

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

Time Charterparties

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Contents

- 1 Time charterparties..... 2
 - 1.1 Introduction..... 2
 - 1.2 General obligations and allocation of risks under a time charterparty..... 3
 - 1.3 When is the time-charterparty’s performance affected by Covid-19? 5
 - 1.3.1 Would the nomination of a Covid-19 infected port be contractual?..... 6
 - 1.3.2 Can the time charterer recover for delays caused by Covid-19? 6
 - 1.3.3 Regulations that may lead to the detention or exclusion of the ship due to a breach of crewing provisions 8
 - 1.3.4 General closure of a port and redirection 9
 - 1.3.5 Cancellation of the charterparty due to delay..... 9
 - 1.3.6 Late redelivery due to delay..... 9
 - 1.3.7 Reduction in speed due to delays at or outside a port..... 10
 - 1.4 Cargo damage and delays..... 10
- 2 Developing clauses to resolve time-charterparty disputes 11
 - 2.1 BIMCO Infectious or Contagious Diseases Clause for Time Charter Parties 2015 11
 - 2.2 INTERTANKO Covid-19 (‘Coronavirus’) Clause – Time charterparties 13
 - 2.3 INTERTANKO Covid-19 (‘Coronavirus’) Additional Vetting Inspection Clause..... 14
 - 2.4 BIMCO COVID-19 Crew Change Clause for Time Charter Parties 2020 14
 - 2.5 INTERTANKO Owners’ Right to Change Crew Clause – Time Charterparties 14
 - 2.6 Charterers club clauses..... 14
 - 2.6.1 Contagious Disease Clause 14
 - 2.6.2 Adapted Contagious Disease Clause 15
 - 2.7 Recent Developments..... 16
 - 2.7.1 BIMCO Infectious or Contagious Diseases Clause for Time Charter Parties 2022... 16

¹ The views expressed are those of the author and do not necessarily reflect the view of the United Nations.

1 Time charterparties

1.1 Introduction

In a Time Charterparty, the owner (or the bareboat charterer if the ship is under such a charter, or in some cases another time charterer), charters the vessel to a time charterer for an agreed period of time. Time charters may be under a demise-charter party and may be used to sub-charter the ship under another time-charterparty, voyage charterparty or other similar contract. A time charterparty can range for a few weeks to several years. In exchange, the time charterer pays money regularly. The payment is called **hire**.

A charterparty does not need a special form and does not need to be signed (*Lidgett v Williams*)². It is however convenient and rather common that parties negotiate by modifying standard charterparty forms. The advantages in doing so are, that such forms include arrangements on the obligations and the general risk allocation, which minimizes the possibility of omissions; also relevant standard form terms have often benefitted from interpretation of their terms by courts and arbitrations thus they provide, if not amended, more certainty concerning their meaning.

The general contract law applies to a time charterparty. Thus, it must be lawful and must not violate any public policy restrictions. There is no specific statutory intervention with respect to time-charterparties. As a result, the parties are free to agree on the allocation of risk between them. The interpretation of a charterparty is based on the law applicable to the contract, which for this course is assumed to be English law. The construction of the contract is made against the commercial background.

*"In interpreting a contract the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge that would have been available to the parties would have understood them to be using the language in the contract to mean; the court focuses on the meaning of the words in their documentary, factual and commercial context..."*³

The relevance of the background knowledge of the parties can be considered in the context of the pandemic by discussing the background knowledge available to the negotiating parties when the contract has been formed:

- (i) Before Covid-19 appeared
- (ii) After Covid-19 appeared but before Covid -19 was declared a pandemic
- (iii) After Covid-19 was declared a pandemic but before Covid-19 "living with the virus" policies were developed in different countries.

Of course, the timing of the appearance of variants of concern (VOCs) that are more contagious or virulent (high mortality rate) can also be of relevance. As charterparties can cover very short or very long periods of time, the background to the agreement as envisaged by the parties at the time they formed the contract could be important in constructing how they have allocated the risks arising from Covid-19.

For example, where the contract was formed before Covid-19 was identified then the interpretation of the contract cannot be taken to include negotiation of the Covid-19 risks. In such a case the interpretation

² *Lidgett v Williams* (1845) 14 L.J.Ch.459).

³ *Acongva Bay* [2018] 2 Lloyd's Rep. 382.

of risk allocation clauses will depend on whether the wording used includes covering public health emergencies, pandemics etc. By contrast, if the contract has been formed after Covid-19 became a commonplace problem around the world a different interpretation may be adopted because the background context is different.

1.2 General obligations and allocation of risks under a time charterparty

The owner has to provide the services of the named ship for the agreed period of time⁴. The service starts with the delivery of the vessel, ready to provide the agreed services to the charterers by following their orders. Delivery has to be at the place agreed in the contract and also during the agreed period of time. The time charterparty ends with the redelivery of the vessel to the shipowner at the agreed place or area of the world. The time of redelivery must be consistent with the agreed length of the time charterparty as agreed in the contract. Because of the vulnerability of shipping to delays courts are prepared to assume a margin around the day of redelivery. Thus, where the charterparty is for 12 months a margin of a few days before and after the one year marked will be allowed to the charterer for redelivery. Where such a margin has been already included in the contract no additional margin is provided. The vessel must comply with the contractual arrangements at the time of delivery⁵ and must be returned undamaged, in a similar order as delivered excepting ordinary wear and tear. If the contract is not presented for service to the charterers at the agreed place, within the agreed period of time or in the condition agreed the charterer would normally have an express right to cancel the charterparty irrespective of whether the contractual breach has been caused by a fault of the shipowner or by some other factor beyond the control of the shipowner.

