

CONTRACTS FOR THE CARRIAGE OF GOODS BY SEA AND MULTIMODAL TRANSPORT

KEY ISSUES ARISING FROM THE
IMPACTS OF THE COVID-19
PANDEMIC



COVID-19
RESPONSE

UNCTAD/DTL/TLB/INF/2022/1

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Two related briefing notes on: “[COVID-19 implications for commercial contracts: carriage of goods by sea and related cargo claims](#)” (UNCTAD/DTL/TLB/INF/2021/1), and 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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Executive summary

Since the beginning of the COVID-19 pandemic, which was declared by the WHO on 11 March 2020, and in response to the emergence of new variants, countries have imposed, eased and re-imposed various restrictions on daily life, including for the entry and exit in ports. This has resulted in disruption and delay, with implications for the performance of commercial contracts for the carriage of goods. This report has been prepared to assist commercial parties to better understand the relevant implications and to consider potential approaches to addressing some of these. It examines some of the key legal issues arising from the pandemic as they affect contracts for the carriage of goods by sea, as well as time charterparties, and multimodal contracts of carriage that (may) involve carriage by sea. It also considers some of the existing standard form clauses that have been developed by industry associations for incorporation into charterparties to provide for commercial risk-allocation as between the parties. Finally, the report provides some relevant recommendations for commercial parties, as well as related considerations for policymakers.

Part A of the report provides an overview of the effect of the pandemic on carriage of goods operations as well as an overview of contracts of carriage of goods by sea, multimodal transport, and time charterparties; and highlights likely types of pandemic-related issues arising. Part B examines two general contractual issues relevant to all such contracts – frustration and force majeure clauses. Part C considers specific issues arising for: ocean carriage under bills of lading and waybills (Section 1); voyage charters (Section 2); time charters (Section 3); and multimodal transport contracts (Section 4). Part D presents and briefly discusses bespoke pandemic clauses that have been developed for incorporation into charterparties, to provide for commercial risk-allocation. Finally, Part E sets out some relevant recommendations for commercial parties, as well as related considerations for policymakers.

The main types of issues that arise from the pandemic in the context of the performance of contracts for the carriage of goods fall into the following categories:

- The carrier's right to redirect the cargo due to unsafety of the discharge port, congestion at the discharge port; or to deviate to drop off sick crew for medical attention; and liability under time charters for additional bunkers consumed.
- Effect of delays due to crew changes.
- Suspension of laytime during crew changes effected while sailing away from anchorage to another port; while vessel waiting to be called to berth.
- Concurrent causes of delay, e.g. quarantine and congestion.
- Cancellation of contracts due to the vessel not having obtained free pratique at the cancellation date.
- Economic loss due to delay caused by quarantines and congestion at ports, due to the pandemic.
- Detention of vessels due to crew overstaying the maximum period on board under the Maritime Labour Convention 2006.
- Physical damage to perishable cargoes due to delay caused by quarantines and congestion at ports, due to the pandemic.
- The effect of force majeure clauses on liability for such delay.
- The potential frustration of the contract of carriage or time charter due to the delays in performing the carriage or the nominated voyages, resulting from pandemic restrictions at ports.
- Delays on the final voyage under a time charter, due to COVID restrictions, resulting in late redelivery by the time charterer of the vessel.
- Insolvency of owners or charterers due to the pandemic.

The effect of a force majeure clause in the pandemic as regards delay will often be limited, as pandemic restrictions will generally not have prevented performance, only delayed performance and/or made

performance more costly. Some force majeure clauses will refer to 'unforeseeable hindrances', and here the time frame of the pandemic will be significant.

Implications for different types of contracts of carriage arising from the pandemic

As the analysis in this report shows, there are a number of implications arising from the pandemic for different types of contracts of carriage. Key observations in this respect include the following:

Voyage charters

The main issues here will be the allocation of risk as regards delays in entering ports and in loading/discharging once there. Initially, the risk of delay will fall on shipowners as until free pratique is obtained and the vessel is out of quarantine, owners will be unable to give a valid Notice of Readiness (NOR). Thereafter the risk of delay will be on charterers. For charters negotiated after the emergence of port delays and restrictions following the declaration of the pandemic on 11 March 2020 these risks can be addressed by negotiation as to laytime allowed and clauses regarding the start of laytime. The start of laytime and the readiness of the vessel will also be an issue as regards cancellation.

Time charters

The outbreak of COVID in a country to where the charterer has ordered the vessel to load or discharge will not make that port unsafe as safety precautions have been put in place which should protect the health of the crew, and any call at such port would not result in the barring of the vessel from access to ports in other countries; the fact that it may be subject to quarantine would seem to be insufficient to make the first port unsafe. The effect of quarantine periods on off-hire will depend on the wording of the particular off-hire clause. Looking at NYPE 1946 clause 15, the vessel would go off-hire for any quarantine related to crew testing positive for COVID-19 under the wording 'any other cause preventing the full working of the vessel'. More generally imposed quarantines, such as a routine 14 day quarantine on all incoming vessels, would need the addition of 'whatsoever' to 'any other cause'.

Bills of lading

The Hague and Hague-Visby Rules defences in Article IV (2) of restraint of princes (g), quarantine (h), and the 'catch all' defence in (q) should be applicable in cases of physical or economic loss caused by delays in loading or discharging the cargo, but it is possible that if quarantine is imposed due to crew testing positive for COVID at the discharge port, that the vessel could be regarded as unseaworthy before and at the start of the voyage; if that quarantine was a cause of the loss or damage then the carrier would not be able to rely on the defences in Article IV (2) unless it could show that it had exercised due diligence to make the ship seaworthy before and at the start of the voyage. This is a non-delegable duty, so fault on the part of crew members – coming back from shore leave knowing that they may have contracted COVID – would be attributable to the carrier. This possibility recedes as the pandemic continues and many countries have taken measures to restrict or prohibit the crew from coming ashore; measures taken by the carrier (e.g. testing of crew before commencement of the voyage and mitigation measures on board in line with relevant sector-specific WHO guidance) could also be relevant in this context.

Deviation

This is an issue common to all contracts. At common law, a deviation to save life would be permitted and this could justify a deviation to take sick crew members to a port for treatment. For contracts subject to the Hague and Hague-Visby Rules, Article IV (4) would also permit deviations to save property as well as reasonable deviations. In time charters the master retains responsibility for the safety of crew and the vessel; this would justify a departure from charterer's orders to proceed with despatch to a specified port and would not put the vessel off-hire, subject to the wording of the clause in question.

Additional costs may fall on cargo interests in two situations. First, under so-called ‘Caspiana’ clauses which will allow the carrier to discharge at an alternative port with resulting transshipment costs falling on cargo interests. Second, additional container demurrage may result as a consequence of excessive time for return of containers due to delays at port of discharge. Shippers should try to negotiate additional free time for returning containers at ports that are experiencing such delays.

Multimodal cargo

Liability for loss due to delays in transit will depend on whether this is localised or unlocalised. Localised loss will fall under the relevant applicable unimodal cargo convention for the transport leg during which the loss occurred. Unlocalised loss will fall under the default regime in the multimodal bill of lading or waybill. In either eventuality, loss resulting from delays due to government action – e.g. quarantines at ports, checks on road borders – the carrier should be able to rely on a defence similar to that in the UNCTAD/ICC Rules for unlocalised loss or damage, that ‘he, his servants or agents or any other person referred to in rule 5.2 took all measures that could reasonably be required to avoid the occurrence and its consequences’. Similar defences apply in case of localised loss falling under the unimodal conventions such as that provided by Article 17 (2) of the CMR.

Recommendations for commercial parties

In order to provide for appropriate allocation of the commercial risks associated with the pandemic, contracting parties may consider contractual approaches, in particular the development and use of appropriate contractual clauses and terms for incorporation into contracts. Relevant considerations vary, however, depending on the type of contract of carriage concerned and the relative bargaining power of the parties.

In the context of liner carriage, a highly concentrated industry, dominated by few global carriers, it is important to note that relevant contracts are not individually negotiated but are typically on the carrier’s standard terms, often subject to one of the international mandatory cargo-liability regimes. Thus, the capacity of parties to introduce clauses into their contract of carriage to regulate the effects of a pandemic or epidemic, is limited in respect of clauses modifying the provisions of a relevant international carriage convention in favour of the carrier [or, in the case of CMR, in favour of both parties]. This is the case for contracts that are subject to the mandatory application of one of the unimodal international conventions on carriage of goods by sea, road, rail, air and inland waterways.

However, there is scope, apart from international road carriage subject to the mandatory application of CMR, for provision of clauses in favour of the shipper/consignee, and also for clauses governing periods outside the ambit of the relevant convention. So-called “Caspiana” clauses in bills of lading, permitting the carrier to discharge at an alternative port in the event of delays at the designated port of discharge, could for instance be modified, so as to provide for some apportionment of transshipment costs in the event of discharge at an alternative port. A contractual cap could also be provided on container demurrage, and provision for extension of free time, when the port of discharge is subject to delays in returning containers. However, given the significant imbalance in the respective bargaining power of the parties where cargo is carried on the carrier’s standard terms, it is unlikely that in practice a carrier would agree to an increase in its liability beyond the mandatory levels set out in any applicable international convention. This consideration applies not only to in-house bills of lading and multimodal transport documents, but also to other standard form documents in commercial use, which have been developed by industry associations that are representing primarily carrier interests. Therefore, in practice, the scope for equitable allocation of commercial risks associated with the pandemic in respect of ocean bills of lading and multimodal transport documents is likely to be very limited.

Charterparties are freely negotiated and, therefore, contractual provisions agreed between the parties are not subject to the mandatory rules of the sea-carriage conventions. However, charterparty terms

may be incorporated into bills of lading so as to affect the holder of the bill of lading. This needs to be borne in mind in considering the main infectious disease clauses that have been produced by relevant industry associations for incorporation into charterparties.

In the light of the above and based on the analysis in this report, relevant recommendations for commercial parties include the following:¹

- Contracting parties may consider inclusion of certain types of clauses as part of their contracts. Ideally, the risks of pandemic delays should be equitably apportioned between the parties to the charterparty. This is done with one of the options in the BIMCO Crew Change Clause but otherwise the BIMCO and INTERTANKO clauses very much shift the risk of delay to the charterer. These clauses can also affect parties to bills of lading and sub-charters involved in the charter, as the clauses mandate their incorporation into these third party contracts. A result may be, that consignees and indorsees become subject to the indemnity obligations imposed on the charterer under the clauses, and the clauses should be amended so as to ensure that sub-clause 3 which imposes indemnity obligations on the charterer is not subject to incorporation. Not surprisingly, the three clauses made available by Charterers Club shift or maintain the risk of delay onto owners.
- To facilitate effective dispute resolution, parties may consider to contractually agree on jurisdiction or arbitration in a forum which enables hearings to continue online throughout the current pandemic; examples are the UK, the US, or Singapore.

Contracting parties may also consider:

- Using amended force majeure clauses which refer to performance being ‘hindered’ rather than ‘prevented’ by the force majeure events. Voyage charterers should consider aiming to conclude clauses which cover both provision of cargo and loading/discharging of cargo. For use of a force majeure clause during the ongoing pandemic, it would be important to be as clear as possible, so as to ensure that the operation of the clause is not limited to force majeure events that ‘could not reasonably have been foreseen at the time of the conclusion of the contract’.
- Including an infectious diseases clause to deal with the allocation of risks due to pandemic/epidemic delays. In particular, some form of provision for apportionment of costs in the event of redirection caused by restrictions in the nominated discharge port. The costs of transshipment should not fall wholly on the cargo owner.
- Including a deviation clause to deal with crew changes and taking sick crew to a hospital on shore, and an apportionment mechanism for related costs.
- For voyage charters, parties may consider appropriate clauses to share the risk of delay arising in connection with the pandemic and relevant response measures; for instance, by using the NOR provisions in cases like *The Linardos*,² so that time can start upon giving NOR at the relevant place but laytime will cease to count for time lost due to vessel not actually being ready. In the

¹ See also the concluding recommendations in an earlier related publication by UNCTAD, which highlights the need to develop mutually acceptable clauses in standard form contracts to cover issues such: as 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. See COVID-19 implications for commercial contracts: carriage of goods by sea and related cargo claims. UNCTAD/DTL/TLB/INF/2021/1. https://unctad.org/system/files/official-document/dtltlbinf2021d1_en.pdf.

