UNCTAD training course on implications of the COVID-19 pandemic for commercial contracts

Voyage Charters. The impact of the pandemic.

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A voyage charter is a contract for the carriage of goods which is generally used if the whole or a substantial part of the vessel is to be used for their carriage, as would be the case with bulk cargoes. The voyage charter is a formal written contract, which provides the terms of the contract negotiated by the parties. The voyage may be to and from a single or multiple places of loading and discharge. The place/s of loading/discharge may be set out in the contract, or the charterer may be given a right to nominate place/s of loading/discharge within a specified geographical range.

Lord Diplock in *The Johanna Oldendorff* analysed the performance of a voyage charter as consisting of four successive stages.[2] They are:

(1) The loading voyage, viz. the voyage of the chartered vessel from wherever she is at the date of the charterparty to the place specified in it as the place of loading.
(2) The loading operation, viz. the delivery of the cargo to the vessel at the place of loading and its stowage on board.
(3) The carrying voyage, viz. the voyage of the vessel to the place specified in the charterparty as the place of delivery.
(4) The discharging operation, viz. the delivery of the cargo from the vessel at the place specified in the charterparty as the place of discharge and its receipt there by the charterer or other consignee."

The risk of delay falls on the owner in the first and third stages, and on the voyage charterer in the second and fourth.

Charterparties are contracts for the carriage of goods and set out the terms of contract as between the charterer and the shipowner, including in the context of a cargo claim. Charterparties are individually negotiated and, therefore, are not subject to the mandatory application of any of the international cargo liability conventions.[3] A bill of lading will still be issued upon shipment of the goods, as a receipt, but in the hands of the charterer it will generally have no contractual significance.[4] However, in the hands of parties other than the charterer, e.g. a third party buyer/consignee to whom the bill of lading has been transferred under a CIF contract, such a charterparty bill of lading will function as a contractual document and attract the mandatory application of the Hague-Visby Rules. It is common for the terms of a voyage charter to be incorporated into the bills of lading issued on shipment of the goods carried under it, so linking the terms of the two contracts.

The charterer must: (a) pay the freight (b) have a cargo available for loading on the vessel's arrival at the load port, and (c) load and discharge the cargo within the laytime allowed. Laytime will start on the giving of a notice of readiness (NOR) on arrival at the place specified for loading or discharge.[5] The

[1] The views expressed are those of the author and do not necessarily reflect the view of the United Nations.
[2] [1974] A.C. 479 at 556.
[3] Although they may incorporate these by reference, for instance to benefit from a strict one-year time-bar.
[4] This is so whether or not the charterer receives the bill of lading when it is issued or, subsequently, on endorsement, see *Rodoconachi v Milburn* (1886) 18 Q.B.D. 67; *The Dunelmia* [1970] 1 QB 289, CA.
[5] For a berth charter this is the berth, for a port charter it is the usual waiting place within the legal and commercial limits of the port, unless the vessel is able to proceed straight to her berth, in which case it will be the berth.

notice of readiness will inform the charterer that the vessel is physically and legally ready to load/discharge the cargo and is at the immediate and effective disposition of the charterer. There will generally be express warranties as to the safety of the berths nominated by charterers, but no warranties as to the safety of the port or the approach to the port.

The shipowner must: provide a seaworthy ship; proceed on the approach voyage and the carrying voyage with reasonable despatch; set out on the carrying voyage at such a time as it could reasonably be expected to arrive at the load port at the date specified in any provision as to vessel's estimated time of arrival or estimated readiness to load; proceed on the customary geographical voyage between the loading and discharging ports without deviation.

The pandemic may have an effect on all of these obligations.

The main issues here will be the allocation of risk as regards delays in entering ports and in loading/discharging once there. Initially, delay will fall on owners as until free pratique [6]is obtained and the vessel is out of quarantine, owners will be unable to give a valid NOR. Thereafter the risk of delay will be on charterers. The start of laytime and the readiness of the vessel will also be an issue as regards cancellation.

For charters negotiated after the emergence of port delays and restrictions following the declaration of the pandemic on 11 March 2020 these risks in many cases can be addressed by negotiation as to laytime allowed and clauses regarding the start of laytime. However, this will not always be possible as the quarantine and operational restrictions at ports may change during the pandemic without being able to be anticipated at the time the voyage charter is concluded.

ISSUE ONE. GETTING TO THE PORT.

1.1 IS IT SAFE TO GO IN? SAFE BERTHS, SAFE PORTS.

Under voyage charters there is no warranty of safety as regards named ports or the approach to them and when the charterer is given an option to nominate from a range of named ports, the position will normally be the same; the nominated port will be treated as safe, as if it had been agreed and written into the contract ab initio. It is possible that a warranty of safety may be implied where the charter provides for nomination of a port within a range which is not specified by name.[7] However, a nomination of a port that is impossible to enter will be illegitimate and a breach of contract by the charterer.[8]

There may be a safe berth warranty, but this will not import a warranty as to the safety of the port.[9] In the absence of a safe berth warranty, it is unlikely that one will be implied.[10] For the same reason, there is no duty to renominate, if the charter port subsequently becomes unsafe, a position left open

[6] Defined in *The Eagle Valencia* [2010] 2 Lloyd's Rep 257, as: "official permission from the port health authorities that the ship is without infectious disease or plague and the crew is allowed to make physical contact with the shore; otherwise, the ship may be required to wait at quarantine anchorage for clearance".
[7] See dicta of Donaldson J in *The Evaggelos Th*, 1971 2 Lloyds Rep 200, 204, a time charter case.
[8] *The Springbank* [1919] KB 162. In *Mediterranean Salvage & Towage Ltd* v. *Seamar Trading & Commerce Inc* (*The Reborn*), [2009] EWCA Civ 531 [55] and [58] Rix L.J. noted that, even in the absence of a warranty of safety, it may well be a breach of contract to order the vessel to a port or berth known to be unsafe, or obviously unsafe, because such an order is to an impossible port or berth; if such an illegitimate order is persisted in, that might amount to a repudiation of the contract.
[9] *The A.P.J. Priti* [1987] 2 Lloyd's Rep. 37 (C.A.).
[10] *The Reborn*, [2009] EWCA Civ 531.

by the House of Lords in *The Evia (no 2)* which involved a time charter.[11] The charterparty will either become frustrated, depending on the effects of the unsafety, or there may be the possibility of the shipowner proceeding to an alternative port if there is a relevant clause (e.g. 'as near as she may safely get'). The authors of *Voyage Charters* are of the view that no general duty or right of renomination exists once a nominated safe port becomes unsafe.[12]

However, irrespective of any warranty of safety, the shipowner would not be required to enter an unsafe port and in the absence of a relevant clause (e.g. 'as near as she may safely get') the charter would be frustrated. If the charter provided for a range of ports to be nominated by the charterer based on *The Teutonia,* the owner would be entitled to discharge at another port within the discharge range and claim full freight.[13] The basis of this right seems to be due to the application of equitable principles, rather than any right or duty on the part of the charterer to renominate.[14]

1.2 Alternative ports

Some redirection may be possible through the operation of a 'near' clause, which qualifies the discharge port nominated in the charter with the following words: '. . . *or so near thereto as she may safely get and lie always afloat*'. In certain circumstances, the clause will entitle the shipowner to discharge at a nearby alternative port if the charter port is unusable and thereby claim the freight due on 'right and true delivery' of the cargo. It will also entitle it to claim demurrage if loading or discharge at the alternative port exceeds the permitted laytime.

