



Soundings

COVID-19 drives floating storage risks

The recent months have seen an unprecedented surge in the use of tankers as floating storage for oil and petroleum products caused by a perfect storm of collapsing demand for such products due to the COVID-19 pandemic - leading to the rapid overwhelming of onshore storage capacity - together with falling oil prices. The use of a tanker for such storage may have a range of practical and legal implications that arise from using a ship in a manner that was not contemplated or specifically provided for by the relevant charterparty.

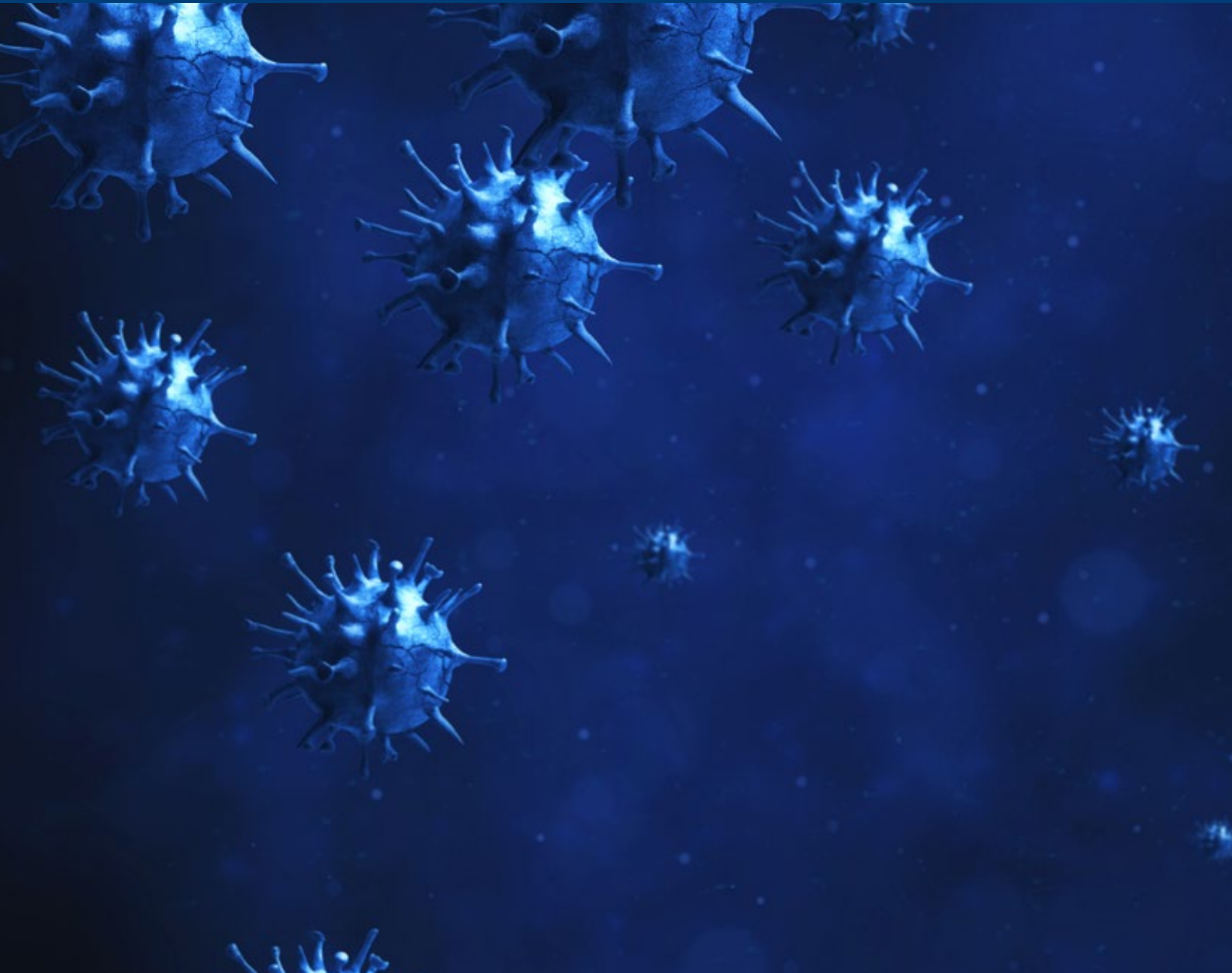
Even as lockdowns begin to ease and demand for oil rebounds, the volume of tanker capacity used as floating storage still appears to be increasing. According to Lloyd's List Intelligence data, at the end of May some 278.2m barrels were tracked on 239 ships at anchor for 20 days or more, accounting for an estimated 10% of the global VLCC fleet.

