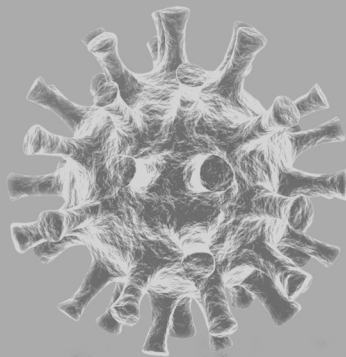


COVID-19 IMPLICATIONS FOR COMMERCIAL CONTRACTS

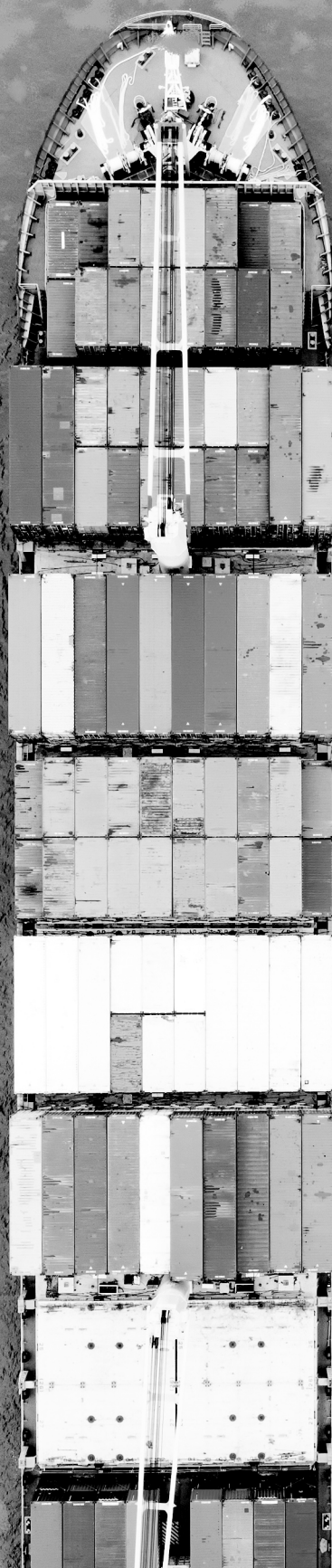
CARRIAGE OF GOODS BY SEA
AND RELATED CARGO CLAIMS





UNCTAD/DTL/TLB/INF/2021/1

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Note

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A related briefing note on "[COVID-19 implications for commercial contracts: International sale of goods on CIF and FOB terms](#)" (UNCTAD/DTL/TLB/INF/2021/2), prepared under the same project, may also be of interest to readers, and should be considered in context.

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Abbreviations

BIMCO	Baltic and International Maritime Council
CIF	Cost Insurance and Freight
CFR	Cost and Freight
DAP	Delivery at Place
FIATA	International Federation of Freight Forwarders
FOB	Free on Board
ICC	International Chamber of Commerce
MSC	Mediterranean Shipping Company
P&I Club	Protection and Indemnity Club

1. COVID-19 and the carriage of goods: background and context

The smooth flow of international trade depends entirely on the transport chain: adequate and timely supplies to manufacturers and efficient capillary distribution chains are essential ingredients of any successful business model. The recent and ongoing Coronavirus outbreak, together with the measures many countries are adopting to bring the pandemic under control, are creating significant impediments to transport systems and supply chains which are facing unprecedented challenges on a global scale.

This challenge hits the global trading system at a juncture in which efficiency is imperative and movement of goods and provision of services on a “just-in-time” basis are the cornerstones of success for public and private service providers alike.¹ While the pandemic and related measures are clearly temporary in nature, the effects on international trade are potentially important, with longer-term repercussions. Paperless transactions are already possible but not yet fully accepted in large sections of the transport industry while automation and robotics in port services are not yet playing a sufficient role to secure the network from interruption. It is likely that the pandemic will boost the development of technology and increase its use in the very short term, and collaboration, coordination, and cooperation among public and private stakeholders at all levels is improving, but for the time being significant related challenges remain.

The purpose of this briefing note is to illustrate some of the implications of the Coronavirus pandemic for commercial contracts on carriage of goods by sea and related cargo claims, and to identify a number of common legal and commercial issues arising from it. Some approaches to addressing these issues will also be suggested with the purpose of encouraging discussion between the affected parties and stimulating preventive measures for future deals.

2. The complex structure of carriage arrangements

International trade in commodities at the current scale is only possible because of modern shipping and a well organised logistics chain.² The availability of the right type of tonnage at the right time and in the right place is crucial for cargo to travel seamlessly between continents and the proper management of the chain is a matter of paramount importance for traders³, trade associations⁴ and national authorities alike.

When the cargo sold is to be carried by sea, performance of a sale contract does require complex transport arrangements which either the seller or the buyer must necessarily plan and organise. For instance, where the sale is made on FOB terms⁵, the buyer must make or procure a contract of carriage to enable the loading of the cargo within the agreed shipment period on board a vessel

¹ For a recent example of the European effort towards the efficiency of port services see the Sea Traffic Management Project on which M. Tsimplis, F. Lorenzon, *“Just in time” and ahead of its time: the BIMCO Sea Traffic Management Clause for Voyage Charterparties* [2018] LSTL 18 (10) pp. 1-4.

² See also “COVID-19 implications for commercial contracts: International sale of goods on CIF and FOB terms”, UNCTAD Briefing Note UNCTAD/DTL/TLB/INF/2021/2.

³ Traders of all sizes are affected by the pandemic, from major players to small exporter and importer.

⁴ Trade organisations such as GAFTA (the Grain and Feed Trade Association, www.gafta.com), FOSFA (the Federation of Oils, Seeds and Fat Associations, www.fosfa.org) and the many other industry trade groups, business associations, sector associations or industry bodies in the market.

⁵ F. Lorenzon, *Sassoon on CIF and FOB Contracts*, 7th edn. (London, 2020); see also “COVID-19 implications for commercial contracts: International sale of goods on CIF and FOB terms”, UNCTAD Briefing Note UNCTAD/DTL/TLB/INF/2021/2.

capable to reach the port of loading and receive the agreed cargo.⁶ Depending on the type and size of the cargo this means either booking space on board a container vessel or hiring a whole ship fit and staunch to receive the cargo in question; this often requires lengthy negotiations through specialist brokers using complex standard forms and exposes the FOB buyer to duties and liabilities arising out of charterparties and the law applicable to them. When the cargo is sold on CIF terms, very similar duties and responsibilities arise for the CIF seller, who must arrange the shipment of the cargo on board a suitable vessel bound for the agreed port of discharge. This may at times require one or more transshipment stops or even ship-to-ship transfers, all risky and complex shipping operations.

Should the contract be agreed on DAP (Delivery at Place) terms, the seller would also need to organise on-carriage from the port of discharge to the agreed point of delivery, including all formalities and logistical issues in the country of delivery.⁷ Often the vessel is only needed for one voyage,⁸ sometimes for a series of voyages and more rarely for a period of time to allow the fulfilment of large supply contracts.⁹ This translates into the use of different types of charterparties, tailor-made to fit the need of the charterer and its downstream market. The same ship may indeed be performing different charterparties at the same time: she may have been let on a long-term time-charterparty, then chartered out on shorter time charters deals, and then again sub-chartered on voyage and sub-voyage charters, to carry a particular shipment or a number of smaller consignments.

Whichever the arrangement between owners and charterers, shipowners will invariably issue a bill of lading¹⁰ for every cargo loaded onto any ship. Similarly, in the context of liner carriage, typically used for the carriage of containerized manufactured cargo, where no charterparty is in place, a bill of lading will be issued by the carrier upon receipt and shipment of the cargo. The bill of lading is an extraordinary document¹¹ as it performs three functions:¹² it is a receipt for the goods shipped, a record of the terms of the contract of carriage and a document of title at common law, providing the lawful holder of the document with the exclusive right to demand delivery of the goods from the carrier upon their arrival at the discharge port. It is the document of title function of the bill of lading, which makes it a key document in international trade, enabling documentary sale of goods and embodying the exclusive right of access to the goods. It is against tender of the bill of lading (in accordance with the contract) that the seller is able to claim payment,¹³ and the buyer/receiver

⁶ See International Chamber of Commerce, *Incoterms 2020: ICC Rules for the Use of Domestic and International Trade Terms* (ICC 2019), ICC publication n. 723E, CIF Term, A2; F. Lorenzon, *Sassoon on CIF and FOB Contracts*, 7th edn. (London, 2020); M. Bridge (Ed.), *Benjamin's Sale of Goods*, 10th edn. (London, 2017).

⁷ Incoterms 2020, DAP Term, A2.

⁸ This is usually achieved by chartering the vessel under a single-voyage charterparty or under a time-trip charterparty for the time required to perform one trip. For present purposes, the practical difference between the two solutions is significant as delay and the costs of it are allocated differently between owner and charterer under time and voyage contracts.

