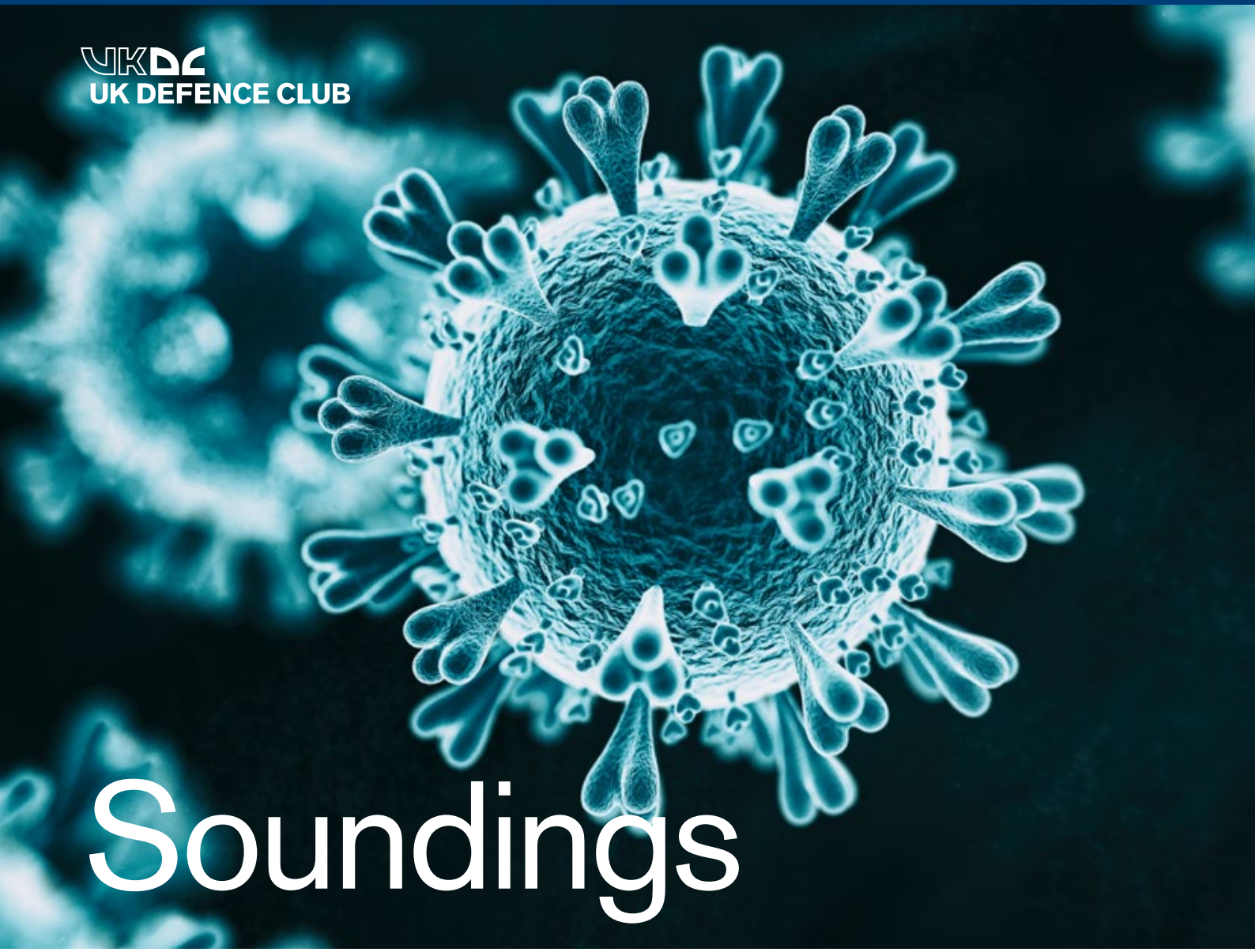
UK DEFENCE CLUB



Soundings

COVID-19 impacts hire obligations under time charterparties

Following the advent of COVID-19, many ports have imposed quarantine restrictions on ships arriving from affected areas or with possible infection on-board. There have also been associated delays due to the closure or restriction of operations in certain ports or unavailability of cargo. Against this backdrop, we have seen various disputes as to whether hire should be payable for the duration of such delays. Can a charterer legitimately refuse to pay hire during periods of delay due to the virus?

