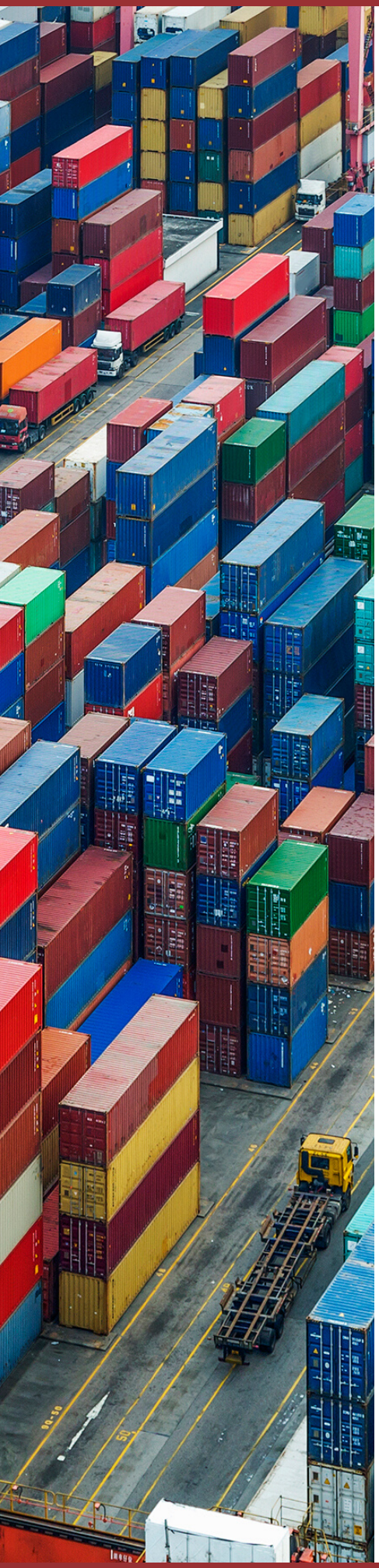


IMPLICATIONS OF COVID-19 ON SHIPPING CONTRACTS: TIME AND VOYAGE CHARTERPARTIES

From an outbreak to a global pandemic, Covid-19 has had volatile repercussions on the global shipping industry. Ports around the world have begun implementing heavier restrictions and safety measures as a precaution against the further spread of the virus. This has cut a swathe through the usual shipping practices.

The Marine Department of Malaysia, for instance, has instructed that ships that have departed or transited from countries declared by the Minister of Health to be at risk within 14 days prior to arrival at any Malaysian port be placed under quarantine, until cleared by the Port Health Office. Similarly, in Turkey, South Korea and Indonesia, quarantine inspections are conducted on vessels travelling from high-risk countries, and crew undergo health screening. In Singapore, thermal screening is implemented by the Maritime and Port Authority of Singapore at all sea checkpoints.

These measures inevitably cause delays and congestion at ports, and disruption to the loading and discharge of cargo. Some vessels refuse to call at certain ports, amid fear of Covid-19. This newsletter briefly highlights some of the key legal issues that arise in the performance of Charterparties in circumstances of Covid-19.

Some tough and urgent decisions may have to be made and options considered, including the need to re-nominate a port if the original port of call is unsafe; deviate from the scheduled voyage to save life and seek medical aid; call an event of frustration if the commercial purpose of the contract has been severely undermined; or to reserve the right to seek damages at a later date. The knock-on effect of delays on contracts of carriage with cargo receivers complicates that situation further.

The commencement of laytime and demurrage too may be called into issue, arising from difficulties in securing *free pratique* (health clearance). Recourse to off-hire clauses may additionally need review.

The ensuing discussion is a brief overview of a complex area of trade and law. It does not constitute legal advice. As each Charterparty and prevailing set of circumstances is unique, do seek independent legal assistance. Our partners shall be happy to render more specific guidance. As always, our wish is that you stay well.