² [1994] 1 Lloyd's Rep. 28(QB). The clause provided: “4. Time commencing . . . 18 hours after Notice of Readiness has been given by the Master, certifying that the vessel has arrived and is in all respects ready to load whether in berth or not . . . Any time lost subsequently by vessel not fulfilling requirements for . . . readiness to load in all respects, including Marine Surveyor’s Certificate . . . or for any other reason for which the vessel is responsible, shall not count as notice time or as time allowed for loading . . .”

context of COVID, this means start of laytime would not be delayed by quarantine, and if there was a further delay due to the need to quarantine because crew have tested positive, laytime will still run if the vessel would be waiting anyway during this time due to congestion at the port. Such a clause would place the risk of delay due to congestion on charterers, but with laytime interrupted for any additional delay caused by fault of the owners leading to additional quarantine due to crew testing positive. The risk of delay due to slower working practices at the port in loading and discharging operations would be on the charterer, but this could be assessed in negotiating the amount of laytime available to charterers when the fixture was being negotiated.

- For time charters, the charterers may wish to try to negotiate for off-hire clauses to have the word ‘whatsoever’ added after ‘any other cause’.
- In addition, parties may consider including requirements in new charterparties that all crew have received coronavirus vaccinations. This may not be practical at the moment, due to supply problems, but once universal global vaccination becomes possible, such a clause would become workable and useful. Clarity is also required from governments as to when and how seafarers, whom the IMO has called to be designated as key workers, will be able to be vaccinated.
- Finally, in the light of the extra-ordinary circumstances of the ongoing COVID-19 pandemic, it would be hoped that commercial parties, in appropriate cases, also consider showing some restraint in exercising some of their legal rights and claims, so as to limit the need for costly legal disputes.

Related considerations for policymakers

In April 2020, UNCTAD prepared a Policy Brief in which it outlined ten action points to support the logistics of international trade in the light of the COVID-19 crisis.³ Bearing these in mind in relation to the issues covered in this report, considerations for policymakers going forward in this pandemic and in respect of future epidemics and pandemics would be the following:

- Crew changes should be allowed and facilitated at all times, to ensure that no crew are forced to remain at sea for longer than the maximum period stipulated in the Maritime Labour Convention 2006. Governments, international organizations and industry need to collaborate in this respect and accelerate their efforts to address the ongoing crew change crisis. Countries should also consider the issue of giving seafarers priority access to vaccinations, both in the interests of public and seafarer health, and to facilitate the logistics of international trade and transport, including in respect of essential goods and medical supplies.
- To address the issue of delayed documents and avoid the incidence and costly resolution of related legal disputes, the remaining legal and regulatory obstacles to the adoption of electronic documents in international trade need to be removed. Progress has been made with the recognition of electronic documentation in the Montreal Convention 1999, the widespread adoption of the IATA electronic waybill, and the provision for electronic documents in the CMR, but more needs to be done as regards electronic alternatives to sea transport documents such as bills of lading and waybills. The UK Law Commission’s current consultation on this issue is encouraging and it is possible that its suggested draft bill may be enacted in 2022.

³ Covid-19: A 10-Point Action Plan to Strengthen International Trade and Transport Facilitation in Times of Pandemic. UNCTAD Policy Brief 79. https://unctad.org/system/files/official-document/presspb2020d3_en.pdf. UNCTAD published a further relevant Policy Brief in December 2021. Strengthening international response and cooperation to address the seafarer crisis and keep global supply chains open during the ongoing COVID-19 pandemic. UNCTAD Policy Brief 91. <https://unctad.org/webflyer/strengthening-international-response-and-cooperation-address-seafarer-crisis-and-keep>.

- Governments could consider mandatory controls on container demurrage accruing at ports whose operation is affected by pandemic/epidemic restrictions in that particular country. In March 2020, the Indian government made recommendations to this effect⁴ and in April 2020, the US issued its amended guidelines under the Shipping Act.⁵ Countries could also consider extending statutory protection against unfair contract terms, like the Unfair Contract Terms Act 1977 in the UK, to container demurrage provisions in bills of lading during times of (future) epidemics and pandemics.
- Governments should strive to ensure that cross-border checks applicable to freight transport are kept to a minimum to avoid delay, in particular in the transit of goods by road.
- Finally, governments should consider strengthening institutions and mechanisms for formal and informal dispute resolution, to ensure these are able to cope with a likely increase in contractual disputes in the context of the COVID-19 pandemic.

⁴ See, Shipping Lines advised not to impose container detention charges on import and export shipments at Ports, 29 March 2020, available on the website of the Indian Ministry of Ports, Shipping and Waterways. <http://sagarmala.gov.in/sites/default/files/PR%20Shipping%20lines%20advised%20not%20to%20imposed%20container%20detention%20charges%20%26%20Exports%20at%20all%20ports-converted.pdf>.

⁵ Lexology. FMC Issues Final Guidance on Unreasonable Demurrage and Detention Practices to Improve Ocean Freight Fluidity. 30 April 2020. <https://www.lexology.com/library/detail.aspx?g=0b639d0b-d340-4ecc-b450-d977edb2feb7>.

Introduction

Nearly every country in the world has been affected by the scourge of COVID-19, so called because it is the disease caused by the coronavirus which emerged in December 2019 and is ongoing at the time of writing. After the WHO declared a pandemic on 11 March 2020,⁶ the world initially seemed on pause, followed by an accordion-like easing and re-imposition of restrictions on daily life. At the time of writing, vaccinations have started to be rolled out, but new, more transmissible variants continue to evolve. However, international carriage of goods by sea has carried on, throughout 2020 and 2021, if not always apace. The main impact on carriage of freight has been in terms of disruption causing delay.⁷

This report examines some of the key legal issues arising from the pandemic as they affect contracts for the carriage of goods by sea, and multimodal contracts of carriage that (may) involve carriage by sea, as well as time charters.⁸ As commercial and maritime law contracts at the international level are often subject to English law, by agreement of the parties⁹, and to jurisdiction of the English High Court or to arbitration in London,¹⁰ relevant issues will principally be examined on the basis of English law, although some reference will also be made to the law of other jurisdictions.

Part A of the report provides an overview of the effect of the pandemic on carriage of goods operations as well as an overview of contracts of carriage of goods by sea, multimodal transport, and time charterparties; and highlights likely types of pandemic-related issues arising. Part B examines two general contractual issues relevant to all such contracts – frustration and force majeure clauses. Part C considers specific issues arising for: ocean carriage under bills of lading and waybills (Section 1); voyage charters (Section 2); time charters (Section 3); and multimodal transport contracts (Section 4). Part D presents and briefly discusses bespoke pandemic clauses that have been developed for incorporation into charterparties, to provide for commercial risk-allocation. Finally, Part E sets out some relevant recommendations for commercial parties, as well as related considerations for policymakers.

⁶ WHO Director-General's opening remarks at the media briefing on COVID-19. 11 March 2020. <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

⁷ For further details of the effect of the pandemic on ports see: <https://www.nepia.com/industry-news/coronavirus-outbreak-impact-on-shipping/> and <https://www.wilhelmsen.com/ships-agency/campaigns/coronavirus/coronavirus-map/>. See also Review of Maritime Transport 2021. UNCTAD/RMT/2021. <https://unctad.org/webflyer/review-maritime-transport-2021>.

⁸ The analysis and guidance provided in this report is intended to assist commercial parties in assessing some of the key implications of the COVID-19 pandemic for certain types of contract. However, to obtain advice with respect to any particular legal matter, readers should seek professional legal advice.

⁹ The Commercial Court Report 2018-9, p10, notes: "Throughout the years, the Commercial Court has always handled an international caseload. Often, cases will arise because parties or standard forms in use in a particular trade have a specific provision in their contracts for English law (or the English courts) to resolve any disputes that arise. The proportion of the Court's business which is international remains stable at around 75 per cent. A domestic case is one where the subject matter of the disputes between the parties is related to property or events situated within the United Kingdom, and the parties are based in the United Kingdom relative to the dispute. To elaborate, the part of the business relevant to the dispute must be carried on in the UK, regardless of whether the business is incorporated, resident or registered overseas. All other cases not fitting in to the description above are classified as "international cases". The statistics above reflect the dominance of international business in the Commercial Court."

¹⁰ See the report by London Solicitors, Holman Fenwick & Willan, <https://www.hfw.com/The-Maritime-Arbitration-Universe-in-Numbers-London-remains-ever-dominant-July-2020>. This confirms that The London Maritime Arbitrators Association (LMAA) handled approximately 1,668 new, individual maritime arbitrations in London in 2019, up from 1,483 in 2018. When combined with the 2019 figures for the London Court of International Arbitration (LCIA) and The International Chamber of Commerce (ICC), London handled approximately 1,730 new international maritime arbitrations last year. London's nearest arbitral competitors for maritime arbitrations in 2019 were Singapore with 229, Hong Kong with 124 and Paris with 43.

A. Setting the scene

1. The effect of the pandemic on carriage of goods operations

While the general economic impacts of the pandemic on maritime freight services has been considered elsewhere,¹¹ this Section highlights reported examples that help illustrate the specific types of issues arising for carriage of goods operations – and related contracts.

1.1 Port quarantines

Local slow down and restrictions to port operations have been observed both at loading and discharging ports around the world, due to COVID-19 related events or measures. For instance, on 1 February 2020, Australia imposed a ban on all personnel entering the country, if they had been to China on or after 1 February. All ships that had left China on or after this date became subject to a 14-day quarantine periods. Reports of sickness on board would be investigated by the authorities and likely lead to an extension for a further 14 days. All ships arriving at Australian ports were required to declare their last five ports of call. The Australian port authorities also delayed pilotage services to ships that had transited directly from China and which had been at sea for less than the 14-day quarantine period.

Australian Border Force Specific advice dated 1 April 2020 for foreign vessels and their maritime crew arriving on an international maritime voyage,¹² stated that all crew must observe a precautionary self-isolation period of 14 days since their last international port call. Vessels might berth in Australia at any time, subject to the following restrictions if the vessel arrived within 14-days from its last international port of call:

- i. All crew must remain on-board while the vessel is berthed in Australia.
- ii. Crew are able to disembark to conduct essential vessel functions and crew must wear personal protective equipment (PPE) while performing these functions.
- iii. Crew must also use PPE in public spaces on board the vessel while non-crew members are on-board.

These restrictions applied until 14 days had elapsed since the vessel had departed the last foreign port before Australia, unless crew were unwell or there was a suspected case of COVID-19 onboard. The period maritime crew spent at sea prior to their arrival in Australia counted towards the 14-day period of self-isolation.

India went into lockdown on 24 March, and the country's Directorate-General of Shipping (DGS) imposed a 14-day quarantine on shipping vessels arriving from any port in China or from any nation with COVID-19. This restriction continues to be in force in respect of vessels arriving from any 'affected nation'.¹³

In May and June 2020 reports came in of ships being quarantined due to the testing of crew members positive for COVID. As of 25 May, at least six ships in Santos, Brazil, had been quarantined, all cleared. In Antwerp, the "Minerva Oceania" was quarantined on arrival on 19 June, after a voyage from Qatar, when 15 of the 26 crew members were reported to have tested positive for COVID-19 and was to be held until early July. In June, in the US, the 4658 TEU container ship "Maersk Idaho" arrived in the Port

¹¹ See for instance, UNCTAD report COVID-19 and maritime transport: Impact and response. UNCTAD/DTL/TLB/2021/1. <https://unctad.org/webflyer/covid-19-and-maritime-transport-impact-and-responses>, which outlines the economic effect of the pandemic on international cargo shipping in the first two quarters of 2020. See also Review of Maritime Transport 2020. UNCTAD/RMT/2020. <https://unctad.org/webflyer/review-maritime-transport-2020>; and Review of Maritime Transport 2021, UNCTAD/RMT/2021. <https://unctad.org/webflyer/review-maritime-transport-2021>.