Covid-19 delays in performing previous contracts, delays in rotating the crew, delays caused by the quarantine orders issued by the port authorities or delays in undertaking necessary inspections to obtain clearance of access to the port or confirm the readiness of the ship all may lead to a failure by the shipowner to meet the conditions for the delivery of the ship. Similar delays at the end of the charterparty period may lead to the charter failing to redeliver in time thus committing a breach of contract. It is not known whether for a contract agreed within the Covid-19 reality the courts would be prepared to assume wider margins for the redelivery of the vessel.

During this period the master is normally under the orders of the charterer. This means that, with respect to loading and discharge ports, docks and berths as well as cargo type and quantity the time charterer's orders have to be followed provided, they are within the agreement.⁶ Similarly, the master has to sign bills of lading as presented by the charterers in accordance with the charterparty.⁷

The time charterer may only be able to nominate ports in an agreed trading area⁸ or may even be restricted by the contract to nominate only ports which are prospectively safe⁹ within the meaning of the Eastern City test.¹⁰

⁴ *The Rowan* (CA) [2012], 1 Lloyd's Law Rep., 564.

⁵ but see *French v Newgass* (1878) 3 CPD 163.

⁶ *The Sussex Oak* (1949) 83 Ll.L.Rep. 297, at page 307.

⁷ *The Nanfri* [1978] 2 Lloyd's Rep 132.

⁸ *Temple Steamship v. Sovfracht* (1945) 79 Ll.L.Rep. 1 HL.

⁹ *The Evaggelos Th* [1971] 2 Lloyd's Rep. 200.

¹⁰ *Leeds Shipping Co Ltd v Société Française Bunge (The Eastern City)* [1958] 2 Lloyd's Rep 127 which states: "A port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship."

Furthermore, the charterer must have the ship redelivered to the shipowner at the end of the agreed period so it cannot give an order which would bring the ship back after the expiration of that period.¹¹

Similarly, the charterer may order the loading of cargo, type and quantity, permissible under the contract.¹² Such cargo must also be lawful and, if dangerous, its dangerous character must be notified to the master before loading unless such knowledge is available to the shipowner.¹³

If the charterer's orders are inconsistent with the contract the shipowner is entitled to refuse to follow them and ask for fresh orders (in the context of redelivery.¹⁴ If the charterer refuses to give contractual orders then the shipowner can accept such conduct as a repudiatory breach, terminate the contract and sue for damages (in the context of cargo not agreed under the charterparty.¹⁵ Alternatively, the shipowner can follow the orders under protest, ensuring that it protects any right for damages arising from the breach of contract.¹⁶

Notably, the obedience of the master to charterers' orders does not waive any rights the shipowner has against the charterer.¹⁷

Furthermore, the English courts will imply an indemnity for liability incurred by the shipowner as a consequence of compliance with an order given by the charterer. In *The Georges Christos Lemos* - third party proceedings¹⁸ this was expressed in the following terms: "*Under a time charter-party, the shipowner puts the vessel at the disposal of the charterer, who can choose for himself what cargoes he shall load, and where he shall send the ship, provided that the limits prescribed by the contract are not exceeded. When deciding who has to bear the consequences of a choice being made in one way rather than the other, it is reasonable to assume that the consequences shall fall upon the person who made the choice; for it is the charterer who has the opportunity to decide upon the wisdom of the selection which he makes from within the range of permissible cargoes.*"

The shipowner normally has obligations to maintain the ship's operational capability in a number of respects including physical (for example seaworthiness, speed, bunker consumption), documentary (for example, class and statutory certification) and by having appropriate insurance in place. The exact arrangement depends on the contractual clause. Notably satisfying the flag state's obligations in relation to manning and to the rotation of crew form part of the statutory requirements which must be complied with.

The shipowner also has the obligation to perform the time charterparty duties, including the loading and discharging operations with the utmost despatch, unless the responsibility for the cargo operations has been transferred to the time-charterers.¹⁹

A separate clause normally allocates the obligations to provide bunkers of appropriate quality (as well as the ownership of the bunkers); and the payment of the various fees and expenditures that may be incurred over the period of the charterparty as the ship trades around the world. Any changes in the price are on the party that contractually assumes the related risk.

¹¹ *The Democritos* [1976] 2 Lloyd's Rep. 149.

¹² *Chandris v. Isbrandtsen-Moller* [1951] 1 KB 240 (CA).

¹³ *Brass v. Maitland* (1856) 6 El & Bl 470 (CA).

¹⁴ *The Gregos* [1995] 1 Lloyd's Rep 1.

¹⁵ See *Chandris v. Isbrandtsen-Moller* [1951] 1 KB 240 (CA).

¹⁶ In the context of safe port see *The Kanchenjunga* [1990] 1 Lloyd's Rep. 391.

¹⁷ *Temple Steamship v Sovfracht* (1945) 79 Ll.L.Rep 1.

¹⁸ *Georges Christos Limos* [1991] 2 Lloyd's Rep. 107.

¹⁹ *The Filikos*, [1983] 1 Lloyd's Rep. 9.