The above factors have given rise to problems such as severe port congestion and increased risks of hull fouling

during lengthy idle periods, which are likely to result in contractual disputes.

Charterparty issues

The standard forms of charterparty represent a finely tuned allocation of the risks that are commonly anticipated to arise during the carriage of cargo from one place to another. When those forms are applied to the different exercise of storage at sea, one or both of the parties may



end up being required to shoulder risks in unexpected ways. The following are some of the issues that are likely to arise.

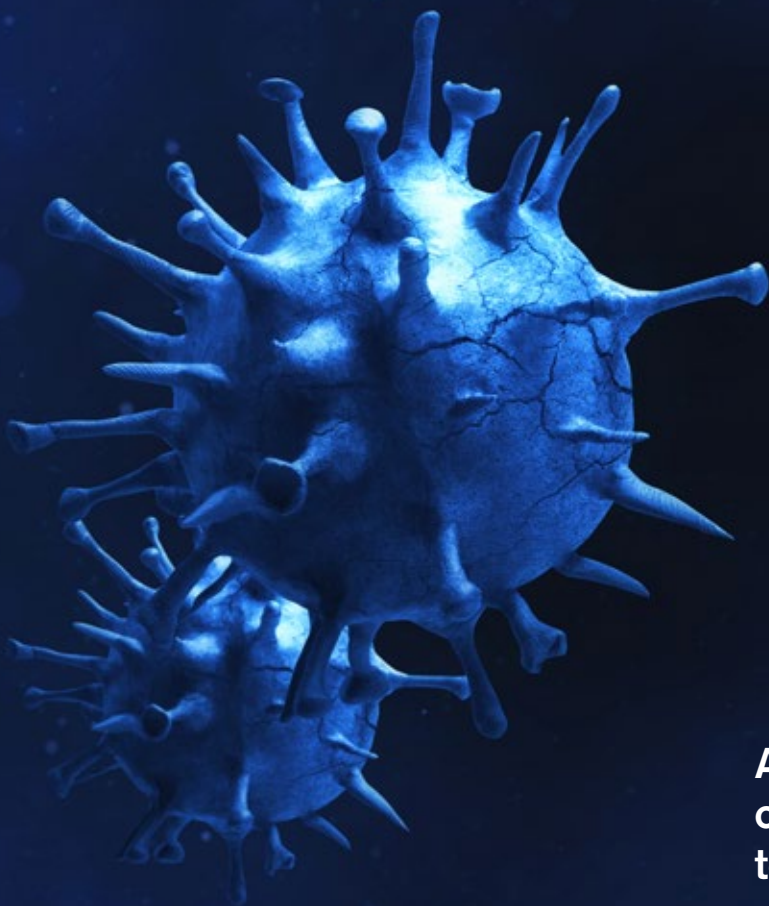
Is the charterer allowed to use the ship as storage?

Whether or not the charterer is even entitled to use the ship as floating storage will depend on the wording of the particular charterparty. However, in general there is a distinction between time charters and voyage charters.

Under a time charter, the charterer is generally free to employ the ship as it sees fit provided it pays hire. In principle, it may be difficult for an owner to refuse to obey orders to use the ship as floating storage, especially if the order is merely to wait off a nominated port pending discharge. Some tanker charter forms even give charterers an express right to use the ship as floating storage – one example being clause 21 of the BPTIME 3 form – although in most cases they are short provisions that do not deal with many of the consequent issues which might arise in cases of long term storage. One complicating factor arises where owners have issued a bill of lading in respect of the cargo. An order to stop and wait may place owners in breach of their obligations under the contract of carriage,

which may, depending on the terms of the charterparty, render such an order unlawful.

The position under a voyage charter is, in principle, very different. Without an express provision, an owner is likely to be entitled to refuse an order to use the ship as floating storage. Such an order arguably would be incompatible with the fundamental nature of a voyage charter as a contract for the carriage of cargo from one place to another and would be liable to place the owner in breach of its obligation to prosecute the voyage with utmost dispatch, both under the charter and any underlying contract of carriage. Some voyage charters do contain clauses giving the charterer liberty to stop the ship and await further orders, usually with provision for demurrage in the event that new orders are not given within a certain period of time – see, for example, clause 22 of the BPVOY4 form and clause 24 of the BPVOY5 form. Whether such clauses apply requires careful scrutiny of the facts. Further, it is not clear that these clauses are even capable of applying to orders given with the intention of using the ship as storage rather than redirecting her to a new discharge port (see, for example, the analysis in *The Zaliv Baikal* [2017] EWHC 1091). Of



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course, it may also be in an owner's interest to follow the order and claim demurrage or damages for detention.