¹² <https://www.vicports.vic.gov.au/News/Documents/abf-maritime-advice-01-april-2020.pdf>.

¹³ Seatrade Maritime News. India imposes 14-day quarantine on vessels from COVID-19 affected countries. 26 March 2020. <https://www.seatrade-maritime.com/ports-logistics/india-imposes-14-day-quarantine-vessels-covid-19-affected-countries>.

of New York where one crew member was hospitalized and later tested positive for the virus. The ship set off on June 20 for its next port, but remained at anchor off Norfolk, as the shipping line was advised of the situation before the ship reached the Virginia dock. Maersk quarantined the crew on shore, while arranging for the vessel to be cleaned and a new crew brought aboard. On 24 June, Republic of Korea's Ministry of Health ordered that all Russian ships calling at the country's ports were to be quarantined for 14 days, after 17 crew members from two Russian reefer ships tested positive for COVID-19 when the ships arrived in Busan. In Spain, Hamburg Sud's container ship the "Cap San Lorenzo" was quarantined after a crew member was reported infected in Santos, Brazil.¹⁴

Exceptionally, some countries temporarily closed their ports to ships arriving from another country. For example, from 0400 GMT on Sunday 8 November 2020, the UK imposed new rules in relation to travel from Denmark as a result of the release of "further information" from health officials in Denmark, where some 200 people were found to have mink-related mutations of virus, most of them connected to farms in the North Jutland region. Ships carrying freight from Denmark were not allowed to dock at English ports, an embargo that lasted ten days.¹⁵

China has seen two partial port closures due to port workers testing positive for Covid-19. For three weeks in May 2021 Yantian International Container Terminal was operating at a fraction of its normal capacity, with operations restricted due to controlling the spread of Covid. Then on 11 August 2021 at a terminal at Ningbo-Zhoushan port, the world's third busiest cargo port, services were shut for two weeks after a port worker was found to be infected with the Delta variant of Covid-19.¹⁶

More recently, it was reported that the Ghana Port Health Service advised on 20 December 2021 that all crew arriving on vessels at ports in Ghana were to be fully vaccinated. If any of the crew were unable to provide vaccination cards to show they are fully vaccinated, the vessel would not be granted free pratique and could face a financial penalty of US\$ 3,500 per unvaccinated person. Following payment of the fine, the unvaccinated persons would receive a single dose of the Johnson & Johnson vaccine, administered by Ghana Port Health at no extra cost.¹⁷

1.2 Container detention charges

Another consequence of COVID-19 imposed restrictions, has been container detention. For instance, the Indian Ministry of Shipping, by order dated 29 March 2020, advised shipping lines not to impose any container detention charge on import and export shipments for the period from 22 March 2020 to 14 April 2020 (both days inclusive), over and above free time arrangement that was in place as a part of any negotiated contractual terms.¹⁸ By its order of March 31, 2020, the Ministry of Shipping advised shipping companies not to charge, levy or recover any demurrage, ground rent beyond allowed free period, storage charge in the port, additional anchorage charges, berth hire charges or vessel demurrage or any performance related penalties on cargo owners and consignees of non-containerized bulk cargo, for the same period. Such relief was granted in addition to an advisory on embargo for imposition of new or additional charges, to facilitate some financial relief during the lockdown period.

¹⁴ The Maritime Executive. More Ships Quarantined as Ports Continue Fight Against COVID-19. 25 June 2020. <https://www.maritime-executive.com/article/more-ships-quarantined-as-ports-continue-fight-against-covid-19>.

¹⁵ Gov.UK. News story. Measures to protect England from new COVID-19 strain extended. 8 November 2020. <https://www.gov.uk/government/news/measures-to-protect-england-from-new-covid-19-strain-extended>. For an interactive updated map on current port restrictions, see <https://wilhelmsen.com/ships-agency/campaigns/coronavirus/coronavirus-map>.

¹⁶ BBC News. Ningbo: Global supply fears as China partly shuts major port. 13 August 2021. <https://www.bbc.co.uk/news/business-58196477>.

¹⁷ Safety4sSea. Crew vaccination requirements from vessels arriving at Ghanaian ports. 7 January 2022. <https://safety4sea.com/crew-vaccination-requirements-from-vessels-arriving-at-ghanaian-ports/>

¹⁸ <http://sagarmala.gov.in/sites/default/files/PR%20Shipping%20lines%20advised%20not%20to%20imposed%20container%20detention%20charges%20%26%20Exports%20at%20all%20ports-converted.pdf>.

On April 28, 2020, the US Federal Maritime Commission (FMC) issued an interpretive rule on demurrage and detention charges under the Shipping Act 1984. The new interpretive rule states that the FMC will look at several factors in determining whether charges are reasonable and justified. The FMC gave a (non-exhaustive) list of factors that the Commission will consider on a case-by-case basis, including:

- Cargo availability;
- Whether empty containers can be returned to the terminal;
- Whether notice of cargo availability was given;
- Whether there are government inspections that delayed movement;
- Whether the carrier and terminal operator have clearly stated their demurrage detention and storage terms and charges for failure to abide by the time periods given.¹⁹

However, according to a report published in June 2021 by Container xChange,²⁰ at the global level, both demurrage and detention increased significantly in 2021 compared to 2020. Across the world's 20 biggest ports, the average demurrage and detention charge doubled, going up +104% after two weeks (equivalent to \$666 for each container across ports, shipping lines and demurrage & detention combined). On average, demurrage and detention charges reached \$1219 per container across container types after two weeks in 2021. The ten leading Chinese ports experienced the biggest increase of demurrage and detention charges from 2020 to 2021. The costs of demurrage and detention went up by +126%.

1.3 Seafarers, the Maritime Labour Convention, and difficulties with crew changes and repatriation²¹

Seafarer problems began to manifest themselves early in the pandemic with crew being unable to come ashore in most ports, and owners consequently being unable to arrange crew changes. Under the Maritime Labour Convention, 2006 (MLC), the maximum period seafarers should serve on board a vessel without leave is 11 months. In August 2020, the International Chamber of Shipping estimated that 250,000 seafarers were stuck at sea, beyond their contracts.²² In March 2021, IMO estimated that based on industry analysis, the number of seafarers requiring repatriation after finishing their contracts had declined - from a high of around 400,000 in September 2020 - to around 200,000, with a similar number waiting to join ships. However, this number could rise again.²³ In July 2021, the International Chamber of Shipping estimated that the number of seafarers remaining on board beyond the expiry of their contract was around 250,000. In the UK, inspections on cruise ships by the MCA revealed a number of expired and invalid seafarers' employment agreements, late payment of wages and crews who had been on board for over 12 months. All these constituted breaches of the Maritime Labour Convention and the ships were detained for that reason.

In Australia, the AMSA detained seven ships visiting Australian ports because of alleged breaches of maritime regulations and banned a bulk carrier, 'Unison Jasper', for six months.²⁴ In some instances, ships have been unable to leave port owing to the difficulty of replacing crew, who have asked authorities to help them to be allowed off vessels. A further arrest in Australia took place on 23 October

¹⁹ See fn.5 above.

²⁰ <https://container-xchange.com/reports/demurrage-detention-report-2021/>.

²¹ See also the Review of Maritime Transport 2021. UNCTAD/RMT/2021. <https://unctad.org/webflyer/review-maritime-transport-2021>, Chapter 5, which focuses in some detail on related issues and developments, as well as UNCTAD Policy Brief 91. Strengthening international response and cooperation to address the seafarer crisis and keep global supply chains open during the ongoing COVID-19 pandemic. <https://unctad.org/webflyer/strengthening-international-response-and-cooperation-address-seafarer-crisis-and-keep>.

²² ICS Annual Review 2020. Heroes at Sea. <https://www.ics-shipping.org/wp-content/uploads/2020/11/annual-review-2020-final-compressed.pdf>.

²³ COVID-19 crew change crisis still a challenge – IMO Secretary-General. 19 March 2021. <https://www.imo.org/en/MediaCentre/PressBriefings/pages/Crew-change-COVID-19.aspx>.

²⁴ AMSA. Media Release. Australia bans bulk carrier Unison Jasper for underpaying seafarers. 29 August 2020. <https://www.amsa.gov.au/news-community/news-and-media-releases/australia-bans-bulk-carrier-unison-jasper-underpaying>.

2020, where an NYK operated car carrier “Metis Leader” was arrested in Melbourne for breaching regulations over crew changes. AMSA has taken a flexible approach to compliance with the MLC limit, leading to some operators being able to retain seafarers working aboard for periods of 12-15 months or longer.²⁵ However, Australia started to enforce the MLC limit as written, as from 28 February 2021.

The problem of crew stuck on vessels was highlighted by the situation of two Indian vessels, the “Jag Anand” and the “Anastasia”, carrying coal from Australia to China, which were waiting at anchorage after arriving in Jingtang on 13 June and Caofeidian port on 20 September 2020, respectively, with the vessels only being allowed to effect crew changes in February 2021.²⁶

On 1 December 2020, the United Nations General Assembly adopted a resolution on “International cooperation to address challenges faced by seafarers as a result of the COVID-19 pandemic to support global supply chains” (A/RES/75/17), which urged Member States to designate seafarers and other marine personnel as key workers and called on Governments “to promptly implement relevant measures designed to facilitate maritime crew changes, including by enabling embarkment and disembarkment and expediting travel and repatriation efforts as well as ensuring access to medical care.”²⁷

In response, and echoing related calls by ILO²⁸ and IMO,²⁹ in January 2021, more than 600 companies and organizations signed the ‘Neptune Declaration on Seafarer Wellbeing and Crew Change’.³⁰ The declaration recognizes their shared responsibility to resolve the crew change crisis and calls for the implementation of the industry protocols. For this purpose, it defines four main actions to facilitate crew changes and keep global supply chains functioning: recognize seafarers as key workers and give them priority access to COVID-19 vaccines; establish and implement gold-standard health protocols based on existing best practice; increase collaboration between ship operators and charterers to facilitate crew changes; and ensure air connectivity between key maritime hubs for seafarers. Subsequently, the signatories developed a set of best practices that serve as a framework for charterers to facilitate crew changes and work with ship owners to minimize the disruptions to operations.³¹ In addition, since accessible data on the number of seafarers who are impacted by the crew change crisis is currently limited, they developed a Neptune Declaration Crew Change Indicator³² building on aggregated data

²⁵ The Maritime Executive. Australia Holds Cargo Ship to Complete Overdue Crew Change. 11 June 2020. <https://www.maritime-executive.com/article/australia-holds-cargo-ship-to-complete-overdue-crew-change>.

²⁶ Splash. China finally grants crew change for MSC bulker, coal carrier queue reducing. 5 February 2021. <https://splash247.com/china-finally-grants-crew-change-for-msc-bulker-coal-carrier-queue-reducing/>.

²⁷ <https://daccess-ods.un.org/tmp/2105195.52230835.html>.

²⁸ On 8 December 2020, the Governing Body of the International Labour Organization (ILO), adopted a Resolution concerning maritime labour issues and the COVID-19 pandemic. https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_760649.pdf. This urges all Members to collaborate to identify obstacles to crew changes and designate seafarers as “key workers”, for the purpose of facilitation of safe and unhindered movement for embarking or disembarking a vessel, and the facilitation of shore leave.

²⁹ On 21 September 2020, another relevant resolution was adopted by the IMO’s Maritime Safety Committee – Recommended action to facilitate ship crew change, access to medical care and seafarer travel during the COVID 19 pandemic. <https://www.intercargo.org/wp-content/uploads/2020/09/Resolution-MS-C.473-ES.2-on-Crew-Change.pdf>. It urged governments and relevant national authorities to engage nationally and internationally in discussions on the implementation of the industry protocols and consider applying them to the maximum extent possible; designate seafarers as “key workers” providing an essential service, in order to facilitate safe and unhindered movement for embarking or disembarking a vessel; consider temporary measures including (where possible under relevant law) waivers, exemptions or other relaxations from any visa or documentary requirements that might normally apply to seafarers; encourage the use of prevention measures, such as tests on crew before embarkation; and provide seafarers with immediate access to medical care ashore.