LAYTIME & DEMURRAGE

(1) Can laytime commence where the vessel has physically arrived but has yet to obtain health clearance (*free pratique*)?

For laytime to commence, the following requirements must be satisfied :-

- the vessel has physically arrived at the destination specified in the Charterparty;
- the vessel is ready and in a fit condition to receive and / or discharge cargo; and
- a notice of readiness (NOR) is tendered by the shipowner.

A vessel must therefore, not only be physically but also legally ready to engage in cargo operations for laytime to commence. This means that all the necessary documents, permits and consent must be in order, including *free pratique*.

Where port authorities are implementing stringent screening processes or compulsory quarantine measures, or where any of the vessel's crew is suspected of being infected with Covid-19, *free pratique* will no longer be a mere formality.

A vessel would only be legally ready, and a NOR validly tendered, once *free pratique* has been obtained. Only then will laytime commence.

(2) If the loading or discharge of cargo is hindered due to the Covid-19 outbreak, will laytime continue to run?

If the running of laytime has commenced, parties should review the Charterparty to identify any applicable laytime exceptions clause. This is to determine whether a hindrance caused by Covid-19 can interrupt the running of laytime.

While "*pandemics*" or "*diseases*" may not be specifically mentioned in a clause on laytime exceptions, a hindrance due to Covid-19 outbreak may still be captured by the words ''*any other cause beyond the control of charterers*'' or a similar expression.

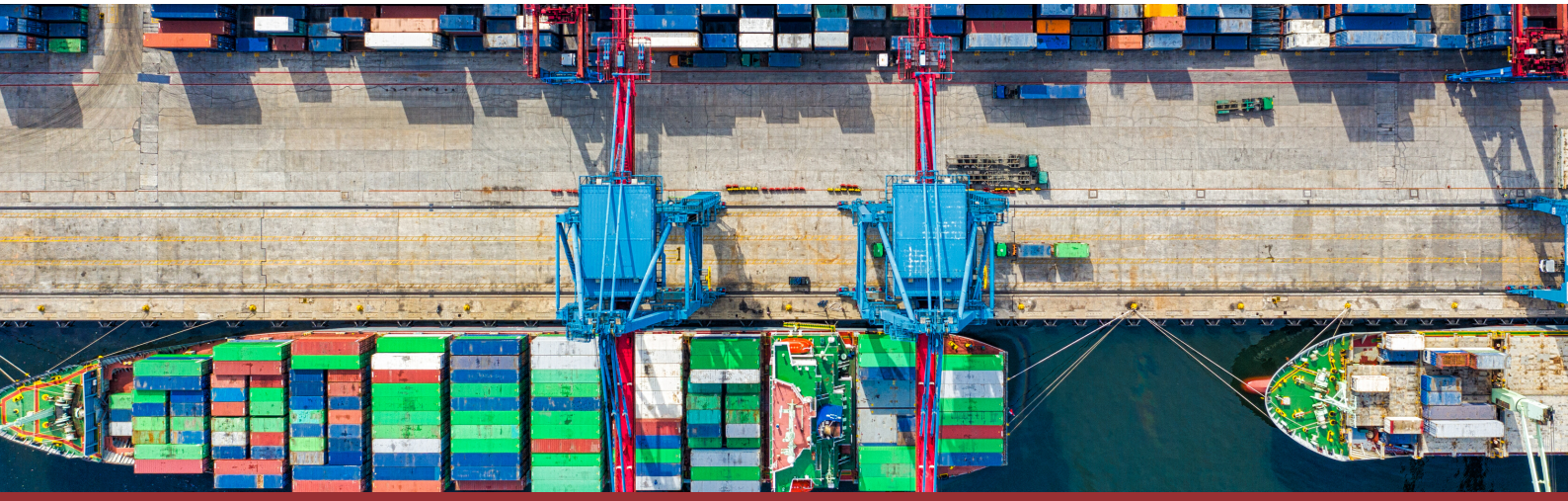
In assessing whether a particular event is captured by a laytime exceptions clause, the following principles apply :-

(i) If the causes of delay listed in the clause are of the same type, the Courts will generally presume that only causes of delay of that type are excluded.

