**COVID-19 CHARTER PARTY IMPLICATIONS[[1]](#footnote-1)**

We are participating in today’s Maritime Law Association ADR and Admiralty Committee meeting remotely due to the health and safety risks posed by the Coronavirus, a lethal virus that has now been classified as a world pandemic. It is not difficult to identify the obvious impacts that the Coronavirus is having and will have on both voyage and time charter parties. The issues that may arise are legion: (a) Is a port located in a stricken city such as New York a “safe port”? (b) Is a port still considered a “safe port” if there was no virus risks when the port was originally declared and those issues arose after the voyage began? (c) What percentage of the crew must be diagnosed with the virus before the vessel is not permitted to visit a berth and port? (d) If the port is deemed unsafe due to the Coronavirus, does the vessel owner have the right to discharge the cargo at a nearby and convenient safe port? (e) Can a tanker vessel construction contract be delayed/cancelled due to the impact of COVID-19 on world oil markets? (f) Who pays for the inevitable delays and costs that will be experienced by Owners and Charterers due to any of these situations?

The first thought that comes to mind in addressing COVID-19 charter party issues is that the typical *force majeure* clause in a charter party may/should excuse at least some contractually required performance. The agreement of the parties is always a good starting point for such an analysis but in the case of COVID-19, each *force majeure* provision must be examined to determine its scope and each individual situation must be analyzed to determine whether the clause excuses the contracted for performance. In addition, it should be noted that different jurisdictions treat *force majeure* differently. For example, Norwegian law (and other civil law jurisdictions) would recognize the COVID-19 epidemic as a *force majeure* situation absent any contractual provision, if the party invoking *force majeure* was not and could not have been aware of the situation when the contract was entered into and the party takes all reasonable steps to overcome the effects of the *force majeure*.[[2]](#footnote-2) In contrast, under American and English common law, *force majeure* is not a legally recognized concept but must be specifically provided for in the contract between the parties. It is a truism that both courts and arbitrators in all jurisdictions will interpret *force majeure* clauses or other exceptions narrowly.[[3]](#footnote-3)

In considering application of *force majeure* to COVID-19, it is important to refer to certain general principles of contract law. Under New York law, *force majeure* provisions generally excuse performance when the parties’ ability to perform is prevented by “an extreme and unforeseeable occurrence” beyond the party’s control.[[4]](#footnote-4) Contract parties are free to define *force majeure* as they see fit, but New York courts interpret such provisions narrowly, excusing a party’s performance “only if the *force majeure* clause specifically includes the event that actually prevents a party’s performance.”[[5]](#footnote-5) Many *force majeure* provisions do not specifically include illness or pandemic as a triggering event and most *force majeure* clauses will not excuse a payment obligation if that is the performance that is required.

The other general principle that applies to *force majeure* clauses that contain the catchall phrase “or any other cause beyond the parties control” is that the application of that phrase will be limited to events of “the same general kind or class as those specifically mentioned.”[[6]](#footnote-6) I have been involved in maritime arbitrations where that principle has been applied to the afore-mentioned catchall phrase in clauses that excuse the running of laytime.

Two other self-evident principles are applicable to *force majeure* declarations. First, notice of the *force majeure* event must be given within a reasonable time after the party invoking *force majeure* “knew or reasonably should have known” about the event giving rise to the declaration. Failure to give such timely notice will inevitably result in a higher burden of proof on the party declaring *force majeure* and, any damages to the other party arising from the late notice will be the responsibility of the party giving the late notice. Second, the party invoking force majeure must do everything it can to mitigate the effects of the *force majeure*. A *force majeure* declaration is not a license to extend contractual performance beyond the period of time reasonably necessary to recover from the impact of the event. Clause 35 of the Supplytime 2017 Charter Party contains language that codifies much of the case law and arbitral authority relating to *force majeure* declarations and the obligation to mitigate:

*…neither party shall be liable for any loss, damage or delay due to any of the following force majeure events and/or conditions to the extent the party invoking force majeure is prevented or hindered from performing any or all of their obligations under this Charter Party, provided they have made all reasonable efforts to avoid, minimize or prevent the effect of such events and/or conditions.*

I can speak from personal experience on a current shipbuilding case with which I am involved the party declaring *force majeure*, in its notice, identified the impact of the virus on its workforce, the specific steps it has taken and will take to enforce safe work conditions on the vessel, the anticipated delay that will result from employing these safety measures and the anticipated return to normal work conditions. An issue has arisen because despite the invocation of *force majeure*, the shipyard is seeking damages from the Owner for the economic impacts of the extension of the project on the shipyard—"time is money”. The shipyard’s rationale is that because its performance is excused under the contract terms, Owner should be responsible for the extra costs incurred by the yard to complete the project. I suspect that views will differ on this issue among our Committee members.