⁹ This is usually done through a medium-term time charterparty or a contract of affreightment with significant consequences on the allocation of the risk of delay between the parties.

¹⁰ Or other carriage contract on an alternative form such as seawaybills; these come in many different negotiable and non-negotiable forms, in port-to-port and multimodal terms. Among the latter see BIMCO's 'MULTIDOC 95' and 'COMBICONBILL', the FIATA Multimodal Transport Bill of Lading. See www.bimco.org.

¹¹ For an overview of different types of transport documents, their features and effects, see also [UNCTAD, The use of documents in international trade](#), UNCTAD/SDTE/TLB/2003/3.

¹² G. Treitel, F.M.B. Reynolds, *Carver on Bills of Lading*, 4th edn. (London, 2017), at 1-001. See in general N. Gaskell, R. Asariotis, Y. Baatz, *Bills of lading: law and contracts* (London, 2000); R. Aikens, M. Bools and R. Lord, *Bills of Lading*, 2nd edn. (London, 2015); see also *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12; [2004] 1 AC 715, at [132].

¹³ Directly by the buyer or through a bank by way of a letter of credit, see "COVID-19 implications for commercial contracts: International sale of goods on CIF and FOB terms", UNCTAD Briefing Note UNCTAD/DTL/TLB/INF/2021/2.

obtains delivery of the goods from the carrier.¹⁴ Unlike charterparties, marine bills of lading attract the mandatory application of international conventions which regulate the rights, duties and liabilities of the parties to the contract of carriage and provide for minimum standards of carrier liability.¹⁵ There are three main international conventions on the carriage of goods by sea currently in force: The Hague Rules¹⁶, the Hague-Visby Rules¹⁷ and the Hamburg Rules¹⁸. The international regime adopted by the main shipping nations and therefore commonly applicable in global trade is the Hague-Visby Rules and this briefing note will make reference to these Rules; however, the Hague Rules and Hamburg Rules are relevant to a number of important trade routes¹⁹ and potential claimants should always verify the applicability of any international carriage convention in order to properly assess their correct legal position.²⁰

In case of cargo sold on FOB terms²¹, the charterparty will be concluded between the shipowner and the buyer, but this may not always be the case, as some traders may sell additional carriage services to their customers. FOB buyers may at times sell on the cargo – usually on CIF or DAP terms²² – for profit while their buyers in turn may be distributing the cargo to a national or local chain of retailers under sale contracts that also entail obligations regarding the carriage of the goods. This may be done through the seamless interaction among a number of carriage contracts: the ship may be time chartered in for a few months and sub voyage chartered for the relevant trip.²³ The goods may be divided into a number of parcels carried under bills of lading, each of which sold to a different buyer. These buyers in turn will make their own handling and on-carriage arrangements with one or more operators which may in turn organise door to door deliveries. All such carriage contracts can indeed serve the same cargo in its voyage from its place of origin to its final destination; by the same token, a bill of lading holder may find itself involved in and/or affected by a much larger framework of contracts²⁴ over which it has no control.

It is important to remember that there is no general rule on how businesses organise their trade and

¹⁴ The way in which the receiver gains access to the goods depends on the law applicable to the bill of lading and may be affected by the law of the place in which receipt is sought.

¹⁵ 'Received for shipment' bills of lading, or multimodal bills of lading may attract the application of national or regional legislation on cargo liability. So far, no relevant international convention governing liability for multimodal transport is in force; see *Multimodal Transport Evolving: freedom and regulation three decades after the 1980 MTO Convention*. In M. Clarke (Ed.) *Maritime law evolving: 30 years at Southampton* (Oxford, 2013); see also UNCTAD, [Multimodal Transport: The feasibility of an international legal instrument](#), UNCTAD/SDTE/TLB/2003/1.

¹⁶ The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading ("Hague Rules"), Brussels, 25 August 1924, 120 L.N.T.S. 155. For the status of ratification, see <https://diplomatie.belgium.be/sites/default/files/downloads/l-4a.pdf>.

¹⁷ The Hague Rules as amended by the 1968 Visby Protocol, and the 1979 SDR Protocol, available at <https://treaties.un.org/doc/publication/unts/volume%201412/volume-1412-i-23643-english.pdf>. For the status of ratification, see <http://diplomatie.belgium.be/sites/default/files/downloads/l-4b.pdf> and <http://diplomatie.belgium.be/sites/default/files/downloads/l-4c.pdf>.

¹⁸ The United Nations Convention on the Carriage of Goods by Sea, 1978 ("Hamburg Rules"), adopted by the General Assembly, 9 December 1993, A/RES/48/34, available at https://www.uncitral.org/pdf/english/texts/transport/hamburg/XI_d_3_e.pdf. For the status of ratification, see <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280042179>.

¹⁹ For instance, shipments in the US trade may be covered by the 1924 Hague Rules.

²⁰ G. Treitel, F.M.B. Reynolds, *Carver on Bills of Lading*, 4th edn. (London, 2017), at 1-001; and 9-068.

²¹ *Incoterms 2020*, FOB Term; F. Lorenzon, *Sassoon on CIF and FOB Contracts*, 7th edn. (London, 2020); M. Bridge (Ed.), *Benjamin's Sale of Goods*, 10th edn. (London, 2017).

²² See *Incoterms*® 2020 Rules, CIF Term, DAP Term.

²³ For a full account of the law on charterparties see H. Bennett (Ed.), *Carver on Charterparties* (London, 2017).

²⁴ This may happen if the bill of lading incorporates the terms and conditions of a charterparty or contract of affreightment, see G. Treitel, F.M.B. Reynolds, *Carver on Bills of Lading*, 4th edn. (London, 2017), at 3-014; *Skips A/S Nordheim v Syrian Petroleum Co Ltd (The Varenna)* [1985] QB 599; *Northrop Grumman Mission Systems Ltd* [2015] EWCA Civ 844; [2015] BLR 657.

that the contractual structure of each and every deal must be assessed on a case-by/case basis.²⁵ Given the complexity of the way in which international trade is organized it should come as no surprise that a global pandemic may have significant consequences on each and every link of the global distribution chain. These consequences may affect one or more stages of the voyage and they may do so in different ways; they may also affect the same cargo more than once generating compound problems to traders and carriers and raising complex legal questions, not easily or coherently answered across different trades, different markets, different jurisdictions. This briefing note deals with some of the most common issues raised by the ongoing COVID-19 pandemic and provides a bird's eye view of the main types of problems related to the pandemic and relevant response measures.

3. How COVID-19 may impact on cargo interests: delay and access to goods

COVID-19 and the various actions taken by governments worldwide to tackle the emergency have had significant impacts on global trade with severe consequences for a large number of businesses.²⁶ Partial or total lockdowns, restrictions to the number of workers allowed in the workplace and the limitation or suspension of even essential services have had significant effects on the shipping industry and have caused a domino effect of inefficiencies which are likely to affect the market for some time to come.

The most significant direct consequence COVID-19 may have, is obviously *delay*, which in turn interferes significantly with the flow of goods across the entire distribution chain and may eventually cripple the ability of the receiver to gain access to the goods within the timeframe for which they were originally bought.²⁷ Ports' efficiency has been impacted due to local restrictions affecting the availability of specialised workforces, both at the loading and discharging ports. At loading, operations may have slowed down and/or been suspended thus impacting the beginning and early parts of the voyage and the timely availability of shipping documents.²⁸ The voyage itself may be affected by ever changing travel restrictions and possible last-minute amendments to the route chosen or the agreed rotation of disports. At discharge, operations may be slow or suspended due to COVID-19 related events or measures; availability of the documents allowing the collection of goods may be delayed and access to the port itself may be limited. Restrictions to port operations cause longer queues and some cargo may be affected by the unusually long wait.²⁹

Delay and compound delays have significant consequences in shipping, consequences which are different depending on the type of contract used in the circumstances. In time charterparties,³⁰ charterers pay hire in advance for the right to use the vessel every day but draw no income from an

²⁵ International trade is often based on local or sectoral customs and course of dealing between the parties; contracts are concluded over the phone or via instant messaging servicing and formalised in writing at a later date; the use of a vast array of standard forms is very common: all these factors make generalizations hardly relevant.

²⁶ See "COVID-19 implications for commercial contracts: International sale of goods on CIF and FOB terms", UNCTAD Briefing Note UNCTAD/DTL/TLB/INF/2021/2.

²⁷ Time is a key factor of international trading with price volatility heavily affected by seasonal demand for raw commodities and manufactured goods alike; *Bowes v Shand* (1877) LR 2 App Cas 455; and the discussion in F. Lorenzon, *Sassoon on CIF and FOB Contracts*, 7th edn. (London, 2020), at 4-043 and ff.

²⁸ Timely tender of shipping documents is a crucial term of the sale contract and failure to present the documents to the buyer or its bank may well prove fatal to the deal; *Concordia Trading BV v Richo International Ltd* [1991] 1 Lloyd's Rep 475.

