

Time charters in the Covid-19 era



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Training course: Implications of the COVID-19 Pandemic for Commercial Contracts

Outline

Part I

Key issues

Risk allocation for time charterparties

Legal implications

Part II

Specially designed clauses for Covid-19

Who benefits?

Covid-19 and the timing of fixture

Before Covid-19 appeared

- The contractual matrix

General arrangements for risk allocation

No state restrictions

Covid-19 risks unexpected and not contemplated by the parties

Before Covid-19 was declared a pandemic

- The contractual matrix

Additional clauses introduced or part of the general risk allocation

Arbitrary and quickly changing state restrictions

Covid-19 risks expected and contemplated by the parties- high uncertainty

Before “living with the virus” policies

- The contractual matrix

Additional clauses introduced or part of the general risk allocation

Amended health policies and fewer restrictions

Covid-19 risks expected and contemplated by the parties. Low uncertainty in risk due to vaccination and safety measures

A contract for the services of the ship

- Owner's obligations (at agreed standards):
 - The named ship
 - Capacity, gear, flag etc.
 - Competent master and the crew
 - Maintain the ship and the crew sufficiency
 - Insurance and necessary certifications
 - The approximate time for delivery at the agreed location
 - Master will follow charterer's orders
 - Including signing B/L
 - Trade within trading limits
 - Any agreed cargo
- Charterer's obligations (agreed standards):
 - Give contractual instructions
 - Load agreed cargo for agreed destinations
 - Inform of dangerous character of cargo
 - Perhaps, nominate only safe ports
 - Issue bills of lading in accordance with C/P
 - Redeliver in time and where agreed
 - Pay hire in advance and in full
 - Deduct from hire only if the contract permits
 - Pay/provide for the bunkers
 - Load/Discharge (but this depends)

Is the nomination of a Covid-19 infected port a legitimate order?

- Trading area
- Safe port warranty (if it exists)
 - To be unsafe it must fail the *Eastern City* test
 - Does Covid-19 threaten the safety of the ship/cargo/adventure?
 - Delays are for the time-charter
- Consider a virus with high mortality
 - Protection measures
 - Risk of infection



Delays due to the lack of personnel providing port services

- Charterer's nomination
 - standards for port services are a choice for the charterer
- Ordinary delays are for charterer's account UNLESS separately considered in the off-hire clauses.
- Off-hire : services of the vessel unavailable to the charterer.
- If ship capable to perform the service but stopped by deficiencies in the port service : very clear wording required in off-hire clause



But sometimes services are denied...

- London Arbitration 4/22
- Ship's berthing delayed
 - Pilots (with elevated temperature) refuse to have temperature taken with mercury thermometer
- Demand for an apology from pilots
- Charterers consider this off-hire
- Shipowners argue for health policy



London Arbitration 4/22: Award

- Genuine concern by master and officers
- Unplanned and not well organised checking of pilot temperature
- Pilot company unhelpful
- Pilots' action not charterer's responsibility (Clause 25)
- No default of officers or crew- probably "put back"
- Owners had no right to insist that the pilots follow the ship's temperature checks
- Master's refusal to allow the pilot onboard was a breach of clause 8.

"8. The Captain shall prosecute his voyages with due despatch and shall render all customary assistance with the ship's crew and boats. The Captain (although appointed by the Owners) shall be under the orders and directions of the Charterers as regards employment and agency ...

15. In the event of loss of time from deficiency and/or default of officers or crew ... or by any other similar cause preventing the full working of the vessel, the payment of hire and overtime, if any, shall cease at the time thereby lost.

...

Should the vessel deviate or put back during a voyage, contrary to the orders or directions of the Charterers, for any reason for other than accident to the cargo the hire is to be suspended from the time of her deviating or putting back until she is again in the same or equidistant position from the destination and the voyage resumed therefrom ...

25. Navigation

... The Owners shall remain responsible for the navigation of the vessel, acts of pilots and tug boats, insurance, crew, and all other similar matters, same as when trading for their own account. ...

