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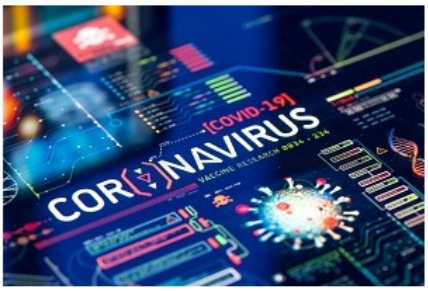
COVID-19: Guide For Members on Contractual Issues

April 2020

Highlights



- While general guidance can be provided, advice in any given situation will depend heavily on individual circumstances and the terms of the applicable contract.
- As matters currently stand, it is unlikely that a port would be considered "unsafe" due to Covid-19, but that could change in the case of blacklisting, or quarantine resulting in inordinate delays (§1).
- Vessels may be off-hire if there are delays due to actual or suspected crew illness, but probably not otherwise, unless "whatsoever" is added to the off-hire clause. But even if technically off-hire, charterers may have to indemnify owners for losses resulting from following charterers' orders (§2.1).
- Regarding the commencement of laytime, WIFPON clauses might not assist owners as the vessel may still need to clear quarantine before NOR can be tendered. Specific clauses can be used to avoid this problem (§2.2).
- Deviations for the purpose of saving the life of a sick crew member will usually be allowed, but continued payment of hire will depend on the charterparty terms. Where there are restrictions on entry / berthing at a discharge port, unloading of cargo at an alternative place may be allowed in some cases (§4).
- Frustration is unlikely to occur in anything other than extreme cases. Force majeure clauses may be relevant, but this will depend on their precise terms and adherence to legal requirements (§5).
- Bespoke clauses such as the BIMCO Infectious or Contagious Diseases Clauses or Intertanko Covid-19 Clauses are generally recommended.

In January the Club published a website article touching on important aspects of the Covid-19 outbreak in the context of time charterparties. As Covid-19 has subsequently escalated into a global pandemic, a more detailed advice on wider aspects of vessel chartering and the carriage of goods by sea should be helpful for members. For other aspects of the Covid-19 situation, the Covid-19 / Coronavirus page on the Club's website carries links for information on precautions for crew, what to do if a crew member is suspected of contracting the virus, and port and country summaries of various restrictions.

The advice given below assumes contracts subject to English law and containing basic industry standard wordings. The focus is on charterparties and contracts of carriage, although the basic principles can be extended to other contracts such as shipbuilding and ship sale and purchase. It is, however, not intended to be a comprehensive statement of the law covering all cases: what is appropriate advice depends on individual circumstances and contractual terms and could change frequently as the general situation develops.

1. Loading Ports: Charterers' Orders and Contractual Agreements

The first issue which may confront an owner will be whether they are obliged to accept instructions from a time charterer to proceed to a load port at which there may be an outbreak of Covid-19 and/or where an authority has imposed restrictions on entry. At this point in time a number of ports have said they will impose a quarantine period on vessels arriving from other countries.

The answer will depend largely on whether the port would still be considered legally "unsafe" under English law. If that were the case, the owner could legitimately refuse to follow orders to sail to the port. There is no legal impediment to a port being unsafe because of a contagious disease, but whether it is unsafe will depend on the relevant facts in existence at the time the order is made (including, for example, statistical and medical evidence). At present it seems unlikely that any port would be considered unsafe because of Covid-19, considering the degree of likelihood of crew being infected and the likely consequences if they were.

Another factor when looking at the safety of the port is whether the vessel might be subject to blacklisting, boycotts or quarantine at subsequent ports of call, or could suffer an inordinate delay at the nominated port. Regarding delay, a 14-day period of quarantine, or being required to wait at a place off the port for a similar period, is very unlikely to be considered "inordinate" such that the nominated port could be considered unsafe. Any blacklisting or boycotting (ie. a complete bar on entry or berthing for a considerable period) would also have to extend to a wide range of ports and thereby reduce considerably the vessel's future earning capability.