²⁹ Perishable cargo may be heavily damaged or become a constructive total loss if vessels or containers are detained or delayed for longer periods of time.

³⁰ T. Coghlin (et al), *Time Charters*, 7th edn. (London, 2014).

idle ship³¹. In voyage charterparties,³² charterers may face significant demurrage³³ bills which may be difficult to avoid in the absence of specific clauses.³⁴ Widespread delay is likely to cause many disputes across the different carriage contracts, in particular throughout the chartering chain; it is also likely to cause breaches of the underlying sale contracts putting receivers and their insurers under pressure to recover their losses from contractual and actual carriers. This, in turn, is likely to generate an increase of cargo claims which will be the focus of this briefing note.

4. Cargo claims: Delayed discharge under marine bills of lading

A final buyer of goods carried under bills of lading is usually eager to receive the cargo, clear it for import and distribute it throughout its logistical chain. Delayed discharge is likely to put the receiver under a great deal of pressure vis-a-vis its downstream clients, expose it to charges and contractual penalties³⁵ or put it in breach of its distribution agreements and potentially affect its cashflow.

The default position is that under the Hague-Visby Rules the carrier is not liable for pure delay unless the contract of carriage contains an undertaking to discharge within a specific timeframe, which is extremely rare.³⁶ The position is different if the delay causes loss of or damage to the cargo, in which case the carrier will be liable for breach of its duty of care³⁷ unless it can rely on one of the statutory exceptions provided.³⁸ Although the cause of the receiver's complaint may be easily described as 'delayed delivery', the root cause of the problem usually lies elsewhere and the way to tackle the problem will depend on the *underlying reason* which has given cause to the delay. In the following pages we will be considering a number of potential causes of delay and discussing possible ways of dealing with them to avoid costly disputes, namely: (a) deviation and damages for delay; (b) quarantine and damages for delay; (c) delay and damages to perishable cargo; and (d) delay in documentation.

4.1 Deviation and damages for delay

COVID-19 related legislation or measures are reported to have caused a number of geographical deviations in recent months. A geographical deviation may be a breach of the contract of carriage and it occurs when a ship which was supposed to go from port A to port B through a particular geographical route, either expressly agreed or customary,³⁹ varies such route, as she is redirected to a different discharge port. This may happen because of a sudden medical emergency, e.g., to leave a sick crew member in hospital and/or pick-up replacement crew, by order of the charterer to tackle unforeseen operational needs, or indeed by a refusal of the crew, the managers, or the owner to follow an order which may put the crew's health at risk or delay the vessel for longer than

³¹ This would cause loss to the time charterer who pays a fixed daily rate for a vessel which does not provide the service expected of her. The charterers only remedy would be to rely on an off-hire clause to try and suspend payment of hire, see below.

³² J. Cooke (et al), *Voyage Charters*, 4th edn. (London, 2014).

³³ Demurrage are liquidated damages due by the charterer to the owner for each day or fraction thereof in which loading and discharging operations are delayed beyond the agreed laytime; J. Schofield, *Laytime and Demurrage*, 7th edn. (London, 2015).

³⁴ See below.

³⁵ Penalty clauses are common in contracts, although English law does not allow its enforcement; see *Cavendish Square Holding BV v Talal El Makdessi and ParkingEye Ltd v Beavis* [2015] UKSC 67.

³⁶ See also fn. 41, below.

³⁷ Hague-Visby Rules, Article III.2.

³⁸ Hague-Visby Rules, Article IV.2.

³⁹ *Beatson v Haworth* (1796) 6 TR 531, see H. Bennett (Ed.), *Carver on Charterparties* (London, 2017), 4-322.

anticipated. Charterparties usually contain detailed clauses about geographical deviation and its consequences⁴⁰ but the position of a receiver/holder of the bill of lading may depend on the express terms of the bill of lading or any charterparty incorporated therein and is often not straightforward.

The three key components that need to be established in a deviation claim are (i) the head of loss the receiver is seeking to recover; (ii) the causal link between the deviation and the loss; and (iii) the reason for the deviation. These three factors will determine whether the claimant (or its cargo underwriter) has suffered a recoverable loss and whether carrier will be liable in damages. Should the claimant be able to prove that the cargo was damaged as a consequence of the deviation, e.g. a longer or slower route to carry time sensitive perishable cargo, the carrier would be liable in damages,⁴¹ unless the deviation was made for the purpose of saving life or property at sea or was otherwise reasonable.⁴² A typical example of a reasonable deviation may be that of a vessel making an unscheduled call to leave a member of the crew with severe COVID-19 symptoms at a port where s/he can be hospitalised; or a deviation to pick up essential medication for the quarantined crew.

For the purposes of this briefing note, we shall be looking at three scenarios in which deviation may occur and the receiver may be seeking to recover damages: (a) a change in rotation of discharge ports; (b) the refusal of the ship to berth; and (c) the use of alternative discharge ports and consequential on-carriage costs. These three issues shall be dealt with in turn.

4.1.1 A change in rotation of discharge ports

Container ships and bulk carriers are often scheduled to deliver cargo in different locations and to stop at a number of discharge ports in a particular order. As the pandemic has progressed unevenly in different parts of the world and each country has been developing and enforcing its own protective measures, some operators have chosen to change the rotation of ports in the hope of accessing one or more of them while still accessible and avoid those on strict lockdown or located in areas where the disease has been spreading too fast to be considered safe.⁴³

While in the bulk industry this would be usually done at the request or with the consent of the receiver, in the container industry, where the interest of the many receivers of cargo stowed on one ship will hardly concur in accelerating or delaying the receipt of their goods, this would not be possible. It may therefore happen that the managers of a box ship take the view that they would better serve their customers by deviating from the contract route, altering the rotation of the planned discharge ports and in so doing change the schedule of their services.⁴⁴

⁴⁰ For a detailed account of such clauses, their limitations and consequences see H. Bennett (Ed.), *Carver on Charterparties* (London, 2017), 4-329 and ff.

⁴¹ Article III.8 of the Hague-Visby Rules invalidates any clause, covenant or agreement which has the effect of lowering or excluding the carrier's liability below the minimum provided for in the convention. However, it should be noted that liability for delay (as opposed to liability for loss of or damage to the goods) is not regulated by the convention and may therefore be limited or excluded, by the terms of the bill of lading. If the only head of loss for which the receiver is seeking recovery is the delay of the vessel in getting to her destination, the question of whether and how much can be recovered will vary across jurisdictions, depending on the national law applicable to the contract. Under English law such damages can be lawfully excluded by specific contractual clauses. Typical wording may read as follows: "The carrier shall under no circumstances whatsoever and howsoever arising be liable for any direct, indirect or consequential loss or damage caused by delay".

⁴² HVR, Art. IV r.4. The burden of proving the reasonableness of the deviation rests on the carrier, who is seeking to rely on the exception.

⁴³ On the issue of COVID-19 and safe ports, see below.

⁴⁴ It is common practice in the container industry for schedules to be advertised with a liberty for the carrier to amend it without restrictions. E.g., "All dates are estimates, given in local date/time and subject to changes without prior notice."

An aggrieved receiver who may suffer loss or damage as a result of this decision, however, may find itself unable to recover any damages because of two key reasons: (a) bills of lading often contain widely drafted clauses giving the carrier the liberty to deviate from the agreed route;⁴⁵ and (b) damages for delay and consequential losses are usually heavily limited or expressly excluded by the terms of the bill of lading.⁴⁶

4.1.2 The refusal of the ship to berth

The current pandemic has caused some disruption to shipping operations, for instance where owners, managers or crew members have refused to berth at ports or to proceed to ports in countries which were particularly affected by the pandemic. This should not come as a surprise, particularly given the severity of the disease and the level of preparedness for managing the effects of its second wave still at an early stage. The master of a ship bound for a port which is constantly on the news for the number of victims of a highly contagious disease, may well perceive the port as prospectively unsafe⁴⁷ and hence (legitimately) refuse to go.⁴⁸ Likewise, legislation providing for quarantine restrictions and/or long waits for the ship to be allowed to discharge may suddenly prove unattractive for a ship that is at the end of its time charter term and needs to be delivered elsewhere to her next customer.⁴⁹ These are all legitimate worries which may, however, cause significant damage to the receiver of the cargo, itself under great pressure from its downstream customers.

Refusal to discharge the cargo at the agreed destination is a clear breach of the bill of lading contract and the carrier would be liable in damages.⁵⁰ It is however possible for the carrier to rely on “safe port warranties”⁵¹ almost invariably included in time and voyage charterparties. Such clauses impose on the charterer the duty to dispatch the vessel exclusively to safe ports while giving the owner the right to refuse to sail into any port which at the time of its nomination is deemed to be prospectively unsafe for the time of arrival.⁵² In case the clause is triggered, any costs arising out of or in connection with an illegitimate order would be on the charterer’s account.⁵³ These clauses are extremely common in both time and voyage charterparties and may directly affect the receiver in cases where it is also party to the charterparty,⁵⁴ or in the common scenario in which the bill of lading

⁴⁵ The extent and validity of these clauses has been the subject of intense legal review which has concluded in favour of a limited validity. For a full discussion see H. Bennett (Ed.), *Carver on Charterparties* (London, 2017), 4-322 and ff; and G. Treitel, FMB Reynolds, *Carver on Bills of Lading*, 4th edn. (London, 2017), 9-246 – 9-248.

