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Dear Sirs,

CORONAVIRUS ISSUES – THREE MONTHS ON

It is only three months ago that Coronavirus or Covid-19 began to be thought of as more than a localised matter of concern. Whereas it was initially thought to be a matter principally for China or East Asia, it is now recognised as a global pandemic that will cost many lives and cause untold economic damage.

The Spread of the Virus

In early February, we were able to report that the virus appeared to be mainly confined to China, although more than 100 other incidences had been reported in 25 other countries.

Today, the World Health Organisation reports that more than 4.25 million cases have been reported, and almost 290,000 deaths worldwide. Cases have been recorded in 212 countries and territories. Updates can be found at : <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/situation-reports/>.

Potential Impact on Carriage of Goods by Sea

We initially anticipated the following:-

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- The closure of ports (and shipyards) in China
- The reluctance of crews to call at Chinese ports
- Quarantine-type measures at ports in other countries, where a vessel has recently called in China, or a crew member has recently visited China

The impact of the disease has been much more widespread, of course, but on the whole we have not seen the disruption that might have been anticipated.

We have not seen the widespread closure of ports. Some shipyards have struggled with manpower shortages.

We have not seen crew reluctant to go to certain ports. What we have seen is the difficulty of managing crew changes, of getting surveyors onto vessels, concern about the boarding of pilots and berthing masters, and similar.

There are wide-ranging and widespread restrictions. The Wilhelmsen website illustrates the issues: <https://www.wilhelmsen.com/ships-agency/campaigns/coronavirus/coronavirus-map/>

Issues that are not specifically related to charterparty standard forms have included:

- A. Signing documents, and whether an electronic signature is sufficient – in particular, where the document is a deed, and the signature needs to be witnessed
- B. The ability (or inability) to present documents to a bank under a letter of credit

Assumptions

We have only considered the standard forms of commonly seen charters. The charters we have looked at are summarised in the attachments. They have been selected on the basis that these are the ones we see most often (give or take NYPE 2015). We would be pleased to analyse other forms on request.

We are, accordingly, commenting on the basis that:-

- None of the charters contains the BIMCO Infectious or Contagious Diseases clause (which was published in 2015 as a result of the Ebola virus) see: https://www.american-club.com/files/files/BIMCO_infectious_disease_charterparties_circular_Jan2015.pdf;
- None of the charters contains a force majeure clause
- We will confine ourselves to charterparty issues for the time being, although there are also possible issues under bills of lading, where cargoes are delayed, or prevented from being discharged.

Preliminary Point: Safe Port

Virtually all charters – whether time charters, time charter trips or voyage charters – will contain a safe port warranty.

It is not necessary to repeat in any detail the established test as to whether a port is safe, apart from saying that it must be safe to approach, enter, use and depart from.

As things currently stand, we doubt that any question of safety as such arises because of the Coronavirus. That is, we do not consider the epidemic position as we currently understand it makes any port unsafe. It may be there will be delays in entering the port, but there is no immediate apparent risk either to the ship or to the crew. At any rate, not one that cannot be avoided by common sense measures. Mere delay in entering (or leaving) a port is unlikely in our view to make it unsafe. So far as we know, all other commentators share our view on this.

The position might be different if there were a significant risk to the health and welfare of those on board at any particular port. But we have seen no indication of this so far, and every such case would be very individual and fact-specific.

Such issues are possibly more likely to arise in the context of period time charters, as opposed to time-charter trips or voyage charters, where the current situation will most likely be taken into account at the fixture stage.

Force Majeure

Force majeure is not a free-standing concept recognised by English law. In this respect, English law differs from many other – mainly civil law – systems, such as France, Germany or the Netherlands. If there is a force majeure clause in the contract, then it will be construed and given effect in accordance with the usual rules of construction of contract terms.

On 7 May, the UK Government issued a document entitled “*Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the COVID-19 emergency*”. This has no legal effect, but appears to suggest contract parties should act “fairly” or “reasonably” towards each other. Historically, English law – unlike for example the US – does not require “good faith” in contractual relations, outside specific examples such as insurance contracts or fiduciary relationships, and it is difficult to know if the Government means to alter that, or whether it just wants people to “play nicely”. So far, nothing has changed.

In Singapore, however, the COVID-19 (Temporary Measures) Act 2020 was enacted on 7 April, which does change the law – although not as yet in a maritime context, so far as we can see.

In China, CCPIT has been issuing force majeure certificates. They are unlikely to have any impact on the legal position under contracts governed by other systems of law than Chinese, but they may have an impact on the enforceability of foreign judgments or awards. That might be the result if the contract is held to have been rendered illegal, or if enforcement is deemed contrary to public policy.

