



COVID-19 – Shipping Update 2: Emerging Themes

At a Glance...

On 11 March 2020, the World Health Organization (WHO) declared COVID-19 a global pandemic. Two days later, the WHO stated that Europe showed more reported cases and deaths than the rest of the world combined, apart from China. Italy now has more reported deaths from COVID-19 than China and, as COVID-19 continues to spread, governments across the globe are implementing ever stricter measures in an attempt to contain or delay the spread of the disease. Those measures are causing significant disruption to seaborne trade.

Reed Smith is fielding a substantial number of enquiries relating to COVID-19. In this briefing, we set out some guidance on the most common issues we are seeing.

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1. Crew health

Owners' priority is the well-being of the crew on their vessels. They need, in particular, to:

- (a) Circulate health and hygiene measures. The Master should ensure full understanding and compliance, and be particularly alert to any symptoms suggesting that a member of the crew may have been infected. Immediate steps need to be taken to isolate that person and seek urgent and appropriate medical advice.
- (b) Disclose to the vessel's next port of call any suspected cases of COVID-19 on board.
- (c) Exercise particular care when persons need to board the vessel in the course of the vessel's trade (e.g., agents, stevedores, local authorities).
- (d) Monitor, insofar as possible, the mental health of their crews. Prolonged delays, confinement due to disembarkation restrictions, or a fellow crew member affected by COVID-19 may prove particularly difficult.
- (e) Contact their P&I insurer and seek to agree in advance a response plan in case of a confirmed or suspected case of COVID-19 on board the vessel to ensure they remain covered.
- (f) Understand that failure to take appropriate pre-emptive and responsive steps may expose owners to liability for crew members who contract COVID-19.

2. Crew changes

Vessel operators should be aware of the possibility that travel restrictions (e.g., domestic lockdowns, border closures and flight stoppages) may prevent scheduled crew changes. This may in turn prevent:

- (a) taking effective delivery of a vessel under a bareboat charter or by way of sale; or
- (b) providing a full crew.

The latest situation in the intended port of delivery or embarkation should be closely monitored, given that governments are imposing restrictions for public health purposes at increasingly short notice, and checks are being made of crew (with the possible imposition of 14-day quarantine periods) before they join or leave a vessel.

3. Supplies/services to the vessel

Owners, operators and charterers should be aware that service providers (e.g., chandlers, shipyards, stevedores) may experience staff or product shortages which may cause delays. Necessary supplies and spares may not be able to reach the vessel due to government restrictions. Both owners and charterers should therefore:

- (a) Ensure that any arrangements for services to be provided to the vessel are made as early as possible so that alternative providers can be found if required.
- (b) Obtain a clear statement from the supplier or service provider as to when and how such supplies/services will be provided (e.g., that a minimum number of stevedores will be engaged within a certain number of days following

notice) to be as certain as possible or what has been agreed.

(c) Seek regular updated time estimates from suppliers and service providers.

4. Delays

(a) **Quarantine:** As operators will be aware, 14-day quarantine restrictions for vessels calling at a port affected by COVID-19 are now widespread. The feared increase in the quarantine period has not materialised.

(b) **Free pratique:** Several port authorities are carrying out enhanced health inspections, which may lead to long delays in obtaining free pratique. Some ports also require advance requests for free pratique. Vessel operators should work with their local agent to ensure that all necessary formalities are taken care of as early as possible.

(c) **Congestion:** The thorough checks carried out by local authorities, together with quarantine measures, can cause significant delays to various stages of the vessel's call at a port. This may cause knock-on congestion. In China, port congestion appears to have eased and terminals have resumed normal working conditions. However, the rapid escalation in Europe and the U.S. (with Africa and South America yet to report serious numbers of incidents), will very likely mean similar problems arising worldwide.

(d) **Pilots:** Delays may be caused due to the unavailability of pilots or the unwillingness of pilots to board a vessel. There have been reported instances where local pilots have refused to board vessels arriving from places within a certain number of days (e.g., Samsun, Turkey) or requiring thorough disinfection of the pilot house before boarding (e.g., California). Vessel operators should liaise with their local agents to ensure that a pilot will be available on arrival.

5. Cargo operations

(a) **Cargo availability:** Restrictions may limit the access of trucks to the port. There were reported cases of unavailability of truck drivers to move cargo to ports in China. Equally, restrictions may apply to inland ports that affect transfer of cargo by river feeder vessels. So far, however, many border shutdowns exempt cross-border transportation of goods, although delays should be expected due to health checks performed on truck drivers.

(b) **Lack of stevedores:** A lack of available stevedores or restrictions on boarding the vessel may lead to slower cargo operations (and possible demurrage or other detention claims).

