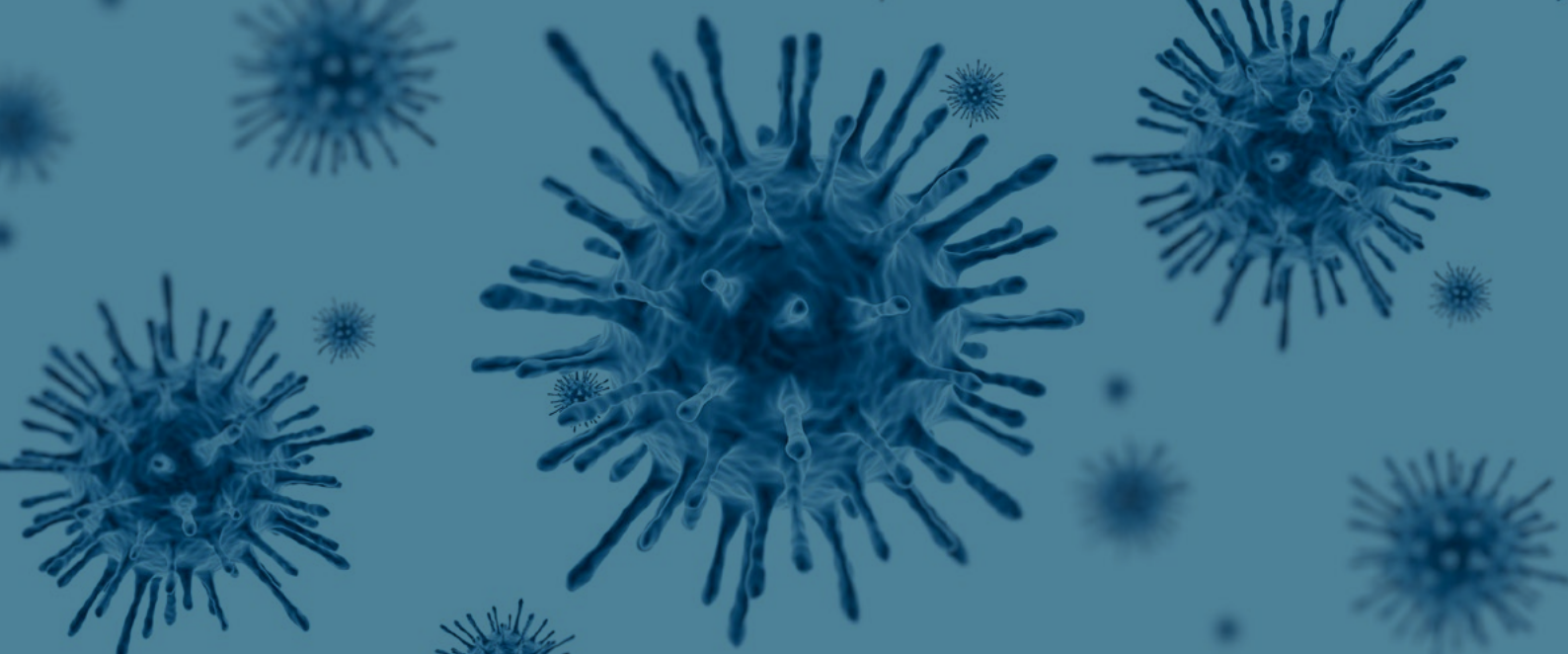




MOORE

**COVID-19:
THE IMPACT ON CHARTER-PARTY CLAUSES
AND OTHER OPERATIONAL IMPLICATIONS**





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INTRODUCTION

Covid-19 was declared as a global pandemic by the World Health Organisation on 11th March 2020, with nations all over the world taking extreme measures to contain or delay the spread of the virus. Countries around the world are strengthening their border control measures in order to prevent the further spread of COVID-19 and port authorities continue to be in a heightened state of alert in order to identify crew members or passengers displaying symptoms compatible with the disease.

COVID-19 pandemic has created an unprecedented global health and economic emergency. As the economic impact of Covid-19 deepens globally and builds by the day, shipping businesses' rights and obligations under contracts are coming into sharp focus. The COVID-19 pandemic has, among other issues, led to uncertainty as to the enforceability of certain commercial contracts. The full impact of COVID-19 remains to be seen.

A guide to most significant charter-party clauses that may be affected by the outbreak of the pandemic are provided for general guidance to the shipping industry and presents the potential implications that could adversely affect the Ship-owners.

