



GSF Guidance Notes and Legal Advice for the Standard BIMCO/GSF SERVICECON Container Contract

Introduction

In 2012 the Baltic International Maritime Council Organization (BIMCO) approached the Global Shippers' Forum to discuss the possibility of developing a standard container contract. BIMCO and GSF recognised that while many large shippers had negotiated highly individualised service volume contracts, such contracts were generally unavailable to small and medium sized shippers. However, the GSF believes that the standard contract will also prove helpful for larger shippers, especially for shipments outside the scope of individualised contracts, or indeed, as a template for more complex individual contracts. Both organisations agreed to work on the development of standardised volume contract, and a joint carrier-shipper working group carried out this work over a two-year period, reaching agreement in October 2014.

Why is legal guidance needed?

The BIMCO/GSF 'SERVICECON' volume contract is essentially a compromise between carrier and shipper interests. While it seeks to strike a fair balance between those interests, there are some provisions that are more favourable to carriers than shippers. Moreover, the contract is intended as a boiler plate, therefore a starting point only for discussions on contract terms. Consequently, we would expect shippers to make changes to the boiler plate. We certainly do not recommend that shippers sign or enter into contract without very careful consideration of the terms.

Therefore, in association with a leading London-based specialist maritime law firm the GSF provides the following guidance for shippers. The guidance provides a clause-by-clause analysis of the various contract terms, and where appropriate offers advice on suggested amendments, deletions or additions to improve the contract terms from a shipper's perspective.

Background to container shipping contracting

Container shipping is characterised by a small number of very large shippers with high shipment demands and the majority of small to medium sized companies whose transportation needs range from relatively modest cargo movements to significant numbers of containers.

Much of the trade is based on service contracts whereby, in return for favourable freight rates, shippers undertake to transport a minimum number of containers over an agreed given period. Larger, multi-national shippers have developed their own bespoke contractual arrangements but despite the number and global value of shipments, until now no standard contract has been available to meet the needs of other **small to medium sized shippers**.

However, as a result of discussions over a two year period between carrier and shipper representatives and as such representing something of a compromise between carrier and shipper interests, the BIMCO/GSF SERVICECON Standard Service Contract ("**SERVICECON**") has been developed to provide a basis for volume carriage in container shipping trades. This guidance note sets out the general principles of SERVICECON along with a commentary on each of its provisions and the views of the Global Shippers' Forum (GSF) on these and where appropriate suggestions for amendment.

Specific issues for shippers to consider in relation to SERVICECON, together with advice, are set out in this GSF briefing note and highlighted throughout in *italics*.

General principles

SERVICECON is a framework agreement principally addressing volume commitments and rates and has been designed for worldwide trading. It does not provide a substitute for a bespoke contractual arrangement and does not cover many of the issues highlighted in Part I, Box 9 (below) such as the role of freight managers, inland haulage, equipment requirements, performance levels, contract management, anti-bribery and negotiated provisions which deviate from local tariff terms and prices.

GSF Comments and Advice:

SERVICECON can be used as a starting point and amended and negotiated as necessary to suit commercial parties' individual needs and circumstances. There inevitably is and will be a balancing point between choosing to adapt SERVICECON or in preparing a more bespoke agreement.

In practical terms, SERVICECON has been drafted as a starting point for carrier/shipper negotiations. The central feature is shippers' declared "Minimum Quantity Commitment" ("**MQC**") which will be the basis for determining the freight rates and providing carriers with the basic necessary information to reserve cargo space over the contractual period.

GSF Comment and Advice

There is no mechanism for forecasting given the assumption made in Clause 3(a) and where appropriate shippers may wish to include rider (additional) clauses, see GSF advice below at Box 9-Additional Clauses.

The GSF is able to assist shippers wishing to engage with carriers by means of more detailed, bespoke service contracts and has worked closely with a leading international law firm specialising in this area should specialist commercial legal advice be required in relation to this topic.

However, as shippers will not necessarily be able to predict the extent of their forward needs, shippers will often err on the side of caution when agreeing the minimum number. In reality, shipment demands often prove to be much higher than the initial estimate and this is addressed by allowing acceptance, at the carriers' option, of cargo beyond shippers' declared MQC.