³⁰ Signed by more than 850 companies and organizations, as of September 2021. Available at <https://www.globalmaritimeforum.org/content/2020/12/The-Neptune-Declaration-on-Seafarer-Wellbeing-and-Crew-Change.pdf>.

³¹ <https://www.globalmaritimeforum.org/content/2021/05/The-Neptune-Declaration-Best-Practices-for-Charterers.pdf>.

³² <https://www.globalmaritimeforum.org/content/2021/11/Neptune-Declaration-Crew-Change-Indicator-November-2021.pdf>.

from 10 leading ship managers covering about 90,000 seafarers on board.³³ After a significant deterioration of the situation since May 2021, the Indicators since August 2021 point to a stabilization and beginning alleviation of the situation.

Thus, despite the above and related efforts,³⁴ crew changes and repatriation of seafarers still entail serious logistical challenges. As of 13 October 2021, only 62 IMO Member States and two Associate Members had designated seafarers as key workers.³⁵ Moreover, while some important progress has been made, it appears that seafarer access to medical care and priority vaccination in some cases still remain inadequate. In June 2021, it was reported that a cargo ship's captain, who developed COVID-19 symptoms shortly after the vessel set sail, fell ill and died on board after 11 days.³⁶ Successive ports had refused to allow the vessel to call, and no medical evacuation measures were taken. For six weeks, despite repeated pleas for assistance, the ship was stranded offshore, unable to find a port that would take the corpse. As a result, the crew was stuck at sea for weeks, with a potential COVID-19 outbreak at its hands. This state of affairs is clearly unacceptable and demonstrates the need for further collaborative action to address the situation on the ground. It also illustrates, however, that the wide-ranging potential for operational disruption and delay remains, as the COVID-19 crisis continues.

1.4 Covid-related port congestion

Autumn 2020 saw increasing congestion at container ports in Europe and in China. COVID-19 test procedures related to import reefer cargo were reportedly slowing down operations in the port of Xingang, where reefers remained lying on quay, occupying all available plugs. Major container lines were imposing congestion surcharges³⁷ and MSC stopped shipments outright while also warning that it might re-route some reefer boxes already underway. On 14 November, it was reported that Evergreen had directed one of its ships to bypass Felixstowe because of "serious port congestion". The ship's cargo was unloaded in Rotterdam instead and ferried back to the UK via London's Thamesport.³⁸

In February 2020, it was reported that various carriers had imposed a surcharge on reefer boxes going into Shanghai and Tianjin due to difficulties in handling containers with a shortage of reefer plugs.³⁹

³³ Anglo- Eastern, Bernhard Schulte, Columbia Shipmanagement, Fleet Management (FLEET), OSM, Synergy Marine, Thome, V.Group, Wallem, and Wilhelmsen Ship Management.

³⁴ See also Review of Maritime Transport 2021. UNCTAD/RMT/2021. <https://unctad.org/webflyer/review-maritime-transport-2021>. Chapter 5; and UNCTAD Policy Brief No. 91. Strengthening international response and cooperation to address the seafarer crisis and keep global supply chains open during the ongoing COVID-19 pandemic. <https://unctad.org/webflyer/strengthening-international-response-and-cooperation-address-seafarer-crisis-and-keep>.

³⁵ Coronavirus (COVID-19) – Designation of seafarers as key workers. Circular Letter No.4204/Add.35/Rev.8. 13 October 2021. [https://wwwcdn.imo.org/localresources/en/MediaCentre/HotTopics/Documents/COVID%20CL%204204%20adds/Circular%20Letter%20No.4204-Add.35%20-%20Coronavirus%20\(Covid-19\)%20-%20Designation%20Of%20Seafarers%20As%20Key%20Workers.pdf](https://wwwcdn.imo.org/localresources/en/MediaCentre/HotTopics/Documents/COVID%20CL%204204%20adds/Circular%20Letter%20No.4204-Add.35%20-%20Coronavirus%20(Covid-19)%20-%20Designation%20Of%20Seafarers%20As%20Key%20Workers.pdf). For an updated list of COVID-19 related communications on measures taken by IMO Member states/Associate Members (updated weekly), see <http://www.imo.org/en/MediaCentre/HotTopics/Pages/COVID-19-Member-States-Communications.aspx>.

³⁶ CNN.com. This cargo ship's captain died aboard. The crew was stuck at sea for weeks, with a potential Covid outbreak on its hands. 20 June 2021. <https://edition.cnn.com/2021/06/19/europe/italy-captain-capurro-intl-hnk-dst/index.html>.

³⁷ MSC had previously imposed a congestion surcharge of \$1,500 for reefers. CMA CGM has imposed a surcharge of \$1,250 and ONE has a charge of \$1,300 for reefer containers going into Tianjin.

³⁸ BBC News. Felixstowe Port in 'chaos' as Christmas and Brexit loom. 14 November 2020. <https://www.bbc.co.uk/news/business-54908129>.

³⁹ Freight Business Journal. ONE imposes China reefer surcharge. 14 February 2020. <https://www.fbi-online.com/one-imposes-china-reefer-surcharge/>.

In January 2021, congestion was reportedly caused at Chinese ports after authorities detected coronavirus on the packaging of frozen food and ordered more stringent checks involving full testing and disinfection of these products.⁴⁰

In Singapore, in March 2021, there were major delays with congestion, causing vessel turnaround times to more than double and week-long cargo rollovers. Waiting times for ultra-large container vessels of 18,000 teu and above were five-to-seven days from the normal two-day turnaround. The number of vessels at Singapore for longer than two days had increased to 46 a day in January 2021, up 59 per cent year on year.⁴¹

According to an EMSA report of 12 March 2021,⁴² the maritime sector faced the prospect of an unprecedented number of vessels with navigational status “at anchor”, with the number of Automatic Identification System (AIS) reports in EU waters indicating vessels at anchor had risen from 8 million in December 2019 to 12 million in December 2020, and 10 million vessels remaining at anchor in January 2021.

In September 2021 it was also reported that the major US ports of Los Angeles and Long Beach – responsible for a large percentage of US container imports - face unprecedented congestion,⁴³ with several dozens of vessels anchored offshore waiting to unload cargo.

Most recently, industry analysts have warned of worsening container port congestion at the start of 2022, with “all the available data show[ing] that congestion and bottleneck problems are worsening getting into 2022”, with “no indication of improvements as of yet”. Thus, almost two years into the pandemic, port congestion and related delay remain an important problem.⁴⁴

1.5 Delays to road freight

Shortly after the start of the pandemic, severe disruption to road freight was experienced at borders within the EU. On 16 March 2020, the European Commission President noted that measures introduced to slow the spread of the coronavirus had also slowed and sometimes paralyzed transport, causing delays and risking shortages, with more than 40 km of queues and waiting times of up to 18 hours at some crossing points. Road transport, which accounts for 75 per cent of freight shipments within the EU, was particularly hit, notably at the Polish-German frontier after Warsaw’s decision to shut its borders to non-Poles, leaving Latvians, Lithuanians, and Estonians unable to return home.⁴⁵

To keep freight moving freely and efficiently across the EU, on 23 March 2020, the European Commission issued practical advice on the implementation of ‘green lanes’ – border crossings open to all freight vehicles carrying goods where any checks or health screenings should take no more than 15

⁴⁰ Bloomberg. Frozen Fish Pileup in China Threatens Global Supply Chains. 26 January 2021. <https://www.bloomberg.com/news/articles/2021-01-26/frozen-fish-pileup-in-china-ripples-across-global-supply-chain>. The report notes: “At least four cold-storage vessels have been waiting near Dalian port for as long as two months, nine container ships are docked at the port, and at least six more are waiting in the Yellow Sea to unload, according to Bloomberg data. Reefer containers typically travel together with thousands of normal containers on ships, as long as they have a power source to keep the cargo cold.”

⁴¹ S&P Global Platts. Singapore port faces container congestion amid surge in vessel calls. 1 March 2021. <https://www.spglobal.com/platts/en/market-insights/latest-news/shipping/030121-singapore-port-faces-container-congestion-amid-surge-in-vessel-calls>.

⁴² <http://www.emsa.europa.eu/newsroom/covid19-impact/item/4351-march-2021-covid-19-impact-on-shipping-report.html>.

⁴³ The New York Times. A record number of cargo ships off the California coast shows a crack in the supply chain. 23 September 2021. <https://www.nytimes.com/2021/09/23/business/cargo-ships-supply-chain.html>.

⁴⁴ Seatrade. Container port congestion worsening at start of 2022: Sea-Intel. 12 January 2022. <https://www.seatrade-maritime.com/ports-logistics/container-port-congestion-worsening-start-2022-sea-intel>

⁴⁵ Reuters. EU urges nations to unblock borders, let freight cross in 15 minutes. 23 March 2020. <https://www.reuters.com/article/us-health-coronavirus-eu-borders-idUSKBN21A2S3>.

minutes. On 28 October, the Commission proposed to extend the Green Lane approach to ensure that multimodal transport works effectively in areas including rail and waterborne freight and air cargo. Member States should ensure the seamless free movement of goods across the Single Market. The Commission also called on EU Member States to support air cargo operations during the COVID-19 crisis, and presented guidance to keep essential transport flows moving, including those of medical supplies and personnel.⁴⁶

On 25 January 2021, the Commission proposed to update the coordinated approach on free movement restrictions. Member States should also seek to avoid disruptions to essential travel, notably to keep transport flows moving in line with the 'Green Lanes' system and to avoid supply chain disruptions. Transport workers, whose exposure to the general population when travelling is typically limited, should not be required to quarantine and in principle be exempted from travel-related tests. The same exemptions should apply when essential travellers are transiting.⁴⁷

However, road traffic delays were experienced at certain EU borders in February 2021, with measures imposed by Germany at its crossings with the Czech Republic and the Austrian province of Tyrol, to curtail the spread of COVID-19 mutations.⁴⁸ Although these borders remained open to freight traffic, truck drivers had to present a negative COVID-19 test, effectively closing the 'Green Lanes' concept introduced last year across Europe to keep trade flowing across borders. Both Tyrol and the Czech Republic introduced similar measures for traffic leaving for Germany. In addition, the discovery of a new, more transmissible, mutation in the UK just before Christmas, led to France banning accompanied freight from the UK for a few days.⁴⁹

Substantial road border delays were also experienced within Africa, particularly around the key hub of Mombasa. Compared to the pre-Covid situation, transit time for truck traffic from port to destination, including turnaround and return-trip arrivals, had more than doubled in some respects.⁵⁰ A report of 26 November 2020, stated that the queue on the Kenyan side, which extends for upwards of 60 km (37 miles), took five days to clear, principally due to COVID-related health checks. To cross over, drivers needed to show a negative COVID-19 test taken in the previous 14 days. Failing that, they must submit to testing at the border and wait two days for the result.⁵¹

1.6 Delays to rail freight

International rail traffic increased between China and Europe, but bad weather and a dispute over COVID-19 restrictions between Kazakhstan and China, caused long delays for rail and road freight attempting the crucial border crossing. According to media in Kazakhstan, in late December 2020, 7,000 containers were waiting to cross into China via the Dostyk and Altynkol border, with some waiting up to 42 days.⁵²

The abovementioned and other disruptions to transport operations have had a range of implications for the rights and obligations of parties to commercial contracts for the international carriage of goods by sea. Starting with an overview of relevant contracts, the issues arising will be presented and considered in context below.

⁴⁶ https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/transportation-during-pandemic_en.

⁴⁷ https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/transportation-during-pandemic_en.