58. Deviation/Put Back:

Should the vessel put back whilst on voyage by reason of ... the refusal of the Captain, Officers or crew to do their duties without any specific or valid ground for rejection, or any Owners' matters unless caused by default of Charterers and/or their staff and/or their agents, the payment of hire shall be suspended from the time of inefficiency in port or at sea until the vessel is again efficient in the same position or regains a point of progress equivalent to that the hire ceased hereunder ..."

Denial of free pratique to the specific ship due to infections or testing issues

- “deficiency of and/or default of men.”
- No authoritative decision on the point,
 - *Obiter*
 - *Royal Greek Government v Ministry of Transport* suggests numerical sufficiency is relevant
 - US law differs
- “any other cause preventing the full working of the vessel” (NYPE 1946 , Clause 15)

“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.”

Mocatta J in *The Apollo*

London Arbitration 6/22

- Claim for off-hire
- One crew member had temperature 37.4 deg C
- Delay in free pratique for a Covid-19 test to be conducted
- Crew member was healthy
- 37.4 deg C is for a healthy person - the actions of the quarantine officer were:
 - “excessive, seemingly arbitrary and unjustified”
- No deficiency in men - no off-hire



The difference a word makes

- ‘In the event of loss of time from deficiency of men or stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo.... or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost.’

eiusdem
generis

- ‘In the event of loss of time from deficiency of men or stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo.... or by any other cause whatsoever preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost.’

not restricted to
the same kind

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

A synthesis:

- Without “whatsoever” external orders which prevent the working of the ship cannot trigger the off- hire clause (in NYPE 1946)
- Inclusion of the word “whatsoever” changes this.

Covid-19

- *With “whatsoever” quarantine orders 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.*
 - *Implied indemnity:*
 - *Potential recovery for the shipowner.*

General closure of a port and redirection

- Port must be accessible
 - Otherwise must re-nominate
 - Order is illegitimate
 - Unless the exclusion of the ship from the port is due to shipowner's breach



Owner's duty

- “... a duty is cast on the master in many cases of accident and emergency to act for the safety of the cargo, in such manner as may be best under the circumstances in which it may be placed; and that, as a correlative right, he is entitled to charge its owner with the expenses properly incurred in so doing”
 - **Gaudet Geipel and Others v Brown (The Ex Cargo Argos): PC 18 Feb 1873**



View of Le Havre, 1873 Claude Monet

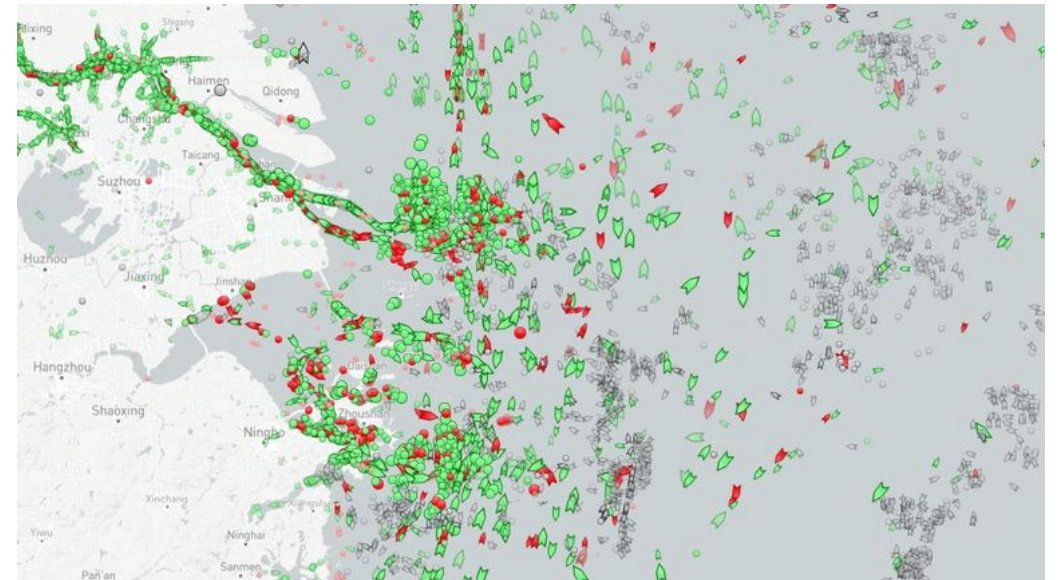
Cancellation of the charterparty due to delay