To rely on the clause, the alternative port must be within the 'ambit' of the named port. The meaning of this term was considered in *The Athamas*.[15] The vessel was chartered for a voyage from India to two named ports in South East Asia – Saigon and Phnom Penh. After discharging about two-thirds of her cargo in Saigon in March 1959, the local pilotage authority unexpectedly refused to take the vessel up the Mekong River to Phnom Penh during the low-water season, which lasted until August. The reason was that the pilotage authority required the vessel to maintain a minimum speed of 10 knots, which was beyond her capacity. The shipowners accordingly discharged the balance of the cargo in Saigon. The Court of Appeal held that they were entitled to rely on the near clause because Saigon, although 250 sailing miles distant from Phnom Penh, was the nearest safe port that was a viable alternative discharge port for this particular cargo off this particular vessel. It also held that where the charter provides for discharge at two named ports, discharge at the first named port can entitle the shipowner to claim freight under the clause if discharge at the second named port is prevented.

In contrast, in *Metcalfe v Britannia Ironworks*, the shipowner was not entitled to rely on the clause when faced with a similar period of delay in getting to the charter discharge port of Taganrog.[16] This was located in the Sea of Azov which had frozen up and would remain so for three months. This eventuality was foreseeable by both parties, unlike the requirement by the port authorities in *The Athamas,* that the vessel maintain a minimum speed of 10 knots when navigating in the low-water season. Moreover, the parties had addressed this eventuality by inserting ice clauses into the charter.

Even if the clause appears to cover the facts of the case, there is still a further hurdle that the shipowners must surmount if they are to be able to rely on it to claim their freight. The shipowners must establish that the time they would have to wait before they could enter the contractual port

[11] *Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes*, [1983] 1 A.C. 736 (1982).
[12] *Voyage Charters*, (fn 109) at 5.56.
[13] *Duncan v. Koster (The Teutonia)* (1872) L.R. 4 P.C. 171.
[14] *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries* [1962] 1 Q.B. 42 (CA).
[15] [1963] 1 Ll. Rep. 287. CA.
[16] [1877] 2 QBD 423.

would amount to an 'unreasonable' period of delay. In deciding this, the court must balance out the costs to the shipowners in lost time if they have to wait for the obstacle to clear, against the trans-shipment costs to charterers in allowing discharge to take place at a non-contractual port or berth.[17]

1.3 Variations of port/s and remuneration

The pandemic may lead to agreed variations in discharge ports or rotation under both time and voyage charters. In a voyage charter, if remuneration is not expressly agreed, this will lead to an award of quantum meruit [18], to the owners in respect of the additional services they perform. In *The Saronikos,*[19] Savile J awarded compensation on the basis of bunkers, plus running costs, plus estimated profit for the time in question. The decision was applied by the arbitrator, Mr Schofield, in *Ameropa SA v Lithuanian Shipping*,[20] where the rotation of ports was varied during the Ebola epidemic of 2014 in West Africa, at owner's suggestion. The arbitrator had found that this gave rise to a claim for quantum meruit compensation, which should be based on the time charter equivalent in the present charter, plus the bunkers consumed, but limited this to the voyage from Douala back to Monrovia. The compensation would not include the extended approach voyage for a subsequent charter which had not even been entered into when the parties agreed to vary the present charter.

ISSUE TWO. GIVING NOR AND STARTING LAYTIME

2.1 Laytime and demurrage

The current public health emergency will have a marked impact on the incidence of laytime and demurrage under voyage charters. The restrictions in ports throughout the world, outlined in the introduction, have inevitably impacted on when laytime starts. A ship will not be 'ready' and in a position to give notice of readiness, NOR, until the crew have had the necessary testing for COVID. This leads to a consideration of the requirement of free pratique.

2.2 Free pratique. Quarantine

2.3 In 2010 in *The Eagle Valencia* this was defined as: "official permission from the port health authorities that the ship is without infectious disease or plague and the crew is allowed to make physical contact with the shore; otherwise, the ship may be required to wait at quarantine anchorage for clearance."[21] If the obtaining of free pratique is a mere formality a valid NOR can be given before free pratique is obtained. In 1971 in *The Delian Spirit* Lord Denning MR said, *obiter*,

> "I can understand that if a ship is known to be infected by a disease such as to prevent her getting her pratique, she would not be ready to load or discharge. But if she has apparently a clean bill of health, such that there is no reason to fear delay, then even though she has not been given her pratique, she is entitled to give notice of readiness, and lay time will begin to run."[22]

Obtaining free pratique is no longer a mere formality in the new normal of COVID-19. The resultant delays will fall to owners' account. In the absence of a specific clause to the contrary, the vessel will

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[17] *Dahl v Nelson* (1881) 6 App. Cas 38 (HL).
[18] "as much as he has earned". It means a claim for a reasonable sum in respect of services or goods supplied.
[19] [1986] 2 Lloyds Rep 277.
[20] [2015] EWHC 3847 (Comm).
[21] [2010] 2 Lloyd's Rep 257.
[22] [1972] 1 QB 103, 124.

not be ready until free pratique is obtained and will not be able to give a valid NOR until that time. It is unlikely that the position is changed by a 'whether in free pratique or not' clause. The tribunal in London Arbitration 11/00[23] considered the clause in circumstances where after NOR was tendered, it became clear that four crew members did not have valid vaccination certificates. This delayed the grant of free pratique for 13 days. The tribunal held that the clause assumed that the vessel obtaining free pratique was a mere formality. As it was not, the NOR given was invalid.

The position, at least as regards the start of laytime, will be different if the charter contains a clause of the type seen in *The Linardos*[24] and *The Jay Ganesh*[25] which permits NOR to be given if the vessel is prevented from berthing due to congestion, but the actual time lost until the vessel was in fact ready would not count as laytime or as time for demurrage. However, a NOR proved to be given by the master or chief officer with the knowledge that it was untrue i.e., in the knowledge that the vessel was not then ready, would be ineffective to start time running. It is possible, by analogy, that this may also mean that charterer's right to cancel would not arise until the subsequent discovery of unreadiness. In the context of the pandemic and the crew's health, there are currently no vaccines being made available for seafarers, so vaccine certificates would not be available, but a master whose vessel had been at sea for the previous fourteen days, and whose crew had not shown symptoms of COVID-19, would be reasonable in assuming that free pratique through testing of the crew would be a "mere formality".

2.3 Quarantine

As well as delays in obtaining free pratique, vessels may face quarantine either because of a finding of COVID-19 infection among the crew during the health inspection, or as a routine measure on incoming vessels or vessels coming from particular countries. The Scottish decision of *White v Winchester* in 1886 shows that where a quarantine restriction is placed on a vessel, she cannot be considered ready to load or discharge.[26] The result of the restriction is that the work is prevented and laytime cannot begin to run.

Various tanker charters provide for quarantine to count against laytime where the charterers order the vessel to a port which is already quarantined, but not when the port nominated subsequently becomes subject to quarantine.[27] A similar provision exists in clause 17(a) ASBATANKVOY form, but the reference to charterers 'sending' a vessel to a port means that the clause would not apply to ports stipulated in the charter.

2.4 Cancellation

Most voyage charters will provide an option for the charterer to cancel the charter if the vessel is not ready to load at the first load port by a specified date. The option to cancel is not qualified by any exceptions in the charterparty. [28]

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[23] (2000) 545 LMLN 3.
[24] [1994] 1 Lloyd's Rep 28, CA.
[25] [1994] 2 Lloyd's Rep 358, QB.
[26] (1886) 23 SLR 342.
[27] For example, ASBATANKVOY cl.17(a), BP Voy 5 cl.37, Exxonmobilvoy 2012 cl.23.
[28] *Smith v Dart* (1884) 14 Q.B.D. 105. Bad weather delayed the vessel from entering the port and obtaining free pratique. The cancelling clause provided: "should the steamer not be arrived at first loading port free of pratique and ready to load on or before the 15th of December next, charterers have the option of cancelling or confirming this charterparty." The vessel arrived off the first loading port on 15th December, but free pratique could not be obtained as bad weather prevented the master from going ashore. The charterers therefore cancelled the charterparty. The exception of perils of the sea in the charter did not prevent the charterers from cancelling.