As a basic principle, hire will remain payable unless a charterer can bring itself within the meaning of an off-hire clause. In particular, although charterparties will almost invariably contain general exceptions clauses as well, such as Clause 16 of the NYPE form or Clause 27 of the Shelltime 4 form, these cannot serve to excuse a charterer from its obligation to pay hire.

Deficiency of men

Where a ship has been quarantined because crew members on-board have been infected (or potentially infected) by the COVID-19 virus, leading to delays, an argument based on off-hire may be available. For instance, the NYPE forms provide that the ship will be off-hire in the event of loss of time from the "deficiency of men … or any other (similar)

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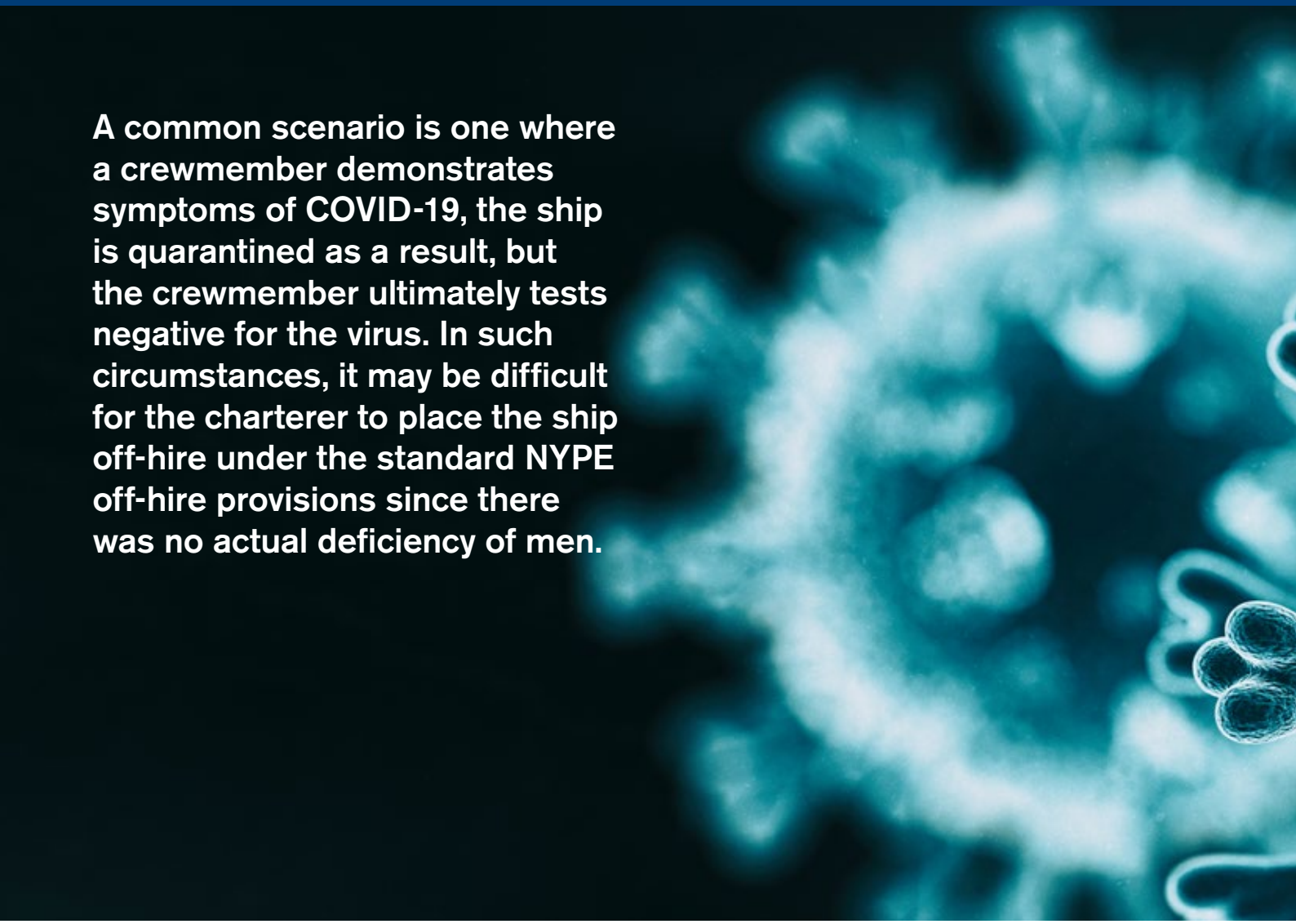