The time charterer has to pay hire regularly, in advance and in full in accordance with the contract.²⁰ Failure to do so entitles the shipowner, under most time charterparties,²¹ to withdraw the ship after following the process provided by the contract, which sometimes grants a grace period to the charterer, so that it can remedy any underpayment, before the right of withdrawal arises.²² Deduction from the hire can only be made where the contract permits such deductions, normally under an express off-hire clause or where the shipowner has wrongfully withheld the services of the ship for a period of time for which hire had already been paid.²³ The latter requirement means that the time charterers can in essence adjust the payment in advance by getting credit for time for which it has already paid but the vessel had not been made available to it. It appears that when the ship is off-hire the obligation to pay hire punctually and on time does not arise until the ship is back on service.²⁴

General exception clauses and the incorporation of the Hague of Hague Visby Rules may affect the liability of the parties to the charterparty, including applicable levels of liability²⁵. The Hague-Visby Rules, in particular, may modify the levels of liability; obligations of the shipowner with respect to seaworthiness before and at the beginning of every voyage may impose general obligations regarding the care of the cargo and may introduce a number of exceptions in respect of cargo liability.²⁶ In addition, incorporation of the Hague or Hague-Visby Rules may affect quantum and time limitations for some claims.

1.3 When is the time-charterparty's performance affected by Covid-19?

Based on the general outline provided above, the effect Covid-19 may have can be discussed as allocated risks taking into account the differentiation in the interpretation of the contractual arrangements which is relevant to the timing of the fixture in relation to the stage of development of the pandemic.

The major effects Covid-19 can have either as a disease affecting the operations of a port or by protective measures taken by a coastal state include the following:

1. Health risks to the crew when the ship visits a port infected by Covid-19
2. Delays in crew changes which may affect the crewing level.
3. Delays in the port operations
4. Congestion at the port.
5. Delays in the access to the port due to denial of free pratique or quarantine/vaccination requirements
6. Cancellation due to delays in granting free pratique or quarantine requirements –
7. Late delivery of the ship.
8. Late redelivery due to delays in granting free pratique or quarantine requirements-
9. Reduction in speed due to delays in port

²⁰ *The Afovos* [1983] 1 Lloyd's Rep 335 (HL).

²¹ This entitlement is based on an express clause in the charterparty. Failure to pay hire is in itself an innominate term see *SPAR SHIPPING AS v GRAND CHINA LOGISTICS HOLDING (GROUP) CO LTD (THE "SPAR CAPELLA", "SPAR VEGA" AND "SPAR DRACO")* [2016] EWCA Civ 982.

²² *The Afovos* [1983] 1 Lloyd's Rep 335; *The Pamela* [1995] 2 Lloyd's Rep 249.

²³ *The Nanfri* [1978] 2 Lloyd's Rep 132 (CA).

²⁴ *The Lutetian* [1982] 2 Lloyd's Rep. 140).

²⁵ In the context of charterparty contracts, the Hague-Visby Rules do not apply mandatorily; therefore, where the Rules are incorporated into the charterparty, their provisions do not necessarily take precedence over any other conflicting charterparty terms. Courts would consider the relevant terms in context and seek to determine the intention of the parties, as a matter of construction of the contract.

²⁶ *The Nanfri* [1978] 2 Lloyd's Rep 132 (CA).

10. Regulations that make a port inaccessible to a specific ship
11. Redirection of the ship to another port
12. Frustration of contract due to delays
13. Cargo damage due to delays

1.3.1 Would the nomination of a Covid-19 infected port be contractual?

Provided that the port is within the trading area, in the absence of an express or implied safe port warranty, the nomination of the port is within the rights of the charterer whether the contract was formed before or after the recognition of Covid-19 as a pandemic.

Even where there is an express safe port warranty or where such a warranty may be implied, the risk of crew infection alone at a nominated port does not normally threaten the safety of the adventure in general and thus it would still remain a contractual nomination which has to be followed by the owner. The situation will depend of course on the consequences of such an infection on the crew.

Arguably, in a time charterparty, the delays are for the charterer's account, except where the off-hire clause operates or where the charterer is wrongfully deprived of the use of the ship. Therefore, the shipowner would not have an interest in asking for a re-nomination of the port unless the lives of the crew or the future ability of the ship to trade, after the completion of the time-charterparty, would be in question.

Presumably, a variant of the virus which would be life-threatening to a normal person could make the nomination of a port unsafe and may permit a demand for re-nomination but this may also depend on other factors, for instance whether appropriate protective measures could be taken to protect the crew.

1.3.2 Can the time charterer recover for delays caused by Covid-19?

Delays can be caused by:

- the lack of personnel providing ship/port services
- denial of free pratique to the specific ship due to infections or refusal/lack of testing or vaccination,²⁷
- general quarantine requirements imposed by the coastal state on all ships

The charterer may have the right to deduct from hire the equivalent for time lost when the ship has been off-hire under the contract. This, in turn, requires that the time charterer proves that the particular delay is one covered by the terms of the off-hire clause, irrespective of whether the shipowner has breached the charterparty, and that it has caused loss of time to the charterer.

1.3.2.1 Delays due to the lack of personnel providing port services

The direction of the ship to the specific port is a charterer's decision. Thus, ordinary delays in the form of unavailability of berth, lack of tug boats, or personnel to provide for free pratique are risks to be borne by the charterer. Off-hire clauses normally operate by reference to events that make the services of the vessel unavailable to the charterer. Where a ship is in all aspects capable to perform the service but is stopped by deficiencies in the port service provided, very clear wording would be needed to make the off-hire clause operate for the benefit of the charterer.

²⁷ <https://safety4sea.com/crew-vaccination-requirements-from-vessels-arriving-at-ghanaian-ports/>.

