

COVID-19: ISSUES UNDER SHIPPING CONTRACTS

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THE COVID-19 PANDEMIC HAS ROCKED THE WORLD. NUMEROUS PEOPLE AROUND THE GLOBE ARE LOCKED DOWN AT HOME, COMPANIES ARE TRYING TO ADAPT, AND THE GLOBAL ECONOMY IS SUFFERING.

"Bulk carrier rates are depressed, though they may be helped by increased demand from China as it exits its lockdown."

Shipping has also been greatly affected. Bulk carrier rates are depressed, though they may be helped by increased demand from China as it exits its lockdown. The outlook is uncertain for container ships, and it is dire for cruise shipping. Ship scrapping activity is low as scrapyards have closed following the lockdowns in India and Pakistan and the quarantine in Bangladesh. Shipbuilding has also been adversely affected and the effect on ship values remains to be seen. Crew on board a number of ships have caught COVID-19, as a result of which the ships have been quarantined (even the nuclear aircraft carrier *Theodore Roosevelt* has seen COVID-19 on the rise, requiring urgent disembarkation of its 4,000 crew). It is also becoming more difficult to carry out crew rotations since various countries, including Singapore, have

prohibited or restricted this. These are just some of the issues – other ones that could arise are highlighted in Watson Farley & Williams' recent article: "COVID 19 – What should we do now?".

With this in mind, we would like to outline some key issues we have seen under a variety of shipping contracts in light of COVID-19, some of which were touched upon in our article: "Ship Finance and COVID-19".

[1] TIME CHARTERPARTIES

Off-Hire

Generally, a vessel will not be off-hire if it is merely delayed in entering a port due to a lockdown, or congestion, on account of COVID-19:

Clause 15 of the NYPE form (1946 edition)

1) This clause would not be triggered because its first requirement (applicability of a named off-hire event) would not be satisfied: none of its specific named events (*"deficiency of men or stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, drydocking for the purpose of examination or painting bottom"*) would apply, and the general *"or by any other cause"* event would not apply either since this refers to events that are similar to the previously-named ones. However, if *"whatsoever"* is added to the end of the general phrase, this would be an applicable event because under English law this encompasses any events at all. Alternatively, if a sufficient number of the crew are infected and are not able to perform their duties because of that, that could constitute a *"deficiency of men"* under the clause.

2) Even if a named event applies, the clause contains a second requirement that the event has prevented *"the full working of the vessel"*. Under English law this means that the event is preventing the vessel from doing what it is immediately required to do by the charter service (as opposed to what the time charterer would like it to be doing). If the vessel is, say, waiting in a berthing queue along with other vessels then this is the required service, the *"full working of the vessel"* is therefore not being prevented and the vessel is not off-hire. On the other hand, if the vessel is taken out of the berthing queue and has to wait somewhere else, it may be that its full working is being prevented and that it would be off-hire. It is a fact-specific exercise.

"If the vessel is taken out of the berthing queue and has to wait somewhere else, it may be that its full working is being prevented and that it would be off-hire."

Clause 17 of the NYPE form (1993 edition)

3) A similar analysis would follow under clause 17, whose specific named events and general event (*"or by any other similar cause"*) would not apply, and whose second requirement would operate in the manner described above.

Shelltime clause 21

4) The second requirement above does not feature in clause 21, which merely requires one of its named events to apply (the first requirement above). Of the numerous events listed in its sub-clauses, only two might possibly apply on specific

facts in a COVID-19 context: *"obtaining medical advice or treatment for or landing any sick or injured person (other than a Charterer's representative...) or for the purpose of landing the body of any person (other than a Charterer's representative)"* (sub-clause iii) or *"delay in quarantine arising from the master, officers or crew having had communication with the shore at any infected area without the written consent or instructions of Charterers or their agents..."* (sub-clause iv).