(ii) If there is no commonality in the causes of delay listed in the clause, then the words will be interpreted more widely and may be given a literal meaning.

(iii) Where the final words of exclusion in the clause include the word ''*whatsoever*'', or something similar, this will tend to exclude the presumption stated in (i) above. The final words will normally be given a wide meaning.

If a vessel is already on demurrage before the delaying event, a laytime exceptions clause will not stop demurrage from continuing to accrue. The primary principle "*once on demurrage, always on demurrage*" will apply, unless the clause is explicitly worded to extend to the disruption not only of laytime, but also to demurrage.



LAYTIME & DEMURRAGE

(3) A charterer encounters difficulty in procuring the cargo in time for loading for reasons relating to the Covid-19 outbreak. Can the charterer rely on laytime exceptions clauses to stop laytime from running?

Regardless of difficulties faced by the charterer in procuring the cargo and getting it delivered to the loading point on time, the charterer's duty to have cargo ready in time for loading is an absolute one. Save for extreme situations that render the contract frustrated, or a suitably worded laytime exceptions clause, laytime will continue to run.

Laytime exceptions would not, in the absence of clear words, extend to hindrance in the preliminary cargo operation of procurement.

(4) Where demurrage is continuing to accrue due to events relating to Covid-19, what is the shipowner's role under such circumstances?

In some circumstances, such as when a shipowner exercises a lien over cargo, the shipowner may be required to take reasonable steps to ensure that the period of detention of the vessel is not unnecessarily prolonged by any failure on its part to act reasonably. The shipowner is however, entitled to look first to his own interest before considering the available measures that can mitigate the loss that is to be passed on to the charterer.

Where the shipowner does take steps beyond its legal obligations to lessen the time the vessel stands on demurrage, it is entitled to recover costs reasonably incurred in doing so.

OFF-HIRE

(5) Must a charterer pay hire when the vessel is delayed due to Covid-19?

A time charterer is bound to pay hire continuously in exchange for the use of the vessel. Hire may be suspended or deducted for the period of delay only if the Charterparty expressly provides for it, commonly under the "*off-hire*" clause.

An off-hire clause will normally set out the events that put a vessel off-hire. Since the clause is for the sole-benefit of the charterer, the charterer must clearly show that the delay is caused by one of the off-hire events. Any ambiguity in the clause will be read in the shipowner's favour.

Most standard off-hire clauses also set out how the off-hire events must affect the use of the vessel. Therefore, apart from identifying the off-hire event, the charterer must establish that the event has "*prevented*", "*hindered*" or "*reduced*" the full working of the vessel. The "*workings of a vessel*" may be prevented by physical as well as legal means. For instance, a vessel that is physically functional may still be put off-hire because it is legally prevented by the port authorities from entering the port, on suspicion of Covid-19.

The following are some examples of off-hire clauses:-

- Clause 17 of NYPE 1993 / 2015 Time Charter : "*In the event of loss of time from deficiency…of officers…detention by Port State control or other competent authority for Vessel deficiencies…or by other similar cause preventing the full working of the vessel, the payment of hire…shall cease for the time thereby lost.*"

- BIMCO's Baltime 1993 : "*In the event of… necessary measures to maintain the efficiency of the Vessel, deficiency of men…either hindering or preventing the working of the Vessel and continuing for more than twenty-four consecutive hours, no hire shall be paid…*"

- Shelltime4 : "*On each and every occasion that there is loss of time (whether by way of interruption in the vessel's service or, from reduction in the vessel's performance, or in any other manner)... 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 written consent or instructions of Charterers or their agents…the vessel shall be off-hire...*"

(6) Does it matter who caused the delay in the arrival of the vessel?

As far as the charterer is concerned, it does not matter if the delay is caused by the shipowner, port authorities or third parties. In putting a vessel off-hire, the charterer is only required to prove that the delay is caused by the prescribed events. The charterer need not attribute fault to the shipowner.

