

COVID-19. The implications for Voyage Charters (2). Pandemic clauses. A case study.



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



In September 2022 the 'Always Accessible' is chartered on Gencon 1976 form for a voyage carrying soya beans from Tubarao, Brazil, or so near thereto as she may safely get and lie always afloat, to Longkau, China, or so near thereto as she may safely get and lie always afloat. The charter is subject to English law and provides for all disputes to be subject to LMAA Arbitration. The charter has a clause paramount which incorporates the Hague-Visby Rules. The charter also contains a force majeure clause which reads.

Strikes or lockouts of men, or any accidents or stoppages on railway and/or canal and/or river by ice or frost or any other force majeure causes including Government interferences, occurring beyond the control of the shippers of consignees, which may prevent or delay the loading and discharging of the vessel, always excepted.

Stage one

Approach voyage and loading

On the approach voyage to Brazil a new COVID variant breaks out which is twice as transmissible as omicron and is twice as lethal as any previous variant. It might also be vaccine resistant. Port work is continuing in Brazil but with stringent safety protocols which have had the effect of doubling the time taken to load and discharge vessels.

Vessels that have called at Brazilian ports are being subject to automatic 21 day quarantines at many ports, including those in China.

The vessel proceeds to a waiting anchorage within the port limits of Tubarao. Free pratique is not given until a further six days, following confirmation from the PCR tests that all the crew are free from COVID.

NOR is then given and three hours later the vessel is then called into berth. The cargo is loaded and two days demurrage is incurred. A bill of lading is issued on behalf of the shipowner, which incorporates all the terms and conditions of the charter.

Issue one. Can owners refuse to enter port? Is there any safe port warranty? If so, is the port safe? Effect on crew of going in, effect on vessel of going in? If no safety warranty, could owners still refuse to enter port?

Issue two. Which party seems to bear the risk of the disruption/delay at the beginning of the voyage/at loadport?

How does laytime run and is it affected by the doubling of the time taken to load at the port? What is the effect of the general force majeure laytime exception in the charter?

**The position if the Intertanko clause
were incorporated.**

INTERTANKO

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').

Only applies to COVID-19. No reference to risk of quarantine or other restrictions. Not limited to when a place becomes affected after date of charter

INTERTANKO

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.

*Prior to reaching the affected port. **Unacceptable risk** of exposure.
Right to request fresh voyage orders. No cancellation rights.*

INTERTANKO

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.

Post tender NOR. Right to go to safe waiting place and request fresh orders.

2 (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.

Owners' rights if charterers fail to provide alternative voyage orders within 48 hours.

INTERTANKO

2.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.

INTERTANKO

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

Effect of incorporation of the clause into bill of lading

The Miramar 1984 AC 676 bill of lading incorporated all terms and conditions of 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.

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.

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.

Stage two

The carrying voyage

Halfway through the voyage to China the chief officer experiences breathing problems and soon becomes seriously ill. He is found to have contracted COVID, probably through contact with a stevedore during the loading of the cargo. The vessel calls into Durban to arrange for the chief officer to go to a hospital for medical treatment. A replacement chief officer is flown to South Africa and after health checks which take place while the vessel is waiting at anchorage, is allowed to join the vessel.

Issue three. Is it a deviation under (a) the voyage charter and (b) the bill of lading contract? Is it a breach of owners' obligation to proceed on the carrying voyage with reasonable dispatch?

Issue four. Is the presence of a crew member with COVID on the vessel at the start of loading something which makes the vessel unseaworthy and if so, have the owners taken due diligence to make the vessel seaworthy before and at the commencement of the voyage? What impact might this have on the issues arising out of the delay/disruptions at the discharge port in China?

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Stage three

Discharge

On arrival at the Chinese discharge port the vessel waits at anchorage for a 21 day quarantine. The vessel then obtains free pratique, gives NOR and shortly afterwards is called into berth.

Due to strict working protocols and the suspension of night working, discharge proceeds more slowly than usual. When half the cargo has been discharged, all vessels are ordered off the berth as two stevedores are found to have the new COVID variant, and the port is temporarily closed.

At this point the vessel has gone on demurrage. The vessel waits for ten days, and is then allowed back to berth to complete discharge.

The cargo is found to be damaged and the vessel is arrested and owners' P&I Club provides security for \$5.65m. The owners later settle the claim with the receivers for \$0.8m. Both surveyors say the cause of the damage is the lengthy delays on the voyage and during discharge.

Due to these delays the owners lose their follow-on charter as they miss their cancellation date. They perform a ballast voyage to a different port for their replacement fixture, which is at a lower freight rate to that in the cancelled fixture.

Issue five. When can NOR be given? Could owners go to another port to discharge pursuant to the 'near clause'?

Issue six. What interrupts laytime/demurrage?

Issue seven. Can owners claim from charterers (a) the cargo claim they settled (b) the losses due to the cancellation of their next fixture?

**The position if the Intertanko clause
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INTERTANKO

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.

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Owners' rights if charterers fail to provide alternative voyage orders within 48 hours.

Intertanko

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.

Wide ranging rights of compensation for consequences of having proceeded to an affected area. Includes events occurring within 30 days of completion of discharge.

Thank you!



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