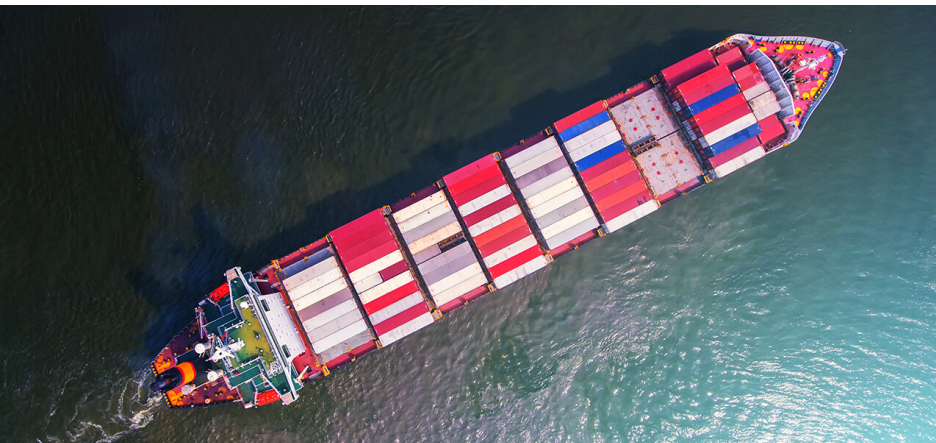
If the vessel is off-hire, then a question may arise as to whether the time charterer can cancel the charterparty if this continues for more than a certain number of days stated in the applicable rider clause.

BIMCO Infectious or Contagious Diseases Clause for Time Charter Parties 2015

This clause permits the owner to refuse to proceed to or remain at a port or place which “*in the reasonable judgement of the Master/Owners*” is an “*an Affected Area*”, defined to be a “*port or place where there is a risk of exposure to the Vessel, crew or other persons on board to the Disease and/or to a risk of quarantine or other restrictions being imposed in connection with the Disease (in turn defined as a “highly infectious or contagious disease that is seriously harmful to humans”)*”. According to BIMCO, this concerns extreme outbreaks of diseases, rather than mere everyday illnesses, as where there is, say, a declaration by a public health authority of a public health emergency (as would be the case with COVID-19).

If, despite this, the vessel proceeds to such a place then the clause provides among other things that “*additional costs, expenses or liabilities whatsoever arising out of the Vessel visiting or having visited an Affected Area, including but not limited to screening, cleaning, fumigating and/or quarantining the Vessel and its crew, shall be for the Charterers’ account*” and that the vessel will “*remain on hire throughout*”. The clause also provides the owner with an indemnity by the time charterer if the vessel incurs/experiences any delays, costs, expenses or liabilities after redelivery as a result of visiting an “*Affected Area*” during the charter.

However, in this depressed shipping market we have seen charterers renegotiating the wording of this clause in an effort to limit its scope. In the absence of such a clause, an owner could, if he suffers loss as a result of proceeding to a port that is in lockdown or quarantined due to COVID-19, seek to rely on the implied indemnity arising from him following the time charterer’s orders under clause 8 of the NYPE forms, or perhaps even the express indemnity under clause 13 of the Shelltime form against the consequences of signing bills obliging the vessel to proceed to a particular port, but this would be an uncertain route to follow.



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[2] VOYAGE CHARTERPARTIES

Laytime

As soon as the vessel arrives at the place stipulated by the charterparty, the Master must tender a Notice of Readiness (NOR). Often this is done before free pratique is provided. However, if free pratique is not provided owing to COVID-19, this would affect the validity of the NOR and prevent the running of laytime, requiring the Master to re-tender an NOR as soon as free pratique has been provided.

As far as COVID-19 quarantine delays are concerned, whether this would constitute an exception to the running of laytime or demurrage depends on the wording of the charterparty. It would not be an exception under the standard wording of, say, the 1994 Gencon form (for bulk carrier vessels); or the Asbatankvoy form (for tanker vessels) save for the possibility of the “*stoppage or restraint of labor*” event applying; or the Shellvoy 4 form (for tanker vessels). By contrast it would likely be an exception under the Shellvoy 5 and 6 forms assuming the quarantine commenced after the date of the charterparty.