⁴⁸ Euronews. EU concerned as Germany partially closes border with Austria and Czech Republic Access to the comments. 16 February 2021. <https://www.euronews.com/2021/02/16/eu-concerned-as-germany-partially-closes-border-with-austria-and-czech-republic>.

⁴⁹ The Guardian. France's Covid freight ban 'will have devastating effect' on UK supplies. 20 December 2020. <https://www.theguardian.com/world/2020/dec/20/frances-covid-freight-ban-to-have-devastating-effect-on-uk-sector-warns>.

⁵⁰ <https://www.freightnews.co.za/article/corona-malaise-doubles-road-freight-delays-mombasa>.

⁵¹ <https://news.trust.org/item/20201126083404-rmiye>.

⁵² <https://theloadstar.com/silk-road-rail-and-road-rates-rising-driven-by-covid-and-border-delays/>.

2. Overview of contracts for the carriage of goods

The principal contracts of carriage involving sea carriage are contained in or evidenced by: negotiable bills of lading; straight bills of lading; non-negotiable sea waybills; multimodal bills of lading; and voyage charters. Time charters are contracts for the use of a vessel for a period of time, but will also be briefly considered.

Contracts for the carriage of goods by sea are principally made to fulfil contracts for the international sale of goods.⁵³ The two most common types of international sales contract are the FOB and the CIF contract. Under the FOB (free on board) contract, the buyer pays for and arranges carriage and the seller's duty is to load the goods onto a vessel nominated by the buyer. In contrast, under a CIF (cost, insurance, freight) contract, it is the seller who pays for and arranges carriage, as well as takes out a policy of insurance on the goods, which will be assigned to the buyer. There are a number of variants, but these are the two most significant contractual forms.

Key features of these contracts, often supported by letters of credit, and some of the implications of COVID-19 on contractual rights and obligations have already been considered elsewhere⁵⁴ and will be further considered in a forthcoming UNCTAD report. For present purposes it is important to bear in mind that under both types of international sale contract the buyer pays the seller against conforming documents and bears the risk of loss of or damage of the goods in transit. That is to say, if goods which were shipped in accordance with the contract of sale do not arrive, or arrive damaged or are short-delivered, the cargo interests, i.e. the buyer or subrogated cargo insurer will need to pursue a cargo claim against the carrier, on terms of the contract of carriage.⁵⁵ This will normally be a negotiable bill of lading but, depending on their needs, parties may agree to use a straight bill of lading or a seawaybill instead. Where goods are shipped on board a chartered vessel, the charterparty would be the relevant contract of carriage in any cargo claim by the charterer; charterparty terms may also become relevant in a cargo claim by the final consignee or its insurer under a charterparty bill of lading which incorporates its terms.

2.1 Negotiable bills of lading

The key document for international sales of goods and their financing through letters of credit is the shipped 'negotiable' bill of lading⁵⁶ which has three functions: as a receipt; a document of title which can be used to transfer ownership and the immediate right of possession in the sale goods during the period of their carriage; and as a contract of carriage.

⁵³ See UNCTAD Briefing note, COVID-19 implications for commercial contracts: Carriage of goods by sea and related cargo claims. UNCTAD/DTL/TLB/INF/2021/1. 2 March 2021. https://unctad.org/system/files/official-document/dtltlbinf2021d1_en.pdf.

⁵⁴ See UNCTAD Briefing note, COVID-19 implications for commercial contracts: International sale of goods on CIF and FOB terms. UNCTAD/DTL/TLB/INF/2021/2. 2 March 2021. https://unctad.org/system/files/official-document/dtltlbinf2021d2_en.pdf.

⁵⁵ In the case of bills of lading, the carrier's standard terms of contract as set out or referred to in the document would typically be subject to one of several international conventions that provide for mandatory minimum standards of carrier liability. See further below, Section C.1.

⁵⁶ Unless otherwise agreed, under a CIF or FOB contract, a negotiable 'shipped' bill of lading must be tendered. A 'shipped' bill, evidencing shipment on board, will enable a buyer to whom risk passes on loading to check whether the goods at the time of loading match up to the description in the contract of sale. In contrast, where the goods are transferred into the carrier's custody at an earlier stage – for example, on delivery to the carrier's warehouse at the port of loading – the bill of lading will be a 'received for shipment' bill of lading. Such a bill can be turned into a 'shipped' bill if it is subsequently marked by the carrier or its agent to that effect.

Bill of lading as receipt

The bill of lading will indicate the condition and quantity of the goods when they are transferred into the custody of the carrier. It will also state the date on which they were loaded and will identify the carrying vessel, as well as the ports of loading and discharge. It will usually be prepared by the consignor, the party who is the current owner of the goods to be loaded onto the vessel, or its agent, relying on the 'mate's receipts' (which are the ship's records of the cargo loaded) and will be presented to the captain of the vessel (the ship's 'master'), for signature, on behalf of the carrier. Once the bill of lading has been signed, it will be issued to the 'shipper' or the 'consignor' who may, in due course, tender the document to its buyer, under a sale contract.⁵⁷ A negotiable bill of lading may be further transferred along a chain of contracts, from one intermediate buyer to the next, and may provide important evidence in any cargo claim brought subsequently by the final consignee against the carrier.

Statements in the bill of lading will provide evidence of the condition and quantity of the goods at time of shipment. i.e., on completion of loading at the start of the sea carrier's period of responsibility, and help the claimant establish a loss. As regards the original shipper, statements in the bill of lading will have prima facie evidential effect, and as regards third party holders of the bill of lading acting in good faith, the statements will generally have conclusive evidential effect.⁵⁸

Bill of lading as a document of title

The bill of lading will have on its face a space identifying the party to whom delivery of the goods is to be made when the vessel reaches its port of discharge. This party is known as the 'consignee'. The addition of the words 'to order' or 'to assigns' make the bill of lading a transferable document of title which may be used for sale of good in transit along a chain of contracts. Such wording constitutes an undertaking by the carrier to the consignor that the cargo will be delivered to the person presenting an original bill of lading, whether that person be the named consignee or a subsequent holder of the bill of lading.

The unique characteristic of the 'negotiable' bill of lading is that this initial delivery undertaking is transferable to subsequent holders of the document without the need for any further involvement of the carrier, so transferring constructive possession to the new holder of the document. Transfers of the bill of lading while the goods are in ocean transit, are capable of transferring both ownership and the immediate right of possession in the goods whose carriage is recorded in the document. An intermediate consignee can transfer these rights by physically transferring the bill of lading and endorsing it by signing on the reverse.⁵⁹ The original document needs to be surrendered to the carrier in order to obtain lawful delivery of the goods at the final port of discharge. A carrier who delivers to a party who cannot produce an original bill of lading, runs the risk of being sued for misdelivery.⁶⁰ The document, therefore, provides its holder with independent documentary security.

⁵⁷ It is common for bills of lading to be issued in sets of three originals. In these cases, all three originals must be tendered under a sale contract, as each of the originals may entitle its holder to claim delivery from the carrier. The indorsement of one original bill of lading will exhaust the capacity of the other two originals to transfer rights of property and possession in the goods carried under the bill.

⁵⁸ This is through the common law estoppel as regards statements as to the apparent order and condition of the goods, and to leading marks, but not as regards statements as to the quantity or weight shipped. These statements are made conclusive as regards a good faith third party through Article III (4) of the Hague-Visby Rules, and for all bills of lading through section 4 of COGSA 1992. These two provisions do not apply to sea waybills.

⁵⁹ A negotiable bill of lading which names a consignee is called an 'order' bill. Where there is no named consignee, but the consignee box contains words of transfer (such as 'or order'), the bill of lading will be a 'bearer' bill and physical transfer of the bill without endorsement will affect transfer of rights of ownership and possession.

⁶⁰ Even if they deliver to a consignee named in the bill of lading or to the owner of the goods. In both situations, a bill of lading may well have been pledged to a bank by way of security for an advance, and the bank will have constructive possession by virtue of holding an original bill of lading.

A straight bill of lading, made out to a named consignee only (without the addition of words such as 'or order'), is not transferable, but also functions as a document of title, as it needs to be presented to the carrier in order to obtain delivery of the goods. Use of this type of document therefore also provides independent documentary security.

Bill of lading as a transferable contract of carriage

The bill of lading also evidences the terms of the initial contract of carriage. Under English law, a third party consignee, indorsee or transferee of a bearer bill may obtain contractual rights and obligations, by virtue of the Carriage of Goods by Sea Act 1992 (COGSA 1992)⁶¹. Section 2 (1) of COGSA 1992 vests in the 'lawful holder' of the bill of lading⁶² the rights under the contract contained in or evidenced by the bill of the lading as if they had been an original party to that contract. Under Section 2 (5) the original shipper (and any intermediate holder) is divested of its rights under the contract when it transfers the bill to another party who then becomes the new 'lawful holder'. Liabilities under the contract are equally transferred to any lawful holder, by virtue of Section 3 (1), but the original shipper will also remain liable to the carrier.⁶³

The terms of the contract contained in or evidenced by the bill of lading will typically be subject to the mandatory provisions of international conventions on carriage of goods by sea, or mandatory national laws implementing these provisions. The need for mandatory application of minimum standards of carrier liability arises from the fact that bills of lading are standard form contracts, issued unilaterally by the carrier, and therefore potentially likely to contain contract terms favourable to the carrier and unduly disadvantageous to a third party consignee/cargo claimant.

The principal international conventions that regulate contracts of carriage contained in or evidenced by the bill of lading, are the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Hague Rules), and Protocol of Signature (Brussels, 25 August 1924), or the Hague Rules as amended by the Visby Protocol of 1968 (Hague-Visby Rules), which contain modifications of the Hague Rules as regards the one-year time bar⁶⁴, package limitation⁶⁵, scope of application⁶⁶, and potential application to third parties⁶⁷, and have been adopted by most of the leading shipping nations⁶⁸. In the UK, the Hague-Visby Rules have been implemented through the Carriage of Goods by Sea Act 1971 which came into force in July 1977. It applies mandatorily to cargo claims arising from carriage of goods by sea covered a bill of lading, provided the port of shipment is in a contracting State, the bill of lading has been issued in a contracting State or the document incorporates the Hague-Visby Rules⁶⁹. Key features of the Hague and Hague Visby Rules include a substantive quid pro quo: the cargo interests benefit from mandatory minimum levels of carrier liability which cannot be contractually

⁶¹ The Act replaced the Bills of Lading Act 1855 for bills of lading and other sea carriage documents (sea waybills, straight bills of lading and ship's delivery orders) issued on or after 16 September 1992; it provides a statutory exception to the doctrine of privity of contract, allowing this initial contract to be passed down the chain of sellers, banks and buyers that may come into existence before the ultimate discharge of the goods.

⁶² Defined in Section 5 (2) of COGSA 1992.

⁶³ Section 3 (3) of COGSA 1992.

⁶⁴ Article III (6).

⁶⁵ Article IV (5).

⁶⁶ Article X provides: The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States if:

(a) the bill of lading is issued in a contracting State, or
(b) the carriage is from a port in a contracting State, or

(c) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract, whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.

⁶⁷ Article IV (bis).

⁶⁸ However, the United States still adhere to the Hague Rules of 1924, see Carriage of Goods by Sea Act 1936.

⁶⁹ Article X (a), (b) and (c), respectively.

reduced or excluded. The carrier benefits from a strict one-year time-bar, a catalogue of exceptions to liability and right to limitation of liability, i.e., a monetary liability cap.⁷⁰

Article III of the Hague-Visby Rules provides a bedrock *minimum* of contractual obligations on the part of the carrier. Article IV provides a corresponding *maximum* of contractual defences and exceptions to liability available to the carrier. Article III (8) prevents contracting out by providing that any clause that attempted to go below the minimum duties or the maximum defences set out in the Rules should be 'null and void and of no effect'. The Rules operate on a 'tackle to tackle' basis from the start of loading to the completion of discharge. Article VII maintains the parties' freedom of contract as regards any contractual duties occurring before loading or after discharge.