⁴⁶ E.g., the MSC bill of lading, at clause 8 reads: “The Carrier does not promise or undertake to load, carry or discharge the Goods on or by any particular Vessel, date or time. Advertised sailings and arrivals are only estimated times, and such schedules may be advanced, delayed or cancelled without notice. In no event shall the Carrier be liable for consequential damages or for any delay in scheduled departures or arrivals of any Vessel or other conveyances used to transport the Goods by sea or otherwise. If the Carrier should nevertheless be held legally liable for any such direct or indirect or consequential loss or damage caused by such alleged delay, such liability shall in no event exceed the Freight paid for the carriage.”

⁴⁷ *Kodros Shipping Corp v Empresa Cubana de Flete (The Evia) (No.2)* [1983] 1 AC 736; *Gard Marine and Energy Ltd v China National Chartering Co Ltd (The Ocean Victory)* [2017] UKSC 35; H. Bennett (Ed.), *Carver on Charterparties* (London, 2017), 4-002 and ff.

⁴⁸ *Kodros Shipping Corp v Empresa Cubana de Flete (The Evia) (No.2)* [1983] 1 AC 736.

⁴⁹ *Marbienes Compania Naviera SA v Ferrosstaal AG (The Democritos)* [1975] 1 Lloyd’s Rep 386; H. Bennett (Ed.), *Carver on Charterparties* (London, 2017), 12-255 and ff. The effects of the delay come to the fore when the owner fails to give the relevant notices of delivery and redelivery to the time charterer or the notice of readiness to the voyage charterer.

⁵⁰ *SIAT di del Ferro v Tradax Overseas SA* [1978] 2 Lloyd’s Rep 470.

⁵¹ H. Bennett (Ed.), *Carver on Charterparties* (London, 2017), at 4-002 and ff.

⁵² *Kodros Shipping Corp v Empresa Cubana de Flete (The Evia) (No.2)* [1983] 1 AC 736.

⁵³ *Compania Naviera Maropan S/A v Bowaters Lloyd Pulp and Paper Mills Ltd (The Stork)* [1955] 2 QB 68.

⁵⁴ E.g., Gencon 1994 clause 3 and NYPE 1946 clause 16. See further below.

incorporates the terms of the charterparty.⁵⁵ On the other hand the carrier is under a common law duty of reasonable dispatch⁵⁶ and hence not entitled to waste time. In extraordinary circumstances such as those generated by the Coronavirus pandemic, all parties should liaise to find a prompt solution to minimise the costs of this impasse.

4.1.3 The use of alternative discharge ports and consequential on-carriage costs

Following from the above, it is possible for the vessel to attempt to resolve the situation by discharging the cargo at an alternative nearby port. This will hardly be a desirable solution for the receiver who is probably well geared and ready to take delivery only at the port named in the bill of lading and for whom such a last-minute change is often an undesirable and expensive solution. Receivers may face additional costs, due to the need for re-shipment, storage, or land transport, as well as potential problems in fulfilling obligations under a sub-sale of the cargo.

Discharging cargo at a different port than the port of discharge stated in the relevant box in the bill of lading is definitely a breach of the contract of carriage for which the carrier is liable.⁵⁷ Bills of lading may, however, contain specific clauses allowing the carrier to discharge the cargo “at any port” and excluding any liability in damages for doing so. The validity and effectiveness of such liberty clauses will depend on the law applicable to the contract but, under English law, they have been recognized as generally valid and effective in protecting the carriers from liability,⁵⁸ albeit with some limitations.⁵⁹

Thus, while any unreasonable deviation is generally regarded as a breach of the contract of carriage, a deviation as a result of COVID-19 related measures or restrictions, may often be considered reasonable or, alternatively, may be covered by a contractual clause excluding liability⁶⁰; moreover, a claim to recover damages for *delay* due to a deviation is a difficult one to win. Receivers and carriers should keep an open line of communication and seek a mutually agreeable solution to any COVID-19 related deviation.

4.2 Quarantine and damages for delay

Should discharge be delayed by a quarantine restriction imposed on the vessel, the Hague Visby Rules would allow the receiver little opportunity of recovery. Article IV r.2(h) of the Rules in fact exempts the carrier from liability for loss of or damage to the goods arising out of quarantine

⁵⁵ To achieve this, the incorporation clause in the bill of lading should be drafted with sufficiently wide wording. A clause incorporating “all terms and conditions, liberties and exceptions of the charterparty” would be sufficiently wide; *The Annefield* [1971] 1 All ER 394.

⁵⁶ *Blackgold Trading Ltd v Almare SpA di Navigazione (The Almare Seconda and Almare Quinta)* [1981] 2 Lloyd’s Rep 433.

⁵⁷ In CIF transactions, the bill of lading tendered for payment must provide evidence that the cargo is bound for the discharge port agreed in the sale contract. Any difference between the discharge port agreed in the sale contract and that indicated in the bill of lading constitute a fatal breach of the contract of sale, *SIAT di Dal Ferro v Tradax Overseas SA* [1980] 1 Lloyd’s Rep 53. However, issuing of a new ‘switch’ bill indicating the revised discharge port is a dangerous practice for the carrier and should be avoided.

⁵⁸ *GH Renton & Co Ltd v Palmyra Trading Corp* [1957] AC 149.

⁵⁹ *Glynn v Margetson* [1893] AC 351.

⁶⁰ A good example is Clause 11(2) of the *Viasea Bill of Lading* which states: “(ii) If on account of any hindrance, risk, delay, difficulty, or disadvantage of any kind and howsoever arising (even though the circumstances giving rise to such hindrance, delay, difficulty or disadvantage existed at the time the contract was entered into or the Goods were received for Carriage) and including, but without limitation, actual or threatening war, warlike operations, hostilities, acts of terrorists, piracy, riots, civil unrest, seizure or blockades epidemic, quarantine, ice, strike, lockout, labor troubles, interdict, congestion or difficulties in loading or discharge, the Carrier or Sub-contractor at any time is in doubt as to whether the Means of Transport can, safely and without delay, leave the place of loading or reach or enter the place of discharge, the Goods may be discharged at any place considered safe and convenient by the Carrier or Sub-contractor.”

restrictions imposed on the vessel, no doubt including any COVID-19 related quarantine.⁶¹ This exclusion may materialise when the restriction restrains the vessel from discharging the cargo, but also where the restriction occurred at the port of loading, as long as the vessel has loaded the cargo and a bill of lading has been issued.⁶²

COVID-19 related measures, short of quarantine proper, may also affect the timing with which vessels perform their ordinary duties. Fumigation, cleaning of tanks and holds, on board sampling and a number of other operations which may require shore assistance, may well delay the ship where the availability of port services is limited due to local Coronavirus restrictions. From the perspective of a receiver, these delays matter particularly when they occur between loading and discharge, as pre-loading events and post-discharge events (except for misdelivery) are often outside the receiver's interest and risk. This would not be the case if the receiver is also a charterer in which case it will have an additional interest in the vessel's timely arrival at the load port, prompt approach to the loading berth and in general her due dispatch.⁶³

4.3 Delay and damages to perishable cargo

While a receiver under a bill of lading is unlikely to be able to recover damages for pure delay, the matter is substantially different when the delay is the direct cause of the physical loss of or damage to the cargo. This may happen when the cargo is perishable and a longer than usual wait on board the ship causes irreversible damage to it. Two points need to be made in this respect: (i) insurance cover; and (ii) liability.

4.3.1 *Check your own cargo cover*

A cargo claimant facing this situation should check its cargo insurance cover in the first place. The large majority of cargo carried by sea is fully insured⁶⁴ and the first port of call to seek redress for a loss should be the cargo underwriter. It is possible for the policy to contain clauses aimed at excluding the type of loss for which the claimant seeks compensation, but every policy is different and prompt and frank communication with the insurer is key.

4.3.2 *The liability of carriers under the Hague Visby Rules (IV.2(g) or (h))*

Should the policy be of no avail for the recovery of the losses at stake, the claimant will have no alternative but to seek compensation from the carrier. The Hague Visby Rules do contain a number of provisions designed to protect the interests of cargo carried under bills of lading, most crucially imposing on the carrier the duty to care for the cargo carried.⁶⁵ Moreover, they impose on the carrier the duty to exercise due diligence (i.e. reasonable care) to make the ship seaworthy before and at

⁶¹ G. Treitel, *FMB Reynolds, Carver on Bills of Lading*, 4th edn. (London, 2017), at 9-226 and the cases referred thereto. See also H. Bennett (Ed.), *Carver on Charterparties* (London, 2017), at 5-130.