Shippers' failure to fulfil their minimum obligation will mean that cargo space set aside by the carrier is unused with resulting lost revenue. In such circumstances carriers are to be automatically compensated

through agreed liquidated damages. The measurement of loss for carrier failure to lift the MQC is more complex and

will depend on extra costs and expenses actually incurred by shippers (such as higher freight for carriage on another vessel). Shippers' proven damages (capped at the same level of Liquidated Damages payable by shippers for failing to tender the MQC) are therefore the basis for determining compensation by carriers for failure to carry an agreed MQC, *unless otherwise agreed. Further guidance and advice is set out below under Clause 5-Non Performance.*

Individual shipments are subject to the contracting carrier's own bill of lading or sea waybill which is incorporated, by reference, into the SERVICECON contract and in the event of a conflict between the carrier's contract of carriage and the SERVICECON contract, the latter prevails.

GSF Comments and Advice

As the contracting carrier's own bill of lading or sea waybill will always apply to shipments under a SERVICECON contract, the shipper is well advised to request a copy and be familiar with their terms.

Detailed content

Part I contains a Box layout for variable information to be agreed and inserted by the parties. Part II contains the terms and conditions while three (3) supporting Annexes A, B and C respectively set out Federal Maritime Commission (FMC) provisions where US jurisdiction applies; ports and rates within the scope of the contract; and Shipper details.

GSF Comments and Advice

There is nothing preventing the parties from including rider clauses in Box 9 in Part I. Inevitably, the greater the number of amendments which parties make to SERVICECON, the longer it is likely to take to negotiate and agree the service contract, see Box 9 below which includes possible rider clauses which the shipper may wish to consider..

Part I

The provisions of Part I and Annexes A, B and C prevail over the provisions of Part II to the extent of any conflict, but no further.

Box 1 – Service Contract Number – to be provided at the time of booking with the Carrier and to appear on the contracting Carrier's bill of lading or sea waybill;

Box 2- Date of Contract – when signed by both parties;

Box 3 – Carrier – full company name and full style address to be included.

GSF Comments and Advice

Shippers should seek to contract with the party named as Carrier on the contracting carrier's bill of lading or sea waybill. If the "Carrier" named in Box 3 is an agent of the Carrier this should be clearly stated and the Shipper be satisfied that the agent has the necessary authority to bind its principal named as Carrier on the

contracting Carrier's bill of lading or sea waybill. See comments made under Box 9 in relation to third party rights.

Box 4 – Shipper – full company name and full style address to be included. This should ideally be the party named as "Shipper" on the contracting carrier's bill of lading or sea waybill, subject to the service contract's wider applicability to the Shipper's affiliated entities identified in Annex C.

Box 5 – Commencement date – from when the service contract shall apply.

Box 6 – Expiry Date or Period – to when the service contract shall apply or the period which the service contract shall apply from the commencement date.

Box 7 – Liquidated Damages – this is the agreed monetary amount per TEU payable by the Shipper should the actual number of TEU shipped over the period of the contract fail to meet the MQC.

GSF Comments and Advice

Particular attention is drawn to Box 8 where the MQC figure (measured in TEU) must be entered. If this is left blank, the contract will be null and void.

Box 9 – Additional (rider) Clauses

GSF Comments and Advice

Rider clauses can be included here if agreed between the parties:

- *The parties may wish to include an express provision which allows them to add additional volumes (possibly increase the MCQ), trade lanes and freight rates during the duration of the contract.*
- *The Shipper may wish to make specific agreements relating to freetime from demurrage and detention and any concessions agreed by the Carrier in respect of these charges which should be included in Annex B.*
- *The role and responsibilities of any freight manager or freight forwarder could potentially be included where it is known that these will be delegated by the Shipper.*
- *If the parties have agreed to a structured reporting, review or relationship management process, details could be included in Box 9.*
- *The Shipper may wish to include a third party rights provision which confers the rights and benefits enjoyed by the Shipper also on the named parties in Annex C. It should be made clear that the existence of any third party rights does not require their consent to vary or terminate the contract. The parties may then also want to clarify that no other third parties have any rights under the contract.*
- *Some Shippers may wish to include their standard compliance and anti-bribery provisions in Box 9.*

Part II

Preamble

This notes that the contract is between the Carrier and Shipper, including the Shipper's associated companies as listed in Annex C.

GSF Comments and Advice

If the Shipper does not want to assume liability for its associated companies under the contract, it should make clear that it is entering into the contract as principal on its own behalf and as agent only for the associated companies listed in Annex C.

Definitions

Terms used throughout SERVICECON are set out and their meaning explained.