If a vessel is quarantined at the load port it will not be 'ready' to load and the owners will face the risk of cancellation by the charterers. In *The Austin Friars,*[29] the port authority prohibited loading until the doctor had visited the vessel and pronounced her free from infection. That occurred after the date in the cancelling clause, and the charterers had therefore validly brought the contract to an end.

The requirement of quarantine inspection in *The Austin Friars* would seem to mean that the charterers can cancel if the vessel has physically arrived at the loading port by the cancelling date, but free pratique has not yet been given. However, in *The San George*[30] the fact that the ship's gear was not ready at the cancelling date but could be made ready by the time the loading operations began, did not mean that the vessel was unready to load at the cancelling date. Applying this to free pratique at a load port where vessels are waiting at anchorage due to congestion, it could be argued that the vessel would be regarded as ready under the cancelling clause if free pratique would be achieved before the vessel could berth, or any quarantine imposed would have expired before that time. This may well be the case if, as Lord Denning stated in *The Delian Spirit* in distinguishing *The Austin Friars*, in connection with the vessel's entitlement to give notice of readiness: "It was a very special case. I can understand that, if a ship is known to be infected by a disease such as to prevent her getting her pratique, she would not be ready to load or discharge. But if she has apparently a clean bill of health, such that there is no reason to fear delay, then even though she has not been given her pratique, she is entitled to give notice of readiness, and laytime will begin to run."[31] However, in the continuing pandemic it would be difficult to show that the vessel did have an apparent clean bill of health such that there was no reason to fear delay so that obtaining free pratique could be regarded as a mere formality.

The right to cancel operates independently of any breach and the fact that the ship is not ready to load by the cancelling date does not give rise to any liability in damages. Damages may be recoverable by charterers, for example for the costs of storage of cargo at the loading port, if there is a breach of the owner's obligations in connection with the approach voyage. The owner's obligation is to commence the approach voyage at a time at which it could be reasonably expected to arrive at the load port by the date specified in the 'ETA' (estimated time of arrival) or 'estimated ready to load' statement in the charterparty. Exception clauses will not protect the owner from delays in leaving the previous port of discharge to commence the approach voyage, unless specifically worded to do so, and will only cover delays occurring during the approach voyage.[32] There is also an implied obligation to proceed on the approach voyage with reasonable dispatch.

2.5 Availability of cargo

The charterer owes an absolute duty to provide a cargo available for loading at the time the vessel gives notice of readiness to load. Where the lack of cargo prevents laytime from starting, the charterer will be liable in detention.[33] Where laytime starts, laytime exceptions such as "However, where delay is caused to vessel getting in to berth after giving notice of readiness for any reason over which Charterers have no control, such delay shall not count as used laytime or demurrage" do not apply to breach of the duty to provide a cargo. This was the clause in *The Nikmary*, where the vessel arrived at the load port in December 2000 with dirty tanks which needed cleaning.[34] The charterers could have

[29] (1894) 10 T.L.R. 633.
[30] [1951] 1KB 223.
[31] [1972] 1 QB 103, 124.
[32] *Monroe Brothers Ltd v Ryan* [1935] 2 KB 28, *Evera SA Commercial v North Shipping* [1956] 2 Lloyd's Rep 367 (*The North Anglia*) and *The Myrtos* [1984] 2 Lloyd's 449.
[33] *The Aello* [1961] A.C. 135. Damages are at large although are often claimed at the demurrage rate.
[34] *Triton Navigation Ltd v Vitol SA* (*The Nikmary*) (CA) [2003] EWCA Civ 1715; [2004] 1 Lloyd's Rep 55.

cancelled but did not. At the cancellation date, the charterers had cargo ready for loading but, shortly after, their supplier decided not to make their cargo available. A few days later, the tanks were passed ready to load and the master gave NOR. The vessel waited at berth until 2 January 2001. The charterer's contractual arrangements with its supplier meant that it had no cargo available for loading until early January. This was not something over which charterers had no control, and as a result, once laytime began when the vessel retendered NOR after the tanks had been cleaned, the laytime exception did not apply. Although laytime will cease to run due to delays caused by the vessel's fault, the relevant obligation here was to proceed to the load port with reasonable despatch, which had not been broken. Presentation after the cancellation date was not a breach. Even if it were a breach, it had no causative effect. The vessel would have properly cleaned her tanks before giving NOR, at a time when the charterers only had a cargo available to load in January.

ISSUE THREE. THE RUNNING OF LAYTIME.

3.1 Laytime exceptions

Obtaining free pratique and any period of quarantine will delay the start of laytime. Once laytime starts, it will continue running unless interrupted by an event falling within a laytime exception or a delay caused by the fault of the shipowner. General charter exceptions will not suspend the running of laytime.[35] The provisions of the Hague Rules (or Hague-Visby Rules) incorporated under a clause paramount are also irrelevant to the running of laytime and demurrage.[36] Nor will restrictions on loading or discharge imposed by the port authority affect the running of laytime and demurrage. In *The Maria G* the harbour master at Calcutta, fearing the effect of an expected bore, ordered the ship to shift from an alongside berth to buoys.[37] On the basis that the local law made it an offence for the charterers to attempt to load during the period the vessel was away from the berth, laytime continued to run. Schofield on *Laytime and demurrage* concludes: "It therefore seems that to stop laytime on the basis of illegality, any prohibition must be of a permanent or, at least, indefinite nature."[38]

Laytime will cease to run if there is a specific laytime exception covering event, such as shortage of port labour in the case of the pandemic, which is delaying the loading or discharging operations. In *Leonis Steamship Company, Ltd. v. Joseph Rank, Ltd. (No. 2)*, (1908) 13 Com. Cas. 161, Bigham J held that an obstruction was caused where there was a delay outside the control of the charterer in loading due to congestion in the port. In *The Radauti*[39] the Court of Appeal held that "obstruction" in a force majeure clause[40] covered the inability of a vessel to get to her berth because of congestion; the degree of congestion was clearly irrelevant as was the likelihood of congestion. Obstructions in getting the cargo to the port will not be covered by such a laytime exception[41] unless there are no storage facilities at the port for the particular cargo.[42]

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[35] *The Johs Stove* [1984] 1 Lloyd's Rep 38.
[36] *Leeds Shipping v Duncan, Fox &* Co [1932] 42 Ll.L. Rep 123.
[37] [1958] 1 Lloyd's Rep. 616.
[38] John Schofield. *Laytime and Demurrage* (8th ed Informa law from Routledge 2021) at 4.537.
[39] [1988] 2 Lloyd's Rep. 416.
[40] Clause 33 "Force majeure: . . . or any other . . . hindrances happening without the fault of the Charterers . . . delaying . . . discharging . . . of the cargo are excepted and neither the charterers nor the shippers should be liable for any loss or damage resulting from any such exempted clause and time lost by reason thereof shall not count as laydays or days on demurrage."
[41] *Grant v Coverdale* (1884) 9 App Cas 470. Similarly, in *Bunge y Born v. Brightman* (1925) 22 Ll.L.Rep. 395 the House of Lords held that an exception of strikes, obstructions, or stoppages "on the railways or in the docks or other loading places" did not exonerate the charterers from liability for delay in loading caused by a strike on a railway between the place of storage and the port, since "railways" referred only to railways within the port.
[42] *Hudson v Ede* (1868) L.R. 3 QB 412 where no facilities for storing grain at the load port and delay due to ice in bringing them down river to the port counted as a loading exception.