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SEAWORTHINESS

The implied warranty of seaworthiness applies with full effect only to voyage charter-parties. The warranty is that the ship will be seaworthy “at the commencement of the voyage” for the particular adventure insured. A seaworthy ship is one that is “reasonably fit in all respects to encounter the ordinary perils of the adventure insured”. In a time policy there is no warranty of seaworthiness but “where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness”.

The warranty of seaworthiness relates not only to the hull but also to the machinery and equipment, the crew, and the way in which a ship is loaded. Owners should be aware that a vessel may become unfit to receive and carry the cargo if it is chartered after calling at an area affected by the COVID-19 infectious disease.

Examples being:

- a vessel is required to undergo compulsory fumigation as a result of calling at an infected area; this may cause cargo to rot if it is perishable.
- Similarly, if a vessel is delayed due to quarantine regulations which in turn cause damage to cargo, the vessel may be considered unseaworthy. The infectious disease may therefore inadvertently put Owners in breach of their obligations to provide a vessel that is seaworthy.

A further consideration is that a vessel may no longer be seaworthy if some or any member of the crew is suffering from COVID-19. On the other hand, the contracts for a number of the ship’s crew have already expired or are due to expire soon and owners may not be able to effect the necessary crew changes in accordance with the terms of the crew contract due to the outbreak of COVID-19 and the restrictions in place in various ports. Provided that safe manning levels for the ship are maintained in accordance with flag state requirements and on mutually agreed extended contracts, this will not affect seaworthiness.



SAFE PORT PRINCIPLE

The most common issue currently facing by owners is whether they are obligated to proceed to a port where there may be a risk of contracting an infectious disease due to COVID-19 outbreak. The standard definition of a safe port is:

“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 court or tribunal is likely to approach the question of the safety of a port in the following way:

Is there a significant risk or danger of:

- crew members catching the COVID-19; and /or
- the ship becoming subject to blacklisting; and/or
- the ship suffering an inordinate delay;

Under English law, a port will be “unsafe” unless, during the relevant period of time, the particular ship can reach it, use it and return from it without being exposed to danger in the absence of some abnormal occurrence, which cannot be avoided by good navigation and seamanship. Whether or not a port is to be considered safe depends upon the relevant facts of each case. Safe port issues typically involve a threat of safety to the vessel or its cargo due to a feature or characteristic of that port. Most (but not all) charters contain a warranty from the charterer that the port will be prospectively safe, i.e. safe at the time of the arrival of the vessel. However, in the event of an infectious disease outbreak such as COVID-19, the concept of safety may be extended to the crew and it has been suggested that such health risks to those on board the vessel can render a port unsafe.



Risks to the crew can render a port unsafe even where there is no risk of damage to the ship

Under a time-charter party's express/implied safe port warranty, charterers are obliged to nominate a safe port. The owners must generally comply with the order to proceed to a port unless there is an unacceptable risk that the port is prospectively unsafe for the time when the vessel will be there. Charterers' obligation to nominate a safe port applies at the time when the port is nominated. The Master does not have to instantly obey charterers' orders if in doubt about the prospective safety of the port. However, if the port becomes unsafe after the first nomination by the Charterers', Owners can ask for a change of, and Charterers' are obliged to cancel, the original order and nominate a new, safe port. If the port becomes unsafe during the stay, charterers may order the ship to leave.

The position is not as clear under voyage-charters. Unless supported by a deviation clause in the voyage charter party, Owners' failure to proceed to a named port may constitute a breach of contract or repudiation, thereby entitling Charterers to claim damages. If the charter party is for one voyage only, deeming the port as unsafe may frustrate the contract and the charter party can be terminated free of liabilities to either party, unless the voyage charter party includes transshipment or lightering clauses. If the charter (and the bill of lading) has a liberty clause (e.g. “so near thereto as she may safely get”), then the owner may discharge the cargo at some other port. Different ports and in a country or region may also be affected differently.

In general, it is arguable whether a port could be said to be unsafe due to the COVID-19 outbreak and is likely to depend on medical evidence such as the likelihood of the crew being exposed to an infectious disease and the fatality rate. It is suggested that risks to the crew can render a port unsafe even where there is no risk of damage to the ship.

If the owners accept charterers' orders in full knowledge of the unsafety of the port owners may have waived their right to refuse to obey charterers' orders but this will not necessarily mean that owners have waived their rights to damages. It is suggested that the governing charter party should contain specific clauses addressing the risks, delays or liabilities associated with COVID-19 infectious disease outbreak.