- If ship not ready:
 - Right to cancel
 - This right does not require a breach by the shipowner to become available to the charterer.
 - *The Madeleine* [1967] 2 Lloyd's Rep. 224 in which a de-ratting exemption certificate had expired.
- No automatic right for damages.
 - Breach of the charterparty is required
 - Repeat ETAs/ERLs and communication avoid such a result.



Late redelivery due to delay

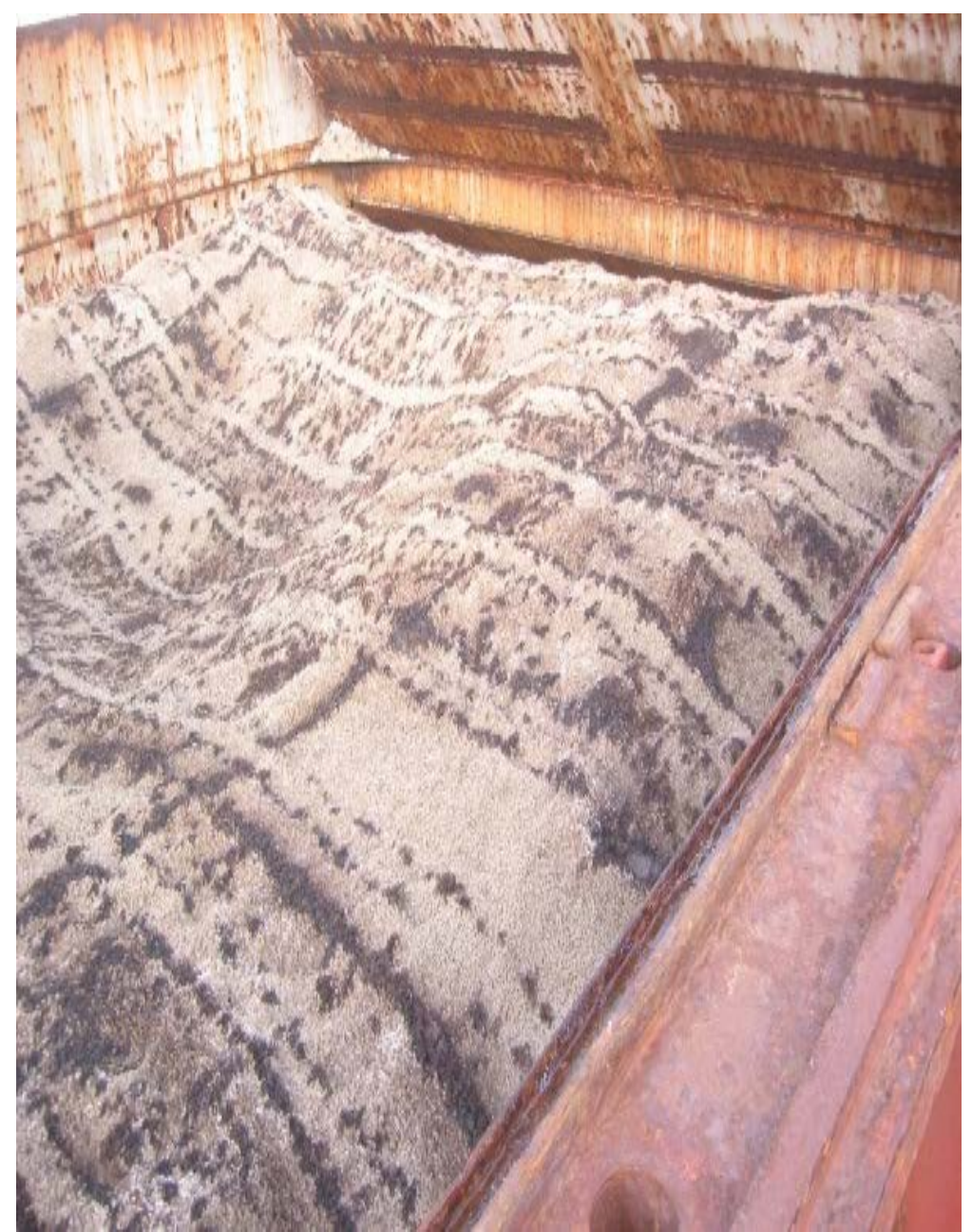
- The Final Terminal Date
 - With and without Covid-19 measures
- Legitimate order
 - Was the Covid-19 delay foreseeable?
 - If “Yes” then order is illegitimate
 - If “No” the order is legitimate
- Late delivery:
 - Shipowner entitled to damages