However, if the delay is caused by the charterer, or is a natural result of complying with the charterer's order, the charterer is not eligible to place the vessel off-hire. For instance, if Italy is declared by the Malaysian Ministry of Health to be a country at risk, a vessel coming from Italy will be compulsorily quarantined in Malaysia. In this case, the charterer may not be able to put the vessel off-hire during the quarantine if the charterer had ordered that the vessel travel first to Italy, and then to Malaysia, because the quarantine is a natural consequence of the charterer's order.

(7) What if the delay is not caused by the prescribed off-hire events?

Some off-hire clauses, Clause 17 of NYPE for instance, includes a sweeping phrase "*any other similar causes*". If such a phrase is present in the Charterparty, any event causing the delay that is similar or is within the general context of the off-hire clause may enable the invocation of the off-hire clause.

Alternatively, charterers may seek to recover damages in lieu of overpaid hire for time lost due to the delay. But to do so, the charterer must establish a breach on the part of the shipowner (for example, that the vessel was unseaworthy, or the shipowner failed to fulfil its contractual obligation in complying with health and safety regulations at the port of call).

SAFE PORT WARRANTY

(8) What is a safe port warranty?

Safe port warranty refers to a charterer's obligation to only instruct the vessel to safe ports. A port is safe if a vessel can reach it, use it and return from it without, in absence of some abnormal occurrence, being exposed to danger that cannot be avoided by good seamanship.

It serves as an assurance from the charterer to the shipowner that the vessel and her crew will not be exposed to dangers when complying with the charterer's orders. This warranty, if not expressly stated in the Charterparty, will be implied.

(9) Does the outbreak of Covid-19 render a port unsafe?

Whether a Covid-19 affected port is unsafe, depends on:-

(i) *the type and degree of "danger" involved*

Type: Normally, a port is unsafe because it exposes the vessel to physical dangers. This may include the danger of a vessel's crew being exposed to the contagious Covid-19. In the most extreme of situations, all of the crew could fall ill, leaving the vessel insufficiently manned. However, a port may also be unsafe if it exposes the vessel to legal risks such as prolonged quarantine or isolation pending the submission of health certificates or legal declarations that are not ordinarily required.

Degree: A Covid-19 affected port would be unsafe only if the risks or dangers at the port are so imminent that a *reasonable shipowner or Master* would decline to send the vessel there. Therefore, if the risk of contracting Covid-19 is exceptionally high at a particular port, either due to a great number of positive cases in the region or the notorious lack of safety measures implemented by the port authorities, to the extent that a reasonable shipowner would be unwilling to send his vessel to the port, it could be regarded as an unsafe port.

(ii) *whether the danger is avoidable*

If the risk at the port can be prevented or reduced by taking preventive measures, the port is likely to be considered safe. Most ports, including Malaysia, have imposed special measures to reduce the risk of Covid-19. Similar measures were also taken during the Ebola and MERS outbreaks and numerous ports remained open. Accordingly, if a port is seeing a steady flow of traffic despite being exposed to Covid-19, it is an indication that the port is likely to be legally safe. The continuing vessel traffic at the port may be sufficient to allow a reasonable shipowner and Master to conclude that the said port is legally safe.

(iii) *whether the outbreak of Covid-19 is considered an abnormal occurrence*

If an alleged danger at a port is a result of an abnormal occurrence, the port is not legally unsafe for the purposes of a safe port warranty and the charterer is not in breach of the warranty.

An abnormal occurrence is something very rare and unexpected for the particular port, for the particular ship's visit at that particular time of the year. The transmission of Covid-19 is now global. Alarm was raised in January 2020. Unless the question of port safety arose at the early days in the spread of Covid-19, it is less likely for the outbreak to be considered an abnormal occurrence now.

However, in a case where the outbreak of Covid-19 is found to be an abnormal occurrence, the shipowner bears the risk for the resulting loss.