A common scenario is one where a crewmember demonstrates symptoms of COVID-19, the ship is quarantined as a result, but the crewmember ultimately tests negative for the virus. In such circumstances, it may be difficult for the charterer to place the ship off-hire under the standard NYPE off-hire provisions since there was no actual deficiency of men.

cause preventing the full working of the vessel". The case law establishes that "deficiency of men" refers to a numerical insufficiency of officers and crew (see "The Ilissos" [1949] 1 KB 525 and Radcliffe v Compagnie Général Transatlantique (1918) 24 Com Cas 40). It is suggested that if the numerical insufficiency in the crew arises from illness, rather than an unwillingness to work, this may amount to a "deficiency of men", though the matter is not free of doubt.

It follows that if the crew are not able to work as a result of illness due to COVID-19, there is a "deficiency of men" and the ship will be off-hire (assuming that the full working of the vessel was prevented and there was a loss of time). If, on the other hand, the crew are physically able to work, there is no "deficiency of men". A common scenario is one where a crewmember demonstrates symptoms of COVID-19, the ship is quarantined as a result, but the crewmember ultimately tests negative for the virus. In such circumstances, it may be difficult for the charterer to place the ship off-hire under the standard NYPE off-hire provisions since there was no actual deficiency of men.

The Shelltime 4 form provides for a deficiency of personnel as well, but goes further, providing that the ship may be placed off-hire where time is lost (i) for the purpose of obtaining medical advice or treatment, or (ii) due to any delay in quarantine arising from the master, officers or crew having had communication with the shore at any infected area without the charterer's consent.