1.3.2.2 Denial of free pratique to the specific ship due to infections or refusal/lack of testing/vaccination.

It is not possible to discuss all off-hire clauses. Several of them include the loss of time from “deficiency of and/or default of men.” (For example, NYPE 1946 Clause 15). There is no authoritative decision on the point. An obiter comment by the High Court judge in *Royal Greek Government v Ministry of Transport*²⁸ suggests that were the crew ill in that case, the off hire clause would operate. However, this was doubted in the Court of Appeal by LJ Bucknill while it was taken to refer to numerical deficiency by LJ Cohen, another judge.²⁹ All comments were obiter (i.e. judicial expressions of opinion that are not binding). The law in the US takes a functional approach which considers whether the delay was caused by the crew's illness. If it did then the charterer is protected by the off-hire clause.

Off-hire clauses usually also refer to “any other clause preventing the full working of the vessel” (NYPE 1946, Clause 15) or even to “any other clause preventing the full working of the vessel whatsoever”. In *The Apollo*,³⁰ it was said by Mocatta J: “It is for the owners to provide the ship and the crew to work her and provide the service then required by the charterers. Here the obtaining of free pratique was no mere formality owing to the illness of the two members of the crew, who had to be discharged to hospital at the vessel's previous port of call suffering from suspected typhus. Where the obtaining of health clearance is a mere formality, I think the very minor delays, if any, involved in obtaining it would not bring the off-hire clause into play, since the ship would be able to render the service then required of her. But in the present case the obtaining of free pratique was no mere formality and there was good cause for the careful testing and disinfection that was carried out before free pratique was given involving a delay of 29 1/2 hours. In my judgment the action taken by the port health authorities did prevent the full working of the vessel and did bring the off-hire clause into play.”

1.3.2.3 Delays due to general quarantine requirements imposed by the coastal state on all ships

These delays would fall under a category of claims for off-hire linked with restrictions imposed by the authorities. However, case law is not always clear in the way decisions by authorities can trigger the off-hire clause.

- Where the departure of the vessel from a river was prohibited by the erection of a boom built by the Chinese government to keep the Japanese navy out of a river the vessel was considered to be on hire. In that case, the term any other cause “whatsoever” was not included in the clause.³¹
- Where the vessel was forbidden by the authorities to pass through the Panama Canal because she carried too much cargo, the vessel was still on hire as its efficiency as a vessel was not affected.³²
- Where the vessel was prevented from discharging by the authorities because it was carrying refugees, the vessel was on hire.³³
- Where 150 tonnes of residual sweeping had remained on board and the port authorities did not allow discharge (for 18 days) the vessel was on hire. Nevertheless, it was said that had the word “whatsoever” been included the result might have been different.³⁴

²⁸ *Royal Greek Government v Ministry of Transport* [1949] 83 Ll Rep 228.

²⁹ *Royal Greek Government v Ministry of Transport* (1949) 82 Ll L Rep 196.

³⁰ *The Apollo* [1978] 1 Lloyd's Rep. 200.

³¹ *Court Line v. Dant*, (1939) 64 Ll.Rep. 212.

³² *The Aquacharm* [1982] 1 Lloyd's Rep 7.

³³ *The Roachbank* [1987] 2 Lloyd's Rep 498.

³⁴ *The Laconian Confidence* [1997] 1 Lloyd's Rep 139, 2 Lloyd's Rep 641.

- Where the vessel was prohibited from discharging because the cargo has been damaged during a collision and the authorities asked for security for the costs of removing and storing the cargo, the vessel was held to be under detention and therefore off hire.³⁵

It could be argued, based on the above cases that, in the absence of the word “whatsoever” the off-hire clause would only operate if there was something wrong with the ship itself (including manning and equipment), affecting its operations. The inclusion of the word [any other cause] “whatsoever” appears to make an off-hire clause broad enough to include also situations in which the operation of the ship is prevented by an external cause. In such a case a compulsory quarantine order by the port authority would arguably be covered by the off-hire clause and the time charterer would be entitled to a deduction from hire for the delay caused.

However, it is submitted, that such an interpretation would be more arguable if the charterparty had been agreed before such restrictions were put in place. It is the view of the author that there would be something peculiar if the off-hire clause could be used as a vehicle for regularly reducing the profitability of the ship when the only way the charterer’s orders could be performed would be by suffering such an ‘expected’ delay.

While this is a matter of construction it must also be pointed out that in the first case the shipowner may be able to recover the hire lost under the expressed or implied indemnity for following the charterer’s orders. In the latter case, an argument that the shipowner had full knowledge of the situation when agreeing the charterparty may work against the possibility of reliance upon the indemnity. It is important to bear in mind that in any given case, the application of the off-hire clause would depend both on the wording of the clause and on the surrounding circumstances.

1.3.3 Regulations that may lead to the detention or exclusion of the ship due to a breach of crewing provisions

A further complication that may arise due to governmental restrictions and which can cause significant delays in the performance of the time charterparty relates to crew changes. This includes, for instance, cases where rotation of the crew as required under the flag state’s regulations (including in line with international law), may not be possible to effect and, as a result, port state control may consider this breach of the statutory requirements as a reason to delay or detain the vessel until this is rectified.

In such a case the shipowner may potentially be in breach of its obligation to maintain/keep the ship fit for the service during the time charterparty, depending on whether the wording of the charterparty makes this obligation strict (i.e., independent of fault), or one of due diligence. If the obligation was one of due diligence, a material question would be whether the lack of rotation involved any negligence on the part of the shipowner or its people. If the shipowner was in breach of the charterparty then such delays or detention would entitle the time charterer to deduct the time from hire either under the off-hire clause or on the basis of equity.