**Unsafe Port Issues**

Let’s deal with some specific charter party issues that will undoubtedly arise in the current COVID-19 era. The most common question likely to be confronted by a vessel owner is whether it is obliged to proceed to a port where there is a substantial risk of contracting the disease. The classic definition of a “safe port”, under both American and English law, is whether during the relevant period of time, the ship can reach the port, load or discharge its cargo, and return from the port without being exposed to dangers which cannot be avoided by good navigation and seamanship. In the case of infectious diseases, the concept of safety is extended to the crew, and it clearly has been suggested that the health risks posed by COVID-19 to vessel crew can render a port unsafe. My experience with maritime arbitrations is that the safety of the crew is of paramount importance to SMA arbitrators and that any close issues involving crew safety will be decided in favor of protecting the crew.

Most time charters contain either express or implied safe port warranties which oblige the Charterer to order the vessel only to ports which will be safe upon the vessel’s arrival. This is a prospective obligation which applies at the time the port is nominated. If the port becomes unsafe after the Charterer’s nomination, the Charterer’s would likely be obliged to cancel the original nomination and nominate a new, safe port. I will deal separately with the application of the BIMCO Infectious Disease Clauses on both time and voyage charters.

The issue is not as clear when it comes to voyage charter particularly when it is a single voyage charter party and the declared port was safe at the time the parties entered into the charter. The failure of the Owner to proceed to the named port may constitute a breach or repudiation of the charter thereby enabling the Charterer to claim damages. If the vessel is unable to proceed to a COVID-19 infected port, declaring an unsafe port may raise “frustration” issues which would excuse the performance of both parties. For Owners it would be an excellent idea to include a lightering clause or a clause that permits discharge at a nearby safe port with the Charterer covering the delays and the extra costs.[[7]](#footnote-7)

The common law permits “frustration” of the contract to excuse performance “when a change in circumstances makes one party’s performance virtually worthless to the other, frustrating the purpose in making the contract.”[[8]](#footnote-8) However, the frustrated performance must be substantial and must go to the core of the contract.[[9]](#footnote-9) In the case of a one-voyage charter party, the inability to reach the nominated port would appear to qualify as a frustration of the venture.

The other common law principle that may also excuse performance of a voyage to a COVID-19 infected port is the doctrine of “impossibility”. This doctrine excuses performance when an unforeseen and unanticipated occurrence makes performance objectively impossible.[[10]](#footnote-10) As with *force majeure* and frustration, courts apply the doctrine of impossibility very narrowly and will not excuse performance “if the difficulties that …make performance impossible reasonably could have been foreseen by the promisor when the parties entered into contract.”[[11]](#footnote-11) Courts are hesitant to apply the doctrine to excuse nonperformance where the parties could have allocated the risk of an event that was reasonably foreseeable at the time the contract was made.[[12]](#footnote-12)

**Seaworthiness Issues**

The concept of Owner’s obligation to provide a ‘seaworthy” vessel means that the vessel must be suited for its intended purpose. Arguably a vessel that has called on an infected port on its prior voyage may be unfit to carry a cargo on the succeeding voyage. If a laden vessel is required to go into quarantine as a result of visiting an infected port and the ensuing lay-up causes damage to the cargo, the Owner may be held responsible as the vessel may be deemed unseaworthy. Each situation may present novel issues as the ever-changing government regulations relating to COVID-19 make planning for these situations virtually impossible.

**Off-Hire and Delays**

An off-hire clause is a standard provision in most time-charter parties so the issue arises whether the vessel owner is entitled to be paid charter hire for the time lost due to COVID-19 related issues. Again, the language of the off-hire provision must be examined and then applied to the situation at hand. The party invoking the off-hire provision will of course have the burden of proving the application of that provision.

If enough crew members are infected with the virus and are thus unable to perform their required responsibilities on the vessel, the off-hire clause may be invoked due to a “deficiency of Crew”. Obviously in such a situation, the time charterer would be unable to use the vessel for its intended purposes and it would not matter what type of vessel is involved. However, questions may arise as to which party is responsible for the off-hire, and thus whether Owner or Charterer must bear the financial burden for the off-hire. For example, what if the Charterer had directed the vessel to an infected port on its prior voyage and the crew became infected as a result of that visit? Is responsibility in that situation allocated based on whether the exposure occurred in the ordinary course of the vessel fulfilling its loading or discharge responsibilities or whether the exposure occurred during a voluntary shore visit by the crew which led to the infection. The specific language of the off-hire provision as well as the law of the particular jurisdiction will likely control the outcome.