⁶² As noted above, fn. 41, the Hague-Visby Rules do not envisage liability for pure delay without associated physical damage to the cargo; therefore, the Hague-Visby Rules exclusion would arguably not protect the carrier from any liability for pure delay that may arise under applicable national law. However, some bills of lading further contain specific clauses allowing the carrier to respond specifically to a quarantine event and excluding all liabilities for delay. For an example, see fn. 61, above.

⁶³ See below. Should the receiver be the time charterer of the vessel, it would have a further interest in the vessel's speedy discharge and post-discharge operations as its profit would depend directly on the efficient employment of the vessel.

⁶⁴ A valid insurance policy must be procured by the seller as part of all CIF sales. FOB buyers would normally insure cargo they have purchased under the ICC Incoterms, although there is no contractual obligation for them to do so.

⁶⁵ Hague-Visby Rules, Art. III.2.

the beginning of the voyage.⁶⁶ This entails the physical seaworthiness of the vessel, its cargo-worthiness, as well as adequate manning and equipment. The burden of proof in respect of the carrier's obligation is reversed⁶⁷ and, therefore, once unseaworthiness has been established as a cause of the loss, the carrier bears the burden of disproving negligence. Two points need to be made here with reference to cargo which is damaged solely by a COVID-19 related delay: (a) the Hague Visby Rules, Art. IV.2(g) and (h), exclude the carrier's liability for loss or damage to cargo caused by 'quarantine restrictions'⁶⁸ and 'arrest or restraint of princes, rulers or people [...]'⁶⁹ which will probably cover any COVID-19 related detention not amounting to a proper quarantine; (b) unless the carrier is in breach of the duty of seaworthiness.

In fact, it may be possible to argue that a carrier sailing with knowledge of coronavirus infections on board or having failed to take the precautionary measures necessary to contain the virus (temperature checks and appropriate testing) should not be allowed to rely on the exclusions of Article IV.2(h) or (g). It must be stressed that the presence of coronavirus positive crewmembers on board is not per se an indication that the carrier is in breach of its seaworthiness obligation under Article III.1: the carrier may have enforced very strict anti-COVID-19 measures which in the circumstances, given the way in which the virus spreads, may have proven ineffective. However, it is at least arguable that in cases in which COVID-19 positive crew causes the ship to be quarantined and in turn the delay causes damages to the cargo carried on board, the loss is due to unseaworthiness and it would be for the carrier to prove the absence of negligence, or risk being liable in damages.⁷⁰

4.4 Delay in documentation

The pandemic has caused a surge in demand of delivery services which, together with staffing issues, may have caused delay in the delivery of the original documents needed to claim and collect the cargo. Lockdown restrictions affecting the number of staff physically available to board ships and collect samples or perform other pre boarding inspections have also created some difficulty to receivers eager to collect and distribute the goods. The two issues will be dealt with in turn.

4.4.1 Bill of lading not available at discharge

One original negotiable bill of lading must be presented to the carrier or its agent at the port of discharge in order for the 'consignee' to obtain delivery of the cargo.⁷¹ This is a clear and important rule in shipping and failure to comply with it has important consequences for the carrier who may lose P&I cover⁷² by releasing the cargo without production of the original document. The likelihood of delay is even higher when it comes to sale of commodities along a string of buyers, as the original negotiable bill of lading must be tendered to each buyer or bank involved, along the chain of contracts. This is likely to lead to delay which means the bill of lading may not be available at the discharge port when the vessel arrives. Failure of the document to arrive due to a postal or banking delay is no excuse and the carrier and/or its agent must insist on the presentation of the original bill.

⁶⁶ Hague-Visby Rules, Art. III.1.

⁶⁷ Hague-Visby Rules, Art. IV.1

⁶⁸ Hague-Visby Rules, Art. IV.2(h).

⁶⁹ Hague-Visby Rules, Art. IV.2(g).

⁷⁰ To prove the exercise of due diligence in making the vessel seaworthy, the carrier needs to disprove negligence on the part of anyone engaged by him, including independent contractors, such as surveyors and classification societies, *Riverstone Meat Co. Pty v. Lancashire Shipping Co. Ltd. (The Muncaster Castle)* [1961] A.C. 807; [1961] 1 Lloyd's Rep. 57 (HL)

⁷¹ *JJ MacWilliam Co Inc v Mediterranean Shipping Company Co SA (The Rafaela S)* [2005] UKHL 11; [2005] 2 AC 423.

⁷² See for example Clause 5.2.15(a) of the Skuld P&I Rules, available at www.skuld.com, last accessed on 27 October 2020.

In some cases, it may be possible to persuade the carrier to release the cargo against a letter of indemnity,⁷³ a simple contractual device in which the receiver undertakes to keep the carrier harmless for any and all losses caused by the release of the cargo to the guarantor. However, this is a risky device for the carrier who would be left with no cargo and remain liable to the lawful holder of the bill of lading,⁷⁴ in case the goods have been released to a party not entitled to them.

A much better and safer way to hedge the risk of delay in the arrival of the original bill of lading would be to use (a) a transport document which does not require presentation, e.g. a seawaybill when the use of such transport document is allowed by contract;⁷⁵ or (b) one of the several electronic transport records that are increasingly becoming available for widespread commercial use in the market. The advantage of the use of a seawaybill is that this particular transport document is not a document of title and, therefore, does not need to be presented at discharge to the carrier;⁷⁶ instead, the receiver should simply provide proof of identity to obtain delivery of the goods from the carrier. However, the law merchant⁷⁷ does require the seller of goods to be carried by sea, to tender a negotiable bill, a document of title allowing the buyer to re-sell the goods in transit into the open market and providing independent documentary security. The parties to the sale contract may of course do away with this obligation and allow (in some cases even require) the tender of a non-negotiable seawaybill, particularly when the buyer is not intending to resell the cargo, or does not require independent documentary security. This would solve the presentation problem entirely but may leave the buyer in a difficult position should it decide to resell the cargo afloat at a later stage.

As to the use of an 'electronic record/electronic bill of lading', although every system in current use works slightly differently,⁷⁸ none of them requires the postal transmission of the documents and the goods can be accessed without any paper trail. There are currently six systems recognised by the International Group of P&I Clubs,⁷⁹ all of which allowing paperless sea borne trade.⁸⁰ The great advantage of e-bills of lading is that they do not require physical transfer of any document which eliminates the likelihood of any significant delay in transmission. The market reaction to paperless trade has been slow, but the leap in security made possible by the advent of blockchain technology and the almost universal use of electronic communications, has pushed more traders to opt for e-solutions. The Coronavirus pandemic has certainly offered the opportunity to reflect on the use of

⁷³ Letters of indemnity (LOI) are a common device and P&I Clubs make them available in standardised wording for carriers and receivers to use, e.g. www.westpandi.com, last accessed on 27 October 2020.

⁷⁴ This may arise in cases of misdelivery, where the party obtaining delivery of the goods against a letter of indemnity turns out not to be the lawful holder of the bill of lading. In these cases, the carrier remains liable to the lawful holder of the bill of lading.

⁷⁵ Under a seawaybill, the carrier undertakes to deliver the goods to the named consignee against identification. For a seller or buyer making a contract for the carriage of goods, requesting the carrier to issue this type of transport document would be suitable in cases where sale of goods in transit is not envisaged, and where no independent documentary security is not required and, therefore, a document of title (i.e., a bill of lading) is not needed. Note that unless otherwise agreed, in CIF and FOB contracts a negotiable bill of lading is required, but buyer and seller are free to agree on the use of a non-negotiable seawaybill, e.g. if no sale of goods in transit is envisaged and no independent documentary security is needed.

⁷⁶ *JJ MacWilliam Co Inc v Mediterranean Shipping Company Co SA (The Rafaela S)* [2005] UKHL 11; [2005] 2 AC 423.

⁷⁷ And certainly, the Incoterms (CIF and CFR A6) and English law (*Heilbert, Symons & Co Ltd v Harvey & Co* (1922) 12 Ll. L Rep 455).

⁷⁸ There are a number of systems currently available, among the most commonly recognised are: essDOCS Exchange Ltd "essDOCS", Bolero International Ltd and E-Title Authority Pte Ltd. These are recognised by P&I Clubs under a common policy. The P&I position is set out e.g., in Gard's Member Circular No. 7/2015 dated October 2015, Electronic (Paperless) Trading Systems, available at http://www.gard.no/Content/20889007/MemberCircular_7_2015.pdf, last accessed on 27 October 2020. See also [UK P&I Club Legal Briefing 2017](#); [2020 Update Part I](#), [Part II](#).

⁷⁹ This is the group formed by the thirteen P&I Clubs which provide marine liability cover for approximately 90% of the world's ocean-going tonnage; see <https://www.igpandi.org/about>, last accessed on 18 December 2020.

