

This is the first in a series of client briefings from our Commodities & Shipping Industry Group on the impact that the coronavirus disease 2019 (COVID-19) is having on international trade.

This first briefing considers the issues arising under time and voyage charterparties. In the briefings to follow, we shall consider the impact on bills of lading, CIF/CFR and FOB sale contracts, as well as on banking and trade finance.

The terms and conditions of charterparties differ depending on the vessel type and trade, and different considerations may apply to time charterparties and voyage charterparties. As a result, the guidance in this client briefing is general in nature and the specific terms of the charterparty will need to be considered in each case. That said, some common issues are likely to arise, and there is potential overlap between a number of the common provisions found in charterparties.

Seaworthiness

The first and possibly most important issue is “seaworthiness” and, in particular, whether COVID-19 can make a vessel unseaworthy.

The concept of seaworthiness applies to both time and voyage charterparties, and it has evolved over time. The link between COVID-19 and seaworthiness may not seem obvious, but there are a number of ways in which COVID-19 may make a vessel unseaworthy.

The classic definition of seaworthiness under English law is as stated by Scrutton LJ in *F.C. Bradley & Sons v Federal Steam Navigation* (1926) 24 Ll.L.Rep 446:

“The ship must have that degree of fitness which an ordinary careful owner would require his vessel to have at the commencement of the voyage having regard to all of the probable circumstances of it.”

The concept extends to “cargoworthiness,” and to the fitness of the crew. It has also been modified by, *inter alia*, the Hague Rules/Hague-Visby Rules, which reduced the absolute seaworthiness obligation under common law to an obligation to exercise due diligence to make the vessel seaworthy.

Whether a vessel is seaworthy also has to be judged in the context of the increased sophistication of vessels, new technology and the greater regulation of the industry generally.

With COVID-19, seaworthiness issues are most likely to arise in cases where the vessel has called at a port that is affected by COVID-19 and/or where members of the crew have, or are suspected of having, COVID-19.

In the case of the crew, it is clear that a vessel may be unseaworthy if the crew members are infected (*The Eurasian Dream* [2002] 1 Lloyd’s Rep. 719). This may also be a valid ground on which to place the vessel off hire or to dispute the validity of a notice of readiness (see below).

In the context of disease and contamination, a vessel has been held to be unseaworthy because its previous port was contaminated by plague and it was detained and required fumigation due to its trading history (*Ciampa v British India Steam Navigation Co Ltd* [1915] 2 K.B. 774).

Safe Port Warranties

Most charterparties contain an express safe port/berth warranty. Even if this is not an express warranty, it will be implied in most time and voyage charterparties.

The test applied by English courts and tribunals in deciding whether a port is “safe” is set out in *The Eastern City* [1958] 2 Lloyd’s Rep. 127:

“...a port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship.”

A vessel need only be “exposed” to danger (*The Polyglory* [1977] 2 Lloyd’s Rep. 353), so, in principle, if there is COVID-19 at the port, this could make it unsafe. This is not certain however, and there will be a number of factors to take into consideration, including:

- Likely delays that may be suffered
- Risk of infection to a vessel’s crew
- The port’s proximity to infected areas
- Risk of contact with shore personnel
- Risk of stowaways
- Risk of vessel detention or quarantine
- Preventative/protective measures in place at the port

A relatively short delay due to quarantine or the requirement for fumigation is unlikely, in itself, to make a port unsafe (*The Hermine* [1979] 1 Lloyd's Rep. 212).

While much of the immediate focus will be on the performance of existing voyages, charterers must, nonetheless, be alert to the primary obligation to nominate a port that is prospectively safe at the time of nomination. Under both time and (probably) voyage charterparties, there is a secondary obligation if the port becomes unsafe after it has been nominated. In those circumstances, the charterer has to cancel the original orders and to issue new orders (*The Saga Cob* [1992] 2 Lloyd's Rep. 545).

When entering into a voyage charterparty or giving orders under a time charterparty, charterers should investigate whether the intended load and/or discharge ports have been or may be affected by COVID-19, and have contingency plans in place in the event that the intended discharge port becomes unsafe during the voyage.