SAFE PORT WARRANTY

(10) What if the port becomes highly exposed to Covid-19 only after the instruction is given by the charterer?

A time charterer is in control of the employment of the vessel. It is within the time charterer's power to change the vessel's employment by appropriate orders given timeously. A time charterer has a continuous obligation to make subsequent orders to avoid the new danger that arises at the originally designated port, by instructing the vessel to an alternative port or ordering the vessel to leave the Covid-infected port.

Being subject to a continuous obligation, it would be prudent for a time charterer to protect itself under its string of sub-charters, or bills of lading, against the consequences of a change in port in performing its continuous obligation; or indeed if the shipowner declines to proceed to that port. Whether the bill of lading is made subject to the terms of the Charterparty would be relevant.

A voyage charterer however, would not ordinarily have the power of re-nominating a port because the charterer is bound by the ports expressly stipulated in a Charterparty. Even for Charterparties that contain a range of ports of loading or discharge for nomination, once nominated, it is as if the port had originally been written into the Charterparty. Thus, charterers under a voyage Charterparty are generally not subject to the continuous obligation.

While voyage charterers generally lack the power to re-nominate ports, some voyage Charterparties contain a "*so near thereto as she may safely get*" provision (e.g. "*The said vessel shall proceed to the loading port or place stated in box 10 or so near thereto as she may safely get and lie always afloat…*"). This is a liberty clause that may allow the shipowner to load or discharge the cargo at an alternative port or place.

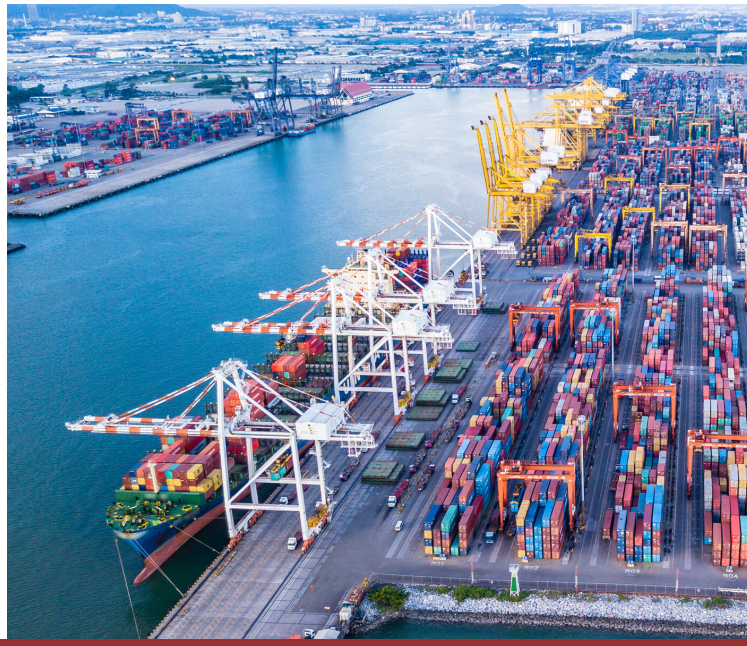
(11) Can the shipowner or Master decline to enter a port due to Covid-19?

Although the Master is obliged to comply with the orders of employment of the vessel given by the charterer, the shipowner is responsible for the safety of the vessel and her crew. A shipowner or Master is obliged to refuse the orders of the charterer if it endangers the safety of the ship or her crew. The Master may therefore, decline to comply with orders to proceed to a patently unsafe port.

However, the shipowner takes the risk of a repudiatory breach of the Charterparty, if the port is later determined to be safe.

If the shipowner complies with an order to enter a Covid-infected port that is found later to be legally unsafe, the shipowner is entitled to claim damages from the charterer for breach of the safe port warranty; provided the shipowner has not waived its right to contend that the charterer is in breach. Hence, shipowners should make an express reservation of rights when entering a potentially unsafe port.