⁸⁰ The IG of P&I Clubs approved Bolero and essDOCS in 2010 and e-Title™ in 2015. Global Share S.A. edoxOnline platform ("edoxOnline") was approved on 11 June 2019, WAVE on 23 December 2019, and CargoX Smart B/L™ ("CargoX") on 11 February 2020.

paperless transport documents and should accelerate their adoption.

4.4.2 *Phytosanitary and other pre-discharge certificates not available at discharge*

Some cargo needs to be inspected before discharge can commence. This is often the case with live animals or foodstuffs, but inspections and sampling may be required for a large array of cargoes for the most varied reasons with significant differences among the many jurisdictions involved in international trade. The allocation of the risk of delay at the discharging port is usually agreed upon in the sale contract and the courts should enforce such agreements. A CIF buyer/receiver of manufactured cargoes carried in a container, for example, would have no contractual duty vis-à-vis its seller to remove the cargo from the port terminal.⁸¹ It may however find that the bill of lading relating to its cargo contains a clause allocating to the receiver a daily fee for failing to return promptly the empty container.⁸² This 'demurrage' may increase substantially the costs of the transaction and receivers should be very wary of incurring any extra costs.

The daily amount of demurrage and the way in which is calculated, including the situations in which it is not due, are a matter usually left to the parties' freedom of contract, although it is hardly something actually negotiated in practice.⁸³ Should the delay in returning the empty box be due directly or indirectly to local anti-COVID-19 measures or legislation, the receiver should open a line of communication with the local carrier's representative and attempt to find an amicable solution.

5. Cargo claims: Issues with accessing discharged goods

Once the goods, either in bulk or boxes, have been discharged from the ship, they are usually inspected and lifted for local use or distribution. But what is usually a simple and relatively quick operation may be easily complicated and/or delayed by COVID-19 and COVID-19 related legislation. The most common issues are: (a) the port or vessel cannot be accessed, and the goods cannot be inspected; (b) goods cannot be collected and terminal charges accrue; (c) and the question may arise as to when does time, for the purposes of calculating the time-bar for making a claim, start running? These three issues will be briefly discussed below.

5.1 Goods not accessible: What is their condition at discharge?

One crucial feature of the sale of goods on shipment terms⁸⁴ is that delivery of the goods from seller to buyer happens at the port of loading across the ship's rail and not when the goods arrive at the port of discharge.⁸⁵ One of the most obvious consequences of the above is that the buyer does not have the opportunity of inspecting the cargo at the point of delivery but must rely on relevant related documentation. When the cargo finally arrives, sometimes several weeks after it was shipped on board and hence delivered under the terms of the sale contract, its condition may have deteriorated and the buyer/receiver, having paid its seller in full against conforming documents, may need to seek redress from the carrier. To do so however, the claimant must gain access to the cargo in order to

⁸¹ See Incoterms® 2020, CIF Term, B2.

⁸² This is usually referred to as 'Demurrage'.

⁸³ A good example of a detailed container demurrage policy can be found at <https://www.splithoff.com/media/2038/cleveland-europe-express-demurrage-and-detention-terms.pdf>, last accessed on 27 October 2020.

⁸⁴ Such as CIF (Cost Insurance and Freight), CFR (Cost and Freight) and FOB (Free on Board).

⁸⁵ "COVID-19 implications for commercial contracts: International sale of goods on CIF and FOB terms", UNCTAD Briefing Note UNCTAD/DTL/TLB/INF/2021/2.

inspect it, collect the necessary samples to prepare the evidence to support the claim and act in mitigation to contain its losses. Moreover, the claimant and its surveyors may need to have prompt access to the vessel's holds in order to ascertain their condition on arrival.

The Hague-Visby Rules give the receiver a very strict timeframe to notify the carrier of any loss or damage to the cargo, thus: immediately "before or at the time of removal of the goods into the custody of the person entitled to delivery"⁸⁶ for loss or damage which is 'apparent' and "within three days [from the] removal of the goods into the custody of the person entitled to delivery"⁸⁷ if the loss or damage is not 'apparent'. While the wording was clearly chosen to fit the business model of a time in which containers had not been invented and is therefore more apposite in the case of bulk shipments, it is clearly applicable to modern containerised cargo and must be complied with, at any rate when the cargo at stake is covered by the Hague Visby Rules.⁸⁸ In the ordinary course of events the receiver is notified of the discharge of the container and given access to it; but what if COVID-19 related legislation prevents the receiver from accessing the terminal and inspecting the container? What if access is denied for days by order of authority?

The importance of this question cannot be overstated as failure to give notice of loss "shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading"⁸⁹ and thus free the carrier from its liability. The answer however is likely to depend on the law applicable to the claim with some jurisdiction suspending the running of time while the inspection is lawfully prevented and others taking the opposite view that notice of loss should nonetheless be given.⁹⁰

Receivers with no access to the goods should seek information about their cargo and its apparent condition on discharge and liaise with the carrier to obtain an extension of the statutory timeframe.

5.2 Terminal charges

The second issue which a prolonged delay in accessing the cargo may cause to the receiver is the accrual of hefty terminal charges.⁹¹ Terminal operators may in fact charge cargo receivers for keeping the key, jetty or slot occupied for longer than the time contractually allowed. These charges may be significant and difficult to challenge as terminal regulations may allow the operator a right of retention on the cargo until all charges have been paid. Whether terminals are allowed to charge and retain the cargo for delays occurred as a consequence of local COVID-19 related legislation depends on the relevant law. Should the receiver be particularly concerned over this risk it should attempt to negotiate with its seller and/or the terminal from which it operates a mutually acceptable solution.

5.3 Time bars

Article III.6 of the Hague-Visby Rules gives cargo interests one year to commence proceedings to

⁸⁶ Hague-Visby Rules, Art. III.6.

⁸⁷ Hague-Visby Rules, Art. III.6.

⁸⁸ Which is most likely the case every time the cargo is carried under the terms of a negotiable and non-negotiable bill of lading; see Hague-Visby Rules, Article I(b); Section 1 of the English Carriage of Goods by Sea Act 1971 and *JJ MacWilliam Co Inc v Mediterranean Shipping Company Co SA (The Rafaela S)* [2005] UKHL 11; [2005] 2 AC 423.

⁸⁹ Hague-Visby Rules, Art. III.6.

⁹⁰ Local legislation may treat the terminal operator as agent of the carrier, in which case delivery into the custody of the receiver will be delayed for the duration of delay; should local legislation treat the terminal operator as agent of the receiver however, the goods would be removed into the custody of the receiver on discharge.

⁹¹ Please also note the issue of accrual of container demurrage, mentioned in section 4.4.2, see text to fn. 81-83, above.

seek recovery from the carrier for loss of or damage to their cargo. This is not a procedural time limit, usually extended in case of emergency legislation, but a substantive time bar: should the aggrieved receiver fail to sue the carrier “within one year of the delivery of the goods, or of the date when they should have been delivered”, “the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods”⁹² and recovery is no longer possible.

While the duration of the time bar is crystal clear – one year – the time from which it starts counting is less so as the Rules simply use the word “delivery”. If the container is discharged on 1st April 2020 but access to the terminal is restricted until 15 June 2020 and the receiver collects the cargo on 22nd June 2020, when will the time bar lapse: 1 April 2021, 15 June 2021, or 22 June 2021? Under English law, “delivery” in the context of Article III.6 of the Hague-Visby Rules is probably meant as transfer of physical possession from the carrier to the receiver and hence the time bar in the above example should be 22nd June 2021.⁹³ However, should local law deem the terminal as receiving the cargo on behalf of the receiver, the outcome may be the opposite and the time bar may be held to be reached much sooner. In the circumstances given above, a receiver would be best advised to seek from the carrier an extension of the time bar, failing which it should commence proceedings no later than one year from the earliest date.

6. Cargo claims under bills of lading incorporating charterparties

When cargo is shipped in bulk under a charterparty, it is often the case that the bill of lading issued by the carrier at loading contains only a few terms of the contract of carriage.⁹⁴ These bills of lading look remarkably different from the ones used in the container industry and may be referred to as ‘short form bills of lading’ or ‘charterparty bills of lading’.⁹⁵ While they are still receipts and documents of title at common law, charterparty bills do not contain the actual terms of the contract of carriage but rather incorporate by reference “all terms and conditions” of a charterparty. This practice is potentially risky for CIF and CFR buyers who are not party to the charterparty but, by way of this bulk incorporation and operation of law,⁹⁶ inherit its terms.

The law of charterparty bills is complex and well beyond the scope of this briefing note; however, for current purposes three points may be of use:

- (a) A bill of lading incorporating “all terms and conditions, liberties and exceptions” of a charterparty is and remains a bill of lading and any action brought under it by a party other than the original charterer will be subject to the relevant international convention, such as the Hague-Visby Rules,⁹⁷ which provide for mandatory minimum liability of the carrier and would override any conflicting charterparty terms;⁹⁸
- (b) Before commencing proceeding under a charterparty bill, the receiver should seek to obtain a copy of the terms and conditions of the relevant charterparty. A number of clauses in the charterparty may cover issues like delay, quarantine and/or detention which may well be

⁹² Hague-Visby Rules, Article III.6.