There are also hybrid forms of charter that may present further nuanced issues. In a trip time charter, for example, whilst the charterer is entitled to use of the ship in return for hire, it may be possible for an owner to argue that orders to use the ship as floating storage are incompatible with the parameters of the voyage or trip envisaged under the charter.

The place of waiting – safety issues


A range of practical issues is likely to arise from a charterer's choice of the place for a ship to wait or drift whilst being used as floating storage. Of paramount importance will be the safety of the place of waiting. A ship waiting or drifting potentially will be exposed to increased weather risks, as well as risks relating to the quality of the holding ground, anchor chain fatigue and so on. The charterer under a time charter is prima facie responsible for ensuring that the ship is only employed between safe places. The owner will also have the protection of the implied indemnity, provided that it is not taken to have accepted the specific risks.

The parties may also need to consider, where applicable, an increased risk from piracy, as well as political risks, such as changes in sanctions regimes, cabotage implications, restrictions upon the duration of time that a ship is allowed to remain in territorial waters and local pollution and biofouling laws. Additional insurance may be required in respect of such risks. The bulk of charterparties will be silent, or will make inadequate provision, in respect of these issues.

A further set of issues arises in connection with the owner's ability to maintain and provision the ship while it is being used as storage. Underwater inspections may be more difficult while anchored or drifting offshore. In remote areas, it may well be very difficult to obtain fresh water and provisions or to change crew. Parties would be well-advised to agree in advance terms which will address rights and obligations as these issues arise, for example a right on the part of the owner to deviate when necessary.

Hull fouling

If the ship is required to wait at a fixed location for an extended period of time, hull fouling is likely to become an issue. The basic position under a time charter is likely to be



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that the owner is responsible for the cost of cleaning the hull and will not be able to rely on the implied indemnity, notwithstanding that the hull was fouled as a result of an extended stay pursuant to the charterer's orders (see "The Coral Seas" [2016] EWHC 1506 (Comm)). Further, an owner may face a risk of claims for reduced performance down the line, in the event that the hull is fouled. An owner may also in principle be liable to its charterer under the maintenance clause if it does not take proper anti-fouling measures.

Therefore, owners will wish to agree special terms that deal with hull fouling and any performance consequences as a result of the use of the ship for storage. Such terms might include an obligation on the charterer to pay or contribute to the cost of cleaning, a suspension of any performance warranties and a provision allowing the ship to steam at intervals (with provision as to who is to pay for bunkers) in order to avoid fouling.

Care of the cargo

The owner will continue to have an obligation to care for the cargo while the ship is used as floating storage. One particular issue is that petroleum products are known to deteriorate over time, with lighter products also affected by evaporation. There is therefore an increased risk of shortage or quality claims against the owner by cargo interests. Owners will be well-advised to agree terms that apportion liability for such claims between the owner and the charterer.

A related set of issues arises from the consequences for the ship of storing petroleum products for long periods. Such cargoes may require regular treatment or heating. Prolonged exposure to certain cargoes may degrade or impregnate the ship's tank coatings or leave sediment. In addition to the risks of cargo contamination as a result,

there is also the possibility that additional cleaning or treatment may be required in order to restore the ship to fitness. Owners will need to consider carefully whether a given ship is properly fitted to store the cargo over long periods. Further, prudent owners will also consider requiring an indemnity in respect of damage to the ship's tanks and equipment, or specific terms that place responsibility for cleaning or repairs on the charterer.

Insurance

The use of a ship as floating storage has a range of insurance implications that will need to be carefully considered. An owner's existing policies – P&I, H&M, war risks and so on – may not cover risks incurred while the ship is used as floating storage. Owners will need to consider the extent to which additional cover is required and, if so, agree who is to bear the cost as between the owner and the charterer.

Conclusions

The use of a tanker as floating storage gives rise to a range of risks, both legal and practical, which are unlikely to be anticipated or properly allocated as between the owner and the charterer in standard forms of charterparties. Given the very high rates for tankers that are currently being seen in the market, there is potential for relatively minor disputes to escalate very quickly when there is no clear provision in the charterparty. Owners and charterers are well-advised to give careful thought to the novel risks that might arise and agree specific terms that will deal with those risks. In this regard, BIMCO has recommended a suite of clauses that will offer a valuable starting point in providing for the various issues that might arise.

Please contact the Managers for further advice in relation to any of the issues discussed above.

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