BILL OF LADING

An outbreak of COVID-19 infectious disease leading to quarantine would generally be a force majeure event. It is an event beyond the Owner's control and therefore the owner should not be liable. Cargo related losses for owners due to quarantine are unlikely. However, an Owner could face a claim related to

- 1 delay in delivery or loading,
- 2 loss of or reduction in value of cargo as a result of a quarantine order by competent authorities, or
- 3 inability to deliver to a named port because of a vessel's quarantine or closure of a port.

Generally, under bill of lading terms and international bill of lading conventions such as the Hague Visby rules, the Owner has full defenses to potential claims. Owners may also be entitled to deviate in order to save life at sea and also to deviate for the purpose of saving life in danger as a result of the outbreak of COVID-19.

Carrier should also consider their position under the bill of lading. After the outbreak of COVID-19 infectious disease, Carriers will still have an obligation to deliver the cargo under the bill of lading to the designated port with utmost due despatch and to take care of the cargo. If the Bill of Lading terms do not permit to deviate (whether to save life at sea or discharge the cargo at a different port), the carrier may be liable towards cargo interests for damages resulting from deviation and or delay.

With regards to discharging the cargo at a different port, the carrier may be entitled to do so if the Bill of Lading incorporates a liberty clause (e.g. "so near thereto as she may safely get") or the BIMCO clauses for "infectious or contagious diseases" and the cargo can be safely delivered to the party entitled to take delivery at that alternative port. It is recommended to incorporate in the Bill of Lading the BIMCO clauses for "infectious or contagious diseases".

ARRIVED SHIP AND LAY-TIME CLAUSES

In order for lay-time to start, there are certain conditions which must be satisfied:

The vessel must have reached the agreed destination. The vessel must have become an "arrived ship" at the specified port of loading or discharge. The charter-party will determine when the vessel has arrived.

The vessel must be ready in all material respects to load or discharge the cargo.

The vessel must tender a notice of readiness confirming that the vessel has arrived at the agreed destination and that she is ready to load or discharge cargo.

Once the vessel has reached the agreed destination, she is said to be an "arrived ship". Charter-parties usually make a distinction between "berth charters" and "port charters". Unless the charter-party specifically and expressly stated where the notice of readiness is to be tendered, then whether a ship is "arrived" will depend on whether the charter is a "berth charter" or a "port charter". In the case of a berth charter, unless the charter-party otherwise provides, the vessel will not be considered arrived until she reaches the specified or nominated berth within a named port.

As a consequence, to the outbreak of COVID-19 infectious disease, an important matter to consider is whether the ship can get to the agreed destination or if, for example, there are quarantine restrictions preventing the ship from becoming an "arrived ship". In the latter situation, the risk will likely lie with the owners. Generally, the problems will not necessarily be related to ships being refused in a port but rather to situations where the crew has been to China or other affected areas within a certain period of time and will therefore not be allowed to go ashore. In such situations, the ship may not be prevented from tendering a valid Notice of Readiness to trigger the start of lay-time.

Once lay-time has commenced it is necessary to look at the express terms of the contract to determine if time will run unaffected by the actual situation at the port of loading or discharge, or, if the parties have agreed on terms which allow the charterers to suspend the running of lay-time.



NOTICE OF READINESS

Most voyage charter-parties make the commencement of lay-time conditional on the tender of a valid notice of readiness. If the notice is invalid, then in the absence of a waiver by charterers (on which see below) lay-time will not commence at all, even if the charterers knew or ought to have known that the vessel was in all respects ready.

The notice of readiness is the notice to the charterer, shipper, receiver or other person as may be required under the charter-party that:

- 1 The vessel has arrived at the specified destination where the notice of readiness can be given.
- 2 The vessel is ready to load or discharge the cargo as the case may be.
- 3 All other requirements under the charter-party concerning the form, timing and the party to whom the notice is to be tendered have been complied with.

Prior to the outbreak of COVID-19 infectious disease, it was common to provide for the commencement of lay-time “whether in free pratique or not”. In the majority of cases, such matters are irrelevant to the giving of a notice of readiness, as those matters were reasonably believed to be “mere formalities” and routine, and a notice of readiness may be given without having obtained the necessary clearances. However, where there is a known, or even a suspected infection problem, no exception to the general principle of readiness will apply, in which case owners should ensure that they have the necessary clearances before a valid notice of readiness can be issued.

OFF-HIRE

Where there is a delay under a time charter, charterers’ thoughts often turn to off-hire. Off-hire does not require a breach of contract; rather it is a right, in certain situations, for charterers to stop paying hire. Whether a vessel in off-hire or not depends on the reasons for the delay.