Force Majeure

Under English law, there is no concept of ‘force majeure’ in the sense of a party to the contract being excused from complying with its obligations due to an event beyond its control. Therefore, a party can only plead force majeure in a COVID-19 context under a voyage charterparty contract (or any contract) governed by English law if the contract expressly permits this.

Some voyage charterparties contain ‘force majeure’ provisions excusing contractual performance if one of the named events applies, however their ability to apply in a COVID-19 context will depend on the wording of the clause.

BIMCO Infectious or Contagious Diseases Clause for Voyage Charter Parties 2015

This clause, drafted by BIMCO for voyage charterparties, contains similar provisions to the BIMCO clause for time charterparties.

[3] PORT/BERTH SAFETY (TIME AND VOYAGE CHARTERPARTIES)

Under English law, a port or berth is unsafe if the particular vessel cannot reach it, use it and depart from it without being exposed to danger which cannot be avoided by good navigation or seamanship. With this in mind, mere delay to a vessel owing to a COVID-19 lockdown or quarantine should not render the port unsafe unless the owner can point to a very real danger, say, to the crew on board the vessel.

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[4] FRUSTRATION

A contract can be brought to an end by frustration if an event for which neither party is responsible makes the performance of that contract radically different from what was originally agreed. Mere delay, or even very excessive delay, hardship or financial loss will not suffice. With this in mind, it would take something very radical, on account of COVID-19, to give rise to frustration.

[5] BILLS OF LADING

Where the BIMCO Infectious or Contagious Diseases Clause appears in a charterparty whose germane terms are in turn incorporated by a Congenbill 1994 form bill of lading, this will be particularly helpful for the owner in the event of a dispute with the bill of lading holder arising out of the owner’s exercise of his rights under this charterparty clause.

[6] SHIPBUILDING CONTRACTS

The BIMCO NEWBUILDCON and Shipbuilders' Association of Japan (SAJ) forms, being the two most commonly used shipbuilding contract forms (albeit significantly amended by the parties in each case), permit the yard to postpone the vessel's delivery date for a "*permissible delay*" due to named "*force majeure*" events that are beyond their reasonable control. In a COVID-19 context, the "*epidemic*" / "*government...requirement or interference*" / "*cause of a similar nature*" (NEWBUILDCON form) or "*epidemics*" / "*quarantines*" / "*requirements of government authorities*" (SAJ form) named events would appear to apply, though the yard would have the burden of proving that this delayed the vessel's construction and that it is beyond the parties' reasonable control, in addition to which it would have to notify the buyer of the occurrence of this event and of its termination. If the "*permissible delay*" continues for a certain number of days, the buyer may have the right to cancel the contract.

"In the absence of a 'force majeure' clause, the exact answer to these issues will depend on the wording of the particular contract."

However, as the wording of these forms is almost always heavily amended by the parties in practice, the parties' exact rights will depend on what the clauses say in their particular contract.

[7] SHIP SALE CONTRACTS (MOAS)

COVID-19 may give rise to issues under MOAs for the sale of ships, where the port at which the vessel is to be delivered by the seller is in lockdown or is quarantined and where the contract provides for the vessel to be delivered by the specified date failing which the contract can be cancelled. In the absence of a 'force majeure' clause (which does not feature in the Norwegian Sale Form that is typically used),

the exact answer to these issues will depend on the wording of the particular contract.

CONCLUSION

COVID-19 is making headlines in just about everything these days. Shipping is no exception and the issues identified above provide a flavour of what can arise under shipping contracts. Our recommendation is to remain vigilant and, in the event of any doubt, seek prompt legal advice. Watson Farley & Williams have a wealth of knowledge in these issues, and all related issues, and are here to help you.

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