⁹³ To the same conclusion see the English case *The Sonia* [2003] EWCA Civ 664; [2003] 2 Lloyd’s Rep 201.

⁹⁴ See for example Congenbill 2016, available at www.bimco.org.

⁹⁵ See F. Lorenzon, *CIF and FOB Contracts*, 7th edn. (London, 2020), 5-014.

⁹⁶ Under English law by operation of Section 2.1 of the Carriage of Goods by Sea Act 1992.

⁹⁷ See Art. V of the Hague Visby Rules.

⁹⁸ Art. III.8 of the Hague-Visby Rules invalidates any clause, covenant or agreement which has the effect of lowering or excluding the carrier’s liability below the minimum provided for in the convention.

relevant to any pandemic related (or affected) claim.⁹⁹ In some cases, charterparties, contracts of affreightment and other contracts of carriage, may also contain a *force majeure* clause proper¹⁰⁰, potentially listing both traditional types of events such as natural disasters, explosions and strikes, and more modern events such as cyber-attacks and epidemics. Whether the delay or disruption resulting from COVID-19 would qualify as a *force majeure* event, depends exclusively on the terms of the clause.¹⁰¹ In principle, parties may e.g., seek to invoke a *force majeure* clause contained in the charterparty, on the ground that the COVID-19 outbreak is an extraordinary event which is beyond the parties' control and which materially affects their ability to perform the charterparty. Whether they are permitted to do so, will depend on the law applicable to the charterparty, the specific wording of the relevant clause and how the parties are affected by the outbreak;¹⁰²

- (c) The charterparty choice of law and jurisdiction or arbitration clauses, if expressly referred to and therefore validly, incorporated into the bill of lading,¹⁰³ will definitely be essential to the claim; and
- (d) Not every clause in the charterparty can be validly incorporated into the bill of lading by way of a general incorporation clause.¹⁰⁴ A prospective claimant should always seek expert legal advice.

7. Cargo claims under charterparties

Cargo claims brought by the charterer of a vessel are governed by the charterparty. For instance, when cargo is sold on (strict) FOB terms, the receiver of the cargo may be the charterer, and the contract of carriage, which is relevant in the context of a cargo claim, is contained in the charterparty, not in the bill of lading. Similarly, when a CIF buyer exercises a right to terminate or cancel the sale contract¹⁰⁵ while the cargo is *en route* on board a chartered vessel, or goes bankrupt, the seller may find itself with cargo stuck on board due to a COVID-19 related event and may need to bring a claim against the carrier; its contractual remedies against the carrier will also be found in the charterparty,

⁹⁹ See above.

¹⁰⁰ In general see: G. Treitel, *Frustration and Force Majeure*, 3rd edn (London, 2014); E. McKendrick, *Force Majeure and Frustration of Contracts*, 2nd edn (London, 1995); H.G. Beale (Ed), *Chitty on Contracts*, 33rd edn (London, 2019), at [23-001] and ff; and specifically on sale contracts M. Bridge (Ed), *Benjamin on Sale of Goods*, 10th edn (London, 2017); at [19-125] – [19-146]; and F. Lorenzon, *Sassoon on CIF and FOB Contracts*, 7th edn (London, 2020); Chapter 13. See also the discussion on *force majeure* clauses in “COVID-19 implications for commercial contracts: International sale of goods on CIF and FOB terms”, UNCTAD Briefing Note UNCTAD/DTL/TLB/INF/2021/2.

¹⁰¹ Where there is no specific reference to disease, epidemic or quarantine, they may be covered by terms such as “acts of Government”, “Act of God”, “labour shortage”, or “other circumstances beyond the parties’ control”, etc. In the latter case, a party might find it easier to establish that travel restrictions, lockdowns and business closures imposed by governments qualify.

¹⁰² Discussions are currently being held on a new BIMCO *Force Majeure* Clause which is expected to be published during the first half of 2021. For a brief description of the high threshold for invoking the clause in order to avoid abuse, as well as the effects and potential remedies under it, see [New BIMCO Force Majeure Clause Ready For Review](#), 15 December 2020; also see <https://www.bimco.org/news/contracts-and-clauses/20201211-new-bimco-force-majeure-clause-ready-for-review>.

¹⁰³ By express reference in the bill of lading, see *The Nerano* [1996] 1 Lloyd’s Rep 1.

¹⁰⁴ *The Anfield* [1971] 1 All ER 394; *Balli Trading Ltd v Afalona Shipping Co Ltd* [1993] 1 Lloyd’s Rep 1.

¹⁰⁵ Under English law a CIF buyer is entitled to reject the documents and terminate the sale contract in cases where the seller is in repudiatory breach of contract, such as in cases where time stipulations or any documentary duties were not strictly adhered to. This might arise, for instance, if completion of loading/shipment is delayed beyond the contractual shipment period as a result of COVID-related restrictions or disruptions; for further details of the trade effects of the pandemic see: “COVID-19 implications for commercial contracts: International sale of goods on CIF and FOB terms”, UNCTAD Briefing Note UNCTAD/DTL/TLB/INF/2021/2.

a contract which it has negotiated and on the basis of which the bill of lading had been issued upon shipment. This does not mean that the bill of lading has no practical use to the claimant - on the contrary: it is still the receipt for the goods shipped and the document of title to the goods. However, when it comes to an aggrieved receiver, who is the charterer and has suffered loss or damage due to a COVID-19 related delay, any contractual remedy available against the carrier is governed by the terms of the charterparty and not the bill of lading.¹⁰⁶

Charterparty claims are substantially different from claims under bill of lading for three crucial reasons: (a) they are not subject to mandatory cargo liability regimes such as the Hague-Visby Rules¹⁰⁷; therefore (b) time bars may be considerably shorter,¹⁰⁸ but this would be subject to negotiation; and (c) every clause in the charterparty dealing with e.g., delay, quarantine and detention will potentially be directly relevant to the claim.

Cargo claims under charterparties would normally arise in the context of a bulk shipment or contract cargo for which the charterer has hired the entire vessel or a portion thereof. The agreement would have taken some time to negotiate and, unlike in the case of bills of lading, the standard form on which it was concluded would have usually been amended substantially. This implies that the charterer/claimant has a much closer relationship with the owner of the vessel and a much better knowledge and understanding of the terms of the contract. This of course does not make disputes less likely, but at least ensures an open line of communication between the parties.

COVID-19 and the related emergency legislation and measures to contain its spread have had an impact on bulk shipments and containerized traffic alike, so the very same issues discussed in the preceding pages have affected charterers too. But the key issue of delay has a profoundly different effect in charterparties, an effect which in turn depends on the type of charterparty agreed upon between the parties.

In time or time-trip charterparties, time is at the very heart of the contractual agreement regarding the use of the vessel and any delay not directly attributable to a breach of contract by the owner would normally be for the charterer's account.¹⁰⁹ Delays at loading, restrictions, inability to sample or measure the cargo, are all falling outside of the responsibility of the owner and any time thereby lost will be paid for in the form of hire. This basic balance may of course be varied by contract and time charters contain long and detailed off-hire clauses¹¹⁰ which may be relevant to a COVID-19 related scenario. These clauses are however interpreted very narrowly by the courts as they are part of the commercial risk-allocation between the parties. Clauses related to detention, quarantine, change in orders and medicals may all become relevant during a pandemic and their mutual interaction does require expert advice.

In voyage charterparties, the costs related to the passing of time are allocated in line with a more complex formula according to which the owner undertakes to perform one or more voyages without reference to a particular duration but specifies a number of days within which loading and discharging operations should be performed (laytime).¹¹¹ Should loading and discharging exceed the agreed duration of laytime, the risk of delay shifts back onto the charterer who will be required to pay daily liquidated damages (demurrage).¹¹² Timing is crucial in this type of contracts which contain

¹⁰⁶ *Rodocanachi v. Milburn* (1886) 18 QBD 67 (QB); *President of India v. Metcalfe* [1970] 1 QB 289.

¹⁰⁷ Unless expressly incorporated by reference.

¹⁰⁸ Three, six, or nine months time bar are very common practice.

¹⁰⁹ See in general H. Bennett (Ed.), *Carver on Charterparties* (London, 2017), 7-463 and ff.

¹¹⁰ For an example of such clauses see Clause 9 of Bimco's GENTIME charter 2016, available at www.bimco.org.

¹¹¹ H. Bennett (Ed.), *Carver on Charterparties* (London, 2017), 9-005 and ff.

