

# **The ISPS Code: The Mutual Dependency of Shipping and Cargo Interests**

**Tony Pegum**

Director,  
Seawise Australia Pty Ltd

## **Tony Pegum**

---

Tony Pegum is a director of Seawise Australia. Tony is based in Perth

Seawise is Australia's largest chartering agent and shipbroker transacting in excess of 16 million tonnes of freight in the last financial year on behalf of its customers. Seawise has 31 employees in its 3 Australian offices.

Seawise is an active member of the MLAANZ Western Australian committee

During his shipbroking career Tony has worked in Sydney, Melbourne and London and has been based in Perth since 1988.

Tony is a member of the Institute of Chartered Shipbrokers.

Tony's primary responsibilities within Seawise include business development and project work.

## THE ISPS CODE: THE MUTUAL DEPENDENCY OF SHIPPING AND CARGO INTERESTS

### Introduction

Shipping transactions require two like-minded parties – a joint venture if you like where one party provides the means of transport and the other provides the goods for carriage. In this context I am thinking primarily of full cargoes in bulk. It is harder to imagine a shipper of one teu on an 8000 teu vessels feeling this way (unless he is unlucky enough to be faced with a general average claim but that's another story).

Simply, this is described as the relationship between ship owner and charterer. However, the like-mindedness is often contrived by a need and can be often founded in the outcome of an adversarial financial contest to establish the parameters of any charter party.

That said, there are mutual undertakings, by way of warranties, minimum standards and specific terms of the charter party incorporating accepted maritime codes adopted by the International Maritime Organisation such as SOLAS, ISM and now the ISPS code (as part of SOLAS) brought into law by the flag state.

The ISPS Code is designed to protect ports and shipping against terrorism. It also serves to prevent illegal immigration, smuggling, theft and piracy.

It is/was a massive undertaking with some 30-40,000 ships (over 500 GRT) engaged in international trading to be inspected and certified and 15-20,000 ports to undertake a Port Facility Security Assessment. There were great doubts as to the ability of ships and ports to reach the 1 July deadline. No extension was granted and to date there have been no major incidents regarding non-compliance (I hope I am not tempting providence in saying this!).

The background to this code's establishment has been well documented and its requirements discussed already so I will focus on the commercial implications of the code's implementation.

### Mutual Undertakings

Security is the main issue for the code to deal with, both on-board and ashore. Again this is a mutual undertaking by the shipowner and cargo interests to ensure they live up to the commitments of the Code. In saying this, the vessel is more vulnerable to delays associated with inspection as the ports and installations are generally approved by the contracting nation however if a vessel is found to be non-compliant the consequences direct or indirect on cargo interests may be profound. This serves to underline the importance placed on the appropriate wording incorporated in shipping contracts addressing these consequences.

### Charter Party Clauses

The ISPS code was adopted in December 2002. In Australia its provisions were enacted by the Maritime Transport Security Act 2003 which received assent in December 2003. Any parties contemplating the establishment of contracts after this time for business where the contract went beyond the implementation date sought to find a mutually acceptable wording for inclusion in a charter party or freight contract. These wordings were a general acknowledgement of the mutual obligation and responsibility of each party.

An example:

1. *Owners to ensure that the ship complies with the applicable requirements of the Australian Maritime Transport Security Act 2003 and the Regulations thereunder pursuant thereto.*
2. *From the date of coming into force of the International ship and Port Security Code (ISPS Code) the Owners shall procure that both the Vessel and "the Company" (as defined by the ISPS Code) shall comply with the requirements of the ISPS Code relating to the Vessel and "the Company".*
3. *Upon request the Owners shall provide a copy of the relevant International Ship Security Certificate (or the Interim International Ship Security Certificate) to the Charterers. The Owners shall provide the Charterers with the full style contact details of the Owners/Company Security Officer (CSO).*
4. *Except as otherwise provided in the C/P, loss, damage, expense or delay, excluding consequential loss, caused by failure on the part of the Owners or "the Company" to comply with the requirements of the ISPS Code or this Clause shall be for the Owners' account.*
5. *Except as otherwise provided in the Charter Party, loss, damage, expense or delay, excluding consequential loss, caused by failure on the part of the Charterers to comply with this Clause shall be for the Charterers' account.*

This was borne of necessity and to a large extent complemented existing provisions of charter parties regularly in use. These provisions include:-



*Owners further warrant the vessel is eligible for trading to the port(s) and place(s) specified for the voyage and at all times shall have on board certificates, records and other documents required for such trading further*

*Owners are also to ensure the vessel complies in all respects with restrictions and statutes for the countries and/or ports traded during this charter*

In March 2004, the international shipowning representative body BIMCO issued their recommended charter party clausing for the ISPS code. BIMCO's recommendation ultimately became the standard ship owners sought to incorporate in any future charter party agreement.