<https://news.sky.com/story/covid-19-extraordinary-image-shows-heavy-marine-traffic-around-shanghai-amid-concerns-over-impact-of-lockdown-on-supply-chains-12593848>
19/4/2022

Cargo damage from Covid-19 delays

- Charterparty claims for cargo damage
 - Shipowner's duty
 - Exception clauses
 - "act of god"
 - "restraint of Princess, Rulers and People".
 - Incorporation of Hague-Visby Rules
- Relevant issues:
 - Direct Covid 19- effect on crew
 - Indirect effects caused by mitigation and protective measures
 - These may alter the standard expected by the shipowner
- Where the restrictions have been in place at the beginning of the voyage the shipowner's planning for cargo care should take these delays into account.

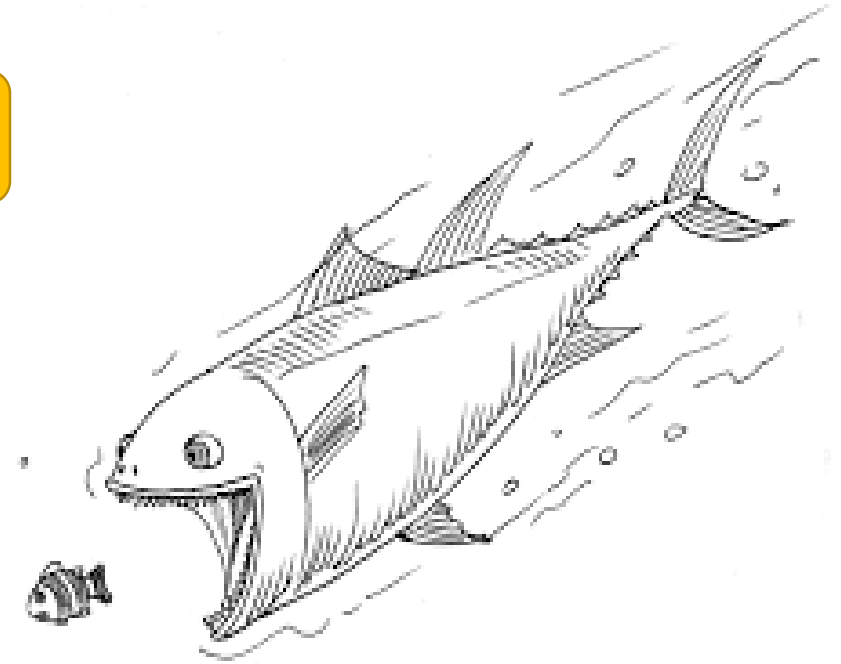


BIMCO Infectious or Contagious Diseases Clause for Time Charter Parties 2015

- “Affected area” determined not only by the risk of the disease but also by the existence of restrictions
- Owner can deny performance (must inform the charterer)
 - Even leave half loaded
 - Vessel remains on-hire
 - All expenses on the charterer
- If charterer does not nominate another voyage within 48h
 - Shipowner can discharge at any port or place
 - All expenses on the charterer
- Owner can accept to perform
 - Retains right for damages
 - All costs on charterer
 - Vessel remains on hire
- Clause must be incorporated in a chain of c/p and for bills of lading