Clause 1 - Scope of Contract and Rates

A cross reference is made to Annex B which contains details of the geographic scope of the parties' agreement, together with applicable freight rates and surcharges (unless all inclusive freight rates are agreed).

Clause 2 - Carrier's Commitment

Sub-clause (a) sets out the Carrier's central obligation to provide equipment and space to meet the Shipper's MQC during the contractual period. Carriers may also, at their option (i.e. depending on available space and scheduling requirements), lift cargo in excess of the MQC.

GSF Comments and Advice

Shippers may wish to have greater certainty that volumes beyond their declared MQC will be carried and could look to include a percentage tolerance with the MQC. For example, Shippers may wish Carriers to be bound to carry the MQC +(10)%. The Shipper may also wish to include wording to clarify that the Carrier shall provide space on requested sailings, within the MQC, provided that the Shipper complies with its respective obligations (if any are agreed) relating to forecasting and communication.

Shipper access to the Carrier's container tracking service and scheduling information is provided for at sub-clause (b).

GSF Comments and Advice

The Shipper may wish to include additional provisions to require the Carrier to notify it of any delay in excess of an agreed number of days when measured against the proforma schedule and also any changes to service patterns or proforma schedules themselves.

Sub-clause (c) addresses standards of training for the Carrier's personnel while sub-clause (d) states the requirement for Carriers to maintain, and if necessary confirm, that appropriate cargo liability insurance cover is in place.

GSF Comments and Advice

The Shipper could consider introducing certain key performance indicators (e.g. space availability, equipment availability, condition of equipment, actual transit time against proforma, timeliness of bill of lading production etc.) measuring the Carrier's performance which could be used as the basis for regular reporting,

adjustments to the MCQ, freight rates or future carrier selection. These may however, be more difficult to negotiate for Shippers at the lower end of the small to medium sized shipper spectrum.

Clause 3 - Shipper's Commitment

Sub-clause (a) sets out the Shipper's obligation to provide not less than the agreed MQC. Unless otherwise agreed, shipments are to be evenly distributed throughout the contractual period or the Carrier advised where this cannot be achieved. Any changes in arrangements must be mutually agreed.

GSF Comment and Advice

If it is known at the outset that the Shipper will not be able to provide cargo evenly distributed throughout the Contract Period, the parties should agree a mechanism for forecasting and sharing information about variations in the Shipper's requirements over time. Shippers may wish to have greater flexibility in case their actual volumes are less than the declared MQC and include a percentage tolerance with the MQC (see Clause 5 below).

Sub-clause (b) requires the Shipper to give the Carrier the number of days' notice stated in Annex B prior to the date of receipt of Cargo by the carrier. In the absence of an agreed and stated figure, the default position is fifteen (15) days' notice.

Sub-clause (c) provides that the agreed rates and cargo quantities are specific to the contract and cannot be used to claim any discount or as part of a cargo commitment under any other contractual arrangements with the Carrier.

Clause 4 - Verification of Contract Carryings

In order to qualify for the agreed freight rates and to fulfil the MQC, cargo must be moved during the Contract Period set out in Part I at Box 5 (Commencement Date) and Box 6 (Expiration Date or Period).

In accordance with sub-clause (a), the date when cargo is received by the Carrier determines whether or not it is within the Contract Period.

GSF Comments and advice

This could be amended to the date of booking, although Carriers may resist this on the basis that bookings could be made to meet the MQC and then subsequently cancelled or postponed.

Administrative provisions for compliance with the contractual arrangements are set out at sub-clause (b), namely that each bill of lading or sea waybill bears the Service Contract Number stated in Box 1, which is also stated at the time of booking; the Shipper must appear as shipper, consignee or notify party on the Carrier's bill of lading or sea waybill; and be subject to a rate quoted in Annex B.

GSF Comments and Advice

The Shipper may wish to vary this provision in light of the applicability of the contract to those parties named in Annex C which could equally appear as shipper or consignee on the Carrier's bill of lading or sea waybill.

The GSF has added Notify Party to cater for circumstances where the shipper is the buyer-not the seller-and in arrangements conducted under letter of credit transactions where the LC is issued in favour of the seller. In such cases, the seller appears as the Shipper, the bank appears as the Consignee, and the Buyer (as the service contracting party) appears as a Notify Party.

Sub-clause (c) contains a table comparing different container dimensions with the standard TEU for the purpose of calculating the agreed TEU-based MQC.