¹¹² H. Bennett (Ed.), *Carver on Charterparties* (London, 2017), 9-172 and ff.

detailed provisions regarding expected time of arrival and expected readiness to load as well as a strict framework of notices to be formally given at a specific time.¹¹³ In voyage charterparties deviation (change in destination, rotation and detention)¹¹⁴ are carefully regulated by a number of contractual clauses. Epidemics, quarantine, and medicals are also usually dealt with expressly in the contract and may be listed as exceptions to the running of laytime and/or demurrage. It follows from the above that cargo claims under charterparties, where cargo may have been damaged by a delay generated by COVID-19 related measures or legislation, will be resolved on the basis of the terms of the charterparty and the general law of contractual interpretation applicable to it. Early and open communication and competent legal support are again essential in the circumstances.

8. Cargo claims under multimodal transport documents

Containers are often carried under multimodal transport documents, i.e., contracts of carriage covering several modes of transport and putting the multimodal transport operator in charge of door-to-door deliveries. Current commercial practice uses a large array of multimodal transport documents in both negotiable and non-negotiable form. Multimodal bills in use include BIMCO's 'MULTIDOC 95' and 'COMBICONBILL' and the FIATA Multimodal Transport Bill of Lading. Some multimodal carriers and non-vessel owning common carriers (NVOCC) have adopted their own in-house standard form (e.g. P&O Nedlloyd's Bill of Lading for Combined Transport or Port to Port shipment).¹¹⁵ All these documents evidence contracts of carriage with a more or less complete contractual liability regime with clear rules on the basis of liability,¹¹⁶ available defences in different stages of the voyage,¹¹⁷ limitation¹¹⁸ and time bar;¹¹⁹ relevant cargo claims may also be subject to one of the mandatory unimodal liability regimes applicable to carriage of goods by sea, road, rail, inland waterway or air, for instance when the stage of transport when the loss occurred can be identified.¹²⁰ It is certainly true to say that each and every bill of lading devises its regime somewhat differently, on the basis of the concept of what is known as the limited network liability system, with the benefit of avoiding as much as possible, interference with mandatory regimes applicable to unimodal segments of the adventure. In practice, this means that the outcome of every single claim depends on the wording of the contract and the specific circumstances of the case, including the question of whether one of the unimodal international liability regimes applies mandatorily to the claim in question.

The direct consequence of this state of affairs is that the way in which COVID-19 and related

¹¹³ Of particular importance is the Notice of Readiness (NOR) which is the formal requirement needed to trigger the commencement of laytime. Delay in giving the NOR beyond the agreed laycan may give the charterer the option to cancel the fixture, leaving the owner with no charterparty to perform.

¹¹⁴ See above.

¹¹⁵ F. Lorenzon, M. Clarke, J. Ramberg, R. Herber, *Integrated Services in the Intermodal Chain*, available at <http://folk.uio.no/erikro/WWW/cog/Intermodal%20liability%20and%20documentation.pdf>, at 30.

¹¹⁶ E.g. MULTIDOC 95, cl. 10; FIATA Bill, cl. 6.

¹¹⁷ E.g. MULTIDOC 95, cl. 11; FIATA Bill, cl. 6.6.

¹¹⁸ E.g. MULTIDOC 95, cl. 12; FIATA Bill, cl. 8.

¹¹⁹ E.g. MULTIDOC 95, cl. 4; FIATA Bill, cl. 17.

¹²⁰ For an overview of the complex international liability regime governing multimodal transport see UNCTAD, [Multimodal Transport: The feasibility of an international legal instrument](#), UNCTAD/SDTE/TLB/2003/1. See also: R. Thomas, 'Multimodalism and Through Transport – Language, Concepts and Categories' (2012) 36 *Tulane Maritime Law Journal* 37; F. Lorenzon, M. Clarke, J. Ramberg, R. Herber, *Integrated Services in the Intermodal Chain*, available at <http://folk.uio.no/erikro/WWW/cog/Intermodal%20liability%20and%20documentation.pdf>. See also R. Herber, 'The European Legal Experience with Multimodalism' (1989) 64 *Tulane Law Review* 611; B. Marten, 'Multimodal transport reform and the European Union: a minimalist approach' (2012) 2 *European Transport Law* 129; and V. Ulfbeck, 'Multimodal transports in the United States and Europe – Global or regional liability rules?' (2009) 34 *Tulane Maritime Law Journal* 41.

measures may affect the performance of multimodal carriage contracts is very similar to the way in which they affect marine contracts. However, delays, detention, quarantine, and their consequences may have very different legal outcomes if arising under multimodal contracts. Full consideration of the relevant legal issues and considerations arising is, however, beyond the scope of this short briefing note.

9. Insolvency

The COVID-19 pandemic has caused or significantly contributed to a large number of insolvencies so far, and more are likely to follow. It is therefore possible that one or more players in the supply chain may have ceased or will cease trading within the timeframe of a long-term time charterparty or distribution agreement or even between the conclusion and the performance of a spot deal. This is nothing new and the fact that the pandemic and/or any form of governmental restriction may have had a role to play in the insolvency does not change the impact of insolvency proceedings on the charterparty and/or arrest proceedings to secure a cargo claim. On a general note, it is to be hoped that all parties involved in international contracts will pursue collaborative approaches to responding to disruptions directly linked to the pandemic and will exercise a degree of restraint in invoking any legal rights they may have, so as to avoid unnecessary business failures across their networks.

10. Key points and conclusion

The present circumstances in which a global Pandemic is hindering global commerce and generating disruptions across the distribution chain pose several difficult legal questions to traders and carriers alike. This briefing note has identified some of the most common issues generated by COVID-19 and has provided some information regarding the legal framework within which affected parties should seek a solution.

Carriage of goods is a complex business which can be hit by the pandemic in many different ways, with the most common outcomes being delay and compound delay. When affected by the pandemic or COVID-19 related measures or legislation, cargo owners and carriers should establish an immediate line of communication to seek a solution for every cargo affected, in the immediate aftermath of the event and in cases where problems are likely to arise. While liability for delay is consistently excluded by express wording in carriage contracts, carriers must operate with utmost dispatch and have a duty to proceed to the agreed destination via the agreed or customary route. Shipowners and managers will not take lightly the decision to deviate from the planned voyage and should contact their counterparties in case they feel unable to perform their part of the bargain.

By the same token shipper and receivers should provide carriers all relevant information to ensure the smooth performance of the contract and proactively propose alternative solutions when the local sanitary situation or legal restrictions prevent in full or in part the ordinary course of loading and discharge operations. In this note reference has been made several times to the need of the parties to communicate and cooperate with one another, making every effort to overcome the difficulties an event such as a global pandemic may cause. It is believed that most of the issues which COVID-19 has generated in shipping can be resolved through open dialogue and responsible commercial practices. Should this fail, the parties should attempt to resolve their differences through the services of a professional mediator who may ease dialogue and facilitate a reasonable outcome. Arbitration and litigation should be considered measures of last resort and not initiated lightly.

Going forward, all parties concerned should put significant effort in attempting to prevent uncertainty in the future performance of carriage contracts and work with their trade associations, insurance representative, stakeholders, and governments to develop a structured response. While issues like deviation and safety at sea are well covered by carefully drafted clauses in standard form contracts, issues like delays at loading, the unavailability of cargo due to unforeseen events, the unavailability of the bill of lading at discharge, access to cargo and port charges do not seem to be equally well catered for. The current pandemic has highlighted the need to re-balance the interests of carriers and cargo in some instances and further work is needed to find mutually acceptable drafting solutions.¹²¹

One issue which has clearly come to the market's attention is that of delay in documentation. With the end of the pandemic and its repercussions not yet in sight, it is hoped that commercial parties will collaborate with one another to facilitate and promote the more widespread adoption and use of the secure electronic solutions already available and accepted by the liability insurance market.

A global pandemic of this scale is an unprecedented event in the history of modern trade. The number, variety and complexity of today's global transactions means that traders who have a deeper understanding of the market and the short-, medium- and long-term consequences of the pandemic are better equipped to avoid and resolve potential disputes. Carriers, insurers, and cargo interests should take this opportunity to make a leap forward and make the best use of technology to prevent disruptions, seek to allocate fairly the risks arising out of unforeseen and serious events, and protect the essential flow of goods across all trade routes. Trade associations have an important role to play in devising appropriate standard form terms, for inclusion into future commercial contracts. Governments and policymakers too, should consider, as feasible, where temporary financial support may be required to avoid potentially widespread business failures.

¹²¹ For instance, in view of the current pandemic, contractual parties are advised to consider inserting clauses that specifically deal with risks that may arise from potential exposure to the coronavirus. For charterparties, the published "[BIMCO Infectious or Contagious Diseases Clause for Voyage and Time Charter Parties](#)", as well as similar [INTERTANKO clauses](#), contain wording which could be used as a starting point for parties negotiating a similar clause. For these and other relevant contracts, care must be taken to ensure that, when preparing such clauses, commercial parties clearly identify the risks and obtain legal advice to best protect their respective interests.