

## **Circular No.0101**

**17 March 2020**

**TO ALL MEMBERS**

Dear Sirs,

**COVID 19 – Q&A for Charterers**

### **Charterparty Issues**

There is the potential for the following issues to cause disruption but this isn't exhaustive and so it is imperative that careful thought goes into planning trade at the moment:

- Inability to berth and significant delays outside ports
- Future fixtures unable to be performed
- Owners attempting to re-negotiate charterparty clauses
- Requirement to nominate alternative ports
- Crew on chartered vessels diagnosed with virus
- Deviation for crew changes and subsequent delay
- Issues under sale contracts, cargo shortages/ unavailability

### **What is Force Majeure**

Force Majeure (FM) excuses a party from performing parts of its contractual obligations where those obligations become impossible or impracticable due to an event or circumstances that the parties could not have anticipated or controlled.

It's up to the parties to agree suitable words for an FM clause, however care should be taken when doing so, and consideration should be given to where any disputes might be resolved. English law does not recognise the concept of FM, and for it to apply there would need to be specific clause in the charterparty. English Law would then give effect to the words agreed by the parties. The drafting of the clause is therefore very important.

### **How may an FM Clause assist?**

The practical impact of an FM clause in a charter is debatable given that most charter parties are based on English law and a FM clause is therefore likely to be interpreted very strictly. If you have a basic FM clause then it may be very difficult to argue that coronavirus amounts to an Act of God.

When looking at an FM clause then including wording such as epidemics, quarantines, acts of government, all other events beyond the charterers control, will greatly improve the position.

If you are sub-chartering out you probably want as narrow a definition as possible, but when chartering the vessel in, you should be looking for as wide a definition as you can negotiate.

It's up to the party who is relying on an FM clause to prove that the event falls within the definition of the clause and has a material impact on the ability to perform.

Causation will often be a key issue. For example, inability to load cargo in port A because the local government have banned vessels from loading would probably tick the boxes, whereas declaring FM because of the inability to discharge in port B because of virus delays in say 40 days' time may not. Questions like 'why would you load a ship knowing that it can't discharge?' will need to be considered.

## **Port Issues**

Many ports are working normally with reduced cargo volumes; there are delays but the reduction in trade has meant that many are able to manage their exposure. The bulk trades require much less human contact than say breakbulk cargo where crew and shore personnel have much more regular contact.

We are about to see the first big test of what happens when you lock down an entire country, with Italy self quarantining with effect from 9 March 2020 for a month. We would envisage that some cargoes and port operations will be allowed to take place but at the time of writing this remains to be clarified.

## **Crew Issues**

Whilst most insurers, vessel managers and owners can self isolate and work remotely it's impossible to do that as a crew member. We are reliant on hard-working crew to run our ships and this causes a raft of issues.

The crew may need to interact with surveyors, pilots, stevedores, agents. They also need to be relieved from duty from time to time and for the most part then travel through airports to home – which itself may be in an area that is more exposed to the virus. Many of the clauses that we have seen attempt to pass full responsibility on to charterers for the consequences of the virus spreading, regardless of cause.

## **What about the BIMCO Infectious disease clause?**

As a starting point, the BIMCO output is of high quality and protects its members' interests well.

However, its members tend to be shipowners or those that provide freight services. Most cargo charterers i.e. those that only use ships as part of the supply chain need to think very carefully about incorporation of BIMCO clauses as they can do the exact opposite of what a charterer might actually want.

We are now starting to see the BIMCO Infectious disease clause widely circulated and, as with most BIMCO clauses, this could be adapted to suit charterers interests better. Careful thought therefore needs to be given before it is agreed.

Unamended, it states that charterers should, indemnify owners for

- costs, expenses and liabilities incurred by owners as a consequence of the vessel waiting for/complying with alternative voyage orders;
- The costs of discharging in alternate ports in safe areas;
- The cost of getting the cargo to alternate ports; and

If the vessel proceeds to an Affected Area, the Owners obligation is only to take reasonable measures in relation to the disease as recommended by the WHO and any additional costs, expenses liabilities including screening, cleaning, fumigating and/or quarantining shall be for the charterers account.

There are elements that are extremely unfair to the charterer here. The consequences of an outbreak sit with charterers, even though they have no control over security, crew, access to the ship, stevedore health, where the crew was last changed, when and where they came from; the list could go on.

## **Insurance Issues**

### **Can I purchase delay insurance?**

There are trade disruption policies available in the market but most contain some form of exclusion for the larger events such as epidemic disease; availability will now be an issue even if they cover what Charterers want and the cost is likely to be significant.

## Practical Considerations

### What protective steps can the charterer take?

Ask owners to provide the vessel's movements for the last 30 days including dates for calls at loading, discharging and bunkering ports or ensure owners warrant that the vessel has not been to an affected area within that time frame.

Ask owners to provide an up to date crew list which includes each crew member, when they signed on and from where.

Ensure the charterparty has an appropriate contagious disease and a clearly worded FM clause.

Ensure that the charter clause(s) cater clearly for the loss of time by excluding the running of laytime and demurrage

### Achieve a Balance

We have seen disease outbreaks in the past, for example Ebola in West Africa four years ago, but these were localised outbreaks and didn't impact shipping in the manner that Covid 19 has.

