



Soundings

Covid-19 and the crew change crisis

Among the many serious knock-on effects of the Covid-19 pandemic, the impact on crew has been a topic of particular concern within the shipping industry. Many ports have imposed restrictions or prohibitions on crew changes, leading to delays whilst joining crew are quarantined, or a need to deviate ships from their intended port rotation in order to effect essential crew changes. Aside from the clear humanitarian issues posed by this crisis, parties also need to consider the contractual impacts that may arise.

Naturally, any situation is highly fact-dependent and subject to the terms agreed by the parties. Regrettably, a lack of clarity in some areas, given that this is uncharted territory, means that there is fertile ground for disputes to arise. That said, there is some general guidance which this article seeks to summarise.

Obligations of seaworthiness

Under common law, an absolute obligation of seaworthiness may be implied on delivery of the ship (under a time charter) or at the time of sailing (under a voyage charter). Charterparties may also contain express obligations of seaworthiness which continue throughout the voyage. The seaworthiness obligation is not limited to the ship's physical fitness but also includes compliance with legal requirements, including those pertaining to crew.

Potentially, a failure to comply with compulsory timeframes for a crew change may expose an owner to a breach of an implied seaworthiness obligation. The ramifications of such a breach will depend on the specific circumstances of each matter. Where the Hague or Hague-Visby Rules are incorporated into the charterparty, what may appear to be an absolute obligation of seaworthiness can be reduced to one of due diligence.

There may be other express terms in a charterparty which require the ship to have a full complement of crew (for example, see clause 2(a)(i) of Shelltime 4). Such an obligation is absolute on delivery but it may be reduced to one of due diligence thereafter. Particular facts in relation to knowledge, timing and availability to perform a crew change would be relevant to considering whether a breach has occurred.

The owner of a ship under a time charter will be concerned about the loss of hire or exposure to damages as the result of any deviation to effect a crew change.

Deviating to change crew

Issues related to crew changes are most likely to be encountered in the context of time charters. Unsurprisingly, however, the standard forms do not tend to directly address the issues flowing from a prolonged worldwide pandemic.

Time charters

The owner of a ship under a time charter will be concerned about the loss of hire or exposure to damages resulting from any deviation to effect a crew change. Under many standard off-hire provisions, where the ship is unavailable to perform charterers' orders due to a crew change, it is likely to be off hire under the common catch all of "any other cause", given that this is a matter pertaining to the crew. Any element of doubt is removed if the word "whatsoever" has been added. Alternatively, time charters frequently contain an off-hire clause which places the ship off-hire from the time of any non-permitted deviation until the ship is back "*in the same or equidistant position from the destination and the voyage resumed therefrom*". In such cases, two questions arise: first, is the deviation to effect a crew change a permitted deviation; and second, when is the ship back on hire?