Disease: a highly infectious or contagious disease that is seriously harmful to humans (a)

Not for
Covid-19



Affected area:

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. (a)

BIMCO Infectious or Contagious Diseases Clause for Time Charter Parties 2022

- Delays (quarantine or refused admission)
On hire and Charterers pay costs UNLESS owner's fault or due to earlier charter in which case owners pay Charterer.
- Ship does not have to go, proceed or stay when there is high risk
- If ship refuses to go etc., Exposure Risk Notice should be given
Owners can request new orders and Charterers must give within reasonable time and taking into account the length of the charterparty.
Ship goes to closest safe waiting position
Ship on hire and Charterers should indemnify Owners for claims by B/L holders.
- Clause must be incorporated in a chain of c/p and for bills of lading



Trigger:

(modified) Disease risk + Preventive measures + reasonable judgment

Formal: Exposure Risk Notice

Owners:

must provide preventive measures

Costs on owners unless a maximum is agreed, excess on charterer

INTERTANKO Covid-19 ('Coronavirus') Clause – Time charterparties

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')**.

Is the risk with or without the ship's health policy?

INTERTANKO Covid-19 ('Coronavirus') Clause – Time charterparties

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 following provisions to apply:

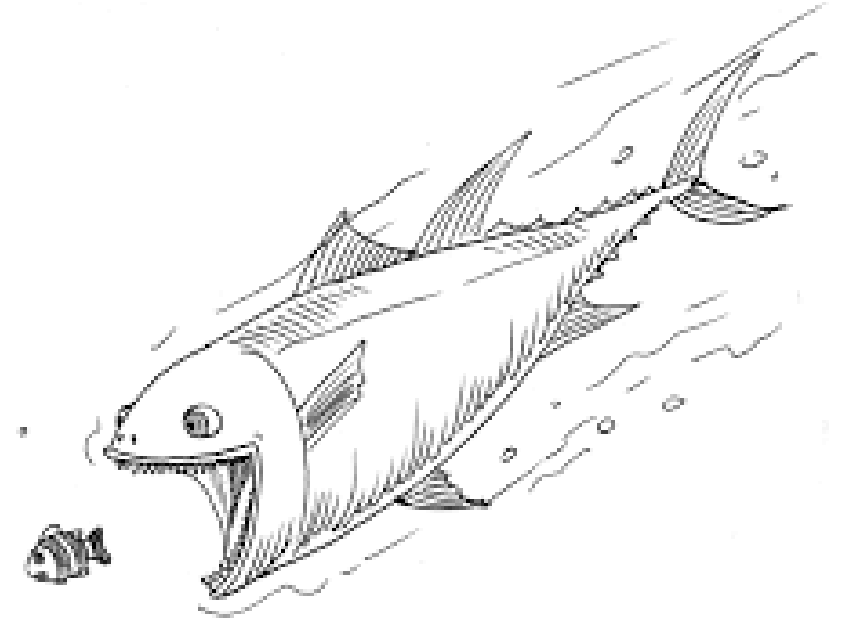
- a) If, **prior to reaching the load or discharge port**, in the **reasonable judgement of the Master or Owners**, the level of risk of exposure of the crew and other persons on board to the Coronavirus virus becomes unacceptable, **Owners shall be entitled to request fresh voyage orders from Charterers**.
- (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 virus becomes unacceptable, the **Vessel may proceed to a safe waiting place** and **Owners shall be entitled to request fresh orders from Charterers**.
- (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**.
- (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.
- (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.**

INTERTANKO Covid-19 ('Coronavirus') Clause – Time charterparties

3. Should the Vessel be boycotted, refused admission to port, quarantined, or otherwise delayed in any manner whatsoever by reason of having proceeded to an Coronavirus Affected Area, the **Vessel shall remain on-hire for all time lost and any direct losses, damages and/or expenses incurred by Owners as a result 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 been redelivered under this charterparty, **then Charterers are to compensate Owners for all time lost as a result as if the Vessel is still on hire**, in addition to compensating Owners for all direct losses, damages, and or expenses which may arise as a result of the above.
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**.
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.