The knock-on effects of antecedent events such as a strike may also delay loading or discharge and such a clause will provide an exception, if the charterer can prove that loading or discharging was delayed by an event taking place prior to the vessel getting to the port. *Carboex S.A v Louis Dreyfus Commodities Suisse S.A*[43] involved clause 9 of the Amwelsh form which provided:
"9.…In case of strikes, lock-outs, civil commotions or any other causes included but not limited to breakdown of shore equipment or accidents beyond the control of the Charterers consignee which prevent or delay the discharging, such time is not to count unless the vessel is already on demurrage."

The issue was whether strikes only delayed discharging when the vessel was in berth, or whether it covered delay in berthing, as a result of antecedent strikes. It was held that there was nothing in clause 9 to support the conclusion that its operation was limited to interruptions and delays occurring during the period of the excepted causes. In order to obtain the protection of clause 9, the charterer must establish that the event on which he relies falls within the clause and was the effective cause of delay to the vessel. The clause therefore excludes time actually lost to the vessel by reason of strikes, not merely time during which the vessel is prevented from entering berth by reason of strikes

In *Reardon Smith Line v. Ministry of Agriculture Fisheries and Food*[44], it was held that exceptions can be successfully relied upon even though the event preventing performance is operating at the date of the contract. An exception relating to obstructions in the port will not cover delays in bringing the cargo to the port[45] unless there are no storage facilities at the port and cargo cannot be brought from the inland facilities to the port.[46]

Laytime will also be suspended due to delays attributable to fault on the part of the shipowner. This will be the case even though the shipowner's fault is non-actionable.[47] Unless the shipowner is responsible for providing stevedores,[48] delays due to shortage of labour in the port will not amount to fault of the shipowner and laytime will not be interrupted, absent some relevant laytime exception.[49] The fault of the shipowner must be co-existent with the delay.[50]

However, charterers can also claim demurrage incurred due to the fault of the shipowner by way of damages for breach of contract by the shipowner. This will be subject to any defences available to the shipowner and the type of loss recoverable will be subject to the general contractual principles on remoteness of damage.[51] Assuming the delay has been caused by an actionable breach of contract by the owners it may be possible to recover by way of damages for consequential delay and the demurrage during that period. In *The Santa Isabella*[52] disponent owners claimed demurrage and charterers were able to establish a breach of contract on the part of the shipowners in regard of carriage of the cargo which had resulted in delays in discharging the cargo due to the need to skim off the damaged cargo and also to fumigate the cargo because of insect infestation. The owners were found to have been in breach of art III (2) of the Hague Rules, incorporated by a clause paramount, in failing properly to ventilate the cargo on the voyage and this had resulted in delays in discharging

[43] [2012] EWCA Civ 838.
[44] [1961] 1 Lloyd's Rep. 385; [1962] 1 Q.B. 42 (CA). The point did not arise when the case went to the House of Lords.
[45] *Grant v Coverdale* (1883-4) L.R. 9 App, Cas 470.
[46] (1867-68) L.R. 3 QB 412.
[47] *The Union Amsterdam* [1982] 2 Lloyd's Rep. 432.
[48] As was the case in *Harris v Best, Ryley & Co* (1892) 68 LT 76 (CA).
[49] *William Alexander & Sons v Aktieselskabet Dampskabet Hansa and others* [1920] AC 88 (HL).
[50] This has been held by the tribunal in three London arbitrations. *London Arbitration 20/14, London Arbitration 12/15, London Arbitration 19/18.*
[51] The first and second rules in *Hadley v Baxendale* (1854) 9 Ex. 341 limit the extent of liability in damages for breach of contract having regard to what was or must be taken to have been the contemplation of the contracting parties at the time they made the contract and to the natural and probable consequences of a breach of contract.
[52] [2019] EWHC 3152 (Comm); [2020] 1 Lloyd's Rep. 603.

experienced at the two South African discharge ports. Charterers were not liable for demurrage in respect of the additional time taken to discharge the cargo due to its damaged condition.

3.2 Demurrage

Once laytime expires and the vessel goes on demurrage, demurrage will continue until the completion of loading or discharging, as the case may be, or disconnection of hoses with tankers. It will not be interrupted by the laytime exceptions but will be interrupted by delays caused by fault of the shipowner. This is the famous maxim 'Once on demurrage always on demurrage'.

The pandemic may create difficulties for owners in providing supporting documents within the time stipulated in a demurrage time bar clause, usually 90 days from completion of discharge. However, owners cannot be required to do the impossible. In London Arbitration 18/89,[53] the clause provided: 'Demurrage, if any, shall be payable by the charterer against owners' invoice supported by notices of Readiness and Statements of Facts from loading and discharge ports duly signed by shippers/receivers respectively'. The tribunal noted that there had to be read into the second sentence of the clause the qualification, after the recital of the required documents, 'if such exist'. Similarly, in *The Sabrewing* [54] Gloster J stated that where the clause required presentation of documents signed by the terminal, if owners could not obtain the signatures within the 90 days, they could present letters or protest instead.

ISSUE FOUR. DEVIATION AND SEAWORTHINESS

4.1 The common law obligation not to deviate

The obligation not to deviate is implied into voyage charters. At common law, there is an implied obligation that the vessel should navigate on the direct contractual route between the load and discharge port. Deviating from the route will reduce the carrier to the status of a carrier from the moment of deviation, depriving it of the right to rely on the terms of the contract of carriage.[55] However, deviation is permissible to save life and therefore a deviation to enable a crew member to obtain treatment may be made, although many ports will refuse to allow the crew member ashore. A deviation to a port of refuge due to a threat to the safety of the crew or vessel will be justified, even if caused by the initial unseaworthiness of the vessel.[56]

4.2 The Hague Rules

The Hague/Hague-Visby Rules may be incorporated into the charter by a clause paramount. Article IV (4) provides: "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 test for determining a 'reasonable deviation' was set out in *Stag Line Ltd. v. Foscolo Mango & Co. Ltd* as something "…a prudent person controlling the voyage at the time [might] make and maintain, having in mind all the relevant circumstances existing at the time, including the terms of the contract and the interests of all parties concerned, but without obligation to consider the interests of any one as

[53] (1989) 254 LMLN 4.
[54] [2008] 1 Lloyd's Rep 286.
[55] *Hain SS Co Ltd v Tate & Lyle* (1936) 41 Comm Cas 350.
[56] Dicta of Lord Porter in *Monarch Steamship Co. Ltd. v. Karlshamns Oljiefabriker*, (H.L.) [1949] AC 196,212 suggest that this would not be the case where the vessel starts on its voyage and the master knows that it is unseaworthy.

conclusive . . ."[57] A "reasonable deviation" within Article IV (4) can be a deviation planned before the voyage begins or the bills of lading are signed, but such a planned deviation is likely to be reasonable only where the deviation is planned in order to perform the contractual adventure.[58] It is questionable whether a deviation to effect a crew change, would be admissible, in the absence of an express clause to this effect, but this may also depend on the circumstances of a case. In the context of a departure from a waiting anchorage to another port to do so, laytime and demurrage would be interrupted for the time taken from leaving anchorage to returning there, as held in *The Stolt Spur*.[59]

4.3 Unseaworthiness

At common law an obligation that the vessel will be seaworthy on loading and then again on sailing will be implied into a contract of carriage, such as a voyage charter. The obligation is absolute but may be modified by exceptions in the voyage charter. Where the charter incorporates the Hague Rules through a clause paramount, the obligation of seaworthiness will be imposed by art. III (1) and is a due diligence obligation applying before and at the start of the voyage.

Seaworthiness encompasses not just the state of the vessel and its cargoworthiness but also having a competent crew.[60] The obligation also encompasses the provision of any health documentation for the crew or vessel at the discharge port, such as a bill of health in a voyage charter in *Levy v. Costerton* [61]and a deratisation certificate in a time charter in *The Madeleine*.[62] A distinction may be made between a new crew coming on board the vessel who will be required to have had a recent COVID test which has come out negative, and the position of existing crew. Subject to availability of test kits, something which improved over summer 2020, the vessel may also be required to administer such tests and keep records of the results.