#### **BIMCO - ISPS Clause for Voyage Charter Parties**

- (A) (i) *From the date of coming into force of the International Code for the Security of Ships and of Port Facilities and the relevant amendments to Chapter XI of SOLAS (ISPS Code) in relation to the Vessel, the Owners shall procure that both the Vessel and "the Company" (as defined by the ISPS Code) shall comply with the requirements of the ISPS Code relating to the Vessel and "the Company". Upon request the Owners shall provide a copy of the relevant International Ship Security Certificate (or the Interim International Ship Security Certificate) to the Charterers. The Owners shall provide the Charterers with the full style contact details of the Company Security Officer (CSO).*
- (ii) *Except as otherwise provided in this Charter Party, loss, damage, expense or delay, excluding consequential loss, caused by failure on the part of the Owners or "the Company" to comply with the requirements of the ISPS Code or this Clause shall be for the Owners' account.*
- (B) (i) *The Charterers shall provide the CSO and the Ship Security Officer (SSO)/Master with their full style contact details and any other information the Owners require to comply with the ISPS Code.*
- (ii) *Except as otherwise provided in this Charter Party, loss, damage, expense, excluding consequential loss, caused by failure on the part of the Charterers to comply with this Clause shall be for the Charterers' account and any delay caused by such failure shall be compensated at the demurrage rate.*

- (C) *Provided that the delay is not caused by the Owners' failure to comply with their obligations under the ISPS Code, the following shall apply:*
- (i) *Notwithstanding anything to the contrary provided in this Charter Party, the Vessel shall be entitled to tender Notice of Readiness even if not cleared due to applicable security regulations or measures imposed by a port facility or any relevant authority under the ISPS Code.*
  - (ii) *Any delay resulting from measures imposed by a port facility or by any relevant authority under the ISPS Code shall count as laytime or time on demurrage if the Vessel is on laytime or demurrage. If the delay occurs before laytime has started or after laytime or time on demurrage has ceased to count, it shall be compensated by the Charterers at the demurrage rate.*
- (D) *Notwithstanding anything to the contrary provided in this Charter Party, any additional costs or expenses whatsoever solely arising out of or related to security regulations or measures required by the port facility or any relevant authority in accordance with the ISPS Code including, but not limited to, security guards, launch services, tug escorts, port security fees or taxes and inspections, shall be split evenly 50/50 between Owners and Charterers, unless such costs or expenses result solely from the Owners' negligence. All measures required by the Owners to comply with the Ship Security Plan shall be for the Owners' account.*
- (E) *If either party makes any payment which is for the other party's account according to this Clause, the other party shall indemnify the paying party.*

The contentious nature of these differing clauses falls into four essential categories:

- i) Costs associated with inspections
  - ii) Laytime and demurrage
  - iii) Cancellation
  - iv) Consequences affecting the supply chain
- i) Broadly, charterers have sought to place the emphasis of compliance on the ship owner as provided for by the Code. It might logically be argued that any associated costs would be met by the carrier. In reality no one knows in advance what the costs might be or can really quantify the associated loss of time. The inspection regime may vary according to the history of port calls, the crew composition and the cargo carried. It may also depend on the local authorities' interpretation of the Code's requirements.

- ii) BIMCO argues that any time associated with inspections should count as laytime. They also assert where laytime has expired, time lost should be treated as time on demurrage (implying the notice of readiness is valid and unaffected by the inspections associated with the Code). Many charterers have varied BIMCO's recommended wording to exclude (as laytime or demurrage) time associated with inspections but in the main, accept the vessel may tender its notice of readiness irrespective of the status of inspections under the Code.
- iii) If a ship owner concedes the time associated with ISPS inspections is not to count as laytime and he is unable to tender a valid notice of readiness, and the vessel is subsequently delayed beyond the cancelling date, the ship owner suddenly finds himself exposed to the prospect of cancellation.
- iv) Consequential damages are difficult to quantify and some times harder to recover. In reality a detention under the auspices of the Code delaying the vessel's loading and or departure could affect the supply chain in several ways e.g. disruption of supply, delays in receipt and compromising "JIT" time lines. The failure of a supplier under a CFR or CIF agreement may upset the commercial relationship between supplier and receiver.

