

## Contractual implications of Coronavirus (COVID-19) - FAQs

The global Coronavirus (COVID-19) pandemic has brought about exceptionally challenging trading conditions and the Club is committed to supporting Members through this difficult time.

To this end, the Club has produced the following guidance which addresses some of the most frequently asked questions from our experience to date regarding contractual implications. The below is not exhaustive, but we hope that it will serve as a helpful guide to Members during these challenging times.

### **Q1. The crew onboard shows symptoms related to COVID-19. Is the vessel off-hire?**

A time charterer is required to pay hire, unless there is an event listed in the relevant 'off-hire' clause in their charterparty, which would place the vessel off-hire. The most widely used 'off-hire' clauses refer to *'deficiency of men'* and/or *'any other cause preventing the full working of the vessel'*, as off-hire events. If COVID-19 has affected a considerable number of crewmembers onboard the vessel, with the operation of the vessel being hindered or delayed as a result, then the vessel can be placed off-hire. Furthermore, if the vessel is delayed due to quarantine because of one or more COVID-19 crew illnesses onboard, then this could also place the vessel off-hire, falling within the scope of the off-hire event *'any other cause preventing the full working of the vessel'*.

### **Q2. The crew onboard shows symptoms related to COVID-19. Is the vessel seaworthy?**

The obligation of seaworthiness is a fundamental concept under English law. Most charterparties will incorporate The Hague or The Hague Visby Rules by way of the Paramount clause, where the standard of seaworthiness required by the shipowner is one of due diligence before and at the beginning of a voyage. Part of the shipowners' seaworthiness obligations is to ensure that their vessel is suitably manned and equipped to perform the contractual voyage, after having considered the probable circumstances that the vessel may encounter on arrival at her port of call. Therefore, the shipowners must ensure that they have appropriate systems in place to prevent the infection of the crew and/ or limit the spread in the event of an infection. Failure to show that there were adequate measures onboard, as well as appropriate procedures to implement these measures, could result in shipowners' failure to exercise due diligence to present a seaworthy vessel.

### **Q3. Can the voyage be interrupted if the crew is infected by COVID-19?**

When a crewmember has been infected by COVID-19 whilst working onboard the vessel, the

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shipowner may have to arrange for their immediate evacuation and medical treatment. This may result in a deviation from the contractual route and may cause delays in performing the voyage. Deviation from the contractual route or failure of the shipowners to complete the voyage with utmost despatch, can possibly lead to a breach of the charterparty. However, it is usual that deviation of the vessel for saving the life of the crew is permissible. Most charterparties, whether in a voyage or time charter context, will allow deviation for the sole purpose of saving life at sea.

#### **Q4. What is the effect of a force majeure clause in a charterparty (either voyage or time)?**

Force majeure is not an established principle in English law and will not be implied, if not contractually incorporated. The parties usually include a force majeure clause into their charterparties to account for unexpected events beyond their control, which may prevent, hinder or delay the performance of the agreed charter. This clause will provide for a list of events which the parties regard as force majeure events and most importantly, it will expressly determine their effect and consequences to the contract. Generally, a successful invocation of the force majeure clause may result in suspension of the services and may relieve the parties of their obligations (wholly or partly) for the duration of the force majeure event and in some cases, even lead to termination of the contract.

#### **Q5. What does a party need to do to rely on force majeure?**

As described above, this is dependent on the existence of a force majeure clause, and the wording of it. However, it is usual that a party looking to rely upon a force majeure clause, should be able to prove that:

1. the clause expressly mentions the specific circumstances (such as outbreaks of diseases/pandemics/quarantine etc);
2. the causation test is met (i.e. but for the circumstances in question the party would have fulfilled its contractual obligations);
3. The inability to perform is beyond the party's control; and
4. there were no reasonable steps that the party could have taken to minimise the effect of the force majeure event.

In addition to the above, there may be a requirement of giving a formal notice to the other party within a certain period stipulated in the clause.

#### **Q6. Can a shipowner refuse to accept orders to a port where there's been an outbreak?**

While a master/shipowner has the ultimate responsibility for the safety of a vessel, an outbreak of COVID-19 is unlikely to allow shipowners to ignore charterers' orders. However there may be specific clauses that give the shipowners such powers (such as the BIMCO Infectious or Contagious Disease Clauses 2015, which are discussed below).

Shipowners should always be careful that any reticence in complying with an order is not viewed as a repudiation of the contract, allowing a charterer to terminate the contract and claim damages.