In the context of the pandemic this could arise where some of the crew members test positive at the port of discharge and the vessel is quarantined for a further period and that delay then results in deterioration of the cargo. A similar position occurred in *Ciampa v. British India Steam Navigation Co. Ltd,*[63] the vessel loaded lemons in Naples to carry to London under a bill of lading allowing her to call at any French port en route in 1915. As intended by owners, the vessel called at Marseilles where the French authorities subjected the lemons to Sulphur fumigation, because of the vessel's previous call at a plague port. The lemons were damaged, and Rowlatt J held the vessel to be unseaworthy as being unfit to receive and carry the cargo. The vessel's call at a previous port made it inevitable that the carriage of a subsequent cargo would be affected adversely by fumigation at some stage on that voyage. Accordingly, owners were not able to rely on the defence of 'restraint of princes.' Similarly, if the result of calling at a port in a country affected by COVID-19 causes delay at a later port due to quarantine restrictions, the owner would seem to be liable for damage caused by the rotting of a perishable cargo due to that extended delay in discharge.

It is unlikely that the routine safety requirements imposed in ports due to the pandemic could be said to make the vessel unseaworthy on the grounds that delay has now become inevitable. However, there may also be unseaworthiness if the quarantine is caused due to COVID being present in the crew, their having come aboard the vessel having contracted it unknowingly. A breach of Article III (1) would be then established on the part of the carrier, as the duty is non-delegable. There would,

[57] *Stag Line Ltd. v. Foscolo Mango & Co. Ltd*., [1932] A.C. 328., 343, per Lord Atkin.
[58] *The Al Taha* [1990] 2 Lloyd's Rep 117.
[59] [2001] EWHC 522 (COMM) [2002] 1 Lloyd's Rep 786.
[60] Article III (1)(b). See *The Eurasian Dream* [2002] 1 Lloyd's Rep. 719.
[61] (1816) 4 Camp. 389.
[62] [1967] 2 Lloyd's Rep 224 (QB).
[63] [1915] 2 K.B. 774.

however, be a defence of due diligence under Article IV (1), and as the duty under the Hague Rules is non-delegable this would depend whether there had been due diligence on the part of the crew members in question. Certainly, once the pandemic developed, the opportunity for contracting COVID-19 ashore would have been reduced, given restrictions on crew disembarkation at ports.

ISSUE FIVE. KNOCK-ON LOSSES DUE TO DELAY

The pandemic may cause delays which result in losses sustained by owners after the completion of the charter. With a voyage charter there will be no implied indemnity, unlike the position with a time charter, and recovery from charterers will depend on whether the delay giving rise to the post-charter losses has been caused by a breach of contract by the charterer. One such breach may be delay in discharging so that the cargo is not discharged within the allotted laydays.

Until recently there had been uncertainty as to whether or not demurrage was the exclusive remedy for the shipowner for breaches by the charterer of loading and discharging within the specified laytime, or whether demurrage only liquidated 'detention' losses where the loss is the deprivation of the shipowner of the use of its vessel. The issue arose in *K Line PTE Ltd v Priminds Shipping (HK) Co, Ltd (The Eternal Bliss)* [64] which involved a claim by shipowners against charterers arising out of delay where the vessel was kept at the anchorage for some 31 days due to port congestion at the Chinese discharge port and lack of storage space ashore for the cargo. In consequence, when the cargo of soyabeans was discharged, it exhibited substantial mould and caking. This led to a cargo claim against owners, who then settled and sought to recover from voyage charterers by way of damages for breach of their obligation to discharge within the laydays.[65]

As a preliminary point of law, acting on the assumption that the delay had caused the deterioration of the cargo, at first instance Andrew Baker J held that damages could be claimed for the cargo claim resulting from the delayed discharge, notwithstanding the demurrage provision. He added that had he come to a different conclusion, there would have been no scope for implying an indemnity-owners' 'second string to their bow', as "It would be inconsistent with that element of the express bargain to imply an indemnity rendering Priminds responsible for one of those consequences." The Court of Appeal reversed the decision and held that demurrage liquidated all claims arising out of charterers' breach of their obligation to load/discharge the vessel within the agreed laydays.[66] Accordingly, all losses sustained by owners due to delays in loading and/or discharging, will be covered exclusively by demurrage. There is, therefore, no scope for damages claims by owners for loss of subsequent fixtures due to delay, nor for recovery of cargo claims due to deterioration of cargo as a result of delay in discharge.

6. BESPOKE PANDEMIC CLAUSES. VOYAGE CHARTER CLAUSES

The normal allocation of risk for delay under a voyage charter is that the shipowner is responsible for the approach and carrying voyages and the charterer is responsible for the loading and discharging

[64] [2020] EWHC 2373 (Comm). 7 September 2020.
[65] A surprising feature of the claim is why owners settled a claim for under the Hague Rules they would have had a good chance of resisting under Article IV (2) (q). Deterioration of the cargo due to delay in discharge due to congestion would very likely constitute such a cause.
[66] [2021] EWCA Civ 1712.

operations.[67] These two stages start from the giving of a notice of readiness at berth under a berth charter and from the giving of a notice of readiness at a usual waiting place within the legal and commercial limits of the port under a port charter. In both cases the vessel must be legally and physically ready to load or discharge at the time notice is given and the requirement of free pratique and quarantines at ports will hinder the giving of a valid NOR and therefore delay the start of laytime. Once laytime begins, the risk of delay, such as slow operations in loading and discharge as a result of working practices mandated by the pandemic, will fall on charterers (and potentially on any third-party holder of a bill of lading that effectively incorporates the terms of the charterparty).

There are two principal bespoke clauses that exist for dealing with the incidence of risk under a voyage charter due to the effects of an epidemic or pandemic at the port/s of loading and discharge. The first is BIMCO's Infectious or Contagious Diseases Clause for Voyage Charter Parties 2015 which was produced in response to the Ebola epidemic in West Africa in 2014. The clause is currently under revision by BIMCO. Secondly, there is INTERTANKO's COVID-19 ('Coronavirus') Clause – Voyage charterparties which was issued on 21 February 2020. Both, seek to push the risk and costs of delay in giving NOR and starting laytime back onto charterers. Additionally, both clauses seek to clarify when the master may decide not to enter a port that may be affected by COVID-19, or to leave such a port, and when the master may decide to discharge at an alternative port to the contractual port, due to the effect of COVID-19 on the contractual port. These provisions to some extent reiterate the effect of the existing legal framework, as set out in *The Teutonia* as well as the framework provided by the 'near' clause. The clauses also aim to make charterers liable to indemnify owners for future adverse consequences they may suffer as a result of visiting a contractual port that is subject to COVID-19, something which owners would otherwise be unable to obtain.[68]

Both voyage charter clauses operate in stages when the load/discharge port is in or becomes an 'affected area'.

i. Owners' right to cancel before getting to the load port – a right given only in the BIMCO form.
ii. Owners' right to sail away from the load port with or without laden cargo.
iii. Owner's right to sail away to discharge at an alternative safe port.

These rights are exercisable only when entering into or remaining in an 'affected area' poses a risk to the vessel or crew in the reasonable judgment of the master. Under both the BIMCO and INTERTANKO clauses the associated costs and time lost which result from these potential variations in performance of the contract are recoverable from charterers. Where the contract is performed in the affected area/s, owners are entitled to recover associated costs and to be indemnified by charterers for potential future costs due to having called at a port in an affected area. The two clauses will now be considered in turn.