The lack of crew rotation may even frustrate the contract if (i) it has arisen without the fault of either party and (ii) it is of such length as to make the situation so “radically different” to the situation contemplated by the parties at the time the contract was entered into, that it would render it “unjust” for the contract to continue.³⁶

³⁵ *Nippon Yusen Kaisha Ltd v Scindia Steam Navigation Co Ltd (The Jalagouri)* [2000] 1 Lloyd’s Rep 515.

³⁶ *The Sea Angel* [2007] 2 Lloyd’s Rep 517.

There is also the possibility that the shipowner decides to deviate or not to follow the charterer's order for the purpose of ensuring that the crew is rotated. In such a case such a planned deviation necessary for the lawful operation of the ship may well be justifiable, especially if planned in advance but in such a case the ship will not be providing services to the time-charterer and this is likely to lead to deductions from hire.

1.3.4 General closure of a port and redirection

Nominating a port that is inaccessible to the ship at the relevant time, due to Covid-19 restrictions, is not an order the charterer can legitimately give. In such a case the time charterer will need to provide a legitimate order and will not be entitled to rely on the off-hire clause even if this includes the term "whatsoever" as the cause of the delay is the illegitimacy of the order.

However, if the exclusion of the ship from the port is due to a breach of contract committed by the shipowner the situation will differ.

1.3.5 Cancellation of the charterparty due to delay

Where the delays introduced by Covid-19, in whichever form, lead to the ship not being ready for the service by a contractually agreed cancelling date, the charterer will have the right to cancel the charterparty in accordance with the contractual cancellation clause. This right does not require a breach by the shipowner to become available to the charterer.

The right of cancellation will not automatically entitle the charterer to a claim for damages. The duty of the shipowner to present the ship by the cancellation date is one of reasonable diligence and a breach of this obligation, or another breach of the charterparty, would need to be proven to entitle the charterer to recover damages, in cases where it had suffered a loss³⁷.

Most charterparties include updates in the Estimated Time of Arrival and communication between the charterers and the shipowners to avoid such a result.

1.3.6 Late redelivery due to delay

Delays, in any form, may also affect the redelivery of the ship to the shipowner giving rise to two questions: first, whether the order given for the last voyage was legitimate and secondly, what liability the charterer may have where the ship is in fact delivered late.

The legitimacy of the charterer's order would depend on whether the delay due to Covid-19 was foreseeable at the time the order was made. If it was foreseeable, then the owner would have the right to decline to follow this order and ask for contractual orders. In such a case late redelivery would nevertheless be a breach of contract and impose liability on the time charterer except where it was caused by a breach of the contract by the shipowner. In such a case the owner would continue to be entitled to receive the hire rate until the final terminal date and after that date, he would be entitled to receive as hire rate the market rate if it is higher than the charter rate.³⁸

If the delay was unforeseeable, the charterer's order would be considered legitimate and the owner would be obliged to follow the order or be considered to be in breach of contract. However, the shipowner would

³⁷ *The Democritos* [1976] 2 Lloyd's Rep. 149.

³⁸ *The Dione* [1975] 1 Lloyd's Rep. 115.

still be entitled to damages for late redelivery (unless the delay was caused by its own breach of contract), because the obligation to redeliver in time is not a due diligence obligation, but is strict.³⁹

1.3.7 Reduction in speed due to delays at or outside a port

When the ship is moored or anchored barnacles may grow on it, thus reducing the ship's speed. Whether the loss of time caused by the loss of the ship's efficiency would be recoverable would depend on the contractual arrangements and the cause for the prolonged stay in waters where the hull can become contaminated.

1.4 Cargo damage and delays

Claims for loss, damage or reduction of cargo market value due to delays are likely to be brought by cargo interests (i.e., shippers/final consignees or their insurers) under bills of lading, which will be discussed in another session. However, in cases where the bills of lading are held by the time charterer or where the time charterer has paid the cargo claimants and seeks an indemnity from the shipowner for breach of the charterparty then the liability provisions of the charterparty will become relevant.

Causation of the damage will be relevant and if the damage could be attributed to a breach of contract by the shipowner, it would generally result in liability. Clauses exempting the shipowner's liability may also be included in the contract. The incorporation of the Hague Visby Rules may complicate the liability regime under the charterparty but will most likely bring it closer to the position regarding liability under the bills of lading.

The appearance of Covid-19 and the direct effects on the crew and the indirect effects caused by mitigation and protective measures may alter the standard expected by the shipowner in delivering the promised services under the charterparty. For example, if the employment of vaccinated seafarers is a prerequisite for using the ship in the trading areas of the charterparty then an unvaccinated crew may make the ship unfit for the service and unseaworthy with respect to crewing adequacy and documentary compliance.

In relation to cargo damage, in general, the applicable exceptions will be a matter of particular interest. General exceptions clauses normally exclude liability for loss or damage due to "act of god" and also "restraint of Princes, Rulers and People". Both could be relevant in specific circumstances although neither would operate where the risk was foreseeable. Thus, at the beginning of the pandemic, a scenario where the goods were damaged due to the lack of sufficient crew to look after the cargo it could have been argued that the disease could fall under the "act of God" exception. Similarly, damage to cargo caused by a delay imposed as a response to the pandemic which was not in place when the voyage started, could be argued to amount to 'restraint of Princes' etc. However, where the possibility of infection is high and the governmental restrictions have been in place since the port was nominated, it would be difficult to argue that these exceptions exclude any liability for related cargo damage. Instead, the arguably more reasonable position would be to assume that the shipowner's planning for the care of the cargo should take these delays into account.

³⁹ *The London Explorer* [1971] 1 Lloyd's Rep. 523.