It should be noted that a port which is prospectively safe when an order is given can subsequently become unsafe if circumstances change. In that case the owner can demand fresh orders from the charterer. If the owner nevertheless decides to proceed to an unsafe port in accordance with the charterer's instructions, they would normally be entitled to an indemnity for any extra costs and expenses incurred as a result of following the order.

Where the load port has been agreed in a voyage charter, there will normally be no choice but to make the approach voyage and wait for a berth unless performance can be excused due to frustration or force majeure (see below at §5).

2. At the Loading or Discharging Port: who pays for lost time?

2.1 Time Charters

In the absence of any breach by the owner, a time charterer is obliged to pay hire unless it can bring itself within the terms of an off-hire clause. The commonly used wording found in clause 15 of the NYPE 46 and clause 17 of the NYPE 93 forms states that the vessel will be off-hire by reason of "deficiency (and/or default) of men" fire, breakdowns or damage to the vessel, drydocking or "any other (similar) cause preventing the full working of the vessel". The English High Court has said (in *The Laconian Confidence* [1997] 1 LLR 139) that legal or administrative restraints on a vessel can qualify as an "other cause" if they relate to the physical efficiency or condition (or suspected condition) of the vessel or crew. On this basis, a vessel which has been delayed by quarantine restrictions due to actual or suspected crew illness is likely to be off-hire, but if the quarantine applies generally to vessels arriving at the port and is not directed at individual cases then it may be arguable that hire should continue to accrue as the physical efficiency or condition of the vessel or crew has not caused the quarantine. On the other hand, if the word "whatsoever" has been added after "any other (similar) cause" charterers would almost certainly be entitled to claim off-hire.

Having said all that, where the quarantine is a natural result of following the charterer's orders, the vessel should remain on hire even if "whatsoever" has been added. Unless an owner has, by implication or express term, agreed to bear a particular risk, it is entitled to be indemnified for losses incurred if the risk becomes manifest as a result of following the charterer's orders. In practice, therefore, vessels are only likely to be off-

hire if the employment order which eventually resulted in quarantine was given by a previous charterer (eg. an order given by charterer A to sail to port X, which later leads to the vessel being quarantined at port Y following an order given by charterer B). In such a case the owner's loss of hire might be recoverable from charterer A under the implied indemnity.

2.2 Voyage Charters

Once the vessel arrives at or off the port, the burden of time lost due to entry or berthing restrictions is allocated according to the charterparty terms regarding service of Notice of Readiness ("NOR") and the running of laytime. Although it seems to contradict plain meaning, "Whether in free pratique or not" ("WIFPON") clauses have been held by the courts to be irrelevant to the question of whether a NOR is valid or not (see The Delian Spirit [1971] 1 LLR 64 and [1971] 1 LLR 506). The vessel must still be physically and legally ready to load or discharge the cargo, meaning that any quarantine restrictions preventing the vessel from berthing must be removed before a valid NOR can be tendered allowing laytime to commence. A WIFPON term merely restates the general legal position that a vessel which is otherwise ready and not subject to (or will not be subject to) any quarantine restrictions can tender a valid NOR, even though the formality of obtaining free pratique has not yet occurred.

The general position can of course be departed from by express charterparty terms. BIMCO and Intertanko have attempted in their bespoke clauses (see below at §6) to alter the balance in owners' favour. The effectiveness of these terms has yet to be tested in the courts and there may be queries about the operation of the BIMCO clause in particular, as it makes no specific reference to the tendering of NORs.

3. At the Loading or Discharging Port: who pays for extra expenses?

A vessel might require disinfection / fumigation if it comes from a designated port or if one or more crew members has fallen ill. Both NYPE forms (46 clause 2, 93 clause 7) provide for "fumigations" relating to crew illness to be for owner's account, and those relating to "ports visited while … employed under this charter" to be for the charterer. Presumably where the necessity for fumigation arises from a port call under a previous charter, the owner would have an implied right of indemnity against the former charterer.