6.1 BIMCO Infectious or Contagious Diseases Clause for Voyage Charter Parties 2015

> (a) For the purposes of this Clause, the words:
> "Disease" means a highly infectious or contagious disease that is seriously harmful to humans.

[67] See e.g. Professor Howard Bennett and others. *Carver on Charterparties* (2nd ed Sweet and Maxwell 2020) at 1-027: "Delay at sea, extending the duration of either the loading or carrying voyage beyond that expected, is for the account of the owner. Delay in port because of berth unavailability is addressed by the concept of "laytime", namely a specified period of time for loading at the port of loading or unloading at the port of discharge. Should the vessel exceed this permitted time, the charterer incurs liability in damages in a stated amount (known as "demurrage"). Demurrage liability places on the charterer the risk of delay beyond the permitted laytime."

[68] *Ben Shipping v An Board Bainne (The "C. Joyce")* [1986] 2 Lloyd's Rep. 285 (QB).

> "Affected Area" means any 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.

The clause applies when the relevant threshold is reached and there is an 'affected area' posing a risk to vessel, crew, to other persons on board and/or risk of quarantine and other restrictions being on the vessel due to the 'disease'. In the BIMCO form this is a 'highly infectious diseases that is seriously harmful to humans'.

> (b) The Vessel shall not be obliged to proceed to or continue to or remain at any place which, in the reasonable judgement of the Master/Owners, becomes an Affected Area *after the date of this Charter Party*

The BIMCO clause is limited to events happening after the date of the charter and does not apply to pre-existing events.

> (c) In accordance with Sub-clause (b):
> (i) at any time before loading commences, the Owners may give notice to the Charterers cancelling this contract of carriage or may refuse to perform such part of it as will require the Vessel to enter or remain at an Affected Area;

The first right given to Owners is the right not to allow the vessel to proceed, continue or remain at any place that becomes an affected area. If there is such a risk, then under the BIMCO form, the Owners can cancel at any time before the start of loading.

> (ii) if loading has commenced, the Owners may notify the Charterers that the Vessel will leave with or without cargo on board, provided always that if the Charter Party provides that loading or discharging is to take place within a range of ports, the Owners shall first request the Charterers to nominate any other safe port which lies within the range for loading and discharging and may only cancel this Charter Party or leave the loading port if the Charterers fail to nominate such alternative safe port within forty-eight (48) hours of receipt of notice of such request. If part cargo has been loaded, the Vessel may complete with cargo for the Owners' account at any other port or ports whether or not on the customary route for the chartered voyage.

If the risk materialises after loading starts the vessel can leave the place, with or without cargo. If there is a range of permitted ports the Owners must notify Charterers to nominate an alternative load port within 48 hours, failing which owners may leave, with or without cargo, or may cancel. This is a separate cancellation right to the right to cancel previously given which operates prior to the start of loading.

> (d) If prior to or after arrival and in accordance with Sub-clause (b) the discharging port is determined to be in an Affected Area, the Owners may request the Charterers to nominate an alternative safe port which lies within the Charter Party range. If the Charterers fail to make such nomination within forty-eight (48) hours of receipt of the Owners' request, the Owners may discharge the cargo, or such cargo remaining on board if discharging has not been completed, at any safe port of their choice (including the port of loading) in complete fulfilment of the contract of carriage. If discharge takes place at any port other than the loading port or at a port that lies outside the range of ports in the Charter Party, the Owners shall be entitled to recover from the Charterers the extra expenses of such discharge, to receive full freight as if the cargo had been carried to the discharging port and, if the extra

distance exceeds 100 miles, to additional freight which shall be the same percentage of the freight contracted for as the percentage which the extra distance represents to the distance of the normal and customary route. The Owners shall have a lien on the cargo for such extra expenses and freight.

If, prior to or after arrival, the discharge port is at risk, Owners may give 48 hours notice to charterers to nominate an alternative safe port from the charter range, failing which Owners my discharge the cargo, or cargo remaining on board, at any safe port of their choice, including the port of loading. If that port is outside the charter range, Owners may claim expenses, full freight, plus extra pro rata freight, if that port is more than 100 miles away, and are granted a lien for these items.

(e) The Owners shall not be obliged to sign, and the Charterers shall not allow or authorise the signing of, bills of lading, waybills or other documents evidencing contracts of carriage for any Affected Area.

(f) If, notwithstanding Sub-clauses (b) to (e), the Vessel does proceed to or continue to or remain at an Affected Area:

(i) The Owners shall notify the Charterers of their decision but the Owners shall not be deemed to have waived any of their rights under this Charter Party.

Owners' conduct may waive their right to reject the order to enter an unsafe port, but not the right to claim damages for consequent losses.[69] Further, in *The Stork*[70], Devlin J suggested that, if the port was obviously unsafe and damage was bound to result, then the owner's action in continuing with the voyage might break the chain of causation so that the owner would thereby forfeit his right to damages. This provision makes clear that entering an 'affected area' will not amount to a waiver by the Owners of either of these rights.

(ii) The Owners shall endeavour to take such reasonable measures in relation to the Disease as may from time to time be recommended by the World Health Organisation.

Owners' obligation is one taking 'reasonable measures' in line with WHO recommendations.

(iii) Any 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 any time lost shall count as laytime or time on demurrage.

This sub-paragraph provides a comprehensive right to Owners to recover from Charterers any additional costs, etc, from the vessel visiting an affected area, including any quarantine of vessel and crew, with any time lost to count as laytime or time on demurrage. The risk of delay in giving NOR pending free pratique is therefore transferred from Owners to Charterers.

(g) The Vessel shall have liberty to comply with all orders, directions, recommendations or advice of competent authorities and/or the Flag State of the Vessel in respect of arrival, routes, ports of call, destinations, discharge of cargo, delivery or in any other respect whatsoever relating to issues arising as a result of the Vessel being or having been ordered to an Affected Area.

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[69] *The Kanchenjunga* [1990] 1 Lloyd's Rep. 391 (HL).
[70] [1954] 2Ll LR 397.

> (h) If in compliance with this Clause anything is done or not done, such shall not be deemed a deviation but shall be considered as due fulfilment of this Charter Party. In the event of a conflict between the provisions of this Clause and any implied or express provision of this Charter Party, this Clause shall prevail to the extent of such conflict, but no further.

This provides that complying with the clause does not constitute a deviation, and the clause prevails over express or implied provisions of the charter in the event of a conflict.

> (i) The Charterers shall indemnify the Owners for claims arising out of the Vessel proceeding in accordance with any of the provisions of Sub-clauses (b) to (h) which are made under any bills of lading, waybills or other documents evidencing contracts of carriage.

This provides Owners an indemnity from Charterers for claims that may be brought under bills of lading, waybills and other carriage documents in respect of losses arising from the vessel proceeding to alternative places of loading and discharge in accordance with the rights detailed in sub-clauses (b) to (h).

> (j) The Charterers shall procure that this Clause shall be incorporated into all bills of lading, waybills or other documents evidencing contracts of carriage issued pursuant to this Charter Party.

The provision requires the clause as a whole to be incorporated into all bills of lading, waybills or other documents evidencing contracts of carriage issued 'pursuant to this Charter Party'; as noted above, sub-clause (e) also states that "The Owners shall not be obliged to sign, and the Charterers shall not allow or authorise the signing of bills of lading, waybills or other documents evidencing contracts of carriage for any Affected Area". Once incorporated, the clause will affect third party holders of charterparty bills of lading and waybills as regards the rights of redirection given to owners if the port of loading or port of discharge are determined to be in an 'Affected Area'. This will be a "Caspiana" clause and treated as setting out the obligation of the voyage undertaken by the Owners, as with the strike clause in *Renton v Palmyra*[71] and will not be rendered null and void by Article III, (8) of the Hague and Hague-Visby Rules. However, the indemnity provision in sub-clause (i) will not be effective against third party holders of such documents as it specifically provides that "Charterers" are to provide the indemnity.[72] As already mentioned, the clause provides for it to have paramount effect over other clauses in the charter.