We are only just recovering from a decade of shipping decline and stagnation. Only recently are most markets again in a situation where owners and charterers are both making money; some will only have just returned to a position where balance sheets and reserves are being replenished. The near collapse of the market in Q1 2020 has the ability to significantly disrupt the recovery.

We are already seeing owner bankruptcies, and this causes much more of an issue for most charterers than a reasonable split of costs with owners on an issue that has the potential to cause significant disruption.

It might be considered reasonable for charterers to agree to contribute to delay or time lost, provided that owners agree not to terminate the voyage after loading and divert the ship if the delay is at the nominated delivery port; equally, charterers should not be expected to pay for time or quarantine expenses if the virus enters the ship's ecosystem through a previous voyage, a newly embarked crew member or shore leave in an impacted area.

### In conclusion

A selection of clauses follows; most owners would probably view our own charterer friendly clause with the same disdain as we view the BIMCO clause. We are therefore happy to assist with drafting clauses that reach a fair balance; please contact us and explain what you want to achieve and where the vessel is trading.

With care and balance most voyages can proceed without issue; the wider issues surrounding regional or even global shutdowns are something for the governments to consider.

### **BIMCO Infectious or Contagious Diseases Clause for Voyage Charter Parties**

(a) For the purposes of this Clause, the words:

“Disease” means a highly infectious or contagious disease that is seriously harmful to humans.

“Affected Area” means any 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.

(b) The Vessel shall not be obliged to proceed to or continue to or remain at any place which, in the reasonable judgement of the Master/Owners, becomes an Affected Area after the date of this charter Party

(c) In accordance with Sub-clause (b):

(i) at any time before loading commences, the Owners may give notice to the Charterers cancelling this contract of carriage or may refuse to perform such part of it as will require the Vessel to enter or remain at an Affected Area;

(ii) if loading has commenced, the Owners may notify the Charterers that the Vessel will leave with or without cargo on board, provided always that if the Charter Party provides that loading or discharging is to take place within a range of ports, the Owners shall first request the Charterers to nominate any other

safe port which lies within the range for loading and discharging and may only cancel this Charter Party or leave the loading port if the Charterers fail to nominate such alternative safe port within forty-eight (48) hours of receipt of notice of such request. If part cargo has been loaded, the Vessel may complete with cargo for the Owners' account at any other port or ports whether or not on the customary route for the chartered voyage.

(d) If prior to or after arrival and in accordance with Sub-clause (b) the discharging port is determined to be in an Affected Area, the Owners may request the Charterers to nominate an alternative safe port which lies within the Charter Party range. If the Charterers fail to make such nomination within forty-eight (48) hours of receipt of the Owners' request, the Owners may discharge the cargo, or such cargo remaining on board if discharging has not been completed, at any safe port of their choice (including the port of loading) in complete fulfilment of the contract of carriage. If discharge takes place at any port other than the loading port or at a port that lies outside the range of ports in the Charter Party, the Owners shall be entitled to recover from the Charterers the extra expenses of such discharge, to receive full freight as if the cargo had been carried to the discharging port and, if the extra distance exceeds 100 miles, to additional freight which shall be the same percentage of the freight contracted for as the percentage which the extra distance represents to the distance of the normal and customary route. The Owners shall have a lien on the cargo for such extra expenses and freight.

(e) The Owners shall not be obliged to sign, and the Charterers shall not allow or authorise the signing of, bills of lading, waybills or other documents evidencing contracts of carriage for any Affected Area.

(f) If, notwithstanding Sub-clauses (b) to (e), the Vessel does proceed to or continue to or remain at an Affected Area:

(i) The Owners shall notify the Charterers of their decision but the Owners shall not be deemed to have waived any of their rights under this Charter Party.

(ii) The Owners shall endeavour to take such reasonable measures in relation to the Disease as may from time to time be recommended by the World Health Organisation.

(iii) Any additional costs, expenses or liabilities whatsoever arising out of the Vessel visiting or having visited an Affected Area, including but not limited to screening, cleaning, fumigating and/or quarantining

the Vessel and its crew, shall be for the Charterers' account and any time lost shall count as laytime or time on demurrage.

(g) The Vessel shall have liberty to comply with all orders, directions, recommendations or advice of competent authorities and/or the Flag State of the Vessel in respect of arrival, routes, ports of call, destinations, discharge of cargo, delivery or in any other respect whatsoever relating to issues arising as a result of the Vessel being or having been ordered to an Affected Area.

(h) If in compliance with this Clause anything is done or not done, such shall not be deemed a deviation but shall be considered as due fulfilment of this Charter Party. In the event of a conflict between the provisions of this Clause and any implied or express provision of this Charter Party, this Clause shall prevail to the extent of such conflict, but no further.

(i) The Charterers shall indemnify the Owners for claims arising out of the Vessel proceeding in accordance with any of the provisions of Sub-clauses (b) to (h) which are made under any bills of lading, waybills or other documents evidencing contracts of carriage.

(j) The Charterers shall procure that this Clause shall be incorporated into all bills of lading, waybills or other documents evidencing contracts of carriage issued pursuant to this Charter Party.

**Yours faithfully,**

**THE CONTINENTAL STEAMSHIP OWNERS MUTUAL PROTECTING & INDEMNITY ASSOCIATION LTD**