Orders for Employment/Implied and Express Indemnities

Time charterers are obliged to provide orders for the vessel's employment, and generally the master is obliged to follow these even where they relate to matters such as the route to follow (*The Hill Harmony* [2001] 1 Lloyd's Rep. 147).

In return, time charterers usually agree to indemnify owners for the consequences of following charterers' orders (*The Island Archon* [1994] 2 Lloyd's Rep. 227). The indemnity is subject to important restrictions (e.g., owners are not entitled to be indemnified for risks they have agreed to accept elsewhere in the charterparty, such as navigational risks).

In voyage charterparties, the application is limited by the fact that the vessel's employment (e.g., the ports and cargo) is usually determined at the time the contract is made, which may indicate that the owners agreed to accept the risks inherent to the particular ports and cargo (*The George C. Lemos* [1991] 2 Lloyd's Rep. 107).

If the owners suffer losses due to calling at a COVID-19-affected port, it is likely that the charterers will face claims from the owners under the indemnity, particularly if the owners are unable to rely on a safe port warranty or some other term of the charterparty (see above).

Infectious or Contagious Diseases Clauses

In addition to more general provisions in charterparties that may apply to COVID-19 (like seaworthiness, safe port warranties and employment), it is fairly common for charterparties to contain clauses dealing specifically with infectious diseases.

Following the outbreak of Ebola in 2014, various industry bodies and operators, including BIMCO, developed Ebola clauses for both time and voyage charterparties.

The BIMCO clauses were drafted in general terms and intended for use in response to any virulent disease, and they are similar to the BIMCO War and Piracy Clauses in that they relieve owners and the master of their obligation to follow charterers' orders to call at an affected area. They also deal with other issues such as the cost of screening, cleaning and quarantine.

Many charterers consider the BIMCO clauses to be too heavily weighted in owners' favor, and instead use a modified or bespoke infectious diseases clause that they consider contains a more balanced allocation of risk and costs.

In the current environment of COVID-19, these clauses can provide welcome certainty and a pre-agreed allocation of risk and costs. If you are considering adopting a general infectious diseases clause, you should ensure that it is sufficiently wide to cover COVID-19, and that it meets the parties' intentions.

Off-hire/Deductions From Hire

Under a time charterparty, any delays are generally for charterers' account unless the charterer is able to rely on an off-hire clause in the charterparty or on the doctrine of equitable set off.

Where crew members are infected by COVID-19 or the vessel is detained or quarantined, the working of the vessel may be affected, or the vessel may be required to deviate, or be delayed by quarantine. Depending on the wording of the off-hire clause, this may entitle charterers to place the vessel off-hire for any time lost.

Depending on the facts of any given case, this may raise other issues, including unseaworthiness and the issue of whether the deviation or delay was a consequence of charterers' orders as to employment.

Notices of Readiness

A valid notice of readiness (NOR) is generally the trigger for commencement of laytime under voyage charterparties, and each charterparty will dictate when and how a valid NOR can be tendered. The general rule is that until a valid NOR has been tendered and laytime commences, owners bear the risk of delay.

One often overlooked element that can invalidate a NOR is *free pratique*. *Free pratique* is confirmation from port authorities that the vessel is free from infectious diseases and can enter port. It is often assumed that a vessel will obtain *free pratique* on arrival at the berth as a "mere formality" and that a valid NOR can, therefore, be tendered before inspection. If, however, the vessel has called at any ports or places affected by COVID-19, it can no longer be assumed that *free pratique* is a "mere formality," and that a valid NOR can be tendered on arrival.

If a valid NOR cannot be tendered until *free pratique* has been granted at the berth, there is the potential for significant delays, which, absent contrary wording in the charterparty, will rest with the owners. Similarly, if the vessel or any of the crew are quarantined and this prevents or delays loading or discharge operations, this will probably prevent the vessel tendering a valid NOR.

Laytime and Demurrage

Assuming *free pratique* is granted, the increased demand on supply lines, reduction in port personnel, mandatory sanitization, medical checks and delay in production of original bills of lading are all potential causes of delay affecting loading and discharge arising out of COVID-19.

Laytime and demurrage disputes will be governed by the specific provisions of the charterparty. Charterers will obviously seek to rely on exceptions to laytime and demurrage to minimize their liability for demurrage.

