

## Contractual FAQ's

### 1. Can an owner refuse a charterer's orders to proceed to an affected port?

In the absence of a bespoke clause (see FAQ 7 below), owners will need to consider whether there are grounds to argue that the port is unsafe. This is very fact dependant and will need to be considered on a case by case basis, but the level of risk required is relatively high. In circumstances where infection should be avoidable if proper precautions are taken, the risk of infection will probably not be considered high enough to give rise to an unsafe port argument. However, the situation is in constant flux and information should be obtained as to the risk level at the port in question.

On the other hand, a risk of the ship being quarantined or boycotted as a result of visiting an affected port may be more certain. Several ports have imposed strict quarantine requirements on ships visiting from a Chinese or affected port. It could therefore be argued that proceeding to China will effectively damage the ship, in that she will be exposed to a risk of quarantine at her next port of call, which could give an owner a right to refuse orders on grounds of unsafety. However, again, this is fact dependent and we would recommend seeking specific legal advice before refusing a charterer's orders, which may expose an owner to a potential damages claim.

### 2. Who will bear any time loss if the ship encounters restrictions, quarantines or delays at a subsequent port after previously calling at an affected port?

Under a time charter, any applicable off hire provisions will need to be considered on a case by case basis. Under the Shelltime form, for example, clause 21 provides that the ship should remain on hire during any period of quarantine provided that the crew have not been quarantined due to "communication with the shore at any infected area without the written consent or instructions of Charterers". Under the NYPE 1946 charter, whilst the ship may be off hire due to fumigations required due to illness, fumigations required due to ports visited under the charter will be for the charterer's account. This accords with the general principle that the ship should not be placed off hire for delay which arises due to the charterer's own fault. If the ship visited the affected port under a previous charter, however, the position may be different.

Under a voyage charter, where a ship is quarantined on arrival or free pratique is not granted due to possible infection or simply arriving from an infected area, owners will not be able to tender a notice of readiness to commence laytime, unless there is an express clause dealing with this (for example "whether in free pratique or not" (WIFPON)).

If a ship is quarantined after tendering notice, whether laytime is suspended or not will depend on the terms of the charter. For example Clause 17 (a) of the Asbatankvoy charter provides for laytime to be suspended for delay due to quarantine if charterers give orders to proceed to a port that is already quarantined, although if the port is declared quarantined while the ship is en route, it will not.

### **3. If the ship is quarantined or restricted, who will be liable for any resulting costs or expenses?**

Where, as is commonly the case, the charterparty contains a clause paramount or a general exclusion clause (see for example clause 27(a) of Shelltime 4), owners may be exempted from liability for costs and damages arising due to quarantine restrictions.

Alternatively, owners may have a basis to claim against charterers for sending them to an affected port under the implied indemnity or safe port provisions. However, this may not assist if owners are deemed to have accepted the risks of going to an affected port or the crew failed to take recommend precautions (such as by taking shore leave contrary to the recommendations of the local authorities).

### **4. What if the ship has to deviate due to a crew member becoming sick?**

Under a time charter an owner will, in the absence of an express clause, generally be responsible for costs related to the welfare of the crew, including deviation and repatriation of a sick crewmember. However, in some circumstances, owners may be able to seek an indemnity from charterers for damages arising from charterers ordering the ship to an affected port. Many charters contain express clauses relating to crew sickness which will need to be considered.

Some charters contain clauses placing the ship off hire if there is a loss of time for the purpose of obtaining medical assistance for the crew (for example, Shelltime 4). This situation would probably not fall within an unamended NYPE 1946 off hire clause (the “deficiency of men” exception is probably only applicable to a numerical deficiency), but the addition of the word “whatsoever” may well change this.

Under a voyage charter, an owner is generally entitled to deviate for the safety of the crew, but the costs and time will be borne by the owner since the freight earned will remain the same. If the ship is delayed in port due to sickness of the crew, there may also be issues of demurrage and the specific terms of the charter will need to be considered.

### **5. Is there frustration or force majeure?**

Frustration is a concept that is particular to English law and arises if performance under the charterparty is rendered impossible, illegal or radically different from that which was originally contemplated by the parties. This will depend on the facts but the bar is very high and mere inconvenience or additional expense will not suffice. It is therefore unlikely that a delay of a few days, or even weeks, due to the virus will result in frustration under contracts that are governed by English law.

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### 5. Is there frustration or force majeure? (continued)

Force majeure, on the other hand, arises only if there is an express clause contained in the contract and depends on the wording of the clause. Therefore, force majeure may be more readily available and easier to assess than frustration. Many force majeure clauses are, for example, triggered in the event of quarantine or delays lasting a certain period of time. Parties relying on force majeure clauses need to pay careful attention to any fundamental requirements, such as notification within a certain time limit.

Under Chinese law, it is understood that force majeure operates as a matter of law and refers to any objective circumstances which are unforeseeable, unavoidable and insurmountable. This may be relevant in the context of shipbuilding contracts with Chinese yards. Delays have been incurred due to Chinese government regulations suspending work in order to limit the spread of infection. Some yards are seeking to rely on force majeure provisions to avoid liability for the resulting delay. Chinese legal advice will need to be sought by Members facing such issues.

### 6. What if a port is closed?

Under a time charter, the charterer may need to decide whether to hold the ship off the port waiting for it to re-open or to provide alternative orders. Either way, it is likely that the ship will be on hire for any delay, in the absence of an express clause placing the ship off hire.

In contrast, under a voyage charter, where the port in question is named, there may not be a contractual right for the ship to proceed to an alternative port and, unless an alternative arrangement can be agreed commercially, it may be necessary to wait for the port to re-open. Depending on the length of the wait, this may raise questions as to frustration or force majeure as discussed above.

### 7. What protective clauses are available?

BIMCO's Infectious and Contagious Diseases clause is recommended for use in all new time and voyage charters. The clause, which was drafted in response to the Ebola outbreak of 2014, is drafted broadly so as to apply to any outbreak of disease that is sufficiently serious and is likely to be triggered by this particular outbreak of the novel coronavirus given that it has been declared a Public Health Emergency by the WHO.

The clause gives owners the right to refuse to proceed to an affected area. The same discretion is given to the master as in the BIMCO war and piracy clauses. As with those clauses, the level of danger must be real and significant. The master is required to make background inquiries and seek guidance from relevant sources, such as regulatory or advisory bodies in the owner's Flag State, as well as guidance issued by specialist intergovernmental organisations, such as the World Health Organisation.