2 Developing clauses to resolve time-charterparty disputes

Various clauses have been developed to facilitate a resolution of the problems which may arise in a time charterparty. These are discussed below. Notably there is no case law related to them and the analysis is a view of the clauses under the author's understanding of the law.

The major questions that all these clauses try to address are:

1. Who will decide what the ship will do if a port is affected by the virus so as to threaten the adventure?
2. When will the party entitled to decide will be contractually entitled to do so?
3. Who will pay for any additional expenditure and delay after a decision is made? Notably, because an infected ship may be affected in the voyage following the end of the charterparty an issue arises on how such losses and delay will be allocated.
4. Whether the ship will stay on hire or will go off-hire following the decision in (1) above.

2.1 BIMCO Infectious or Contagious Diseases Clause for Time Charter Parties 2015⁴⁰

The BIMCO Time Charter Parties clause 2015 is not especially designed for Covid-19. It was designed for the Ebola outbreak in Africa.

The clause in essence operates in the following fashion:

1. It permits the shipowner or the master to decline going into an affected area or, if the ship is already in such an area to leave with or without cargo onboard. The decision of whether the port is affected must be a reasonable judgment.
2. If the order is declined the shipowner must inform the charterer and ask for new orders.
3. A failure by the charterers to give such an order:
 - a. permits the shipowner to discharge any cargo on board at any port or place
 - b. makes the charterers liable for all additional expenses while continuing to pay hire
4. If the shipowner agrees to go into the affected area then:
 - a. Its contractual rights are reserved
 - b. All expenses and delays are for the charterers' account
5. The charterer not only has all liability for costs, expenditure etc whether the ship goes into the affected area, awaits for new orders or performs the new orders but also with respect to delays, damages or losses that the shipowner may suffer after the redelivery of the ship.
6. The express shipowner's obligations under the clause consist of:
 - a. Making a reasonable judgment of whether an area is affected
 - b. Informing the charterer of its decision
 - c. Following the relevant WHO guidelines.⁴¹

The clause is triggered on the basis of two interconnected definitions. "Disease" is defined as "*a highly infectious or contagious disease that is seriously harmful to humans*".⁴² The currently dominant variant of

⁴⁰ Available at [BIMCO Infectious or Contagious Diseases Clause for Time Charter Parties 2015](#). Explanatory notes at [BIMCO - Main features of the Infectious or Contagious Diseases Clauses](#).

⁴¹ The latest version of which can be found at: https://www.who.int/publications/i/item/WHO-2019-nCoV-Non-passenger_ships-2021-1 (accessed 21/4/2022).

⁴² Paragraph (a).

Covid-19, the omicron, may be argued as not falling under this definition which must be seen in the contractual and not in the epidemiological context.⁴³

However, the real trigger for the clause is the whether the ship is or is ordered to go to an “*affected area*”. An affected area is one in which there is a risk of exposure to the crew or to the ship “*and/or*” one in which “*a risk of quarantine or other restrictions being imposed in connection with the Disease*” exists. Thus the imposition of a restriction at a port may support an argument that the disease must fulfil the characteristics required in its definition, i.e that it “is seriously harmful” to people. It is submitted that such a circular argument is too broad to be correct because any preventive restriction imposed for health purposes imposed by any government may then be argued as triggering the operation of this clause, permitting a radical change in the performance of the time charterparty.

The clause is also likely to be difficult to operate in a pandemic situation where most States impose such measures. What would then be the options of the charterer who, under the clause, will have to give fresh orders or face the consequences i.e. the discharge of the cargo at a place selected by the shipowner.

Perhaps the better interpretation is that the clause is intended to deal only with local outbreaks. In such a case it can, perhaps, be understood that while the charterer may want to ship to deliver the cargo at the port of discharge, it is justifiable for the shipowner to discharge at another port if the one agreed is affected. In such a case, commercial considerations may arguably guide the shipowner to discharge in a nearby port rather than exercise the very wide discretion of landing the goods at a remote or inconvenient for the charterer port.

This arrangement, not only entitles shipowners to alter the allocation of risks but it preserves their right to damages, expressly excluding the possibility of a waiver, if the ship remains in the affected area. In such a case the ship’s stay is exclusively at the risk of the charterer who, under the clause, abandons any right to off-hire and any potential claims in deviation.

The clause imposes⁴⁴ on the charterer an obligation to indemnify the shipowner for losses incurred after the end of the charterparty, provided they arise from a visit in an affected area. This right could perhaps be argued as a confirmation of the indemnity available to the shipowner when it incurs losses following charterer’s orders. It is however uncertain whether the implied indemnity extends to such losses so this part of the clause confers more certain rights to the shipowner.

This is a one-sided clause, which answers the four major questions asked by entitling the shipowner to make the decisions and puts all the risks on the time charterer. If certainty is a requirement, then this clause provides it.

However, it is arguably inappropriate for the global problems introduced by Covid-19. It was probably suitable for the Ebola situation where the mortality is higher and the spread was restricted to some countries only. When the market enables the charterer to trade with most of the world a choice by the charterer to trade with a small part of the world where infectious disease may threaten the lives of the crew may justify such a one-sided arrangement. It is difficult to see this operating otherwise; and with the ‘milder’ variants of Covid-19 currently dominating and the extensive vaccination efforts it is arguable that

⁴³ A supporting argument for this is the removal of Covid-19 from the UK’s list of Highly Contagious Infectious Diseases (<https://www.gov.uk/guidance/high-consequence-infectious-diseases-hcid>) since 19th March 2020. It is an interesting legal question whether the definition of such a disease under the charterparty will be decided by the law applicable to the charterparty, which in our discussion has to be English, by the categorisation of the place of performance or perhaps by developing an objective test.