As a general rule, laytime exceptions will not apply once the vessel is on demurrage, and general provisions excepting delays are not applicable to laytime and demurrage unless "clearly worded to that effect" (*The Lefthero* [1992] 2 Lloyd's Rep. 109). *Force majeure* clauses will also not excuse delays under a voyage charterparty where a vessel is already on demurrage unless there are clear express words to that effect (*The Forum Craftsman* [1991] 1 Lloyd's Rep. 81). However, if there is "fault" by owners in causing COVID-19-related delay (e.g., unseaworthiness or crew illness), this may relieve charterers of their liability for delays.

As a matter of good practice, prior to entering into the charterparty, the parties should check whether there are existing or expected delays due to COVID-19 at the intended load or discharge port(s) and negotiate laytime and demurrage provisions accordingly.

Damages for Detention

Many voyage charterparties limit the number of days for which demurrage is payable. Thereafter, charterers are liable for damages for detention (i.e., actual losses incurred by owners as a result of the delay in loading/discharge operations).

Owners' actual losses could be considerably more than the demurrage rate, and if charterers find themselves in a prolonged detention, demurrage clauses should be considered in tandem with any clauses governing termination for delay and/or *force majeure* provisions, failing which charterers may consider frustration (see below).

Charterparties often include termination clauses affording owners and/or charterers the right to terminate in the case of long-term detention or arrest. The relevant clauses must be read carefully in order to determine whether they cover a COVID-19 detention or quarantine, but, if so, they potentially enable charterers to terminate or cancel the charterparty.

Letters of Indemnity

COVID-19 is already causing delays in the arrival of shipping documents at discharge ports and, in particular, bills of lading.

An increasing number of owners are, therefore, likely to be discharging cargo against letters of indemnity (LOIs). The charterparty will dictate whether owners are obliged to discharge against a LOI and, if so, what that LOI should look like; an agreed form is often appended. Owners will also want to know that the party that is providing the LOI is creditworthy, given that owners are unlikely to be able to rely on P&I insurance for any liability they incur for misdelivery of cargo.

These issues are not unusual. The current climate, however, is unusual. A global recession is likely and many currently successful and solvent companies will face financial difficulties. Owners should, therefore, ensure that any LOI provides adequate security in the event claims are made for delivery without production of original bills of lading. Due diligence is key.

Force Majeure

The term *force majeure* has no established meaning in English law, and the precise contractual clause will govern whether it applies in any given case.

It is standard practice to name events that will constitute *force majeure* events, as well as having a catch-all provision covering events beyond a party's reasonable control. The list of events may include "epidemic or pandemic" and "any law or any action taken by a government or public authority," which may apply, provided the action is sufficiently proximate to the event relied upon. It is similarly common for a *force majeure* clause to include a provision stating that a *force majeure* event should not be reasonably foreseeable.

The consequences of a *force majeure* event are usually to suspend performance and to have the time for performance extended, although there may also be on-notice termination provisions.

There is obviously potential overlap between *force majeure* clauses and other clauses in the charterparty.

Frustration

In the absence of an applicable *force majeure* clause, owners and charterers may consider invoking the general doctrine of frustration if COVID-19 prevents them from performing their contractual obligations. Once a contract is frustrated, the parties' contractual obligations are discharged. A helpful comparison of the governing principles for frustration and *force majeure* can be found in our [client alert](#).

Mere hardship, inconvenience or material loss will not frustrate a contract. The doctrine of frustration only arises when an event occurs that is both unexpected and beyond the control of owners and charterers, and renders it physically or commercially impossible to fulfil the charterparty, or transforms the obligation to perform into a radically different obligation from that undertaken at the moment of entry into the charterparty.

Whether performance is frustrated due to COVID-19 will depend on the facts at the time frustration is claimed. In *The Hermine* [1979] 1 Lloyd's Rep. 212, it was held that an obstruction that merely caused delay did not render a port unsafe unless the delay was sufficient to frustrate the commercial venture. If the effect of COVID-19 on the performance required is such that it transforms the obligation to perform into a radically different obligation from that undertaken at the moment of entry into the contract, the charterparty may, in those circumstances, be frustrated.

Our Commodities & Shipping Industry Group is based in Singapore, London, Perth and the UAE. With 45 offices in 20 key jurisdictions, we are well placed to assist with your commodities and shipping matters.

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