If a large number of crew/officers are ill and prevent the full working of the ship, this may be considered as an off hire event (e.g. “deficiency of men” off-hire event in Clause 15 of the NYPE 46 Form (“deficiency of officers or crew” in Clause 17 of NYPE 93). If the charter-party also includes the words “or any other cause” (in conjunction with “deficiency of men”) or the words “any other cause whatsoever” it may be easier for charterers to bring themselves within the off-hire provision. (some charters specifically refer to “quarantine restrictions” -Shelltime 4). If the vessel deviates to help crew that get sick, it is likely that the time spent doing this will be off-hire.

However, charterers should bear in mind that if the contagion onboard the vessel is the natural result of compliance with the charterer’s orders, this will not give rise to off-hire. If the delay is caused only by the presence of the disease in port, it is hard to see why the ship would be off-hire under clause 15.

DEVIATION

A geographical deviation may also be so serious as to prevent the shipowner from being able to rely on protection and limitation rights contained in the contract of carriage, be the charter-party or bill of lading. During the voyage the ship must follow the usual or agreed, direct route between the agreed ports. Some charter-parties specify the route to be followed. In the absence of express stipulations to the contrary, the owner of a vessel impliedly undertakes to proceed by a usual and reasonable route without unjustifiable departure from that route and without unreasonable delay. This undertaking of the ship-owner is to be understood with reference to the circumstances that arise during the performance of the contract.

Article IV Rule 4 of the Hague or Hague-Visby Rules provides that “any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of these rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom”. The deviation should not be greater than that reasonably necessary in the circumstances and is at the Owners’ expense.

If a member of a ship’s crew is unwell or is suspected of having been infected by COVID-19, this could lead to deviation and/or quarantine. A deviation for the purpose of saving life is permissible. Under a time charter, owners are at liberty to deviate for the purpose of saving life, excusing owners from their obligations to proceed with utmost dispatch and to comply with charterers’ employment orders. The vessel may also be off-hire for the entire period of the deviation which would include the putting back of the voyage. Under a voyage charter, although the deviation would be permissible, owners would not be able to claim additional freight. It should be stressed, however, that the “saving life” element must be firmly established to justify the deviation. This would likely mean that the crew member must be seriously unwell and requires immediate onshore treatment. Owners may want to add a clause providing for additional freight if the vessel is forced to deviate to save the life of a crew member who was infected as a result of visiting a port.

Under a bill of lading contract, a similar deviation would most likely be permissible if the Hague Visby Rules are incorporated (article IV rule 4). Time and voyage charters and bills of lading commonly incorporate the Hague-Visby Rules and/or US COGSA. These both exempt owners from loss or damage caused by quarantine restrictions.

INFECTIOUS OR CONTAGIOUS DISEASES CLAUSES

BIMCO has issued clauses for voyage and time charters dealing with infectious or contagious diseases. The ‘disease’ is described as: “a highly infectious or contagious disease that is seriously harmful to humans”. According to BIMCO, there should be no argument that COVID-19 falls within the definition. BIMCO recommends the incorporation into voyage and time charter parties of the Infectious or Contagious Diseases Clauses. The threshold for invoking BIMCO’s Infectious or Contagious Diseases (IOCD) Clauses is necessarily set at a high level to avoid misuse. The two clauses are designed to respond to extreme outbreaks of diseases and not just “everyday” illnesses. The voyage charter party clause can only be triggered when the two interdependent definitions of “Disease” and “Affected Area” are fulfilled.

According to BIMCO, the definition of “Affected Area” does not refer to areas declared by the World Health Organisation (WHO) but to ports and places where there is a “risk of exposure” to the Disease. The Affected Area means also subsequent ports of call away from the infection risk area which may quarantine or otherwise restrict the ship simply because it has called at a port in a particular country. This implies that a public health authority has declared a port as an infection risk area or that a port authority has placed arrival restrictions on ships coming from certain countries.

FOCRE MAJEURE

Force majeure clauses are contractual clauses which alter parties' obligations and/or liabilities under a contract when an extraordinary event or circumstance beyond their control prevents one or all of them from fulfilling those obligations.

Under English law, force majeure is a creature of contract and not of the general common law. In addition, there is no implied term of force majeure under English law. Because force majeure is not a common law concept, parties would normally try to recreate it contractually and set out in advance a list of events where force majeure can be invoked. Depending on their drafting, such clauses may have a variety of consequences, including: excusing the affected party from performing the contract in whole or in part; excusing that party from delay in performance, entitling them to suspend or claim an extension of time for performance; or giving that party a right to terminate.