BIMCO is currently updating both its voyage and time charter clauses for infectious and contagious diseases. In July 2021 its press release stated:

The COVID-19 pandemic in contrast has presented different challenges because it is a pandemic and its impact is global. This means in the context of the IOCD Clauses that the entire world could arguably be an "Affected Area".

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[71] [1956] 2 Lloyd's Rep. 379 (HL).

[72] See *The Miramar* 1984 AC 676 where a bill of lading incorporated a voyage charterparty which provided for charterers to pay demurrage. The House of Lords rejected any manipulation of language to extend the liability for demurrage to the bill of lading consignee. See also *The Polar* [2021] EWCA Civ 1828 as to the effect of the incorporation of a war risks and a Gulf of Aden clause into the bills of lading. The liberties given to the shipowner not to continue with the voyage or to deviate from the usual route were germane to the loading, carriage and discharge of the cargo and were therefore incorporated into the bills of lading, but the obligation of the "charterer" to bear the expenses caused by the exercise of such liberties was not incorporated and the court declined to manipulate the language of the charter so as to impose an obligation on the bill of lading holders.

The revised IOCD Clauses will be appropriate for outbreaks of both an epidemic and pandemic scale. The aim is not to produce specific COVID-19 clauses but instead to ensure that the revised IOCD Clauses have a generic application with a long shelf life because no one can predict the nature of epidemics or pandemics in the future.

Since not every disease covered by the clauses will pose a significant risk to human life, there will not be an automatic right for owners to refuse to call at an area where there is an outbreak. The revised clauses will take account of the fact that protective measures can be put in place to protect the crew and still allow the ship to trade.

Refusal to call at a port: the last resort
Under the new clauses the right of owners to refuse to call at a port will be a remedy of last resort available only in extreme situations where whatever measures the owners have taken will be insufficient to protect the crew.

BIMCO Force Majeure Clause 2022[73]

BIMCO has also produced a force majeure clause. The clause lists various force majeure events including "plague, epidemic, pandemic" but requires the affected party to prove that the Force Majeure Event could not reasonably have been foreseen at the time of the conclusion of the contract, which makes it unlikely to be applicable in the current pandemic.

6.2. INTERTANKO COVID-19 ('Coronavirus') Clause – Voyage charterparties[74]

The clause was drawn up by INTERTANKO on 21 February 2020, at a time when there was still doubt as to whether COVID-19 (coronavirus) would qualify under the definition of 'disease' in the BIMCO clause considered above. It expressly refers to 'coronavirus', and to no other infectious diseases.

1. Notwithstanding any other term to the contrary in this charterparty, the Vessel will not be required to call at any port, place, country or region if in the Master's or Owners' reasonable judgement there may be a risk of exposure of the crew or other persons on board to Covid-19 ('Coronavirus').

The provision applies when the relevant threshold is reached and there is a risk of exposure of the crew or other persons on board to Coronavirus. There is no reference to the risk of subsequent quarantining of the vessel, as per the definition of 'affected area' in the BIMCO clause. The assessment of risk is based on the reasonable judgement of the master or owners. The vessel is not required to call at any such port if there is such a risk of exposure to Coronavirus.

2. Should Charterers order the Vessel to a port, place, country or region which is presently or subsequently becomes affected by the Coronavirus virus (the 'Coronavirus Affected Area') and if such order has not been refused in accordance with sub-clause 1 hereof, then the

[73] https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/force-majeure-clause-2022.
[74] Available at https://www.intertanko.com/info-centre/model-clauses-library/templateclausearticle/intertanko-covid-19-coronavirus-clause-voyage-charterparties. An explanatory note is available at https://www.intertanko.com/info-centre/model-clauses-library/templateclausearticle/intertanko-covid-19-coronavirus-clause-voyage-charterparties-explanatory-notes.

following provisions to apply:
a) If, prior to reaching the load or discharge port, in the reasonable judgement of the Master or Owners, the level of risk of exposure of the crew and other persons on board to the Coronavirus virus becomes unacceptable, Owners shall be entitled to request fresh voyage orders from Charterers.
b) If, following tender of notice of readiness, either prior to or during loading or discharge, in the reasonable judgment of the Master or Owners, the level of risk of exposure of the crew or other persons on board to the Coronavirus becomes unacceptable, the Vessel may proceed to a safe waiting place and Owners shall be entitled to request fresh orders from Charterers.

Paragraphs (a) and (b) deal with Owners' rights if the level of risk of exposure to Coronavirus becomes unacceptable, in the reasonable judgment of the Master/Owners. If that is the case, Owners may request fresh orders, prior to reaching the load or discharge port, and similarly, if the risk becomes unacceptable following tender of NOR point, the Owners have the liberty of proceeding to a waiting place to await fresh orders from the Charterers. The BIMCO clause, by contrast, gives Owners these rights when there is an order to go to an 'Affected Area' with no reference to the risk of exposure being unacceptable. The BIMCO clause also provides for two instances of cancellation by Owners as a result of risks in the 'Affected Area'. There are no rights to cancel in the INTERTANKO clause.

c) Any time taken for the purposes of obtaining free pratique shall be for Charterers' account and shall not prevent the tender of a valid and effective notice of readiness.

Specific reference is made in (c) to time taken for the granting of free pratique to be for the account of charterers and not to prevent the valid tender of NOR. This means the relevant risk of delay is shifted from the Owners to the Charterers. Once laytime has started the form is silent and therefore the risk of slow operations in the port remains with Charterers. This is also the cases with the BIMCO form.

d) Charterers shall arrange at their time and expense for all appropriate inspections and certification, including but not limited to screening, cleaning, fumigation, quarantine of the Vessel and/or crew or other persons on board and the obtaining of medical advice and/or treatment, as required at any port or place where the Vessel calls under this charterparty.

This sets out Charterers' obligations as regards arranging and paying for all 'appropriate inspections and certification'… 'as required at any port …'. While it is clear that the intention of the clause is for the Charterers to be responsible for the related costs, some of the wording of the clause may be open to interpretation. For instance, what specific obligations the clause entails regarding 'quarantine of the Vessel and/or Crew' and 'obtaining of medical advice and/or treatment', is not entirely clear, given that Owners' are responsible for the ship and crew, including in respect of health and safety and any related requirements by port authorities.

e) Owners shall promptly provide any recent crew health records, evidence of the Vessel's prior trading pattern, and other existing documentation required by the port authorities for the purposes of free pratique. Owners shall ensure that shore leave for any crew member in a Coronavirus Affected Area shall be prohibited.

This paragraph provides for Owners' obligations to promptly provide documentation required by the port authorities for the purposes of free pratique. This is important for Charterers in the light of sub-clause (c). A breach of this obligation would mean that laytime would be suspended for any time lost thereby due to the fault of the shipowner. Significantly, Owners must prohibit shore leave for any crew member in a Coronavirus Affected Area, something which is not provided for in the BIMCO clause.

> f) In the event Charterers fail to provide alternative voyage orders as required in sub-clause 2 (a) or (b) above within 48 hours of receiving the request for new orders, Owners shall be entitled to discharge the cargo at any safe port of their choice (including at the loading port) which shall be considered as complete fulfilment of this charterparty. Owners shall be entitled to recover from Charterers the extra expenses of such discharge and to receive the full freight as though the cargo had been carried to the discharge port, Owners shall have a lien on the cargo for such expenses and freight.