Time Charter Forms

None of the standard forms regularly seen contains provisions that directly address the situation.

A circular from 4 Pump Court said that “*many charterparties include specific clauses dealing with the outbreak of illness or infectious disease*”. They refer to clause 25 of Supplytime 2017. This is a BIMCO form, and it might be thought that forms published after 2015 might contain

the BIMCO Infectious Diseases Clause. So far as we can tell from a quick review, however, that is not the case.

We have had a query about the BIMCO Clause. This was in a Supplytime form, and the query was whether Covid affected the performance of the vessel in a way which triggered the operation of the clause. It is perhaps harder to see how the clause works in the context of a Supplytime contract than a blue sea charter.

Force majeure clauses are rarely in a charterparty context. We have seen examples in sale of goods contracts, but not charterparties.

The issues that might arise are, in generic terms:

1. **Delivery into service.** If a vessel is unable to reach the point where delivery is to take place, the charterer may have the right to cancel the fixture.

Even if she can reach the place of delivery, there could be a dispute as to whether she is then “*at the disposal of charterers*” (to use the words in line 18 of NYPE 1946) if she is detained or delayed for, say, quarantine purposes. The case of Ciampa v British India [1915] 2 KB held that a vessel that loaded lemons at a plague port, which meant she was compulsorily fumigated at Marseilles, damaging the lemons, was unseaworthy. We have reservations that a period of quarantine would by itself render a vessel unseaworthy, but the point is arguable.

In practical terms, since this will only ever be an issue at the commencement of a time charter, it is probable that new charters will address such issues. The issue might remain relevant, however, in the case of charters with long lead-in times. For example, charters of newbuild ships are often entered into years in advance.

2. **Redelivery at the end of the charter period.** A delay might lead to an overrun. In those circumstances, could owners claim damages for late redelivery?

The normal rule is that the obligation to redeliver at or before the contractual terminal date is absolute, so that a charterer will be liable in damages for late redelivery even if the last voyage orders were legitimate. There may, however, be clauses that address the position. Clause 19(b) of Shelltime 4 for example provides that owners are to be paid at the hire rate for any overrun if the last voyage is legitimate. The exceptions clause may also come into play (see below).

Query the position where a vessel calls at a port on her last voyage under one charter, and is then detained or quarantined at the first port of call under her next fixture because she has come from a place that is regarded as justifying such a step. Might it be argued that a claim lies against the first charterer, perhaps on the ground that she had not been redelivered in like good order and condition? The BIMCO clause addresses this issue, but absent such a term, the point is moot.

3. **If the delay occurs during service, is the vessel off-hire?**

The terms of each off-hire clause would need consideration, but in general terms the only off-hire event is likely to be “*deficiency of men*”. Even then, if an illness is the

result of obeying charterer's orders, we do not consider the vessel would be off-hire. The position would be different if a crew member fell ill as a result of infection contracted before he joined the ship.

Shelltime 4 is an exception, in that clause 21 (iii) and (iv) address illness and quarantine issues.

The charterer might claim that the intervention of port authorities prevented the full working of the vessel, at any rate if the word "whatsoever" is added to the NYPE clause. But Time Charters para 25.40 suggests that causes that apply to ships generally, as opposed to the specific vessel, are to be treated as entirely extraneous, and not an off-hire event.

If the infection or delay is the consequence (maybe the inevitable consequence) of obedience to the charterer's orders, then the implied indemnity comes into play.

4. Do any of the exceptions clauses bite?

Virtually all general exceptions clauses contain a "mutual" exclusion for restraint of princes. This wording covers state action taken on public health issues.

Shelltime 4 clause 27 refers expressly to quarantine restrictions and neither party is responsible for any loss, damage, delay or failure in performance.

We do not consider this would excuse a charterer from paying hire, but it might well exclude liability for period overrun.

If the Hague Rules are incorporated into the charter, then the owner will have the protection of the Article 4(2) exceptions, which include restraint of princes (g), and quarantine restrictions (h), provided due diligence has been exercised.

5. Are the fumigation/de-rat clauses of any relevance?

We think not, since they only address the question who is liable to pay the cost.

Each of the charters has slightly different provisions. But we doubt they make a great deal of difference to the general position outlined above. For convenience, we have listed in the attachment the forms we have considered, and referred to the clauses which are of potential relevance.

Over the past few months, we have fielded a number of queries that are related to the consequences of Covid-19. There have been general enquiries as to whether there might be some sort of force majeure argument, or whether one of the general exemption clauses might apply. There have been questions about access to vessels for surveyors (such as SIRE inspectors) and the terms on which they are permitted aboard. So far, however, none has developed into a dispute or a major problem.