⁴⁴ Paragraph (k).

Covid-19 may not fall under the definition of disease. Where a more lethal variant emerges then perhaps the clause would be more readily considered to be applicable. The interpretation of the clause will depend on the views of courts and may be affected by local factors, as well as experiences and developments regarding the pandemic. The different approaches by countries China and many other countries may pose challenging legal questions regarding the diseases which fall under this clause and under what law and whose assessment a particular disease can be considered as fulfilling the criteria set by this clause.

2.2 INTERTANKO Covid-19 ('Coronavirus') Clause – Time charterparties⁴⁵

The INTERTANKO clause has been developed by this industry association to serve the interests of tanker owners. The clause gives the master and the owner the right to assess whether there may be a “risk of exposure” to Covid-19 for persons onboard the ship. Thus, this clause will operate where such risk exists and irrespective of the dominant variant of the virus.

However, the “risk of exposure” to Covid-19 is presently global. Similarly, the risk of exposure is reduced when there are protective protocols in place or the ship operations in the port do not involve close interaction with potential carriers of the virus or where the port has testing and protection protocols minimising that risk. Thus, the risk assessment should be made, it is submitted, by reference to the specific operations, of the specific ship at the specific port. Where there is a risk of exposure then the master or the owner can decline to call into this port. The clause does not involve any classification of the risk to human health posed by the relevant variant. It simply refers to the “risk of exposure” to the particular virus. Thus, the clause becomes rather broad in its scope as any exposure to even low-risk variants of Covid-19 grants the shipowner significant rights to perform the contract in alternative ways.

If the ship does accept the order to go towards an affected port, the master may, nevertheless, decline to go into port if the level of risk of exposure has increased by the time the ship arrives. This change of heart can take place even after a Notice of Readiness has been issued or loading or discharge operations have been initiated. In essence, this reverses the decision in *The Kanchenjunga*⁴⁶. If at any stage the option to decline to go into a port is exercised then the charterers have to issue fresh orders. All additional time and expenditure are for the charterer’s account and the ship remains on-hire. The liability of the charterer is only for direct losses but it extends to problems the shipowner may have with the employment of the ship up to 30 days after redelivery in which case the charterer has to pay, in addition to any direct losses, hire in accordance with the charterparty. Whether this arrangement of “damages plus hire” can be seen as a, partly, liquidated damages clause or a penalty clause would be an issue for discussion.

The shipowner undertakes to provide the information required by the port authorities for the purposes of free pratique, a duty which, it is submitted, already exists and prohibits shore leave for the crew, a duty which does not exist at the moment. It is suggested that if the shore leave is not prohibited by the master and an infected crew member returns to the ship then the risk of exposure would increase. However, taking steps to leave the port would not reduce this risk as the infected seafarer would already be back onboard. In such a case it is arguable that any delay would be due to the failure of the master to take this basic precautionary measure. Notably, there is no general requirement for the master to impose reasonable protective measures to reduce the exposure of the crew to the virus and the ship operations can continue as previously, under this clause.⁴⁷

⁴⁵ Available at [INTERTANKO Covid-19 \('Coronavirus'\) Clause – Time charterparties. Explanatory notes available at INTERTANKO Covid-19 \('Coronavirus'\) Clause – Time charterparties \(Explanatory Notes\)](#).

⁴⁶ *The Kanchenjunga* [1990] 1 Lloyd’s Rep. 391.

⁴⁷ But now this is part of the WHO guidelines (Ibid. n 40).

The clause excludes the possibility of arguing for the frustration of the contract on the basis of Covid-19 and provides liberty for following all orders by the authorities thus excluding the possibility of arguing them as a breach.

2.3 INTERTANKO Covid-19 ('Coronavirus') Additional Vetting Inspection Clause

This clause ensures that where a vetting inspection is missed due to the ship being in a Covid-19 affected area the contractual obligation to comply with such requirements remains inoperative until the ship's trading pattern permits the inspection. This is a very wide exception which may lead to a ship operating without the vetting requirements for a significant period of time.

2.4 BIMCO COVID-19 Crew Change Clause for Time Charter Parties 2020⁴⁸

This clause resolves the issue of restrictions in crew rotation at some ports by entitling the shipowner to deviate the ship for this purpose. The time charterer undertakes to incorporate the clause into sub charters and bills of lading the parties of which are more likely to rely on claims based on deviation. It does however also include an option to determine the payment of hire to the shipowner at a reduced rate and a contribution for bunkers or to put everything on the shipowner who have to pay on other related expenditure.

2.5 INTERTANKO Owners' Right to Change Crew Clause – Time Charterparties⁴⁹

This clause provides an assurance to the shipowner that the charterers will not object when the shipowner decides at its own expense to change crew where this is allowed by local or national laws. The clause does not expressly permit a deviation and the reference to "*intended port calls*" may be read as permitting delays in ports where the charterer orders the vessel to or, more generally, to ports the shipowner intends to call to. It may be assumed that the general support to the Neptune Declaration which can have no direct contractual effect permits an interpretation that the shipowner can take the ship to the ports which allow such changes. Notably there is no duty to take into account the impact on the planned commercial schedule of the ship nor is there any provision of extending the period of the ship's employment by an equivalent time.

2.6 Charterers club clauses

As an answer to the shipowner-friendly clauses two clauses have been developed by the Charters Club.