A party seeking to rely on a force majeure clause must also show that:

- the force majeure event was the cause of the inability to perform or delayed performance;
- their non-performance was due to circumstances beyond their control; and
- there were no reasonable steps that they could have taken to avoid or mitigate the event or its consequences.

Delays on cargo shipment

Regarding voyage charter parties, the charterers must, as a starting point, have the cargo ready for shipment as agreed. In the event the cargo is not ready, it will depend on the contractual terms who will bear this risk. Contracts often contain clauses, sometimes in the form of riders, which regulate responsibilities and delays, for example, in the form of a general exceptions clauses or force majeure clauses. Concerning negotiations of future fixtures, it is vital to examine all such terms in detail to evaluate the risk of delay and establish how it will be allocated. Several weeks of delay without any possibility to get demurrage will "kill" many business propositions.

It is important to note that if the contract is governed by English law, a force majeure event will only have the meaning it has been given in the contract. This is because English law does not recognise force majeure as a freestanding legal concept. It should also be noted that even if the shippers or other parties on the cargo side can invoke force majeure against the charterers under the sales contract, this does not necessarily

mean that the charterers have the same right under the governing voyage charter party. Unless expressly stated, laytime and demurrage will continue to run during a force majeure event. It is therefore important to scrutinise any applicable exceptions or force majeure clauses to see if they regulate the running of time.

Shipbuilding contracts

Unlike many codified legal systems, there is no general concept of force majeure under English law permitting a party to a contract to relief where it cannot comply with its obligations under a contract due to an event beyond its control - such as COVID-19. The party affected by the event will only be able to invoke force majeure if the contract expressly permits it to do so and only to extent expressly provided for in the contract.

Even if the Covid-19 pandemic or a related consequence such as government action is a type of event covered by the force majeure clause, the next question to consider is the impact on the affected party's ability to perform its contractual obligations. The spread of the COVID-19 virus has led to shipyards claiming 'force majeure'.

BIMCO's members are reporting several incidents of shipyards in China and elsewhere seeking to invoke the force majeure provisions in their shipbuilding contracts in consequence of COVID-19. In China, governmental authorities have been prepared to issue notices relating to COVID-19 in order to assist shipyards to evidence the effect of COVID-19 and claim force majeure under their contracts with shipowners.