Voyage Charter Forms

Again, none of the standard voyage charter forms we have considered contains provisions that directly address the situation. (We have considered eight forms: four for bulk cargoes and four tanker charters. There are, of course, many other standard forms in use...)

Issues that might arise under voyage charter parties are, in generic terms as follows. Indeed, the bulk of the questions we have been asked have been to do with the running of time:

1. Readiness of Vessel upon arrival

If there are protective measures such as health check-ups and quarantine delays at ports, the issue of free pratique may arise.

The granting of free pratique is usually a mere formality, but in the absence of a WIFPON provision, the owners are likely to bear the risk of delays where a more stringent approach is adopted by local authorities.

Clause 13(1)(a) of Shellvoy 6 for example provides that in the event that Owners fail to obtain free pratique, *“all time, costs and expenses as a result of delays due to any of the foregoing shall be for Owners’ account”*.

Clause 10.5 of BPVOY 5 allows the Master an option to issue a letter of protest in the event free pratique is not granted and that *“NOR shall be effective for the purposes of calculating laytime or demurrage...However, any delay in grant of free pratique through the fault of Owners...shall not count as laytime or demurrage”*

If the vessel is unable to be ready so that NOR can be validly tendered within the cancelling date/period, charterers will have the right to cancel the fixture.

If a charter provides for laytime to commence “whether in free pratique or not” (WIFPON), the granting of free pratique will be irrelevant to the question of the notice of readiness. (But this does not exclude the relevance of port or health authority intervention).

Running of laytime/demurrage

Clause 9 of Asbatankvoy contains a warranty by charterers that the nominated safe place or wharf shall be reachable on the vessel’s arrival, and this is a condition precedent to charterers’ right to rely on the laytime exception in clause 6 (time not to run if berthing delayed by causes beyond charterers’ control). The warranty does not appear in other charter forms, including Shellvoy, BPVOY and ExxonMobilvoy.

But whether the Laura Prima ([1982] 1 Lloyd’s Rep 1) rule applies in this context is at least open to question. While the Fjordaas ([1988] 1 Lloyd’s Rep 336) says there is no distinction between physical and non-physical obstacles, we suggest that a general port closure or quarantine order might permit time to run, while an order affecting only the particular ship might not. Again, likely to be very fact-specific.

Asbatankvoy cl 8 provides:

8. DEMURRAGE. Charterer shall pay demurrage per running hour and pro rata for a part thereof at the rate specified in Part I for all time that loading and discharging and used laytime as elsewhere herein provided exceeds the allowed laytime elsewhere herein specified. If, however, demurrage shall be incurred at ports of loading and/or discharge by reason of fire, explosion, storm or by a strike, lockout, stoppage or restraint of labor or by breakdown of machinery or equipment in or about the plant of the Charterer, supplier, shipper or consignee of the cargo, the rate of demurrage shall be reduced one-half of the amount stated in Part I per running hour or pro rata for part of an hour for demurrage so incurred. The Charterer shall not be liable for any demurrage for delay caused by strike, lockout, stoppage or restraint of labor for Master, officers and crew of the Vessel or tugboat or pilots.

Do any of these exceptions apply? We would say not – but that would not prevent the operation of clause 17(a) [Quarantine] or clause 19 [General exceptions] in an appropriate case.

On the other hand, clause 8 of the Amwelsh 1993 form looks like a minefield.

Neither the Vessel, her Master or Owners, nor the Charterers shall, unless otherwise expressly provided in this Charter Party, be responsible for loss or damage to, or failure to supply, load, discharge or deliver the cargo resulting from: Act of God, act of war, act of public enemies, pirates or assailing thieves; arrest or restraint of princes, rulers or people; embargoes; seizure under legal process; provided bond is promptly furnished to release vessel or cargo; floods; frosts; fogs; fires; blockades; riots; insurrections; civil commotions; earthquakes; explosions; collisions; strandings and accidents of navigation; accidents at the mines or to machinery or to loading equipment; or any other causes beyond the Owners' or the Charterers' control; always provided that such events directly affect the loading and/or discharging process of the Vessel, and its performance under this Charter Party.

Especially the phrase “beyond the Owners' or the Charterers' control”, with the proviso about “directly affecting”.

One specific issue we have considered is where a vessel was kept waiting at a port, but which then had to leave to go elsewhere for bunkers because she was running low, and whether that served to interrupt laytime.