Clause 5 - Non-performance

GSF Comments and Advice

Shippers are advised to take careful note of the non-performance clause provisions in SERVICECON and to fully consider the implications before signing a SERVICECON contract with a carrier, see more detailed comment and advice below.

Sub-clause (a) provides that where cargo obligations are not fulfilled, the Carrier's losses (i.e. reduced freight earnings due to unused space) are automatically compensated in accordance with the agreed rate of Liquidated Damages (as stated in Part I Box 7) covering the difference between the MQC and number of TEU actually shipped.

GSF Comments and Advice.

Shippers may wish to have greater flexibility in case their actual volumes are less than the declared MQC and include a percentage tolerance with the MQC. For example, Shippers may not want to be bound to pay Liquidated Damages to Carriers unless actual volumes fall below the MQC -(X) %. If the Carrier refuses to agree any flexibility with the MQC, the Shipper should consider whether to reduce the MQC to a level at which it is comfortable or the right to liquidated damages should be removed altogether.

If the Carrier fails to lift cargo tendered in accordance with the MQC, sub-clause (b) provides that the Shipper's commitment may be reduced by that number and, in the event of repeated failures (constituting a material breach), the contract may be terminated in accordance with Clause 9(b) (below).

As to damages, the position for determining Shippers' losses is less easily measured than Carriers' unused space and resulting reduced earnings. Cargo may be shipped on another vessel at the same, higher or lower, freight. Sub-clause (c) therefore provides that the Shipper's losses will be determined at the end of the

Contract Period by reference to their proven damages capped at the agreed Liquidated Damages rate payable by the Shipper for failing to tender the MQC.

GSF Comments and Advice

The non-performance provisions represent a compromise between BIMCO and GSF. Accordingly, there is no reciprocity in liquidated damages being payable to the Shipper. The Shipper is therefore advised to carefully consider these non-performance compensation provisions. There is no reason why Shippers should not seek to agree liquidated damages for a Carrier's failure to lift the MQC (or the MQC +(X) %) which could alternatively be set at the level of the agreed freight rates contained in Annex B or at a level which represents a genuine pre-estimate of the Shippers' loss.

Clause 6 - Force Majeure

This sets out a list of illustrative political events and natural disasters beyond the parties' control and for which they are relieved from their performance obligations, other than in respect of payments. Changes in market conditions or other commercial issues are expressly excluded. Once the Force Majeure event has come to an end, the contract will resume with a pro rata adjustment, where appropriate, to the Shipper's MQC. If the Force Majeure event last more than thirty (30) days, either party may terminate the affected parts of the contract. This infers that where some trade lanes are affected by Force Majeure and others aren't, that the contract may only be terminated in respect of those affected by Force Majeure whilst the others remain in force.

GSF Comments and Advice

The Shipper may wish to consider extending this termination right such that it extends to the whole contract and not merely the affected parts of it if minimising the number of Carriers which the Shipper transacts with is important to the Shipper.

Clause 7 - Contracts of Carriage

The Carrier's standard bill of lading or waybill is incorporated by reference into SERVICECON. In the event of conflict between the two, SERVICECON prevails.

GSF Comments and Advice

The Shipper should check whether there are any provisions in the contract of carriage which it wishes to override by way of express provisions in SERVICECON. As a minimum, the Shipper may wish to check the dispute resolution mechanism and governing law provisions in the contract of carriage and consider any amendments it may wish to make to these. Dispute and jurisdiction provisions in bills of lading and sea waybills are frequently more convenient or favourable to carriers. The shipper may wish to negotiate a more suitable and convenient place and jurisdiction to arbitrate in the event of disputes. The Shipper may also wish to consider a specific service deliverable such that, subject to the Shipper providing its shipping instructions within an agreed timeframe, the Carrier shall reciprocate and provide the contract of carriage to the Shipper within an agreed timeframe from the departure of the carrying vessel.

Clause 8 - Assignment

Either party may assign the contract to any company within its Group (i.e. which is in the same or common control of that party) but must obtain the counterparty's agreement for assignment outside its Group. The original contracting party always remains responsible for due performance.

Clause 9 - Termination

The contract is subject to termination:

Sub-clause (a) once the MQC has been reached when notice may (but does not have to) be given by either party.

GSF Comments and Advice

The Shipper should amend this provision so that this right of termination may only be exercised at its option. The Shipper should not lose its right to the agreed freight rates and charges for additional volumes above the MQC. If anything the Shipper may wish to consider tiered freight rates or rebates which progressively reduce the cost of transportation for volumes in excess of the MQC;

Sub-clause (b) in the event of a material breach or repeated non-material breaches where the party in breach fails to rectify the position within thirty (30) days; and

Sub-clause (c) if one of the parties is subject to winding-up or other similar insolvency procedures.

