in connection with the performance of the Charter; and

(e) have the right to audit the other party's records and reports in relation to this Charter at any time during and within seven (7) years after termination of the Charter. Such records and information shall include at a minimum all invoices for payment submitted by the other party along with complete supporting documentation. The auditing party shall have the right to reproduce and retain copies of any of the aforesaid records or information. If there are anti-trust issues with or a party objects to a direct audit, the auditing party may appoint an independent company who is approved by the audited party (such approval not to be unreasonably withheld and to be given within 7 days of the request) to conduct the audit and provide the auditing party with its findings on the audited party's compliance with the Relevant Requirements without disclosing the records or information to the auditing party.

Either Owner or Charterer may terminate the Charter at any time upon written notice to the other, if in their reasonable judgment supported by credible evidence the other is in breach of this clause or such a breach is imminent. The timing of this entitlement (which shall be at the non-breaching party's discretion) is either:

(i) with immediate effect at any time prior to commencement of loading; or

(ii) if the laden voyage has not been completed and the cargo discharged, once the laden voyage has been completed and the cargo discharged.

This right shall be without prejudice to any other rights the non-breaching party may have in respect of such breach.

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