2. Deviation/Quarantine

If a crew member is suspected of being infected, it could lead to deviation in attempt to save life and/or quarantine on arrival at a port.

Deviation for the safety of crew is likely to be at owner's expense and no additional freight will be payable. But if the Hague/Hague-Visby Rules apply under the charter, owners will have a defence to claims if it is a reasonable deviation and is done in saving or attempting to save life (Article 4(2)(1)).

Many voyage charters include an express quarantine clause that provides for time lost to quarantine not to count unless the quarantine was in effect at the time the affected port was nominated by charterers or the vessel was already on her passage when the quarantine order was put into effect.

If the Hague Rules are incorporated into the charter, then the owner will have the protection of the Article 4(2) exceptions with respect to quarantine restrictions (h), provided due diligence has been exercised.

3. **General/Laytime exceptions clauses**

Each of the charters has different provisions as to the running of laytime and/or demurrage. Some of these are summarised in the attached schedules.

For example, Asbatankvoy and Shellvoy include general exceptions clauses which contain a “mutual” exclusion for restraint of princes. This wording covers state action taken on public health issues.

If the Hague-Visby/Hague Rules are incorporated into the charter, then the owner will have the protection of the Article 4(2) exceptions, which include restraint of princes (g), and quarantine restrictions (h), provided due diligence has been exercised. But these are protections against claims, and do not affect the running of time.

Some voyage charters also contain express laytime clauses such as clause 14(c) of ExxonMobil VOY 2012, which provides for time lost “*by reason of local law, regulations, requirements or orders of any governmental or military authorities (including, but not limited to port authorities, Coast Guard, Naval. Customs, Immigration and/or Health authorities...)*” does not count.

Clause 11.4 of BYVOY 5 provides that “*any delay arising from...closure of, or any restriction of operation at, any port or terminal by order of any local authority...shall count as one half laytime or demurrage...*” provided the delay could not have been reasonably prevented.

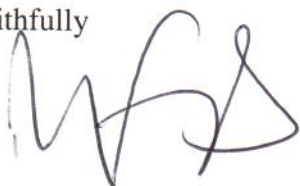
Many similar clauses could be listed, but perhaps it is better just to illustrate to kind of issue that can arise, and that there is no common or standard way in which they are addressed.

Conclusion

We have tried to address the issues in more than general terms, and with specific reference to the various charter forms and the relevant clauses. Obviously, however, there are many more forms than we have considered, and equally obviously most situations will be very fact-specific. There is also the consideration that something may occur that we have not anticipated...

Hopefully this summary will at least alert you to the possibilities.

Yours faithfully



MFB

CHARTER FORMS CONSIDERED: TIME CHARTERS

	<u>NYPE 1946</u>	<u>NYPE 1993</u>	<u>NYPE 2015</u>	<u>Baltimere 1939 (as amended)</u>
Delivery	lines 18-20	clause 2	clause 2	clause 1
Cancelling	clause 14	clause 15	clause 3	-
Redelivery	clause 4	clause 10	clause 4	clause 7
Off-hire	clause 15	clause 17	clause 17	clause 11
Exceptions	clause 16, and US COGSA clause 24	clause 21, and clause paramount at clause 31	clause 21, and clause paramount at clause 33	clause 13, no COGSA, no clause paramount The responsibility and exemption clause (clause 13) is much wider than clause 16 of NYPE 1946 in that Owners are only responsible for “ <i>personal acts or omissions or defaults</i> ”. The position may be different, if there is a clause paramount.
Fumigation	clause 2	clause 7	clause 7	clause 4 (which appears to be a blanket requirement that charterers pay)

CHARTER FORMS CONSIDERED: TIME CHARTERS (CONTINUED)

	<u>BP Time 3</u>	<u>BP Time 3.1</u>	<u>Boxtime</u>	<u>Shelltime 4</u>
Delivery	clause 1	clause 4.1 (“at the disposal”)	clause 1 (note no obligation to put vessel “at charterer’s disposal” – just to “deliver”)	clause 4(d) – “on dropping outward pilot”
Cancelling	clause 2	clause 5	clause 1	clause 5
Redelivery	clause 3	clause 6	clause 6(m)	clause 4(d)
Off-hire	clause 19	clause 30	clause 8	clause 21: 21. (a) On each and every occasion that there is loss of time...: (i) <u>due to deficiency of personnel or stores;</u> (iii) <u>for the purpose of obtaining medical advice or treatment for or landing any sick or injured person (other than a Charterers' representative ...)</u> or for the purpose of landing the body of any person ..., or; (iv) <u>due to any delay in quarantine arising from the</u>