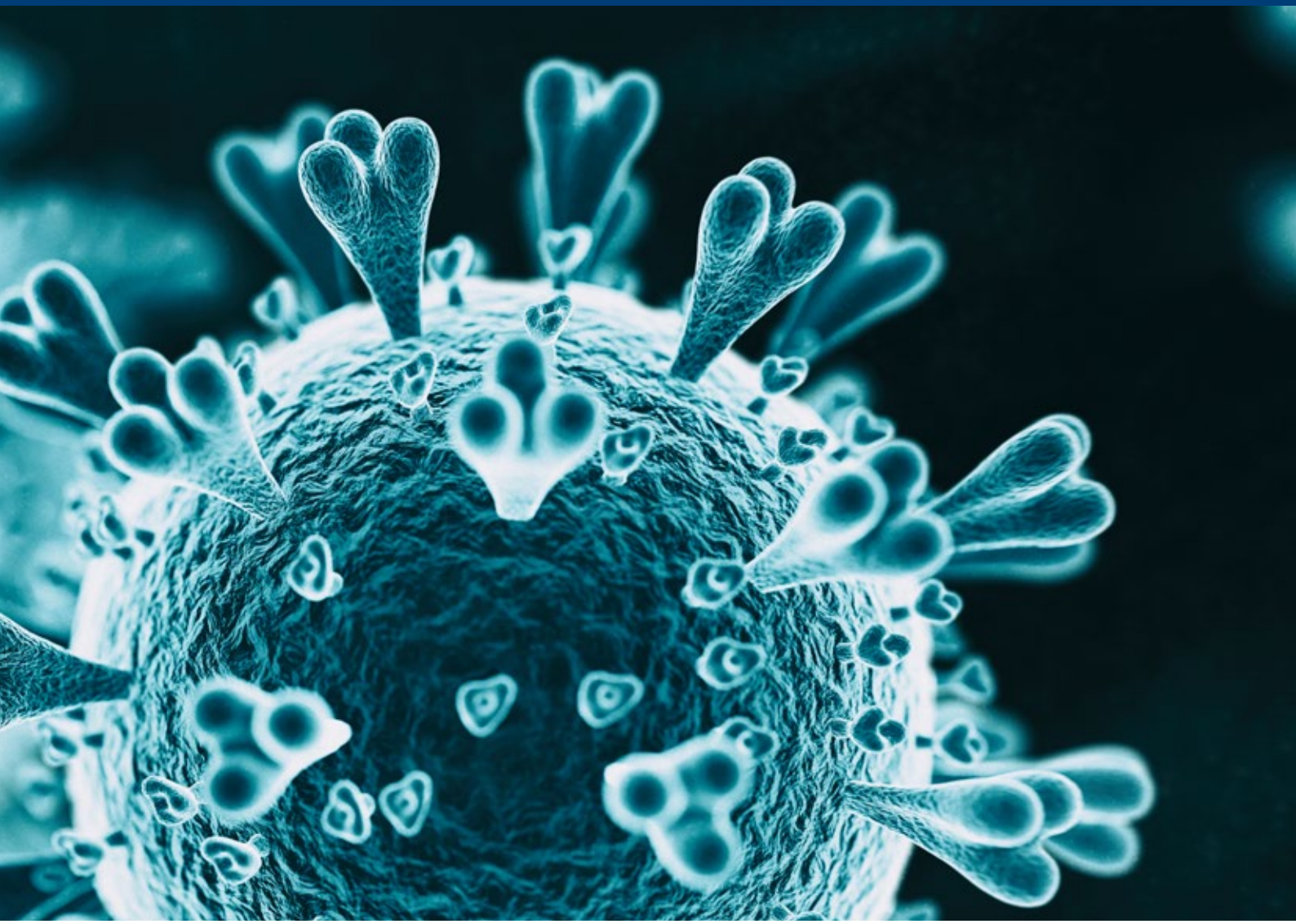
Any other cause

The factual scenario presented above may, alternatively, fall within the catch-all category of "any other cause". As the High Court held in "The Laconian Confidence" [1997] 1 Lloyd's Rep 139, legal or administrative restraints on a ship may qualify as an "other cause" if they relate to the physical efficiency or condition of the crew.

Moreover, where an off-hire clause is triggered by "any other cause whatsoever" (a common amendment to the NYPE form), the off-hire definition is broadened significantly and it may apply where the ship has been quarantined due to general concerns about exposure to COVID-19 which are unrelated to actual or suspected crew illness.

A natural consequence of the charterer's orders

Even if the charterer can point to a relevant off-hire event, however, it is important to consider whether such event arose as a natural consequence of the charterer's orders. If so, a court or tribunal might hold that the ship nevertheless remained on-hire. This may be the case, for instance, where the ship has been ordered by the charterer to call at one port and is subsequently quarantined or otherwise delayed at the next port as a result of infection incurred at the first port.



Normal quarantine

Another clause that is commonly added into time charters provides that "normal quarantine" time and expenses are for the charterer's account, but any time and expenses for "quarantine due to pestilence, illness, etc., of Master, Officers and crew" are for the owner's account, "unless caused by ports called or cargoes carried under the charter party".