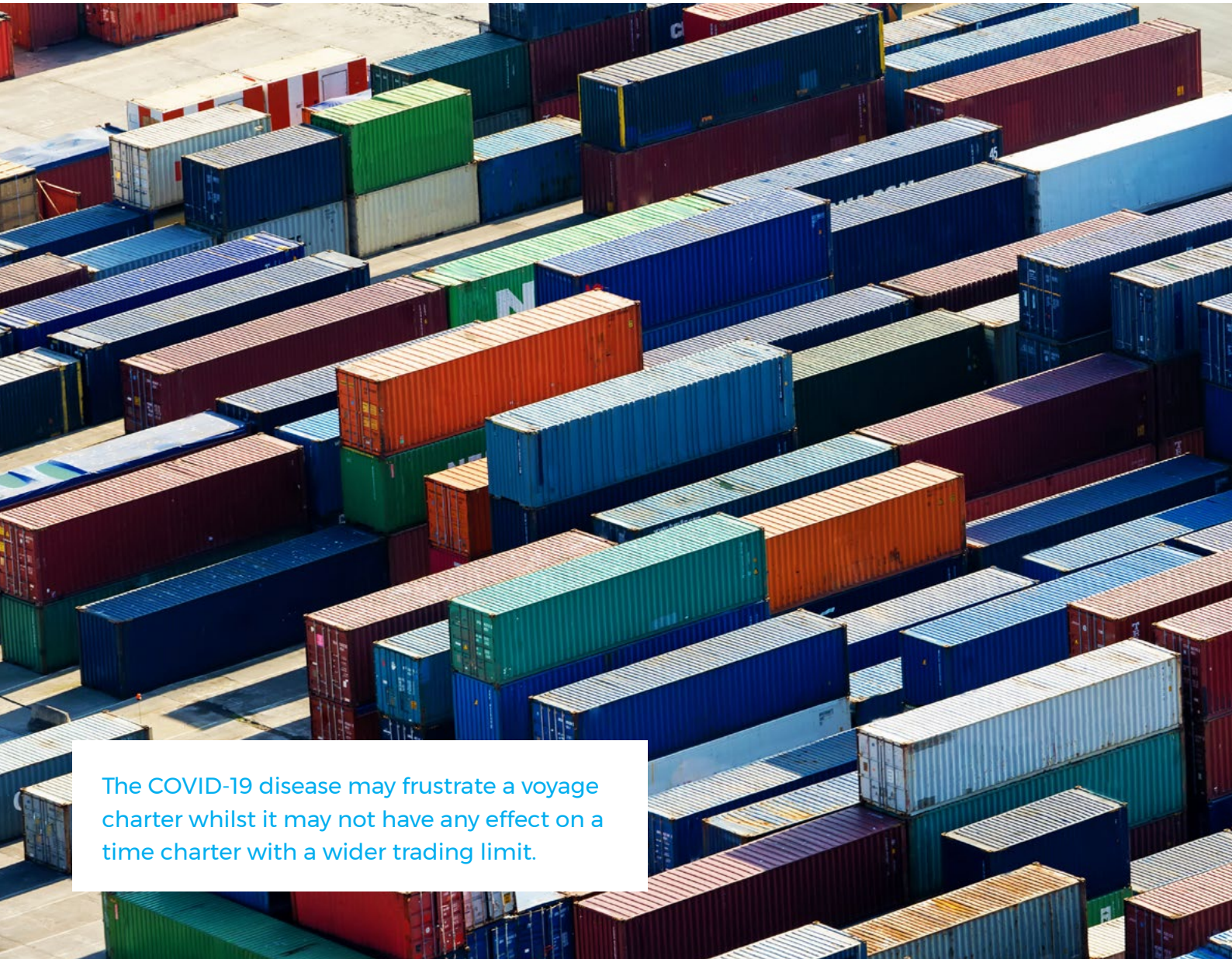
If shipyards can prove the existence of a named force majeure event in consequence of COVID-19, one can expect them to claim postponements of the delivery date for any delays to construction that have been caused by it. Parties should however be aware of strict provisions and deadlines for the yard to declare force majeure and for the buyer to challenge the force majeure notice. Failure to carefully consider the terms of the force majeure clause may lead to respective parties' loss of rights. However, even where the contractual delivery date has been postponed due to permissible delays, the buyer will usually still be entitled to cancel the new-build contract if the delay extends beyond the "drop dead" date specified in the new-build contract.

The IMO has issued some welcome guidance to shipyards and buyers, through which they have indicated that ships originally scheduled to be delivered before the 1 July 2020 deadline that are delayed beyond that date due to "unforeseen circumstances beyond the control of the shipbuilder and owner", may potentially nonetheless be accepted by flag administrations as if they were delivered before that date.

FRUSTRATION

If the contract does not contain a force majeure clause, the doctrine of frustration may come into play. Frustration occurs where there is an event which makes the contract either impossible to perform or its performance radically different, through no fault of either party. In such circumstances, the contract is automatically terminated. Generally, frustration will be less straightforward to establish than force majeure. The outbreak of the virus could leave to substantial delays due to quarantine for example. A charter may be frustrated if the performance of the charter is sufficiently delayed.

The COVID-19 disease may not necessarily render the charter frustrated depending on the terms of the charter. The main factor is whether the interruption will be substantial in relation to the remainder of the charter period. The COVID-19 disease may frustrate a voyage charter whilst it may not have any effect on a time charter with a wider trading limit. In effect, if the charter permits the ship to trade between other places then the charter will not be frustrated even though the charterer may find it hard to find an employment for the ship.



The COVID-19 disease may frustrate a voyage charter whilst it may not have any effect on a time charter with a wider trading limit.

CREW TRAVEL AND PORT RESTRICTIONS

IMO has echoed shipping industry calls for governments to keep shipping and supply chains open and grant special travel exemptions to seafarers in response to the COVID-19 pandemic. In a Circular Letter issued 30 March 2020, the Organization has distributed a series of recommendations for governments and relevant national authorities, proposed by a broad cross-section of global industry associations representing the maritime transportation sector. The Circular Letter specifically calls on governments to designate professional seafarers and marine personnel, regardless of their nationality, as ‘key workers’ providing an essential service. Referring to the issue of crew changes, it says professional seafarers and marine personnel should be granted any necessary and appropriate exemptions from national travel or movement restrictions to allow them to join or leave ships, and that governments should permit professional seafarers and marine personnel to disembark ships in port and transit through their territory (i.e. to an airport) to allow crews to be changed and seafarers to be repatriated.