6. "COVID-19 proofing" your charterparty contracts

We highlighted in our [previous alert](#) the likely contractual issues that may arise as a result of the current COVID-19 epidemic. As the impact of COVID-19 deepens, parties can start to use their experiences to date when considering appropriate contractual provisions.

BIMCO's Infectious or Contagious Diseases Clause may apply if expressly agreed, assuming that (i) COVID-19 is "seriously harmful to humans" – a requirement that may cause various disputes as to the demographics that are relevant for the purposes of this clause; and (ii) it is COVID-19 rather than some other issue that gives rise to the risk of restrictions being imposed on the vessel. Intertanko's Coronavirus Clause has also been prepared specifically to deal with COVID-19. However, Owners are receiving serious pushback to both when negotiating charters.

So what common ground can the parties realistically hope to achieve?

- Ensure that COVID-19 is expressly referred to in the charter.
- Prepare also for a different strain of the virus causing COVID-19 (SARS-CoV-2) arising with a new name – i.e., extend the definition of "COVID-19" to cover this.
- Remember who generally bears the risk at different stages of a voyage charter – this is often a good starting point when negotiations become difficult.
- List the vessel's ports of call during the 30 days preceding delivery as part of pre-fixture negotiations.
- Think proactively: parties should draft their contract with a focus on how the situation may develop before a dispute arises. The COVID-19 pandemic is still in its early stages with changes taking place on a daily basis.

And what is likely to be more contentious?

(a) **Safe port/berth:** It bears repeating that, in most cases, charterers have an express or implied obligation to nominate a safe port. A safe port is one that is prospectively safe for the vessel to reach, use, and depart from. In the current circumstances, it may be difficult to argue that a port is unsafe because of COVID-19, so long as any risk of contagion is capable of being dealt with by taking reasonable precautions. But this may change.

It remains unlikely therefore that, save in exceptional circumstances, COVID-19 would render a port or berth unsafe, save perhaps where the steps being taken at the port to combat the spread (taking into account precautionary measures expected by an ordinarily prudent and skillful master) are inadequate, cause contamination on board, and lead to crew deficiency such as to render the vessel unseaworthy [see previous alert].

(b) **Force majeure:** By their essence, force majeure incidents are unexpected events. Given the global extent of COVID-19, it is now difficult to describe a COVID-19 related issue as unexpected, and so a general exceptions clause may be the better way forward. Parties should consider the following points when negotiating the contract:

(i) Define the event

In all cases, clear wording will be needed to extend a force majeure or exceptions clause to cover COVID-19.

It will certainly be necessary in new contracts to amend any force majeure clause to include events that are both foreseeable and unforeseeable, and it may be better simply to include a separate COVID-19 clause or to refer to any clause dealing with it as an exceptions clause.

The designation of COVID-19 as a pandemic is helpful, and wording in charters that refers to epidemic may also be of assistance

Quarantine restrictions are more straightforward and already appear in some standard forms, such as Shellvoy 5 and 6 and Shelltime 4.

A reference to “*action by governmental, local or public authorities*” may assist, but again clear wording would be preferable.

A provision allowing “*deviation for the purpose of saving life*” would appear to cover both life of third parties at sea as well as members of the vessel’s crew, and express wording to cover the latter is also increasingly common place.

Remember that a ‘catch all’ provision will be construed *ejusdem generis* unless the word “*whatsoever*” is inserted.

(ii) Trigger

Consider what steps are required to invoke the clause, bearing in mind that the wording will be strictly construed. Do you need performance to be “prevented”, or merely “hindered” or “delayed” by the event? Or are parties excused where there is any “inability to perform”?

And do you want a requirement that the force majeure event must have had an actual impact on the contract or should an anticipated effect suffice? If the latter, whose judgment would be relevant (owners/master, hypothetical bystander)?

(iii) Cause/effect

And can you show (as you must) that COVID-19 is the cause of the prevention or delay?

Do you want to say “causes” or “resulting from”, or simply “gives rise to” or “leading to”? Do you understand what the use of each imparts?

In China, the authorities were issuing certificates to say that there was a “force majeure” event. That is less likely in European countries. It may therefore be advisable to agree that information from a mutually trusted source (e.g., the vessel’s flag state) certifying that a certain area has been affected by COVID-19 shall be conclusive proof. In that case, it is prudent to confirm with such source in advance that it can actually provide the necessary information in the form contemplated by the parties.

The party seeking to rely on the clause will bear the burden of proving that the force majeure event made performance impossible and also that “but for” the event, performance would have been possible. See, for example, *Classic Maritime Inc v. Limbungan Makmur SDN BHD* [2019] EWCA Civ 1102 – owners can put charterers to proof that cargo would have been available.

(iv) Alternatives

Unless clear and careful wording is used, there will be an obligation to consider alternative means of performance – do you want that?

(v) Notice requirements

Consider how quickly it will be obvious that there is a COVID-19 event causing problems and negotiate any notice requirements accordingly.