A third sea carriage convention in force internationally is the United Nations Convention on the Carriage of Goods by Sea, 1978, known as the Hamburg Rules, an updated and more 'cargo-friendly' version of the Hague and Hague-Visby Rules. They came into force on 1 November 1992 but have not been adopted by any of the major trading nations, including the UK.⁷¹ The Hamburg Rules dispense with the two-pronged liability scheme of the Hague-Visby Rules in favour of a unitary system. Under Article 5, once the claimant can prove that the loss or damage took place while the goods were in the charge of the carrier, as defined by Article 4, the carrier will be presumed to be liable for the loss or damage. Delay is treated as a separate head of liability under Article 5 (1) and has its own special limitation figure in Article 6. The presumption of liability under Article 5 can be rebutted only if the carrier proves that 'he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences'

2.2 Non-negotiable bills of lading and seawaybills

Apart from the negotiable bill of lading described, a straight bill of lading or a sea waybill may be used for the carriage of goods by sea, both of which evidence a contract of carriage and act as a receipt. A straight bill of lading, which is made out to a named consignee without any additional words of transferability (e.g., 'or order') and has a limited function as a document of title, allowing a single transfer of the exclusive right to demand delivery of the goods from the carrier, from shipper to consignee. No further transfers are possible. The named consignee, however, must present the original document to obtain delivery from the carrier. Straight bills of lading are subject to the mandatory application of the Hague-Visby Rules.⁷²

The non-negotiable sea waybill has no function as a document of title and the consignee obtains delivery by proving its identity to the carrier. The sea waybill is not subject to the mandatory application of the

⁷⁰ For further details see Sir Guenter Treitel and Professor Francis M B Reynolds. *Carver on Bills of Lading* (4th ed Sweet & Maxwell 2017), chapter 9.

⁷¹ Nevertheless, it is quite feasible that disputes involving the Hamburg Rules will come before English courts or arbitrators. This may be because the cargo claim arises out of a voyage where the state of loading is a Contracting Party to the Hamburg Rules. The Hamburg Rules dispense with the two-pronged liability scheme of the Hague-Visby Rules in favour of a unitary system. Under Article 5, once the claimant can prove that the loss or damage took place while the goods were in the charge of the carrier, as defined by Article 4, the carrier will be presumed to be liable for the loss or damage. Delay is treated as a separate head of liability under Article 5 (1) and has its own special limitation figure in Article 6. The presumption of liability under Article 5 can be rebutted only if the carrier proves that 'he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences'.

⁷² This has been confirmed by the decision of the House of Lords in *The Rafaela S* [2005] 2 A.C. 423. It should be noted that for the purposes of transfer of contractual rights under COGSA 1992 the straight bill of lading is not a bill of lading; transfer of contractual rights to the consignee operates through the provisions of the Act on sea waybills.

Hague or Hague-Visby Rules, although under UK law the Hague-Visby Rules can apply with force of law to a sea waybill which incorporates the rules, using specific wording of incorporation.⁷³

2.3 The voyage charterparty

If the whole or a substantial part of the vessel is to be used, as would be the case with bulk cargoes, then a *charterparty* is more likely to be used. This is a formal written contract, which provides the terms of the contract negotiated by the parties. Where the vessel is required for just a single voyage, a *voyage charter* will generally be used. The charterer will pay *freight* to the carrier as their carrying charge. It will also undertake to load and discharge the vessel within a set period of time. This is known as *laytime*. If it exceeds this period, the charterer will become liable to pay liquidated damages to the shipowner. This is known as *demurrage*. Voyage charters generally involve the use of the whole vessel but can also involve the use of only part of its cargo-carrying capacity. A variant of the voyage charter is the 'slot charter' of dry cargo ships adapted for the carriage of container boxes in twenty-foot or equivalent units (TEUs) in 'slots' or 'cells'. Instead of chartering the whole or part of a specific vessel, a container operator will book a set number of TEUs on sailings by ships of a particular operator. Also worth noting in this context is the concept of a contract of affreightment (COA), a contract under which the carrier will lift a fixed or determinable quantity of cargo of a specified type over a given period of time, in a vessel or vessels to be determined by the carrier and will operate as a series of voyage charters.

Charterparties are contracts for the carriage of goods and set out the terms of contract as between the charterer and the shipowner, including in the context of a cargo claim. Charterparties are individually negotiated and, therefore, are not subject to the mandatory application of any of the international cargo liability conventions.⁷⁴ A bill of lading will still be issued upon shipment of the goods, as a receipt, but in the hands of the charterer it will generally have no contractual significance.⁷⁵ However, in the hands of parties other than the charterer, e.g. a third party buyer/consignee to whom the bill of lading has been transferred under a CIF contract, such a charterparty bill of lading will function as a contractual document and attract the mandatory application of the Hague-Visby Rules.

2.4 Contract for the use of the vessel - time charter

Charterparties for the use of a vessel over a period of time rather than for a particular voyage, are called *time charters*, and *hire*, rather than *freight*, will be paid to the shipowner. Time charterparties can vary greatly in their length, ranging from a few weeks to months, years or even decades. Delays during the charter will be governed by an *off-hire* clause rather than by *laytime* and *demurrage* provisions. An important commercial feature of most time charters is that it will be the time charterer, and not the shipowner, who makes the express contracts with the shippers whose goods are to be carried on the ship, for instance under a voyage charterparty. Time charters have traditionally been regarded as contracts for the use of a vessel rather than contracts for the carriage of goods. This reflects the wider choice that such contracts extend to the charterer in relation to the cargoes that may be carried and the available voyage destinations. To a limited extent, the distinction is reflected in the law. For example, bills of lading and voyage charters, but not time charters, are excluded from the operation of the Law Reform (Frustrated Contracts) Act 1943. However, in many other areas, such as the operation of the Carriage of Goods by Sea Acts 1971 and 1992, the key division is between bills of lading and

⁷³ Section 1 (6) (b) of COGSA 1971, as interpreted by *The European Enterprise* [1989] 2 Lloyd's Rep. 185 (QB). Such incorporation will not bring in the second sentence of Article III (4) of the Hague-Visby Rules giving conclusive effect to three specified statements in the bill of lading held by a third party. As regards title to sue the carrier, COGSA 1992 transfers rights of suit under the contract to the consignee through section 2 (1) (b) which provides for the vesting of contractual rights in the contract contained in or under the seawaybill to: "(b) the person who (without being an original party to the contract of carriage) is the person to whom delivery of the goods to which a sea waybill relates, is to be made by the carrier in accordance with that contract." The original shipper's rights are not divested, unlike the position with bills of lading.

⁷⁴ Although they may incorporate these by reference, for instance to benefit from a strict one-year time-bar.

⁷⁵ This is so whether or not the charterer receives the bill of lading when it is issued or, subsequently, on endorsement, see *Rodoconachi v Milburn* (1886) 18 Q.B.D. 67; *The Dunelmia* [1970] 1 QB 289, CA.

charterparties, whether voyage or time. The conceptual divide between the two types of charterparty has been further eroded by the emergence of a hybrid, the 'trip' charter, which is essentially a voyage charter, but one that adapts the contractual format of the time charter.

Under a voyage charter the shipowner is responsible for the fuel costs, the 'bunkering', during the contract of carriage, whereas in time charters it is the charterer who is responsible for fuelling the vessel. In both voyage and time charters, the crew will be employed by the shipowner. However, a time charterer may sometimes contract on the basis that it provides its own crew. Such a charter is known as a *demise charter*. Unlike an ordinary charterer, the demise charterer obtains a possessory interest in the chartered vessel. Demise charters are usually employed as a financing device for ship purchases.

3. The likely pandemic-related carriage issues

The principal effects of the pandemic have been delays at ports due to quarantines and other restrictions, and changes in working practices. These will be considered as regards voyage charters, time charters, and bills of lading for ocean carriage and, subsequently, for multimodal carriage. Apart from routine delays, further delays might be imposed if a ship was quarantined before entry into port due either to where it had previously traded, or to the discovery of infection in crew members. For instance, in the UK, over a ten-day period in November 2020, Danish vessels were affected by port restrictions, following the discovery of a new strain of coronavirus in mink farms in Denmark. Similar temporary /intermittent restrictions may have been imposed in the course of the ongoing pandemic in different countries, depending on the changing public health situation.

The types of issues in contracts of carriage of goods that the pandemic is likely to give rise to are in the following categories:

- The carrier's right to redirect the cargo due to unsafety of the discharge port, congestion at the discharge port; or to deviate to drop off sick crew for medical attention; and liability under time charters for additional bunkers consumed.
- Effect of delays due to crew changes.
- Suspension of laytime during crew changes effected while sailing away from anchorage to another port; while vessel waiting to be called to berth
- Concurrent causes of delay, e.g. quarantine and congestion
- Cancellation of contracts due to the vessel not having obtained free pratique at the cancellation date.
- Economic loss due to delay caused by quarantines and congestion at ports, due to the pandemic.
- Detention of vessels due to crew overstaying the maximum period on board under the Maritime Labour Convention 2006.
- Physical damage to perishable cargoes due to delay caused by quarantines and congestion at ports, due to the pandemic
- The effect of force majeure clauses on liability for such delay
- The potential frustration of the contract of carriage or time charter due to the delays in performing the carriage or the nominated voyages resulting from pandemic restrictions at ports.
- Delays on the final voyage under a time charter, due to COVID restrictions, resulting in late redelivery by the time charterer of the vessel.
- Insolvency of owners or charterers due to the pandemic.

As regards quarantine, three situations present themselves: automatic quarantine of all vessels arriving at a particular port; quarantine of all vessels that have called at ports from specified countries within a period before arriving at the port; quarantine of the vessel due to the presence of COVID-19 in any individual on board the vessel, be it crew or stowaways. Each situation might have different legal consequences on the allocation of loss under contracts, due to the resulting delay.

Further, the operation of events during three stages of the pandemic might lead to different legal consequences for contracts of carriage. The first was the initial stage with the outbreak of coronavirus in China in January 2020. The second was the stage after 11 March 2020, when the WHO declared a pandemic and when the new normal of coronavirus affecting every country in the world began. The third stage was when country specific restrictions beyond the new normal were declared, such as the UK's temporary closure of its ports to vessels from Denmark in November 2020, and France's two-day ban on admitting accompanied road freight from the UK in late December 2020.

Before considering further the specific issues that may arise under different types of contracts, the following section sets out some general considerations that relate to the question of whether 'force majeure' or frustration may excuse any failure to perform as a consequence of the pandemic and related measures and restrictions.

B. General contractual considerations. Force majeure and frustration

1. Force majeure

The doctrine of 'Force majeure' is a feature of the civil law jurisdictions and is reflected in the civil codes of countries such as China⁷⁶ and France.⁷⁷ The doctrine has no place in English law. However, the term 'force majeure' may be used in exceptions clauses,⁷⁸ or similar terms such as 'any cause/other cause beyond the control' of a particular party. For instance, where the Hague or Hague-Visby Rules apply, the liability exception in Article IV (2) (q) is one such clause, providing that the carrier will be free from liability for loss or damage due to: "[a]ny other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage".

In voyage charters, such a provision may appear in a general exceptions clause and/or as a laytime exception. The two basic obligations of a voyage charterer (apart from the payment of freight) are to provide a cargo for loading on the vessel's arrival, and to load and discharge that cargo within the contractually agreed laydays (laytime). If the laydays are exceeded, the charterer must typically pay demurrage (i.e., an agreed amount of damages), but the charterparty may contain a clause that provides for exceptions to laytime in cases where loading is delayed due to certain listed events.