Shipowners must note that even if a port has been found to be legally unsafe due to Covid-19, the shipowner's claim for damages arising from breach of a safe port warranty may be challenged if the Master contributed to or failed to mitigate the damage (for example, by failing to take reasonable precautions against the transmission of the virus).



DEVIATION

(12) Is the shipowner at liberty to deviate from the voyage if a crew member is suspected of a Covid-19 infection?

Under a voyage Charterparty, a shipowner is at liberty to deviate for purposes of saving, or attempting to save life. Some Charterparty clauses go further, to afford shipowners the liberty to deviate and call at ports *en route* the named voyage, provided it is for a reasonable purpose relevant to the voyage (e.g. Clause 3 of GENCON 1994, and BIMCO Liberty and Deviation Clause).

Time Charterparties too allow for deviation for the purpose of saving life. Further, the shipowner's duty to proceed with due despatch under a time Charterparty, is subject to the Master's judgement as to the safety of the ship, crew and cargo.

As such, if it is established that there is a genuine risk to life, the shipowner may deviate from the voyage.

(13) If the shipowner decides, or charterer requests, to deviate from the voyage to disembark crew suspected of infection, who bears the deviation expenses?

In the absence of a specific clause under the Charterparty which provides that the deviation expenses are to the charterer's account, generally the shipowner bears such costs. Shipowners may check with their respective insurers whether the deviation expenses, such as costs of additional bunker and port charges are covered.

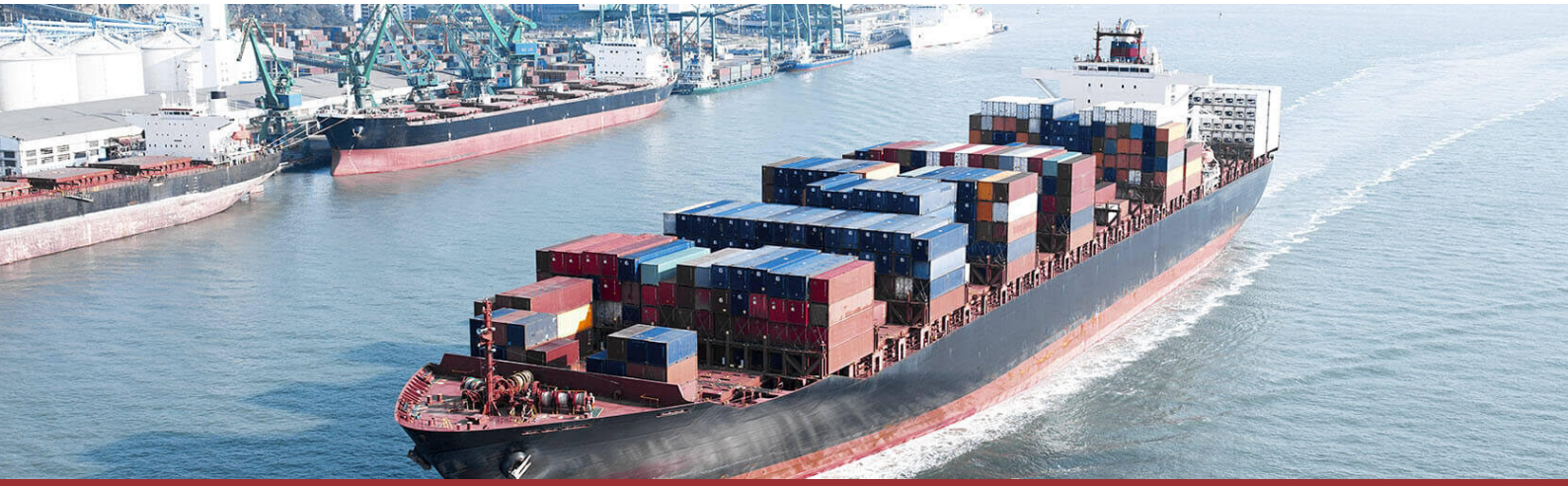
For time charters, charterers should examine the Charterparty to identify if such deviation could amount to an off-hire event, or allow for deduction of hire.