This paragraph provides for the rights of Owners to discharge at an alternative safe port of their choice in the event that Charterers do not respond within 48 hours for Owners' request for new orders. Similar to the BIMCO clause, the Owners' choice of an alternative safe port appears to be entirely free, i.e. not limited to any safe port that is 'near'; this could be problematic for the Charterer, as well as any third-party holder of a charterparty bill of lading, such as a CIF buyer, whose cargo may be affected by the Owners' contractual lien. The INTERTANKO form makes no reference to the right to claim additional pro rata freight in the event of the vessel discharging at a distant alternative safe port.

3. Should the Vessel be boycotted, refused admission to port, quarantined, or otherwise delayed in any manner whatsoever by reason of having proceeded to a Coronavirus Affected Area, for all time lost Owners to be compensated by Charterers at the demurrage rate and all direct losses, damages and/or expenses incurred by Owners shall be paid by Charterers. In the event that the Vessel is boycotted, refused admission, or otherwise delayed as stated above within 30 days after having completed discharge under this charterparty, then Charterers are to compensate Owners for all time lost as a result at the demurrage rate in addition to compensating Owners for all direct losses, damages, and or expenses which may arise as a result of the above.

This sub-clause provides for Charterers to compensate Owners at the demurrage rate for all time lost as a result of going to a Coronavirus affected area, as well as to pay for all direct losses, damages and/or expenses. In addition, Charterers must compensate for lost time at the demurrage rate, as well pay for all direct losses, damages and/or expenses, in the event of boycotts, or refusal of admission, of the vessel or other delays as a result of having proceeded to a Coronavirus affected area, which occur within 30 days of completion of discharge under the present charter. This is a liability that would not exist under a normal voyage charter and may include delays or expenses under a subsequent fixture.

4. Owners and Charterers agree that the outbreak of Coronavirus virus shall not be considered as force majeure or as a frustrating event of the charterparty.

This provision aims to exclude the effect of any force majeure exception clause or of the doctrine of frustration in relation to the outbreak of Coronavirus. There is no equivalent in the BIMCO form.

5. The Vessel shall have liberty to comply with all orders, directions, recommendations, precautionary measures or advice of any governmental or International authority and/or the

Flag State of the Vessel relating to or arising as a result of the Vessel being ordered to a Coronavirus Affected Area.

6. Charterers shall ensure that all Bills of Lading for cargo to be carried under this charterparty shall incorporate the above provisions.

As with the BIMCO clause, bill of lading holders will be affected by the redirection provisions of the incorporated clause, but will not be subject to any of the liabilities which are imposed on 'Charterers'.

6.3. Charterers' Club clauses

The BIMCO and INTERTANKO clauses are very owner-focused. By contrast the *Charterers Club*[75] have provided a contagious disease clause for voyage charters.

Voyage Charterparty Contagious Disease Clause

> Notwithstanding any other provision in this charter party the Charterers shall not be liable for any damage and/or delay due to voyage orders that result in the Vessel calling at a port where fever and/or epidemics and/or contagious disease are prevalent in the circumstances where such fever and/or epidemics are widely publicised. It will be the responsibility of the Master and/or crew to maintain an up to date knowledge of the spread of these fevers and/or epidemics and/or contagious disease and advise the Charterers of any issues with the voyage order as soon as possible once the voyage order has been made. Should any other provision in this charter party conflict with this clause then this clause shall be considered paramount and as such will override any contrary provision.

The clause ensures that Charterers incur no liability due to voyage orders for a port where "*fever and/or epidemics and/or contagious disease are prevalent in the circumstances where such fever and/or epidemics are widely publicised."* The existing charter laytime and demurrage regime is unaffected and delays in giving NOR and starting laytime will continue to be at Owners' risk.

Adapted Contagious Disease Clause

Charterers' Club have also provided an adapted version of the BIMCO Infectious Disease Clause for Voyage Charters, as follows.

> a) The Vessel shall not be obliged to proceed to or from, or continue to, or through, or remain at, any port, place, area or country (hereinafter "Affected Area") which will expose the Vessel and crew, or other persons on board the Vessel, to the risk of infection from highly infectious diseases as determined and notified by the World Health Organization to be harmful to human health;

The threshold here for Owners being allowed not to proceed to an affected area is exposure to the risk of infection from highly infectious diseases as determined and notified by the World Health Organization to be harmful to human health and, in contrast to the BIMCO and INTERTANKO clauses, is not based on the reasonable judgement of the master.

> b) The Vessel should not proceed, or continue to, or through, or remain in an Affected Area provided Owners are able to document through competent international authorities the risk

[75] https://www.themecogroup.co.uk/charterers-liability-insurance/.

> of infection in which case they must immediately contact the Charterers. Wherever legally permissible, bearing in mind obligations under insurances and other contracts, including but not limited to Bills of Lading (under which Owners may also have binding obligations and a need to maintain insurance coverage) Charterers shall use reasonable endeavours [sic] to issue alternative voyage orders;

Owners' rights as regards affected areas are subject to Owners documenting of the risk of infection through competent international authorities, rather than by reliance on the reasonable judgment of the master. Charterers' obligation to issue alternative voyage orders is one of 'reasonable endeavours'. There is no reference to Owners being able to "discharge the cargo, or such cargo remaining on board if discharging has not been completed, at any safe port of their choice (including the port of loading) in complete fulfilment of the contract of carriage" in the event that the discharging port is in an affected area and the charterers have failed to respond within 48 hours to owners' request for them to nominate an alternative safe port within the charterparty range.

> c) The Vessel shall have liberty to comply with all orders, directions, recommendations or advice of competent authorities and/ or the Flag State of the Vessel in respect of arrival, routes, ports of call, destinations, discharge of cargo, delivery, or in any other respect whatsoever relating to issues arising as a result of the Vessel being ordered to an Affected Area;
> d) Any additional costs and expenses arising out of the Vessel visiting an Affected Area, including but not limited to screening, cleaning, fumigating and/ or quarantining the Vessel and its crew for such diseases either in the Affected Area, or at subsequent ports of call, shall be for the Charterers' account provided said costs are reasonably incurred and are fully documented and provided further they have not been generated by Vessel/Crew/Owners' fault or negligence in complying with this Clause.
> e) If in compliance with this Clause anything is done or not done, such shall not be deemed a deviation, but shall be considered as due fulfilment of this Charter Party. In the event of a conflict between the provisions of this Clause and any implied or express provision of the Charter Party, this Clause shall prevail to the extent of such conflict, but no further.

The provision is similar to the respective BIMCO and INTERTANKO clauses in terms of allocation of responsibility. However, the wording in sub-clause (d) reflects a more balanced approach, as Owners' additional costs and expenses are only for the Charterers' account if reasonably incurred, fully documented and not resulting from negligence. The adapted clause does not provide for and any time lost to count as laytime or time on demurrage as is the case in (f)(iii) of the BIMCO clause. The compensation[76] and indemnity provisions[77] of the BIMCO clause do not appear, and there is no reference to charterers having to procure that "this Clause shall be incorporated into all bills of lading, waybills or other documents evidencing contracts of carriage issued pursuant to this Charter Party".[78]

[76] Para (d) "…If discharge takes place at any port other than the loading port or at a port that lies outside the range of ports in the Charter Party, the Owners shall be entitled to recover from the Charterers the extra expenses of such discharge, to receive full freight as if the cargo had been carried to the discharging port and, if the extra distance exceeds 100 miles, to additional freight which shall be the same percentage of the freight contracted for as the percentage which the extra distance represents to the distance of the normal and customary route. The Owners shall have a lien on the cargo for such extra expenses and freight."

[77] Para h(i) "(i) The Charterers shall indemnify the Owners for claims arising out of the Vessel proceeding in accordance with any of the provisions of Sub-clauses (b) to (h) which are made under any bills of lading, waybills or other documents evidencing contracts of carriage."

[78] Para j.