In general, the party relying on an exception must prove that:

- (i) there has been an event falling within the clause;⁷⁹
- (ii) the event has affected performance of the contract in the manner specified in the clause – the clause may refer to 'prevention' of performance or 'hindering' of performance (which sets a lower threshold). If the party would not have been able to perform anyway, i.e., if the event was not causal, the clause will provide no defence;

⁷⁶ Article 117 of the Contract Law of the PRC provides that: "A party who was unable to perform a contract due to force majeure is exempted from liability in part or in whole in light of the impact of the event of force majeure, except otherwise provided by law. Where an event of force majeure occurred after the party's delay in performance, it is not exempted from liability." When the affected party find it only "difficult" not entirely "impossible" to perform the contract due to COVID-19, the law on material change of circumstances in article 26 of Interpretation II of the SPC on Certain Issues Concerning the Application of the PRC Contract Law in 2009 may apply. This provides:

"Article 26 Where any significant change in the objective environment has taken place after the formation of a contract which could not have been foreseen by the relevant parties at the time of entering into the contract, is not occasioned by any force majeure cause and does not belong to any commercial risk, rendering the continual performance of the contract manifestly unfair to the relevant party or rendering it impossible to realize the purpose of the contract, the People's Court shall confirm whether the contract shall be modified or terminated in accordance with the principle of justice taking into account the actual circumstance, where a relevant party petitions a People's Court to modify or terminate the contract." As from 1 January 2021 article 533 of the PRC Civil Code has revised the definition of Change of Circumstances and the remedies available to the parties affected by it, in particular by deleting the restrictive provisions of "not caused by force majeure" and "unable to achieve the purpose of the contract" in article 26. These provisions will apply only where the contract is subject to Chinese law.

⁷⁷ "Force majeure" is defined in article 1218 of the French Civil Code as an event beyond the control of the affected party that could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects could not be avoided by appropriate measures. If the inability to perform is temporary, the performance of the obligations by the affected party is suspended unless the delay is such that it justifies the termination of the contract. If the prevention is permanent, the contract is terminated by operation of law. Under the doctrine of *imprévision*, relief may be granted if the circumstances in a given situation change in such a way that the performance of the contract would become excessively burdensome for one party. Since October 1, 2016, *imprévision* is governed by article 1195 of the French Civil Code.

⁷⁸ 'Force majeure' may also be a factor in contractual clauses defining events which will terminate the contract.

⁷⁹ This is so notwithstanding that the event may have been foreseeable at the date of the contract *Reardon Smith v Ministry of Agriculture, Fisheries* [1962] 1 Q.B. 42 (CA).

- (iii) the event was beyond the reasonable control of the party relying on the exception – or of any party performing the operations, such as loading and discharging, that are the charterer’s responsibility;⁸⁰ where an alternative mode of performance exists, as with a voyage charter provision for the shipment of alternative cargoes, or to ship from alternative ports, the party affected must perform or seek to perform by one of the alternative methods⁸¹; and
- (iv) that reasonable steps were taken by the party relying on the exception to mitigate and avoid the effects of the event.

A recent consideration of such a clause can be found in the case *Classic Maritime Inc v Limbungan Makmur Sdn Bhd*⁸², where the issue of causality became a decisive factor. Due to a mine burst at the Fundao Dam in Brazil in November 2015, it became impossible to ship iron pellets from Ponta Ubu between November 2015 and June 2016. The contract of affreightment (COA) provided for shipments from either Tubarao or Ponta Ubu to Malaysia on tonnage to be provided by the shipowner. The mine operator was the sole supplier of pellets for shipment from that port. Clause 32 provided exceptions which included “accidents at the mine” and “any other causes beyond Owners’, Charterers’, Shippers’ or Receivers’ control; always provided that any such events directly affect the performance of either party under This Charter Party. If any time is lost due to such events or causes, such time shall not count as Laytime or demurrage (unless the Vessel is already on demurrage in which case only half time to count).”

The dam burst was an ‘accident at the mine’, and also was ‘beyond...the Shippers’ control’. However, there was already an established failure by the charterer to supply cargoes to which the dam burst made no difference,⁸³ and it was found that even if the dam had not burst, the charterer likely would not have been able and willing to supply cargoes between November 2015 and June 2016.

The effect of a force majeure clause in the pandemic as regards delay will often be limited however, as pandemic restrictions will generally not have prevented performance, only delayed performance and/or made performance more costly.

Some force majeure clauses will refer to ‘unforeseeable hindrances’, and here the time frame of the pandemic will be significant. An example is the very recent standard form force majeure clause produced by BIMCO in January 2022, for incorporation into contracts, in particular charterparties.⁸⁴ The clause explicitly covers a number of relevant force majeure events, including ‘plague, epidemic, pandemic’ (para. b(v)). However, the clause is restricted to cases where “performance prevents a party from performing one or more of its contractual obligations (“the Affected Party”), provided that such party proves, among others “that the Force Majeure Event could not reasonably have been foreseen at the time of the conclusion of the contract” (para. a(iii)). Therefore, the clause is not likely to be useful to parties during the ongoing pandemic. Coronavirus-related lockdowns and quarantines would clearly have amounted to unforeseeable causes beyond the control of either owner or charterer in charterparties concluded before mid to late January 2020 in relation to loading or discharging in China. This may be less clearly the case when considering charterparties that were concluded after the declaration by the WHO of a pandemic on 11 March 2020, for loading and discharging at ports throughout the world. Such exceptions might, however, cover unforeseen intensification of port restrictions in the ‘new normal’, such as the ten-day ban imposed by the UK in November 2020, on admitting vessels from Denmark to its ports.

⁸⁰ See *The Crudesky* [2014] 1 Lloyd’s Rep 1.

⁸¹ *The Furness Bridge* [1977] 2 Lloyd’s Reports 367 (QB).

⁸² [2018] EWHC 2389 (Comm); varied [2019] EWCA Civ 1102.

⁸³ See also *Burnett Steamship Co Ltd v Danube & Black Sea Shipping Agencies* [1933] 2 KB 438, where the clause provided that “should any time be lost whilst steamer is in a loading berth owing to work being impossible through rain ... the amount of actual time so lost during which it is impossible to work owing to rain ... to be added to the loading time”. The Court of Appeal held that the clause would only apply if the charterer had cargo which was ready to be loaded during the period of rain.

⁸⁴ <https://www.bimco.org/insights-and-information/contracts/20220110-force-majeure-clause>

2. Frustration

Frustration is an English common law doctrine. Lord Radcliffe in *Davis Contractors v Fareham UDC* stated that frustration operates “whenever the law recognises that without fault of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render a thing radically different from that which was undertaken by the contract.”⁸⁵ When a contract is frustrated the parties obligations arising after the time of frustration are discharged but the contract remains in force until the moment of frustration. The change of circumstance must be so fundamental as to alter the whole commercial basis of the contract, not merely such as to involve one or other of the parties in increased expenditure in performing its obligations.⁸⁶ The test involves a similar assessment of the *factual consequences* of the supervening event to that used for deciding whether an innocent party may terminate the contract when the other has broken an innominate term.⁸⁷ However, in the latter instance, the innocent party will also be able to claim damages from the guilty party for losses that it has sustained due to the premature termination of the contract. By contrast, if the contract is frustrated, neither party can claim damages from the other in respect of the termination of the contract.

In assessing whether a charterparty has been frustrated, the courts have taken into account the following factors: whether the charter is impossible of fulfilment, which will be the case if the vessel sinks;⁸⁸ whether the charter specifies a particular route for the voyage, and that route is now unusable;⁸⁹ and whether the new situation poses a peril to ship, crew or cargo.⁹⁰ This last factor is more likely to be relevant to voyage charters than to time charters,⁹¹ and may be particularly relevant in the context of health risks due to the pandemic.

One of the most important factors is the length of any delay in performance caused by the new circumstances when set against the anticipated time for performance of the contract. Such an assessment involves a comparison of the period of delay with the duration of the charter. With a voyage charter, one needs to ask how long the voyage as a whole will take, after the change in circumstances, and compare it with the time that it would have taken as a whole, had there been no change in circumstances. In *The Eugenia*,⁹² a voyage charter for a voyage with delivery at Genoa, loading at Odessa, discharge in India was held not to have been frustrated by Nasser’s closure of the Suez Canal in 1956, which led to a voyage time of 138 days via the Cape, as opposed to 108 days had the vessel been able to proceed through the Suez Canal.

⁸⁵ *Davis Contractors Ltd v Fareham UDC* [1956] AC 696, HL, at 729.

⁸⁶ *Ibid.* See especially Lord Radcliffe at 728–9.

⁸⁷ An innominate term is a term of the contract whose breach will only give the contractual counterparty the right to terminate the contract in the event that the consequences of the breach are so severe as to ‘go to the root of the contract’. See *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, CA.

⁸⁸ *The Lorna 1* [1983] 1 Lloyd’s Rep 373, CA.

⁸⁹ See *The Massalia* [1961] 2 QB 278, where this rather spurious interpretation of the charter provisions enabled the facts to be distinguished from those in *The Eugenia* [1964] 2 QB 226.

⁹⁰ *Tsakiroglou & Co v Noble Thorl GmbH* [1962] AC 93, HL, a cif contract in which frustration was unsuccessfully argued on the ground that the closure of the Suez Canal and the subsequent need for rerouting round the Cape had gone to the root of the contract.

⁹¹ If the time-chartered vessel cannot perform a particular voyage, the charterer can always charter in a substitute vessel.

⁹² [1964] 2 QB 226. This decision was reluctantly followed in a similar case of delay due to closure of the Suez Canal, this time in the 1967 Arab/Israeli war, in *The Captain George K* [1970] 2 Lloyd’s Rep 21, QB.

However, delay will not always be determinative of whether a charter has been frustrated.⁹³

A clause in the contract that makes full provision for the effect of a supervening event will preclude frustration. For instance, in *The Kyla*⁹⁴ a clause in a time charter requiring charterers to maintain full hull and machinery cover, was found to create an assumption of risk and responsibility on the part of the owners to repair the hull damage up to the insured figure of US\$16 million. Accordingly, the contract was not considered to be frustrated when the vessel was damaged without the owner's fault and the cost of repair exceeded the vessel's sound market value. By contrast in *Bank Line v Capel (Arthur) & Co*⁹⁵ a clause allowing the charter to cancel in the event of the vessel's requisition did not have this effect when the UK government requisition in World War One was indefinite in its prospective duration.⁹⁶

If the change of circumstances is caused by the breach of contract of one of the parties, the defaulting party may not argue that those changed circumstances amount to frustration; hence the question of whether there had been a breach of the safe port warranty was critical to the issue of frustration in *The Evia (No 2)*.⁹⁷ In *DGM Commodities Corp v Sea Metropolitan SA*⁹⁸ voyage charterers were unable to argue that the contract was frustrated due to a six-month delay at the discharge port due to receivers refusing to discharge cargo in a particular hold which included contaminated cargo. The charterers were under a non-delegable duty to discharge the cargo and remained liable for its breach even if that duty had been delegated to the receivers.⁹⁹ Similarly if the change of circumstances is caused by the action of one of the parties, even if there is no breach of contract, then that party is also precluded from arguing frustration.¹⁰⁰

At common law, advance payments in general lie where they fall and are only recoverable if there is a total failure of consideration.¹⁰¹ This will not be the case in most voyage charters where at least some services, such as loading the cargo, will have been performed before the right to advance freight arises. Such a situation would amount only to a partial failure of consideration. Under a time charter, hire paid in advance before the frustrating event would not be recoverable by the charterer. Conversely, services performed before the accrual of a right to payment, which falls after the frustrating event, would attract no right to compensation, as in *The Lorna 1* where the shipowners were unable to recover any freight, because at the date of the frustrating event, the sinking of the vessel, the obligation to pay freight had

⁹³ In *The Sea Angel*, salvors concluded a 20-day trip charter for a vessel to assist in the trans-shipment of oil from the stricken vessel off Karachi. Three days before the end of the charter, after conclusion of these services, the vessel was detained by the refusal of the port authority to issue a certificate, confirming that no port dues were outstanding. Three months later, after litigation in the local courts, the vessel was eventually able to leave and to be redelivered under the time charter. The Court of Appeal rejected the shipowners' argument that the charter had been frustrated because the probable length of the delay had greatly exceeded the unexpired portion of the charter. A comparison of the likely delay with the unexpired portion of the charter was only one of the factors to be considered and was outweighed by other factors: the supervening event had occurred at the very end of a charter, with redelivery as essentially the only remaining obligation.