2.6.1 Contagious Disease Clause

This clause applies notwithstanding any other clause in the charterparty. This implies that any safety undertaking by the charterers is overridden by this clause as well as any indemnity for following charterer's order when the clause operates. The clause applies to a ship "*at a port where fever and/or epidemics and/or contagious disease are prevalent*". The wording is general and would cover any such occurrences although without, it appears, a need for a serious risk to human health. An unclear point concerns the method of determining whether a fever, epidemic or contagious disease is prevalent. Would this be a matter for the WHO, the port authority or an objective assessment is unclear.

⁴⁸ Available with explanatory notes at [BIMCO COVID-19 Crew Change Clause for Time Charter Parties 2020](#).

⁴⁹ Available with explanatory notes at [BIMCO COVID-19 Crew Change Clause for Time Charter Parties 2020](#).

The clause appears to differentiate between the payment of hire and the payment of other damages or delays. With respect to damages or delays incurred by following the charterer's order to go to an infected port the clause excludes the charterer's liability "where such fever and/or epidemics are widely publicised". The timing of when this test should be fulfilled is not set. It is unclear whether a claim by the shipowner with respect to delays and costs incurred after the end of the charterparty will fall under the exclusion.

The second part of the clause ensures that the ship is off-hire when damage or delay to the vessel is caused by visiting an affected port. This part of the clause will arguably operate whether the relevant fever or epidemic is publicised or not.

The clause puts the burden of collecting information about the port in this respect on the master and the crew who have to notify the charterer of any relevant problems as soon as possible after the voyage order is given. There is no obligation for the charterer to issue new orders or act on this advice. This implies that the party who decides in this clause is the charterer while the costs and expenses are on the shipowner if the problem is already known while the ship is also off-hire.

In the context of Covid-19 the clause is likely to apply for all variants and to protect the charterers against all liability as well as releasing them from the payment of hire with respect to known infected areas. With respect to new areas of infection it appears that the vessel is again off-hire but other delays or damages may end up on the charterer depending on the other clauses of the charterparty.

2.6.2 Adapted Contagious Disease Clause

This clause is an effort by the charterers club to balance the BIMCO clause discussed above.

The affected area is defined as any 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*". This appears to determine the classification by a certain standard. However, I failed to identify any such list of diseases issued by the WHO. The degree of harm required to trigger the clause is also uncertain.

Similarly to the BIMCO clause it provides the shipowner with an option to stop following the existing orders for an affected area and ask for fresh orders. However, the owners must document by competent international authorities that there is a risk of infection. Thus, a reasonable judgment, the test used under the BIMCO clause is replaced with a more objective one. If the shipowner can fulfil this test then it must inform the charterers who shall then use "*reasonable endeavors*" to issue alternative voyage orders. The charterers decision on whether to issue fresh orders needs to take into account, bill of lading obligations and insurance requirements. A general liberty to comply with orders by authorities is granted to the shipowner. This is also true with respect to the BIMCO and INTERANKO clauses examined above.

The charterers are liable for additional expenses and costs, including quarantining costs for the vessel and its crew in the affected area and subsequent ports provided these are properly documented and reasonable and not caused by negligence of the shipowner or the crew.

Any claim of deviation is excluded and any act taken under this clause is considered as due fulfilment of the charterparty. This arguably embraces not only the performance under fresh orders but also a decline to issue fresh orders. It seems that if the port is held to be unsafe and there is a safe port warranty in the charterparty this clause will avoid the consequences for the charterer as whatever it decides will be considered as due performance.

This clause is more balanced in the allocation of financial risks between shipowners and charterers but it may lead to difficulties where the charterer insists on performance in an affected area. At least this clause couples the right to take a decision with the financial consequences of such action, arguably a more balanced arrangement.

2.7 Recent Developments

2.7.1 BIMCO Infectious or Contagious Diseases Clause for Time Charter Parties 2022

Note: This clause was published after the end of the UNCTAD training courses in June 2022. BIMCO kindly allowed us to have access to the clause before publication and this enabled us to provide some comments for the benefit of the participants, which are also reflected as part of the final training materials available on the websites for the training courses.

The new BIMCO IODC clause for time charterparties is more balanced than the 2015 version of it as well as the INTERTANKO Covid-19 ('Coronavirus') Clause – Time charterparties. The following points are of importance:

- The operation of the clause depends on the "Risk of exposure to a Disease" assessed by reference to preventative measures;
- Preventative measures are defined as "reasonable, applicable and available" measures to prevent exposure to a disease;⁵⁰
- The Owners have an obligation to take preventative measures to protect the crew and other persons onboard from infectious and contagious diseases;
- If there is a risk of exposure to a disease, despite the implemented preventative measures, the Owners must give written notice to the Charterers. The ship can then go to the nearest safe waiting place and await for orders. This liberty is available whether the ship is ordered, is proceeding to or is already in the port or place where the risk exists;
- The Charterers must give new orders in reasonable time;
- The vessel remains on hire and the additional costs are on the Charterers unless there has been a fault by the Owners in which case the ship is off-hire and any additional costs for the Charterers is on the Owners;
- The Charterers have the obligation to incorporate the clause in sub-charters and bills of lading issued.

Overall, the clause has become much more balanced and very similar to a bespoke solution for contractual performance which is likely to survive scrutiny under the Hague and Hague Visby Rules.

⁵⁰ The WHO guidance (https://www.who.int/publications/i/item/WHO-2019-nCoV-Non-passenger_ships-2021-1) as well as flag state requirements, port and discharge port standards and IMO guidelines would all be relevant and would be detailed in a Health Policy adopted for the ship.