

Steering through the Covid-19 pandemic

Sally-Ann Underhill and Nick Austin, of Reed Smith, provide some advice to the most common problems facing the shipping sector as it navigates the coronavirus crisis

On 11 March 2020 the World Health Organization (WHO) declared Covid-19 a global pandemic. The ever-stricter measures imposed by governments, in an attempt to contain or delay the spread of the disease, are causing significant disruption to seaborne trade. Companies like Reed Smith have been fielding questions on a range of issues relating to Covid-19 in the shipping industry, the most common of which are outlined below.

1. Crew health

Owners' priority will always be the well-being of the crew on their vessels. They should:

- (a) Circulate health and hygiene measures. The master should ensure full understanding and compliance, be particularly alert to any symptoms suggesting that a crew member may have been infected and take immediate steps 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 (eg agents, stevedores, local authorities) and limit all non-essential interactions.
- (d) Monitor the mental health of their crews.
- (e) Work with their P&I insurer 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

Travel restrictions (eg domestic lockdowns, border closures and flight stoppages) may prevent scheduled crew changes. This may prevent: (a) taking effective delivery of a vessel under a bareboat charter or sale and purchase agreement; or (b) providing a full crew.

The latest situation in the intended port of delivery or embarkation should be closely monitored given most governments have imposed severe restrictions and crew checks (with possible quarantine requirements) before they embark or disembark.

3. Supplies/services to the vessel

Owners, operators and charterers should all be aware that service providers (eg chandlers, shipyards, stevedores) may experience staff or product shortages which may cause delays. Necessary



supplies and spares may not reach the vessel due to government restrictions. Both owners and charterers should:

- (a) Ensure service arrangements to vessels 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 supplies/services will be provided.
- (c) Seek regular updates and time estimates from suppliers and service providers.

4. Delays

- (a) **Quarantine.** 14-day quarantine restrictions for vessels calling at ports affected by Covid-19 are now widespread.
- (b) **Free pratique.** Many 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 local agents to ensure all necessary formalities are complied with at the earliest possible stage.
- (c) **Congestion.** The thorough checks being carried out by local authorities, together with quarantine measures, can cause significant delays to various stages of the vessel's call. This may cause knock-on congestion.
- (d) **Pilots.** Delays may be caused due to the unavailability or unwillingness of pilots to board vessels. There have been reports of pilots refusing to board vessels arriving from certain destinations or requiring thorough disinfection of the pilot house before attendance.

5. Cargo operations

- (a) **Cargo availability.** Restrictions may limit the access of trucks to ports. So far, many border shutdowns have exempted cross-border transportation of goods, although delays are likely due to health checks on truck drivers.
- (b) **Lack of stevedores.** A lack of available stevedores or restrictions on boarding vessels may lead to slower cargo operations (and possible demurrage or other delay claims).

6. "Covid-19-proofing" your charterparty contracts

As the impact of Covid-19 deepens, parties are gaining experience of its impact on their charterparty terms and the importance of certain clauses. For example, 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 be debated depending on the demographics that are relevant for the purposes of this clause; and

(ii) it is Covid-19 rather than some other issue that effectively causes the restrictions imposed on the vessel.

Intertanko's Coronavirus Clause has also been prepared specifically to deal with Covid-19. However, there are reports of charterers pushing back on owners' attempts to introduce these protections.

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

- Ensure Covid-19 is expressly referred to in the relevant clauses of the charter.
- Prepare for a different strain of the virus causing Covid-19 (SARS-CoV-2) potentially arising with a new name – ie 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 may still be in its relatively early stages, with changes taking place daily.

What is likely to be more contentious?

(a) Safe port/berth

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 can be dealt with by taking reasonable precautions. Save in exceptional circumstances, Covid-19 is unlikely to render a port or berth unsafe, unless perhaps where the steps being taken at the port to combat the spread (taking into account precautionary measures expected by an ordinarily prudent and skilful master) are inadequate, cause contamination on board, and/or lead to crew deficiency so as to render the vessel unseaworthy.

(b) Force majeure

In essence, force majeure incidents are unexpected events occurring outside the control of one or other party. Given the global extent of Covid-19, it is now difficult to describe a Covid-19 issue as unexpected and so introducing appropriate wording in a general exceptions' clause, if possible, may be the better way forward. Points to consider during negotiations:

(i) Define the event

Clear wording will be needed to extend a force majeure or exceptions clause to cover Covid-19. Unless the coronavirus is referred to expressly, the clause will at least need to be amended to include both foreseeable and unforeseeable

events. A separate Covid-19 clause may be preferable. The designation by the WHO of Covid-19 as a pandemic is helpful and wording in charterparties that refers to "epidemic" may also be of assistance. Quarantine restrictions can be more straightforward and already appear in several 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 and the vessel's crew, while express wording to cover the latter is becoming more common. A "catch all" provision is likely to be construed as covering only the same kind of events as precede it in the clause 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"? Do you want a requirement that the force majeure event must have actually impacted the contract or should an anticipated effect suffice and, if so, whose judgment would be relevant (owners/master, hypothetical bystander)?

(iii) Cause/effect

Can the party seeking to rely on the clause show 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 need to understand what the use of each imparts?

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 still have been possible. See, for example, *Classic Maritime Inc v Limbungan Makmur Sdn Bhd* [2020] 1 Lloyd's Rep 178 – owners can put charterers to proof that cargo would have been available anyway.



(iv) Alternatives

Unless clear and careful wording is used, there will be an obligation to consider alternative means of performance.

(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) Outcome

Do you want the parties to be able to walk away from the contract? If so, when – immediately or after an agreed period? How time sensitive is 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 help in finding alternative ports for discharge?

(c) Costs

Does a contractual provision allocating additional costs resulting from action needed to work through a Covid-19 situation suffice? 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 pay. 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 exception of the cruise industry (to which most countries have closed their ports), many 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 change as the Covid-19 situation develops.

However, just because Covid-19 makes a contract more expensive to perform does not mean it is legally frustrated.

(e) Off-hire in common time charterparty forms

(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 number of crew. If this happens, the off-hire clause may operate if the resulting “deficiency of men” prevents the full working of the vessel.

(ii) “Should the vessel deviate”

This provision (or similar wording) is regularly seen in owner-friendly charterparties (eg BPTIME 3, LINERTIME). If the vessel deviates to disembark or hospitalise a crew member 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 hire to be suspended when time is lost “for the purpose of obtaining medical advice or treatment for or landing any sick or injured person” (eg Shelltime 4).

(iii) Consider adding protective 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. Even with extra efforts to liaise with local agents and prepare all necessary documentation for free pratique well in advance, and to conclude health inspections as swiftly as possible, delays may still occur.

Express wording will be needed to ensure that NORs can be tendered and time starts to run even without free pratique being granted. Wording similar to that seen in hold inspection provisions may be appropriate; eg 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, 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.

(h) Quarantine

Almost all ports are imposing quarantine restrictions for vessels carrying cargo. Under article 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. **MRI**



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