(14) What if the deviation results in delay in the delivery of cargo, or the cargo is delivered to a port other than that stated in the bill of lading?

In the absence of express provisions under the bills of lading allowing for deviation, the carrier (usually the shipowner) still has an obligation to deliver the cargo to the designated port. The shipowner could be liable for the loss of and / or damage to the cargo arising out of deviation, particularly if the cargo is perishable.

The shipowner, acting as a carrier under a bill of lading, may seek to rely on provisions under the Hague Rules or Hague-Visby Rules (where applicable), to exclude the liability for loss and damage resulting from "*quarantine restrictions*" or "*saving or attempting to save life or property at sea*". The shipowner should check with its insurers if there is a Shipowners' Liability to Cargo ('SOL') Cover in place that protects for liabilities related to the loss, short landing or damage to cargo.

If the shipowner or charterer needs to deviate from the designated voyage, it is prudent to negotiate and discuss the options with cargo interests for the loading or discharging at an alternative port, to minimise the potential risk of loss or damage to cargo.



FORCE MAJEURE

(15) What is a *Force Majeure* clause?

A *force majeure* clause protects parties who are unable to fulfil their contractual obligations due to supervening events beyond the parties' control. The clause allows parties to suspend or be excused from the performance of obligations that are impaired by the *force majeure* event.

A *force majeure* clause is a creature of contract and must be expressly stipulated in the Charterparty. It can sometimes be found using different terminology, but with similar effect, under "*exceptions clauses*".

(16) Can the outbreak of Covid-19 amount to a *force majeure* event?

This depends largely on the wording of the *force majeure* clause in the Charterparty, and the events listed in the clause. The outbreak of Covid-19 may fall within the description of "*disease*" (BIMCO Infectious or Contagious Diseases Clause), "*pandemic*", "*any place where fever or epidemics are prevalent*" (Baltime Form, Clause 14(a)), "*quarantine restrictions*" (Hague-Visby Article IV, rule 2, Shelltime 4, Clause 27), "*restraint of princes*" or some general wording such as "*or any other causes*" or "*events beyond the Parties' control*".

Typically, the clause requires the performance to be "*prevented*" by the relevant event for it to take effect. However, some clauses are drafted to also cover circumstances where the performance is merely "*hindered*" or "*delayed*" by the event.

There must be a causative link between the Covid- 19 pandemic and the hindrance of performance. (e.g. "*Neither the Vessel nor Master or Owner, nor the Charterer, shall be in breach of its obligations, or be responsible for any loss, damage, delay or failure, in the event that performance is prevented or delayed as a result of :- Act of God, quarantine restrictions, arrest or restraint of princes or any other events beyond the Parties' control.*")

(17) What is the consequence of Covid-19 being recognised as a *force majeure* event?

It will relieve a party from performing part or whole of the Charterparty that is directly affected by the outbreak of Covid-19, or suspend the obligation to perform the Charterparty until it is no longer prevented, hindered or delayed by Covid-19.

Some clauses may also address the issue of payments made or services provided prior to the *force majeure* event (e.g. cargo that are already loaded on the vessel, freight that has been paid).

Care must be taken to examine the potential effect of invoking *force majeure* down the chain of contracts, e.g. between sub-charterparties, to bills of lading and to the sale and supply of commodities contracts. It requires a critical examination of the relevant clauses in each contract and a holistic analysis of the interplay between the clauses. The considerations in this exercise include: Are the *force majeure* clauses back-to-back? What if the *force majeure* defence under the first contract succeeds but fails under the subsequent contract or vice versa? What if an intermediate contract does not contain a *force majeure* clause? Is there an indemnity clause or an Inter-Club Agreement which alters the allocation of risk in a multi-contract claim?

FORCE MAJEURE

(18) If the performance of an obligation is also affected by matters other than Covid-19, is the *force majeure* clause still applicable?