For voyage charters, these types of expenses would normally be the responsibility of the owner, unless the parties have agreed otherwise in the charter terms (see below §6).

4. On the voyage: Deviation

If a crew member becomes ill on board, then a deviation for the purpose of saving life will almost always be permissible. Commonly used charterparty forms contain liberties to deviate in this situation (eg. NYPE 46 clause 16, NYPE 93 clause 22, Shelltime 4 clause 27(b) and Gencon 94 clause 3), as do the Hague and Hague-Visby Rules (Article IV, Rule 4) and Hamburg Rules Article 5, Rule 6).

During such a deviation, hire should remain payable under NYPE form time charters, unless "whatsoever" has been added in the case of the NYPE 46 form. By contrast, Shelltime 4 contains an express provision stating that the vessel will be off-hire (clause 21(iii)). Many time charters have rider clauses specifically addressing deviations or "putting back" and these would need to be examined closely to see if they give the charterer the right to deduct from hire, notwithstanding the terms of the off-hire clause on a standard form.

In voyage charter cases, while a deviation to save life will generally be permitted the costs of doing so will normally fall on the owner. Unless there is specific provision in the charterparty, the owner will have no right to additional freight.

Deviation from the original voyage may also be permitted where there are significant restrictions on entry to the discharge port. This may be allowed by an express term of the relevant contract, or because the contract has come to an end due to frustration or the operation of a force majeure clause (see below §5). It should be noted, however, that termination by frustration or force majeure is only likely to occur if the delay is substantial (ie. probably at least several weeks).

Where there are delays cargo interests may advance claims for financial loss, or because the goods have deteriorated. The carrier in such cases should be able to rely on the defences of "[R]estraint of princes" (Hague and Hague-Visby Rules Art IV, Rule 2(g)) or "Quarantine restrictions" (Art IV, Rule 2(h)).

5. Frustration and Force Majeure

5.1 Frustration

Frustration is a common law concept relevant to all contracts under English law. It may occur where, without fault on either side, a contract becomes impossible to perform or its performance would be radically different to what the parties originally contemplated. Where a contract has become frustrated any future performance obligations on the parties come to an end.

It is usually very difficult to prove frustration. The fact that performance may have become substantially more expensive or there will be longer than anticipated delays (unless these delays become so prolonged that performance will become something radically different), will not in itself be frustrating. Furthermore, there will generally not be frustration where the parties have included terms in the contract which are relevant to the situation.

Looking at the Covid-19 position as it currently stands, the kinds of delays being seen would fall some way short of what is required for frustration. If this state of affairs deteriorates it may come about that the performance of some voyage charters, or time charters for a trip or of short duration, becomes radically different on account of inordinate delays. In any event, charterparties which contain clauses dealing with Covid-19, or diseases generally, are unlikely to be frustrated in respect of those types of events, as the parties can look to the express terms of the contract to ascertain their rights and obligations.

5.2 Force Majeure

The force majeure concept also pertains to unexpected situations outside the parties' reasonable control, but unlike frustration it is not a doctrine of the common law. For force majeure to be relevant, it must be a term of the contract and its scope and application will depend on an interpretation of terms according to normal contractual principles. Force majeure clauses will typically list a number of events which may lead to one or both parties having the right to terminate the contract entirely (a so-called "frustration" clause), and/or to suspend performance for a period of time or be excused for what would otherwise have been a breach (an "exceptions" clause).