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### **Q7. Can COVID-19 turn the port unsafe?**

A charterparty will often have an explicit or implied obligation for the charterer to only nominate safe ports. The standard definition of a safe port is found in *The Eastern City* and requires that “*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...*”.

While this is a fact dependant question, it is very unlikely a port will be rendered unsafe by an outbreak of COVID-19. Firstly, the risks associated with the port should be those which can be guarded against with good precautionary measures. Secondly, as a matter of law there would be a debate as to whether an outbreak of COVID-19 (depending on the time of the order and the time of the outbreak) would be deemed an “*abnormal occurrence*” and not a “*characteristic of a port*”.

### **Q8. Can a party terminate the contract on the basis of frustration?**

In the absence of an applicable force majeure clause in the contract, the parties may attempt to rely on the doctrine of frustration. Frustration occurs when an unexpected event following the formation of the contract, has rendered the performance of the contract impossible, illegal or radically different, without any fault of either party. Whilst the COVID-19 pandemic has caused and will continue to cause significant disruptions and inconvenience to world trade and shipping, it appears unlikely that it will amount to a frustrating event.

In case a party seeks to rely on frustration, they will have to carefully assess whether the duration and the extent of the disruption caused to their operations by the pandemic has resulted in such a severe change of circumstances, which would eventually undermine the commercial purpose – or even the existence – of the contract. This could prove to be a rather complex exercise.

### **Q9. Will time count as laytime/demurrage when the vessel is delayed at the port due to COVID-19 issues?**

In order for a valid notice of readiness (NOR) to be issued and for laytime to commence, the vessel must be ready in all respects to receive the cargo, i.e. physically and legally, with all her documentary requirements in place. The granting of free pratique (i.e. the official permission of the port health authorities that the vessel is without any infectious diseases and can make contact with the shore) could be rather problematic in the present circumstances, especially if it is known to the authorities that crewmembers onboard are infected or suspected to be infected by COVID-19. In that case, it is likely that the vessel will have problems issuing a valid NOR, which would prevent laytime from commencing.

On the assumption that a valid NOR is issued, laytime will start and will continue to run, unless there is a relevant exception in the laytime provision in the charterparty with regards to the vessel’s operations being delayed or suspended as a result of the pandemic. By the same token, if the vessel is on demurrage, she will remain on demurrage unless there is an express

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exception to the contrary, which would interrupt the ‘*once on demurrage, always on demurrage*’ rule. It is worth mentioning that general exclusion clauses in the charterparties, excluding delays in the operations, will not apply on laytime and demurrage, unless they are ‘*clearly worded to that effect*’ (*The Lefthero*).

#### **Q10. What is the effect of BIMCO's 'epidemics' clause on owners and charterers?**

BIMCO has two specific clauses that deal with outbreaks and epidemics;

1. The Infectious or Contagious Diseases Clause for Time Charter Parties 2015; and
2. The Infectious or Contagious Diseases Clause for VOYAGE Charter Parties 2015

The effect of these clauses is broadly similar, in that they come in to play when a vessel is required to transit or call at an “Affected Area”. The definition of an Affected Area is wide; being any port of place where there is a risk of exposure to a Disease (defined, again widely, as a highly infectious or contagious disease that is seriously harmful to humans).

Both clauses give shipowners the right to refuse to enter or remain at Affected Areas if certain conditions are met. Both clauses also enable shipowners to proceed to an Affected Area on notice, with any additional costs being for the charterers’ account, with the vessel remaining on-hire throughout (in the case of a time charter).

Currently all BIMCO material related to COVID-19 is free to view at:  
<https://www.bimco.org/covid19>.

#### **Q11. What happens to the cargo on board the vessel in the event there is a force-majeure event?**

The presence of cargo onboard a vessel can dramatically complicate the situation if there is a force majeure event.

To the extent that The Hague or The Hague Visby Rules apply (either through a Clause Paramount or application of law) both the ship and carrier will have a defence to any loss or damage to the cargo arising from “quarantine restrictions” or “saving or attempting to save life or property at sea”.

In circumstances where a force majeure event leads to termination of the charterparty with cargo on-board, the situation at English Law is governed by the principle of bailment which would make the shipowner responsible for care of the cargo, giving him a corresponding right to recover expenses reasonably incurred in performing this duty.

For further guidance or assistance please contact the Club’s [LCC team](#).