For a *force majeure* clause to apply, the *force majeure* event must be the effective cause preventing the performance of the affected party. If the affected party would have been unable to perform its obligation even without the outbreak of Covid-19 or any other *force majeure* event, it is unlikely that its performance will be excused by reason of *force majeure*.

(19) What should a party do to effectively invoke a *force majeure* clause?

- **Give notice:** *Force majeure* clauses commonly require a party to provide notice and details of the event within a fixed time period. Failure to do so timeously may deprive an affected party from relying on the *force majeure* clause.

- **Mitigate the loss or damage:** A party relying on the clause is under a duty to exercise reasonable endeavours to prevent or mitigate the effects of the *force majeure* event. For instance, if a party is relying on '*quarantine restrictions*' as a *force majeure* defence for the late delivery of cargo, reasonable efforts must be shown to have been taken to release the vessel from quarantine as soon as possible. This may include steps to disinfect the vessel, closely monitoring the crews' health condition and submitting timely reports to port authorities.

- **Gather evidence:** It is crucial to gather contemporaneous evidence of the facts supporting the position taken surrounding Covid-19, to demonstrate how the outbreak affects performance of the Charterparty. Correspondence between parties, public announcements and marine department notifications are all important, as is evidence of the mitigating steps taken.

FRUSTRATION

(20) Could Covid-19 frustrate the performance of a Charterparty?

The threshold to establish that a contract is frustrated is very high, and applies only to extreme situations.

Under Malaysian law, the doctrine of frustration is governed by Section 57(2) of the Contracts Act 1950, which states that the contract will become void if an act which, after a contract is made, becomes impossible or unlawful to perform.

If parties merely wish for temporary relief of their obligations under the Charterparty, it is advisable that parties negotiate, rather than call the entire contract frustrated. This is especially important for long term contracts.

(21) What are the requirements for a contract to be considered frustrated?

The following 4 elements need to be satisfied:-

- there is a supervening event that occurred after the contract is formed;
- the supervening event caused a fundamental or radical change to the nature of parties' contractual rights, rendered performance of the contract impossible or deprives the contract of its commercial purpose;
- the supervening event is not self-induced or caused by the default of the party seeking to rely on the principle of frustration; and
- the supervening event must not have been contemplated by parties during the formation of the contract, and there is no provision under the contract that deals with it.

(22) To frustrate a Charterparty on grounds of delay, how long does the interruption or delay need to last?

Parties should assess at the time of the occurrence, whether the delay would be of a very substantial duration, as compared to the unexpired balance of the charter period. If there is a substantial period of charter that will remain after the interruption is anticipated to cease, it is unlikely that the contract will be considered frustrated.

It is important that the party seeking to invoke the principle of frustration maintains a record of the evidence used to assess the duration of the delay at the material time that decision is made, such as letters, telephone notes, emails, port and media release, and regulations, directives, or advisories from authorities.

(23) What are the possible circumstances in the Covid-19 outbreak that might frustrate a Charterparty?

It may be artificial to identify all these circumstances, because it is very fact sensitive; dependent on the precise turn of events and governing contractual terms. Theoretically, possible scenarios where Covid-19 may frustrate a Charterparty include:-

- Inordinate delay in obtaining cargo due to severe logistics disruption, business closure, or cargo congestion at ports. The delay may frustrate a charter, but only if ALL source of alternative cargo within the range of the loading port are unavailable for a substantial period of time, relative to the length of the Charterparty.
- Under a voyage charter where a port has been nominated by the charterer, but loading or discharging is prevented or unavoidably delayed due to port closure or quarantine restrictions, such that it defeats the commercial purpose of the contract. However, frustration cannot be invoked if the voyage charter provides that "*the vessel shall proceed to the loading port or so near thereto as she may safely get*", which allows the shipowner to discharge its contractual obligations by proceeding to load or discharge cargo at a reasonably near alternative port, and where there is no impediment to load or discharge cargo at that port.

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