**Demurrage and Other Issues**

As a young lawyer I remember litigating demurrage cases and arguing about principles such as “once on demurrage, always on demurrage” or does the shifting time allowance apply to each port in a multiple port voyage charter party. In determining whether laytime continues to run if the vessel has been impacted by COVID-19 measures, the specific language of the clause needs to be examined. For example, the ASBATANKVOY charter party expressly excludes delay resulting from a quarantine situation after charterers have nominated a load or discharge port. The other provision that will affect demurrage is whether the charter party permits the running of laytime “whether in free *pratique* or not.” Some charters require that free *pratique* be obtained before the running of laytime can commence.

The known existence of the COVID-19 virus is both an opportunity and possible impediment in these situations. Vessel owners should tailor clauses that will protect them if, for example, extra time will be required at a port due to US Coast Guard inspections of vessels, anticipated congestion at ports due to safety measures adopted for both shore workers and crew, and any post-nomination shutdowns of the designated port due to a sudden outbreak of the virus.

Tony Siciliano recently circulated an article on delays and/or cancellation of LNG construction contracts authored by Andreas Dracoulis and Rahul Kumar of Haynes & Booth LLP originally published in *LNG Shipping & Terminals*. In terms of cancelling the contract with the shipyard I would recommend extreme caution. The authors of the article cite certain facts that might justify cancellation such as excessive builder delays in delivery, failure of the vessel to meet contractual performance guarantees or failure of the vessel to meet a “drop dead” delivery date. My sense is that both delay and cancellation are available to an Owner who is willing to compensate the yard for the delay or cancellation. It is easier to put a price on a delay in delivering the vessel than in putting a price on a total cancellation. If the cancellation is found to be a breach of the ship-building contract, not only would the pre-delivery installments paid by Owner be forfeited but also, Owner would be responsible for any other damages resulting from the cancellation such as the reduced value of the completed vessel in a depressed market.[[13]](#footnote-13) Cancellation is not a recommended strategy unless the builder has committed a clear contractual breach and even then the recommended course would be to negotiate a reasonable financial settlement.

**BIMCO Infectious Disease Clauses**

On January 16, 2015 the Baltic and International Maritime Council known more commonly as “BIMCO” published “Infectious or Contagious Diseases” clauses for both time and voyage charter parties. The entire clauses are attached to this presentation. The clauses were adopted in response to the issues that had arisen as a result of the SARS and Ebola viruses. The BIMCO circular that accompanies the clauses notes that these virulent diseases can have significant implications for shipowners and operators such as “quarantine of a vessel and crew in an area where the disease is prevalent as well as the imposition of restrictions, possibly weeks or months later, in ports remote from the infected region as a precaution against the disease spreading further.”[[14]](#footnote-14) The foregoing rationale for the clause applies with even stronger force to the current COVID-19 epidemic which is the reason that BIMCO recently republished these clauses.

The guiding principles for the clauses cited by BIMCO in the accompanying circular read like a codification of the judicial and arbitral rules that apply to *force majeure* clauses. Thus the provisions are intended to be applied “only in the most severe cases”, a high threshold has been inserted “so that the triggering mechanism will take effect only in instances of extreme illness and cannot be misused for commercial purposes in relation to more commonly encountered or widespread viruses.”[[15]](#footnote-15) BIMCO notes that the term “epidemics” is not used in the clauses “given the potential for ambiguity and lack of clear meaning.”[[16]](#footnote-16)

In terms of the clauses themselves, they have been modelled on the BIMCO War and Piracy Clauses, where vessel owners may refuse to trade in an area of danger. If the Owner waives that option at the request of the Charterer, the Charterer becomes responsible for any ensuing delays, costs and liabilities including additional costs for preventative measures taken by Owner to protect the vessel and crew.[[17]](#footnote-17) Under the time charter clause, the Charterer’s obligations would include post-charter party cleaning, quarantine or fumigation costs that might be necessary to permit the vessel to continue its prior trading pattern. For an Owner confronted with a Charterer insisting on taking the vessel to an infected port, it would be prudent to obtain the necessary indemnities and financial guarantees from the Charterer.[[18]](#footnote-18) This of course has been standard practice by Owners for many years in situations such as delivery of a cargo to a party that is not shown as the receiver on the bills of lading, or in complying with a Charterer’s request to issue a second set of original bills of lading.