In line with Rix LJ's reasoning in "The Doric Pride" [2006] 2 Lloyd's Rep 175, such a clause appears to reflect the basic distinction in a time charterparty between matters which are the responsibility of the owner, and matters which are the responsibility of the charterer. However, one difficult issue is whether the quarantine precautions recently imposed at many ports around the world due to COVID-19 are to be counted as "normal" quarantine for the purposes of this clause.

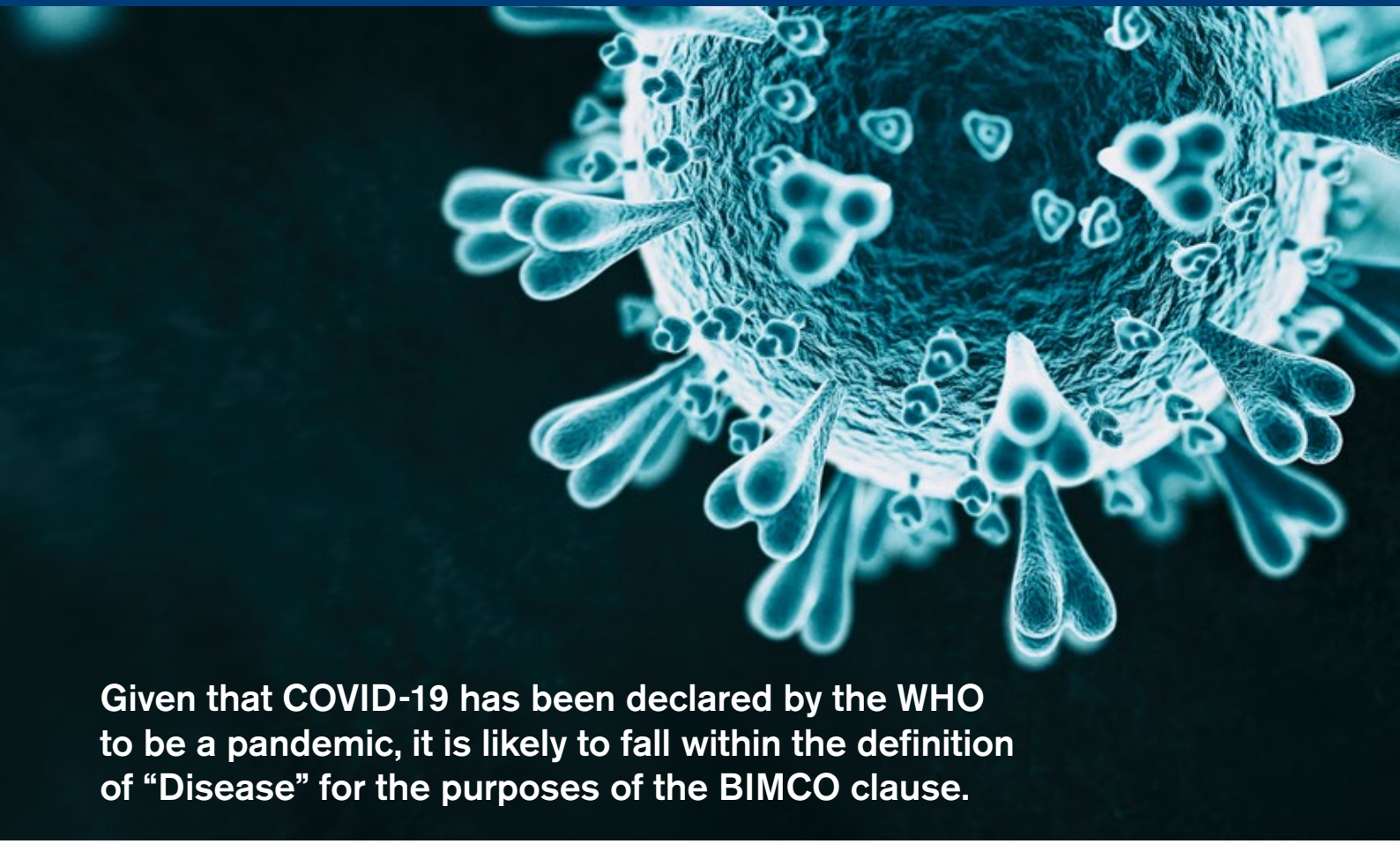
Given the exceptional nature of these quarantine arrangements, they may be seen to be "abnormal" quarantines. On the other hand, it is arguable that quarantine measures applied to all ships should be treated as "normal". Such an argument would carry more weight in respect of charterparties entered into after the outbreak of COVID-19, and the imposition of such quarantine measures. If the quarantine in question is not caught by this clause, then time and expenses may need to be allocated in accordance with the other terms of the charter.