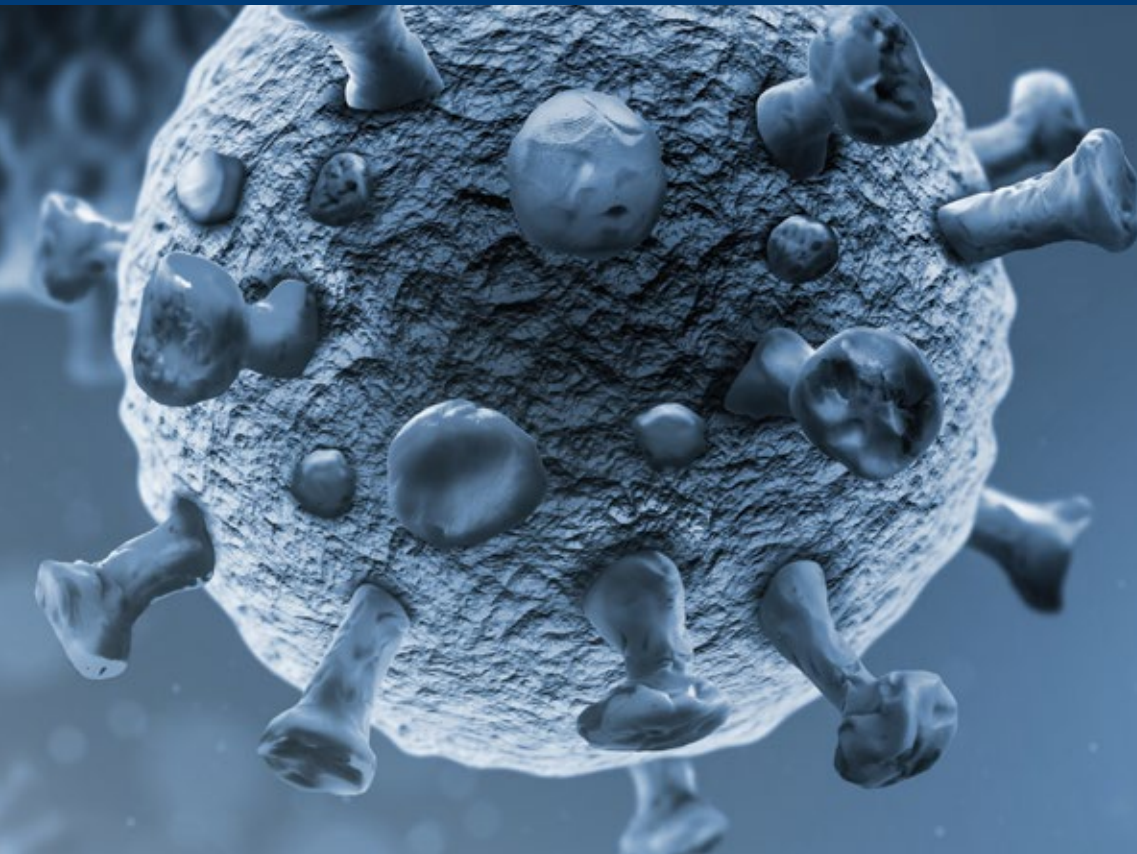
As to the first, the contractual right to deviate is often limited to saving life and property. That does not assist here. If the Hague or Hague-Visby Rules are incorporated into the charter, the liberty to deviate may be extended to include "*any reasonable deviation*". As to what is reasonable, each charter and set of facts will need to be examined, but it may not be possible to argue that a deviation for a crew change would be a reasonable deviation. The need to perform a crew change is somewhat different from saving life at sea or landing a sick crewmember.

There is a potential common law right to deviate in order to avoid danger to the ship and cargo. The potential argument would be that the ship had to deviate because the crew would otherwise

be unable to operate the ship properly and safely. In *Kish v Taylor* [1912] AC 604, a deviation was allowed despite the fact that it was necessitated by a breach of the owner's seaworthiness obligation and such a right may well appear to exist irrespective of whether or not the owner ought to have avoided it by performing a crew change prior to the commencement of the subject charterparty or the relevant voyage.

As to the second question, consider a voyage from port A to port B on the charterer's account. If a ship deviates from that voyage to port X to change crew, it goes off-hire under this type of off-hire clause from the moment of deviation. It only returns on-hire once the ship is equivalently close (or closer) to port B than it was when diverting to port X. This addresses the case where port X is a diversion off the usual route from A to B, but what if the A-X and X-B voyages are two sides of a triangle, with the usual A-B route being the third side of the triangle? In this case, the ship is notionally on diversion immediately on leaving A, but when it leaves X to steam to B the ship is significantly closer to B than it was when it left A. Can an owner claim a credit in respect of the progress towards B which takes place during the voyage to X? This is a more complicated situation and will turn on the precise wording of any off-hire provisions but as a general proposition, the ship may only be off-hire for the additional time taken by the A-X-B voyage as compared with the notional A-B voyage.

The difficulty that this situation is causing for owners is apparent from the recent introduction of the BIMCO Covid-19 Crew Change Clause for Time Charter Parties 2020, under which the parties can agree either that the owner bears the relevant time and costs of the deviation or that the parties share it. Further information on this clause can be found at <https://www.ukdefence.com/insights/july-2020-new-bimco-covid-19-crew-change-clause-152720/>



Time charter trip and voyage charters

Although perhaps less common, deviations may also be encountered in time charter trips and voyage charters. In those cases, it is more likely that the owner will bear the cost and loss of time involved in the diversions, given that the owner will know the intended ports of call in advance and such charters tend to be of much shorter duration. Deviations in the case of voyage charters also raise the additional concern on the part of an owner that they may permit the charterer to terminate the charter. Careful consideration will need to be given to any terms which give the owner a limited right to deviate in such cases.

Quarantine due to on-signing crew

Cases have also regularly been seen where a ship is quarantined and either unable to leave the present port or enter the next port due to on-signing crew. This may occur due to a suspected or actual infection amongst the new crew or merely for procedural reasons.

A ship on time charter is on-hire unless the charterer can demonstrate that a specific off-hire event has occurred. The standard charter forms tend to make the owner responsible for the efficiency and condition of the ship and the crew, leaving the risk of entirely extraneous causes typically for the charterer's account: *The Laconian Confidence* [1997] 1 Lloyd's Rep 139. The common amendment of the traditional NYPE off-hire clause to include the word "whatsoever" will make the position stronger in the charterer's favour.