(vi) What do you want as the outcome?

Do you want the parties to be able to walk away from the contract? And if so, when – immediately or after a certain number of days? How time sensitive is the performance? Would owners prefer to keep the vessel under the current charter at current rates, even with a period of non-payment of hire, or would they prefer to go back into the market to find a replacement fixture?

What options do you need if cargo has already been loaded? And, for owners, how much do you want charterers to assist in finding alternative ports for discharge?

(c) **Costs:** Or do you really just want a contractual provision to allocate additional costs which arise as a result of action needed to work through a COVID-19 situation? Charterers may be willing to share these costs, although their starting point, particularly in spot fixtures, may be that owners have entered into the charter with full knowledge of the risks involved and should therefore bear the risk. Even an apparently lucrative freight and demurrage rate may not truly compensate owners for the additional costs of performance in a fast-changing environment.

(d) **Frustration:** With the possible exception of the cruise industry where countries are closing their ports to cruise vessels, the current issues arising from COVID-19 generally involve delays. Even in the case of quarantines, unless a vessel were to go from one port to another and be refused entry or suffer repeated delays, it is unlikely that these would meet the very high threshold set by English law to justify frustration of a contract. This may still change as the COVID-19 situation develops throughout Europe, the United States, and beyond.

But remember that just because it is more expensive to perform the contract than was anticipated when entering into the contract, does not mean the contract is frustrated.

(e) **Off-hire:** In a usual form of time charterparty, the following off-hire events may be engaged:

(i) “**Deficiency of men**”: COVID-19 is a particularly contagious disease. Under the current IMO guidance, a suspected COVID-19 case could easily lead to the isolation of a significant part of a team within the crew. If this happens, the off-hire clause may operate if this deficiency prevents the full working of the vessel.

(ii) “**Should the Vessel deviate**”: This provision (or similar alternatives) is used in owner-friendly charterparties (e.g., BPTIME 3, LINERTIME). If the vessel deviates to disembark or hospitalise a member who is suspected of contracting COVID-19, then the obligation to pay hire may be suspended. The same effect is achieved by off-hire clauses providing for no hire to be paid when time is lost “*for the purpose of obtaining medical advice or treatment for or landing any sick or injured person*” (e.g., Shelltime 4).

(iii) **Consider adding similar wording:** Parties may wish to clarify that it will be justifiable to deviate in order to disembark and/or hospitalise a confirmed COVID-19 patient or even a person who is reasonably suspected by the master of having contracted COVID-19, even if such person turns out not to have done so.

(f) **Laytime/demurrage:**

(i) **NOR:** Something more than “WIFPON” is likely to be required to deal with the fact that in the current environment, free pratique is, in practice, no longer a question of mere formality, as is often the case.

Even with extra efforts to liaise with local agents and prepare all necessary documentation for free pratique purposes well in advance, and to conclude health inspections as swiftly as possible, delays are likely.

Express wording will be needed to ensure that NORs can be tendered and time starts to run even without free pratique being granted. Wording along the lines of clauses often used in respect of hold inspections may be appropriate; e.g., NOR can be tendered and time will start to count before free pratique is granted, but if it is not granted, time stops running until it is.

(ii) **Delays:** As already noted, there may be delays in completing loading/discharge operations due to congestion or insufficient numbers of stevedores. Charterers are seeking amendments to standard form wording and, depending on the freight agreed, an extension of the half laytime/half demurrage provisions of BPVOY4 may be viewed as a reasonable compromise.

(g) **Deviation:** If losses are caused due to deviation for the purposes of disembarking a crew member so that they can receive medical care (and to ensure the remaining crew are not infected), owners may be able to rely on the provisions of the Hague/Hague Visby Rules, both in the charterparty if they are incorporated and under the Owners’ bill of lading contract if they apply. Both documents will need to be checked carefully for this purpose.

(h) **Quarantine:** Most ports are imposing quarantine restrictions for vessels carrying goods. Under Art. 2 Rule IV (h) of the Hague/Hague Visby Rules, owners may not be liable for losses caused due to “*quarantine restrictions*”. Owners can seek to rely on this exclusion in any disputes with the bill of lading holder assuming the Hague/Hague Visby Rules apply, or with the charterer if the applicable charterparty expressly incorporates them. Careful consideration and advice will be needed if issues of this nature arise.

Our Reed Smith Coronavirus team includes multidisciplinary lawyers from Asia, EME and the United States who stand ready to advise you on the issues above or others you may face related to COVID-19.

For more information on the legal and business implications of COVID-19, visit the [Reed Smith Coronavirus \(COVID-19\) Resource Center](#) or contact us at COVID-19@reedsmith.com

If you have questions or would like additional information on the material covered in this Alert, please contact one of the authors – listed below – or the Reed Smith lawyer with whom you regularly work.



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