As more ports refuse to allow crew changes, or in other cases where crew on board are simply unable to leave or new crew to join due to Covid-19 related border or airline restrictions, a number of issues can arise:

- Expiry of seafarer’s contract: contract length varies; although under the Maritime Labour Convention (“MLC”) should not exceed 12 months. However, the ITF have stated (E-Circular 087 dated 17 March 2020) that until 16 April 2020, it will not challenge extensions of up to one month, even where they exceed the MLC period or other periods allowable under ITF approved collective bargaining agreements, provided individual seafarers consent to such an extension. A number of States have also said that they will permit extensions.
- Expiry of Seafarer certificates and medical certificates: most administrations, including most of the major seafarer supply states (and flag states that issue endorsements), have announced an extension of certificate validity for periods between 1 and 6 months.
- Expiry of P&I Club enhanced PEMEs: under our scheme these have a validity period of 12 months; however, we have agreed with our clinics that they can give a 3 month extension, with further 3 month extensions thereafter to a maximum of 12 months beyond the original 12 month period of validity.
- “Overlap” wages; an owner may find itself liable for wages of both a crew member who has to remain on board and for the intended replacement who is about to join or has joined the vessel. Such wages may not fall within the Club’s cover.

- To maintain the International Convention on Standards of Training, Certification and Watchkeeping for seafarers (STCW Convention) 1978, as amended, Administrations will need to co-operate. The IMO recently issued Circular Letter No.4204, in which they petition all issuing Administrations to “take a pragmatic and practical approach with regard to the extension of certificates and endorsements, as strictly necessary, and to notify ships, seafarers and relevant Administrations accordingly”. This memorandum of understanding has been extended to Port State Control Authorities

Port restrictions

Port authorities will commonly require all ships to proactively report any suspect or actual illness cases to local health authorities after arrival, e.g. by completing and delivering the Maritime Declaration of Health in accordance with Annex 8 of the International Health Regulations (IHR).

Onboard preventive measures

It is very important to raise the awareness amongst crew members so that they are aware of the risks, how the virus can be spread, and precautions to be taken. The IMO has provided some advice for seafarers and shipping, so have flag states world-wide.

Onboard mitigating measures

All measures implemented onboard should be recorded on the Ship Sanitation Control Certificate (IHR Annex 3). Ship operators in the process of establishing onboard procedures for taking care of a suspected diagnosis of COVID-19 onboard may also want to consult World Health Organization’s guidance on home care for patients with suspected novel coronavirus infection for more detailed advice. In order to better understand how to detect, prevent, respond to and control the new coronavirus, it is further suggested enrolling in World Health Organization’s open online training courses on COVID-19.