In *The Doric Pride* [2006] 2 Lloyd's Rep. 175, Lord Justice Rix discussed clauses dealing with responsibility for arrest and detention. He suggested that such clauses reflect the basic distinction in time charters between matters which are the owner's and the charterer's responsibility. The owner is generally responsible for the ship and crew, whereas the charterer is responsible for the employment of the ship. Applying this sensible

distinction, a difficult situation arises where the charterer directs the ship to proceed to a particular port and the owner takes the opportunity to change the crew at that port, with the result that the ship is then quarantined and unable to enter its next port pursuant to the charterer's orders. The party counting time in this case may depend on whether the quarantine would have been imposed even if there had been no crew change. For example, if quarantine were imposed because an infected pilot had boarded at a previous port, called under the charterer's orders, then this may fall for the charterer's account.

There are reports of owners seeking to rely on rider clauses which provide for 'normal quarantine' in port to be for the charterer's account. This is certainly a point to investigate, but if the root cause of the quarantine is the owner's recently-joined crew rather than a necessary consequence of the charterer's instructions, this is likely to be a difficult position for an owner to maintain. This raises questions as to what is "normal quarantine" in the context of a "new normal".

Influence of third parties

The crew and representative bodies (such as the ITF) may bring pressure to bear on an owner to effect a crew where the existing crew's contracts have expired or the crew is approaching the maximum time period during which they can be at sea under applicable regulations or contracts. The crew may refuse to work further and demand to be replaced and repatriated.

In such cases, it will generally be the owner who is left dealing with any economic consequences which may flow from the delay due to the crew's actions. As a matter of general principle, this would make sense given that (save in bareboat charters) it would typically be the owner's responsibility to ensure that the ship is properly crewed. However, the general principle is less clear where, for example, the crew refuse to change at a port



When negotiating new charters, parties should be alive to these issues and include suitable provisions...

(nominated by a charterer in the normal cycle of voyages) due to the reported health conditions at that port.

Notwithstanding the general position, the question of which party will bear the loss consequent on any crew's refusal to perform will ultimately be determined by the charter terms. In *Royal Greek Government v Minister of Transport (The Ilissos)* [1948] 82 LI L Rep 196, in which the crew refused to sail except in convoy, the court held that the ship was not off-hire due to any 'deficiency of men' and that term was held to apply to a numerical deficiency only. Unless the off-hire clause refers to a 'default of men' (or crew, master, etc.), the ship will generally remain on hire in such cases. A similar approach is likely to apply where the crew refuse to work for reasons connected to Covid-19 or the expiry of their contracts (as an indirect consequence of the virus).

The charterer may therefore look to other provisions of the charter. For example, some assistance may be found within the charter if the off-hire clause extends to 'any other clause whatsoever', or if there is some warranty by the owner that the crew have sufficient time left on their contracts to allow the planned charter to take place. There are reports of charterers inserting 'no crew change' clauses into charters, or refusing to charter ships if any crew has been serving on board for more than 12 months.

Furthermore, a charterer may refuse to cooperate with an owner to allow a crew change to take place. Unless there is a clause in

the charter which entitles the owner to deviate for this purpose, the charterer is generally entitled to refuse its consent, even if such a stance may be considered unreasonable. Unless the owner can persuade the charterer to agree, for example by offering a reduced rate of hire for the deviation or an indemnity, the owner may be obliged to deviate from the charterer's instructions and accept the consequences of doing so, in the interests of the crew.

Concluding remarks

When negotiating new charters, parties should be alive to these issues and include suitable provisions, such as the BIMCO Covid-19 Crew Change Clause for Time Charter Parties 2020. However, in the vast majority of pre-existing charterparties the present unusual circumstances are largely unanticipated. The legal position may therefore be unclear in many cases, in most cases neither party will consider it fair that they should bear the costs associated with factors wholly outside their control, and the health and safety of the crew should be a priority regardless of liability. In this context, particularly in light of the humanitarian implications involved, it is suggested that parties should seek commercial solutions to the logistical problems associated with crew changes due to the pandemic where possible.

Members may, as always, contact the Managers with any queries relating to the issues discussed above or for further information relating to the Covid-19 epidemic.

The UK Defence Club

Thomas Miller Defence Ltd, 90 Fenchurch Street, London, EC3M 4ST
tel: +44 207 283 4646 fax: +44 207 204 2131
email: tmdefence@thomasmiller.com web: ukdefence.com