INTERTANKO Covid-19 ('Coronavirus') Clause – Time charterparties

- Covid-19 ports are treated expressly as problematic
 - Irrespective of whether there is a safe port warranty in the charterparty
- No serious health risk required
- Risk of infection is enough!
- Contract remains in force and whatever the shipowner chooses to do is deemed contractual performance
- All expenditure is on the charterer
 - Including losses incurred 30 days after the redelivery



BIMCO COVID-19 Crew Change Clause for Time Charter Parties 2020

(a) In addition to any other right to deviate under this contract, the Vessel shall have liberty to deviate for crew changes if COVID-19-related restrictions prevent crew changes from being conducted at the ports or places to which the Vessel has been ordered or within the scheduled period of call. Any deviation under this clause shall **not be deemed to be an infringement or breach of this contract, and Owners shall not be liable for any loss or damage resulting therefrom.**

(b) Owners shall exercise the right under subclause (a) above with due regard to Charterers' interests and shall notify Charterers in writing as soon as reasonably possible of any intended deviation for crew changes purposes.

(c) Charterers shall procure that subclause (a) shall be incorporated into any and all sub-charter parties, bills of lading, waybills or other documents evidencing contracts of carriage issued pursuant to this Charter Party.

BIMCO COVID-19 Crew Change Clause for Time Charter Parties 2020

(d) During the period of such deviation the Vessel shall:

(i)* remain on hire, but at a reduced rate of hire of USD per day. In the absence of an agreed amount, fifty per cent (50%) of the hire rate shall apply. The cost of bunkers consumed shall be shared equally between Owners and Charterers.

(ii)* be off-hire and the cost of bunkers consumed shall be for Owners' account.

(e) While the Vessel is at the port of deviation all port charges, pilotage and other expenses arising out of such crew changes shall be **for the Owners' account**.



INTERTANKO Owners' Right to Change Crew Clause – Time Charterparties

Not a contractual promise

Charterers warrant that:

(i) they are aware of and support the aims of the Neptune Declaration on Seafarer Wellbeing and Crew Change; and

(ii) they shall not object to and/or impose any restriction owners' right to change crew where such change is allowed by local or national laws or regulations applicable to intended port calls.

Any time lost solely caused by crew change to be for Owners' account.

?

Off-hire

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

In the event of cancelled SIRE/CDI inspections in a Coronavirus Affected Area, the SIRE/CDI requirements in this charterparty shall be suspended and shall not be re-instated until the Vessel's trading pattern permits such inspection.



Charterers P&I Club Clause- Time 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.
- Should there be any delay and/or damage to the Vessel due to calling at a port where fever and/or epidemics and/or contagious disease are prevalent then **the Vessel will be off-hire until the full working of the Vessel is restored to Charterers.**
- 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.**

Charterers P&I Club Clause- Amended BIMCO Clause for Time Charterparty

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;

Modified definition:
No such list

Charterers P&I Club Clause- Amended BIMCO Clause for Time Charterparty

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 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 endeavors to issue alternative voyage orders;**

Charterers P&I Club Clause- Amended BIMCO Clause for Time Charterparty

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.

Conclusions

- Covid-19 can cause delays in the performance of time-charterparty duties
- Who should pay for these delays is a matter of construction of the contract
- The clauses developed for time-charterparties provide clarity and avoid dispute resolution costs
- With the exception of crew changes, flexibility for performance or non-performance of a voyage to a Covid-19 affected port is primarily granted to the shipowner and expenses are on the charterer
 - BIMCO IODC 2022 and Charterers P&I Club clauses are more balanced
- “Shipowner” developed Covid-19 clauses are to be incorporated down the charterparty chain and into bills of lading
- “Crew change” clauses facilitate change of crew at the expense of the shipowner but not entirely clear in some aspects
- A balanced negotiation of terms is required to avoid later disputes

The end