COMPLIANCE WITH STATUTORY AND CLASS REQUIREMENTS

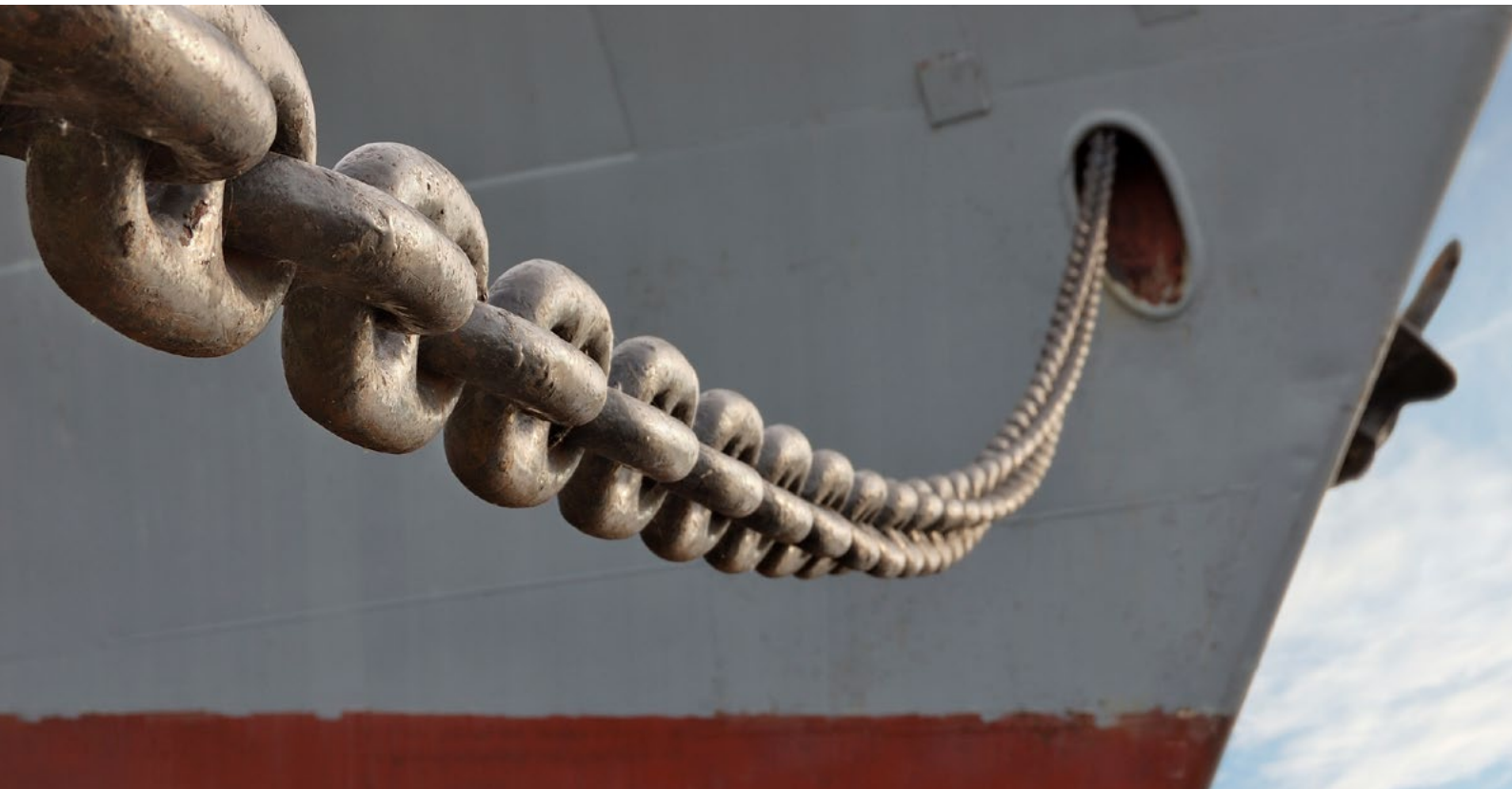
As a result of the outbreak of COVID-19 infectious disease, ships may face challenges in meeting applicable statutory requirements under various international conventions, such as inability to renew ships' or crews' formal certificates; unable to obtain dry docking services; and unable to timely repatriate seafarers. To contain the spread of the virus,

classification societies are also limiting their activities at the moment and may not be able to respond to survey requests. Many flag states have already clarified that extensions will be granted in certain cases, however, in all such cases, ship operators are advised to approach the flag state and/or classification society of the ship.

CYBER SECURITY

COVID-19 poses an unparalleled cybersecurity challenge. As the crisis around the COVID-19 continues to expand, shipping entities are being forced to adapt to rapidly evolving security requirements. These include transitioning employees to remote workers and remaining vigilant against adversaries seeking to take advantage of the crisis. It's critical that organisations and entities should take steps to help business continue to operate securely and to enable the (from now on) remote workers to have a frictionless

work-from-home experience. We have seen a sharp increase in emails and the use of smartphones, tablets, laptops and other remote infrastructure suggesting that critical technologies are in place to support the operations. It's critical that shipping entities take steps to help business continue to operate securely and to enable remote workers to have a frictionless work-from-home experience. Normal service levels will therefore be maintained.



The background image shows a large container ship docked at a port. The ship's hull is white with a red stripe at the bottom. Above the deck, there are stacks of colorful shipping containers in red, blue, and yellow. In the background, a massive, intricate steel structure, likely a port crane or gantry, is visible, painted in blue and orange. The sky is clear and blue. A large, semi-transparent blue triangle is overlaid on the right side of the image, containing the text.

CONCLUSION

As already mentioned, the full impact of COVID-19 pandemic remains to be seen. At this stage, disputes are likely to focus on whether parties are entitled to excuse themselves from performance of their contractual obligations by force majeure, frustration or otherwise. As the situation develops, it is likely that the attention will turn to whether parties can hold others responsible for the losses and/or delays suffered. It is therefore important that parties consider their position now and think ahead so that these risks can be properly managed.

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CONTACT US

Costas Constantinou

Global Head of Shipping

+30 213 0186 100

costas.constantinou@moore.gr

Michael Orfanidis

Audit Partner - Chartered Shipbroker (MICS)

+30 213 0186 100

michael.orfanidis@moore.gr



For more information please visit:
www.moore.gr

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