Ultimately charterers have either accepted the BIMCO provisions or sought to vary the recommended wording to reduce their potential liability relating to the costs associated with inspections and the consequential loss of time. Whilst many charterers have attempted to amend the provisions of the BIMCO wording to place greater responsibility/onus on the Owner to accept the consequences of any ISPS detention or disruption the outcome has essentially been dictated by commercial considerations where the ship owners have held the "whip hand" for the past year or so with the freight market currently riding unprecedented highs on the back of huge growth in China's international trade.

BIMCO's recommendation clausing for time charters is similar but more specific.

*'Notwithstanding anything else contained in this charter party, all delays, costs or expenses whatsoever arising out of or related to security regulations or measures required by the port facility or any relevant authority in accordance with the ISPS code including, but not limited to, security guards, launch services, tug escorts, port security fees or taxes and inspections shall be for the CHARTERER'S account, unless such costs or expenses result solely from Owners negligence. All measures required by the Owners to comply with the ship security plan shall be for the Owner's account'.*

Effectively, any incident associated with any matter arising from the ISPS regime not directly attributable to vessel is for the charterer's account. Under the time charter the charterer

assumes the disponent ownership for the vessel and therefore it is logical they assume the liability associated with any loss of time. The ship operators exposure under this form will largely depend on the clausings contained in his voyage charter party.

### **Practical Issues**

Generally the charter party or freight contract will provide for certain information to be tendered to the charterer for the approval of the performing vessel under a frame contract (of affreightment) or spot charter. The charterer will seek evidence of the vessel's compliance in the form of the International Ship Security Certificate (ISSC). This is in addition to evidence of the vessel's document of compliance (DOC) and Safety Management Certificate (SMC) as prescribed by the International Safety Management (ISM) code.

It is most unlikely a prudent charterer will accept the nomination of a vessel without evidence the vessel has been issued with a valid ISSC.

Conversely, the ship owner is not afforded the same rights and must rely upon his own inquiries as to the status of the ports nominated under the charter party as to compliance with the code. These details are provided by the IMO under the auspices of their Global Integrated Shipping Information Service (GISIS).

The charterer will provide the ship owner with their full style/contact details and where the charter party allows for the sub-letting or sub-contracting of the vessel, the contact details of sub-charterer. The charterer will also provide information to the ship owner to enable the ship owner to comply with the Code.

### **Ramifications**

We are so far unaware of examples of a vessel having been detained and therefore unable to continue its service under the charter party. On the face of it, the clausings generally addresses the practical aspects of compliance and what happens if the vessel is inspected and the consequential loss of time. What is doesn't address is a potential grey area regarding the validity of notices of readiness, the instrument by which laytime will commence to count.

Issues may arise where a vessel's trading history (generally the last 10 port calls) is clean (having called at ISPS approved ports) but an incident arises at one of these ports, subsequent to the vessel's loading, thereby triggering enhanced inspections at the vessels subsequent ports of call. An increase in the inspection regime in such cases may be more time consuming (and therefore more costly) but there is really no one to blame. The ship owner is saddled with the consequential damages of this event.





This is most likely to be collected through increased wharfage over time. Ship owners may also share in these costs through increased berthage charges.

Shipping is a joint venture but commercial forces can dilute this mutuality. In reality there is no room for dilution of interest in addressing what the ISPS code was put in place to achieve. The Code and its provisions seek to deliver enhanced security for our ports and the vessels servicing them. This is something we all acknowledge and applaud. The difficulties arise in wrestling with the commercial fall-out of any incident innocent or otherwise. Undoubtedly the maritime law fraternity will be at the cutting edge of dealing with the fall-out between a carrier and their cargo interests resulting from an ISPS inspection where the interpretation of laytime is unclear and one party suffers financial hardship and is aggrieved enough to test the mettle of the wording of the ISPS clause a particular charter party.

Tony Pegum

Perth - September 2004