A force majeure clause may potentially be relevant In the Covid-19 context where it refers to "disease", "plague", "epidemic" and/or "quarantine". The commonly found term "restraint of princes, rulers and people" may also be relevant where mandatory government restrictions are in place. Other points to note regarding force majeure clauses are (subject to any wording to the contrary):

- the burden of showing that the facts fall within a force majeure clause rests with the party seeking to rely on the clause;
- parties are required to use "reasonable endeavours" to avoid, overcome or mitigate a force majeure event, even if this results in additional expense being incurred and/or would benefit the other party;
- if a force majeure clause is construed as an "exceptions" clause, a causal link is required between the force majeure event and the inability of the party to perform (ie. "but for" the event the party would have been able to perform);

- the force majeure event must be the sole effective cause of the non-performance;
- there are often notice requirements in force majeure clauses, and these should be strictly adhered to;
- the mere fact that an authority or some company (eg. a shipper or receiver of cargo) "declares" force majeure is likely to be irrelevant to contracts to which they are not party (eg. charterparties). Whether a particular set of facts gives rise to force majeure and its consequences will depend entirely on the terms of the contract between the parties concerned; and
- where there are contractual clauses dealing specifically with a particular event, these should take precedence over a more general force majeure clause to the extent of any conflict between the two.

6. Special Clauses

Incorporating a clause which deals with diseases generally or the Covid-19 virus itself can assist in avoiding potential disputes where there is loss of time or extra costs are incurred. Of course it may not now be possible to agree such a clause for charters that were fixed before the virus was known about, but discussions along these lines between the parties to any new fixtures are recommended.

BIMCO published two clauses (Infectious or Contagious Diseases Clause for Time / Voyage Charter Parties) in 2015 in response to the Ebola outbreak in Africa. These clauses might in theory cover current issues, but it is an arguable point whether Covid-19 would, as matters stand, be classified as a "Disease" (defined in the clauses as "a highly infectious or contagious disease that is seriously harmful to humans"), which is a precondition for the clause to have effect. Furthermore, the Club has recently seen cases where charterers have refused to agree to the BIMCO clause, on the grounds that if Covid-19 were to fall within the definition of a "Disease" under the clause, then there could be a multitude of ports around the world which would be "Affected Areas", thereby potentially hindering to a large degree the charterer's ability to trade the vessel.

In February, Intertanko published two clauses ("Covid-19 ('Coronavirus') Clause – Time / Voyage Charterparties") which, as the name suggests, are intended to deal solely with Covid-19. They can be used for any cargo carrying vessel, not only tankers. The clauses are slightly narrower in operation than the BIMCO clauses as the owner's various rights only take effect where there is a reasonable judgment that there is an unacceptable level of risk to the crew or other persons on board. The BIMCO clauses, by contrast, can also operate where there is a risk to the vessel of quarantine or other restrictions.

Both sets of clauses follow a similar scheme. If the owner / master reasonably assesses there to be an unacceptable risk of exposure, they may refuse to follow the charterer's original orders and request alternative orders or, if the vessel comes to be in an affected area, they can depart to a safe place. Any extra costs incurred in respect of quarantine, fumigations, cleaning and the like will be for charterer's account. With time charters, the vessel will remain on hire throughout, while for voyage charters time lost will count as laytime or demurrage (although see above §2.2 in relation to tender of NOR).

If fresh orders are required but not given by the charterer the vessel will simply remain on hire or, in the voyage charter case, owners will have the right to discharge the cargo at a safe port of their choice. With the latter, any extra expenses are recoverable from the charterer, full freight will still be payable and (for the BIMCO clause) additional freight will be payable if the vessel has to sail an extra distance of over 100 miles.

To prevent there being any disjuncture between the BIMCO / Intertanko clauses and any contracts of carriage between owners and cargo interests, it is specified that the clauses must be incorporated into bills of lading or other carriage documents. Finally, the clauses make it clear that their terms are to supersede any other terms of the charter, including force majeure provisions.

While we trust this advice will answer many questions that members currently have about contractual issues relating to Covid-19, the situation is developing and changing rapidly and this could give rise to different challenges. We encourage members to get in touch with their usual contact at the Club if they have any enquiries.

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