	<u>BP Time 3</u>	<u>BP Time 3.1</u>	<u>Boxtime</u>	<u>Shelltime 4</u>
Exceptions	clause 35 (basic COGSA incorporated verbatim – but no Art 3(8) [paramountcy])	clause 54.1 (basic COGSA incorporated verbatim– but no Art 3(8) [paramountcy])	none express, though might be implied from responsibility clauses at clauses 16 & 17	<p><u>master, officers or crew having had communication with the shore at any infected area without the written consent or instructions of Charterers or their agents...;</u></p> <p>clause 27:</p> <p>27. (a) The vessel, her master and Owners shall not, unless otherwise in this charter expressly provided, be liable for any loss or damage or delay or failure arising or resulting from ...; provided, however, that Clauses 1, 2, 3 and 24 hereof shall be unaffected by the foregoing. Further, <u>neither the vessel, her master or Owners, nor Charterers shall, unless otherwise in this charter expressly provided, be liable for any loss or damage or delay or failure in performance hereunder arising or resulting from</u></p>

	<u>BP Time 3</u>	<u>BP Time 3.1</u>	<u>Boxtime</u>	<u>Shelltime 4</u>
				act of God, ... seizure under legal process, ... <u>quarantine restrictions</u> , ... or <u>arrest or restraint of</u> <u>princes, rulers or people</u>
Fumigation	N/A	N/A	clause 5(e)	clause 6 – for owner's account

CHARTER FORMS CONSIDERED: VOYAGE CHARTERS (BULK)

	GENCON 1994	SYNACOMEX 2000	NORGRAIN	SUGAR 1999
Notice of Readiness	clause 6(c) – WIFPON if no berth immediately available	Clause 8 – WIFPON only if no berth immediately available	clause 18(a) & (b)	Clause 19 – WIFPON only if no berth immediately available
Cancellation	clause 9	Clause 6	clause 4	clause 13
Safe Berth Warranty	clause 1	Clause 2	clause 1	clause 4
Quarantine	none	Clause 22, line 268: mutual exclusion	NOTHING SPECIFIC	nothing specific
Exceptions	clause 2	Clause 22	clause 36 – inc restraint of princes, but no express mutual exclusion for quarantine	clause 6 – inc restraint of princes, but no express mutual exclusion for quarantine
Paramount Clause	none	Clause 22	clause 36 (effectively)	none
Deviation	clause 3	Clause 20	clause 34	clause 21

CHARTER FORMS CONSIDERED: VOYAGE CHARTERS (TANKERS)

	<u>Asbatankvoy</u>	<u>ExxonMobil VOY2012</u>	<u>Shellvoy 6</u>	<u>BPVOY 5</u>
Notice of Readiness	clause 6 - delay after NOR over which charterer has no control does not count as laytime	clause 11	clause 13 (berth charter; limited right to start time prior to berthing)	clause 10 (if berth not available, and free pratique refused, time counts from issue of letter of protest, unless delay due to owner's fault)
Cancellation	clause 5	clause 12	clause 11	clause 7.2
Safe Berth Warranty	clause 9	clause 16(b) (due diligence)	clause 4	clause 9 (due diligence)
Quarantine	clause 17(a) – for charterer unless declared after vessel on passage	clause 23 (time not count unless port quarantined at time of charterer's nomination)	Clause 23 (time to count unless quarantine in effect after vessel on passage)	clause 37 (time to count unless quarantine in effect after vessel on passage) but see also clause 46.2
Exceptions	clause 8, 19 (mutual exclusion for restraint of princes)	clause 14(c)(v) & (vii) – paramount exclusion of running of laytime and demurrage if delay result of action of health authorities	clause 15(2) (demurrage at 50% if restraint of princes) clause 32(1) (actual fault and privity, and express restraint of princes and quarantine exceptions) BUT	clause 11.4 (demurrage at 50% in some circs) clause 12.1 (no demurrage if time lost due to vessel causes, including deficiency of crew) clause 46(1) and (2)

	<u>Asbatankvoy</u>	<u>ExxonMobil VOY2012</u>	<u>Shellvoy 6</u>	<u>BPVOY 5</u>
Paramount Clause	clause 20(b)(i)	clause 27(b)(i) – which applies the Rotterdam Rules (!) unless b/1 issued in a place where US COGSA etc applies	clause 32(3) which applies the Hague Visby Rules to cargo claims	clause 46.1 (ish) main parts of Hague Visby Rules incorporated – but not the paramourncy clause (Art 3(8))
Deviation	clause 20(c)(vii)	No specific clause, so presumably Hague Rules protection	clause 31	clause 32.1