In accordance with sub-clause (d), termination is without prejudice to prior accrued rights (such as bookings made before the termination date which are to be carried out after the termination date). Termination for convenience by either party (aside from Clause 9(a)) would not work in the context of SERVICECON given the reciprocal commitments sought by both parties.

The (partial) termination right in Clause 6 (Force Majeure) is separate from those set out in this Clause.

Clause 10 - Dispute Resolution Clause

All disputes under SERVICECON are to be determined in accordance with the dispute resolution provisions in the Carrier's contract of carriage (which is incorporated into SERVICECON by reference, see Clause 7 above).

GSF Comment and Advice

The Shipper may wish to amend this and include alternative dispute resolution provisions and / or jurisdiction. As an example, US Shippers may wish to include provisions for the FMC to arbitrate disputes in relation to their contracts. This could be achieved either in a Box 9 rider clause and/or an additional Annex.

Clause 11 - Confidentiality

Subject to limited exceptions or where required by law, pre-contractual discussions and the contract's contents must remain confidential until twelve (12) months after the date of termination. Nevertheless, certain information, in anonymous format, may be disclosed for the purposes of statistical data.

GSF Comment and Advice

The Shipper may wish to broaden the ability to disclose confidential information to cover circumstances including the engagement of a freight forwarder or freight manager and also in an anonymised format the preparation of annual freight tenders.

Clause 12 - Entire Contract

The contract is defined by its written provisions and all exchanges prior to the date of the agreement, stated and entered in Part I Box 2, are excluded. Any modifications must be agreed in writing.

Clause 13 - Notices

This sets out the basis for giving and receiving notices under the contract. Unless the parties otherwise specify then the contact details provided in Box 3 and Box 4 shall apply to the provision of notices between the parties.

GSF Comments and Advice

The Shipper may wish to set out further details in the notice provision particularly if alternative contact details apply to either of the parties and/or to include details of agreed means of communication and deemed notice provisions outlining the deemed time for communications to be received by different means of communication.

Annex A - (FMC Requirements)

This applies where shipments are subject to US jurisdiction. The Shipper's status must be certified and certain documentation retained by the Carrier or a designated agent.

Annex B - (Scope of Contract and Rates)

Details are to be inserted of ports of loading and ports of discharge to define the contractual geographic scope together with the number of days' notice to be given prior to loading and a copy of the schedule of agreed freight rates attached.

GSF Comment and Advice

It is very important for Shippers to ensure that the scope of the freight rates and charges quoted are clear and unambiguous. A table including the following information as a minimum is recommended: place of receipt (if not port of loading), port of loading, port of discharge, place of delivery (if not port of discharge), container size and type, currency and freight rate.

If freight rates are subject to surcharges then these should be clearly set out (e.g. BAF, CAF, THC etc.) along with which, if any, are included within the freight rates. It is quite common for many shippers now to agree all inclusive freight rates on either a port to port basis or point to point basis subject to a regular (often quarterly) bunker adjustment mechanism to revise a given element of the all in inclusive freight rates throughout the term of the contract.

If the freight rates are to be truly fixed throughout the duration of the contract without the imposition of additional surcharges or only limited, previously agreed types of surcharges, suitable wording should be included within Annex B.

If any deviations from the tariff levels for demurrage and detention have been agreed, these should be contained in Annex B for each port of loading and/or port of discharge, container size and type.

If multiple currencies are included in Annex B, clear wording should be included as to the timing, frequency and method for exchange rates to be established.

The Shipper may wish to include wording relating to maintaining fixed levels of pre-FOB charges to prevent the indirect implementation of surcharges via consignors pricing this into the price of the cargo at origin.

Annex C - (SHIPPER-associated companies)

This is for Shippers to list the full company names and full style addresses of their related companies to be covered by the contract.

GSF Disclaimer

This guidance note has been prepared for information purposes only. It is intended to highlight certain legal issues and practical issues relevant to the implementation and adoption of the BIMCO/GSF SERVICECON Standard Service Contract. The GSF takes no legal responsibility for the advice provided, it is intended for information purposes only. It should not be relied on as a substitute for specific legal advice and users are advised to seek their own legal advice before signing a SERVICECON contract. Legal comment is from an English law perspective