Has the charterparty been frustrated?

An alternative argument that a charterer may seek to run is that delays caused by COVID-19 have frustrated the charterparty, thereby relieving it of its future obligations to pay hire. A charterparty will be frustrated where, through no fault on either side, it becomes physically or commercially impossible to perform, or if performance would be radically different to what the parties originally contemplated. In such circumstances, the charterparty is automatically terminated and all future performance obligations of both parties come to an end.

However, the test for frustration is a difficult one to satisfy. In particular, a charterer will not be able to establish that the charterparty has been frustrated just because it has become unprofitable to perform or because there have been some delays in performance.

Invariably, whether an argument based on frustration is viable turns on the precise circumstances encountered by the ship. For example, a 14-day quarantine restriction imposed by ports is unlikely to render performance radically different to what was contemplated by the parties. However, more severe impediments on contractual performance may well constitute a frustrating event, such as where force majeure has been declared by ports in places including India and South Africa, although a declaration of force



Given that COVID-19 has been declared by the WHO to be a pandemic, it is likely to fall within the definition of "Disease" for the purposes of the BIMCO clause.

majeure by a port does not automatically frustrate a charterparty. The charterparty's duration and trading limits will also be relevant. The fact of delays at a few ports might not make it impossible to perform a long-term period charterparty which allows for worldwide trading, but might preclude or impact the performance of a trip time charter.

In any event, where the parties have expressly provided for COVID-19-related risks in the charterparty, their rights and obligations will be governed by such provisions, and the charterparty is unlikely to be frustrated.

Has specific provision been made for COVID-19?

Where parties have incorporated clauses dealing with diseases generally or with COVID-19, such clauses will clarify, and possibly determine, the position on hire. A prominent example is the BIMCO Infectious or Contagious Diseases Clause for Time Charter Parties, which was published in 2015 in the wake of the Ebola virus and applies in relation to a "Disease", which is defined as "a highly infectious or contagious disease that is seriously harmful to humans".

Where it applies, the BIMCO clause permits the owner to refuse to proceed to or remain at a port or place which "in the reasonable judgment of the Master/Owners" is an "Affected Area", that is, a "port or place where there is a risk of exposure to the Vessel, crew or other persons on board to the Disease and/or to a risk of quarantine or other restrictions being imposed in connection with the Disease". Crucially for present purposes, if the ship proceeds to the Affected Area despite such objections and with the owner reserving its rights, then it will remain on hire throughout.

Given that COVID-19 has been declared by the WHO to be a pandemic, it is likely to fall within the definition of "Disease" for the purposes of the BIMCO clause. However, the courts have not had an opportunity to consider this point and might be minded to disagree. In particular, the mortality rates seen thus far have been lower than those of SARS and Ebola, making it at least arguable that COVID-19 is not "seriously harmful" within the meaning of the clause.

Conclusion

As the COVID-19 pandemic continues to give rise to delays for many ships in ports around the world, questions as to whether hire is payable for the period of such delays will continue to be debated between owners and charterers. As can be seen, this type of argument may take various forms. However, whether hire is payable is ultimately dependent on the precise situation and the specific wording of the charterparty in question, so each dispute will need to be considered on a case by case basis.

Members are invited to contact the Association for further guidance in relation to the above issues.

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