With respect to the voyage charter clause, it limits its application to events or situations that arise after the date of the charter party. Again, this is not an unusual legal concept and it is often cited in cases where a party declares *force majeure* even though the situation was known to that party at the time the charter party was made or at the time the discharge port is declared. The various provisions of these infectious disease clauses can certainly be discussed if there is time during the meeting.

My final point is that now that the COVID-19 virus is known around the world, the freedom of contract principle will apply with great force to sophisticated parties such as vessel owners, time charterers and cargo interests. The risks to be encountered from the virus are known and both Owners and Charterers should use their respective leverage to bargain for the desired allocation of financial responsibility for COVID-19 related situations and events.

Respectfully submitted,

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1. Prepared and submitted by Leo G. Kailas of Reitler Kailas & Rosenblatt LLC. [↑](#footnote-ref-1)
2. The term force majeure is a French phrase that not surprisingly, means greater force. It is derived from the Roman law phrase “vis major” which recognized that unforeseeable and insurmountable events may prevent a contracting party from performing. Article 79 of the UN Convention for the International Sale of Goods 1980 (“CISG”) embodies the force majeure principle. [↑](#footnote-ref-2)
3. In an article entitled, *Panic Button: Can You Use COVID-19 to Get Out of Contracts?,* Erik Kravets of the Kravets and Kravets maritime firm in Cuxhaven, Germany notes that the recently republished BIMCO Infectious Disease Clause discussed below, was adopted “precisely because its standard-language force majeure clause does not encompass COVID-19 or its related government-caused risks.” I don’t entirely agree with his premise as, at least in the United States, the health threat posed by COVID-19 has led to numerous government shut-downs of all but essential services. Also, even if infectious diseases or epidemics are not specifically called out in the *force majeure* provision, a government shutdown of the port certainly would be an excused event. Also, other charter party provisions such as the “safe port” warranty will, as discussed below, excuse performance if the existence of the virus makes the port unsafe. [↑](#footnote-ref-3)
4. *Team Mktg. USA Corp. v. Power Pact LLC*, 41 A.D. 3d 939, 942 (3d Dept. 2007). [↑](#footnote-ref-4)
5. *Kel Kim Corp. v. Cent. Markets, Inc.*, 70 N.Y.2d 900, 902 (1987). [↑](#footnote-ref-5)
6. *Team Mktg.*, *supra* at 942-943. [↑](#footnote-ref-6)
7. The deviation of the vessel to a different port presents a host of other issues in both time and voyage charters. For example, the charterer may be exposed to liability to its receiver for not delivering the cargo to the port designated on the bill of lading. It would be prudent in the current COVID-19 environment for vessel owners to ensure that bills of lading issued by the vessel expressly and correctly incorporate the terms of the governing charter party. Even if the charter party does not have a lightering or deviation clause, the charterer could rely on the “safe port” warranty contained in the charter party to excuse its performance. [↑](#footnote-ref-7)
8. *PPF Safeguard, LLC v. BCR Safeguard Holding, LLC*, 85 A.D.3D 506, 508 (1st Dept. 2011), (quoting *Restatement (Second) of Contracts* § 265 Comment a). [↑](#footnote-ref-8)
9. *PPF Safeguard, supra* at 508. [↑](#footnote-ref-9)
10. *Kel Kim, supra* at 902. [↑](#footnote-ref-10)
11. 30 Williston on Contracts § 77.95 (4th ed.) [↑](#footnote-ref-11)
12. *Warner v. Kaplan*, 71 A.D.3d 1, 6 (1st Dept. 2009). [↑](#footnote-ref-12)
13. If the shipyard decided to scrap the construction of the vessel, the cancelling Owner may also be liable for any delays and disruptions at the shipyard caused by the abandonment of the project. [↑](#footnote-ref-13)
14. BIMCO *Special Circular* No. 3, January 16, 2015 at 1. [↑](#footnote-ref-14)
15. *Id*., BIMCO *Circular* at 1-2. [↑](#footnote-ref-15)
16. *Id*., BIMCO *Circular* at 2. [↑](#footnote-ref-16)
17. *Id*., BIMCO *Circular* at 2. [↑](#footnote-ref-17)
18. In today’s uncertain times, an indemnity or guaranty may not be sufficient unless it is supported by a stand-by letter of credit from a first-class bank. [↑](#footnote-ref-18)