⁹⁴ [2012] EWHC 3522 (Comm); [2012] 2 CLC 998.

⁹⁵ [1919] AC 435, HL.

⁹⁶ See, also, *The Florida* [2006] EWHC 1137 (Comm); [2007] 1 Lloyd's Rep 1, where a liberty clause did not make full provision for the effect on a voyage charter for the carriage of vegetable oil of a supervening import ban by the Nigerian authorities on such a cargo. An example of where a contractual clause has allocated the risk of a supervening event to one of the contractual parties.

⁹⁷ *Ibid.* Cf the question in *Monarch SS Co Ltd v A/B Karlshamns Oljefabriker* [1949] AC 196, HL, as to whether the delay could be attributable to the breach of the warranty of seaworthiness.

⁹⁸ [2012] EWHC 1984 (Comm); [2012] 2 Lloyd's Rep. 587.

⁹⁹ A similar period of delay in *The Adelfa* [1988] 2 Lloyd's Rep 466, QB amounted to frustration. There the vessel was detained by an arrest by the receivers and there was no undertaking in the charterparty, express or implied, that cargo receivers would not arrest the vessel or seek to do so.

¹⁰⁰ *The Super Servant Two* [1990] 1 Lloyd's Rep 1, CA. See, also, *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1938] AC 524, PC.

¹⁰¹ As in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32.

not accrued. If the contract is held to have been frustrated, and the parties still perform it, the post-frustration performance is paid for on a *quantum meruit* basis, as in *The Massalia*.¹⁰²

The *Law Reform (Frustrated Contracts) Act 1943* amends these rules, save as regards voyage charters and any contracts for the carriage of goods by sea other than a charterparty. Trip charters are regarded as time charters, and so fall within the operation of the statute.¹⁰³ Section 1(2) provides for the return of payments made before the frustration of the contract subject to a discretion in the court to allow such payments to be retained in whole or in part to cover expenses incurred by the payee in performance of the contract. Section 1 (3) gives the court the power to order a suitable payment to be made when one party has conferred a 'valuable benefit' on the other, due to its performance of the contract prior to the date of its frustration. Furthermore, section 2 (4) gives the court power to sever part of a frustrated contract from the rest of the contract and treat that part as not having been frustrated. Thus, if a twelve-month charter is frustrated in month six, the court would be likely to use this proviso to sever the first five months and apply the provisions of section 1 (2) and (3) only to the hire instalment in the sixth month, during which the frustrating event occurred.

The pandemic is unlikely to cause time charters to be frustrated as the consequential delay in performance is comparatively small compared to the duration of the contract. Similarly, with voyage charters, although it is arguable that unexpected substantial delays in being called to berth at the discharge port, such as those affecting two Indian ships carrying coal from Australia to two ports in China, may frustrate the charter. If a charter is for the carriage of specific goods and export restrictions imposed as a result of the pandemic make it unlawful to load that cargo, then that would frustrate the contract. Delay which poses a risk to a perishable cargo would arguably frustrate the contract, although if this happens after commencement of the voyage, the shipowner, as bailee of the cargo, would have to discharge the cargo at a convenient alternative port. Delay which merely has the effect of prolonging the adventure and causing additional costs to one or other of the parties will not frustrate the contract.

¹⁰² [1961] 2 QB 278.

¹⁰³ *The Eugenia* [1964] 2 QB 226.

C. Contracts for the carriage of goods by sea, multimodal transport, and time charters

1. Ocean carriage under bills of lading and waybills

Most bills of lading will be subject to the Hague Rules or Hague-Visby Rules, i.e., to mandatory minimum standards of carrier liability, which cannot be contractually lessened or excluded. The carrier's responsibility is on the 'tackle to tackle' basis and extends from the commencement of loading to the completion of discharging.¹⁰⁴ If cargo is lost or damaged during this period, then there will be a prima facie breach of the carrier's obligation under Article III (2) to take care of the cargo. This can be rebutted by establishing that the loss or damage was due to one of the exceptions listed in Article IV (2). To rely on the liability exceptions the carrier must establish that one of the listed 'perils has caused the loss in question and also show that it took proper care of the cargo.¹⁰⁵ "It should be noted that two of the listed exceptions may also be available to the carrier in cases of negligence: the nautical fault exception in Article IV (2) (a)¹⁰⁶; and the fire exception in (b).¹⁰⁷

The carrier is also under an obligation under Article III (1) to provide a seaworthy ship before and at the beginning of the voyage which will include the provision of a competent crew. Should the cargo claimant prove that there was a breach of this obligation and that this was a contributory cause of the loss or damage, the carrier will have to establish that it took due diligence (i.e., disprove negligence) under Article IV (1), failing which it will be barred from relying on the exceptions in Article IV (2). The obligation under Article III (1) is non-delegable and negligence on the part of any of the servants, agents, or independent contractors of the carrier will mean that the carrier has failed to take due diligence to make the vessel seaworthy before and at the beginning of the voyage and will be liable for any resultant loss.

The carrier is also under three implied common law obligations: (i) to proceed on the voyage with reasonable despatch; (ii) not to deviate from the customary route between the ports of loading and discharge; and (iii) to deliver the cargo to the holder of an original bill of lading, and to no other party. These obligations are not specified in the Hague Rules, although reference is made to 'delivery' in art. III (6) for the purposes of starting the one-year limitation period within which suit must be made, and it has been held that this strict time bar also applies to misdelivery claims.¹⁰⁸

The bill of lading may also incorporate the terms of a charterparty, as is common with contracts for the carriage of bulk cargoes on board a chartered vessel. The general incorporation of "all terms and conditions" of a charterparty, will serve to effectively incorporate all terms 'germane' to the carriage of goods, but this does not include any jurisdiction or arbitration clause in the charter, which would need to be referred to expressly. Charterparty clauses relating to freight, laytime and demurrage will be brought in by general words of incorporation (such as 'all terms and condition'), except in cases where the clause in question would not make sense in the bill of lading context without being reworded. Thus, a charterparty demurrage clause which states 'demurrage to be paid' will be incorporated into the bill

¹⁰⁴ Article 1 (e) "'Carriage of goods" covers the period from the time when the goods are loaded on to the time they are discharged from the ship.' The Hamburg Rules apply within a 'port to port' period under article 4 (1) which provides: "The responsibility of the carrier for the goods under this Convention covers the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge."

¹⁰⁵ *Volcafe Ltd v Compania Sud Americana de Vapores SA* [2018] UKSC 61, [2019] AC 358. For an overview of the operation of the burden of proof under the Hague-Visby Rules and Hamburg Rules, see Asariotis, R.: Allocation of liability and burden of proof in the Draft Instrument on Transport Law. *Lloyd's Maritime and Commercial Law Quarterly* (2002), 386-402; Asariotis, R.: Burden of proof and allocation of liability for loss due to a combination of causes under the new Rotterdam Rules, *Journal of International Maritime Law* (2008) 537-554.

¹⁰⁶ (a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.

¹⁰⁷ (b) Fire, unless caused by the actual fault or privity of the carrier. *The Lady M* [2019] EWCA Civ 388.

¹⁰⁸ *The Alhani* [2018] EWHC 1495 (Comm).

of lading, but not one which states 'charterer to pay demurrage', except if the clause is expressly mentioned in the words of incorporation.¹⁰⁹

The effect of the pandemic on carriage of cargo has primarily been in the form of delays at loading and discharging ports. Delays can cause economic loss to consignees in a just-in-time economy, and also physical damage to perishable cargo due to the extended voyage time. It is important to note that the Hague Rules and Hague-Visby Rules do not specify any obligation on the carrier as regards time of delivery or provide for liability in case of delay, unlike the Hamburg Rules,¹¹⁰ but the carrier will be subject to the implied obligation to proceed on the voyage with reasonable despatch. Given the external nature of these port restrictions, it is unlikely that this obligation will be broken.

Furthermore, in cases where the Hague or Visby Rules apply, and cargo has been damaged (or lost) as a result of delay (e.g., in the case of perishable cargo), the carrier would probably be able to rely on the defence in Article IV (2) (g) of "Arrest or restraint of princes, rulers or people, or seizure under legal process" and in Article IV (2) (h) "quarantine restrictions". Delays in discharge due to the vessel waiting to obtain free pratique,¹¹¹ and quarantine measures seem to fall within these two defences, provided this has caused a physical damage to or loss of the cargo (e.g., in the case of perishable goods). However, the carrier would not be liable under the Hague or Hague-Visby Rules for pure economic loss arising from delay.

1.1 Exceptions in Article IV (2) of the Hague or Hague-Visby Rules

The liability exception of "restraint of princes" in paragraph (g) covers any forcible interference with the goods or the voyage by persons acting with governmental or quasi-governmental authority backed by force or the threat of force. There must be an actual interference, or at least a very imminent one.¹¹² The possibility of a future restraint is not enough, even though such restraint actually materialises.¹¹³ The master must act reasonably when confronted with such governmental restrictions and should bear the risks of delay in deciding whether or not to challenge them. The master is not required to act in breach of the restriction, which would prove hazardous. The standard practitioner work *Voyage Charters*¹¹⁴ states: "if an adventure is inevitably doomed to become subject to the restraint because of the normal operation of local law, the exception of "restraint of princes" may not operate, at least where that party knew of or accepted the risk at the time of the contract."¹¹⁵ This means that the exception would not operate in relation to restraints in operation at the time of the contract. In *Ciampa v British Steam Navigation Co Ltd*, Rowlatt J stated that where the facts exist at the date of loading showing that the vessel was "inevitably doomed" to be subject to the restraint, the exception would not apply. This

¹⁰⁹ *The Miramar* 1984 AC 676. The House of Lords refused to manipulate the language of the charter clause to make it fit in the bill of lading contract. However, if a clause is specifically mentioned in the words of incorporations, such as an arbitration or jurisdiction clause, the courts will manipulate its language to ensure it applies in the bill of lading context. *The Nerano* [1996] 1 Lloyd's Rep. 1(CA); *The Channel Ranger* [2014] EWCA Civ 1366.

¹¹⁰ See Article 5 Hamburg Rules. For an analytical overview of the Hamburg Rules see UNCTAD, The Economic and Commercial Implications of the Entry into Force of the Hamburg Rules and the Multimodal Transport Convention. TD/B/C.4/315/Rev.1. 31 Jul 1991. https://unctad.org/system/files/official-document/tdbc4315rev1_en.pdf.

¹¹¹ Defined in *The Eagle Valencia* [2010] 2 Lloyd's Rep 257, as: "official permission from the port health authorities that the ship is without infectious disease or plague and the crew is allowed to make physical contact with the shore; otherwise, the ship may be required to wait at quarantine anchorage for clearance." See further Section C.2.2, below.

¹¹² *Nobel's Explosives Co. v. Jenkins & Co.* [1896] 2 Q.B. 326., where on the day the vessel arrived at Hong Kong, war broke out between China and Japan and the master landed the cargo there, reasonably assuming that cargo consigned for Japan, would be confiscated, possibly along with the ship and the rest of her cargo, by Chinese warships outside Hong Kong.

¹¹³ *Watts, Watts & Co. v. Mitsui & Co.* [1917] A.C. 227. In June 1914, shipowners agreed to provide a vessel to be nominated for a voyage from the Sea of Azov to Japan subject to, among others, the exception of "restraint of princes". On 1 September 1914, they refused to nominate a vessel, fearing the closure of the Dardanelles before the vessel could load and pass outwards through them. At that date numerous vessels were transiting the Dardanelles, but the straits were later closed at a time which would have trapped the vessel in the Black Sea. The House of Lords held that the owners were not able to rely on the defence of 'restraint of princes.'

¹¹⁴ Julian Cooke and others. *Voyage Charters*, (4th ed Informa Law from Routledge 2014).

¹¹⁵ *Ibid.* at 85.315.

means the carrier would be liable if the extended COVID quarantine is already in existence at the port of discharge at the time the contract is made. However, this reasoning was doubted in the context of a strike clause in by the Court of Appeal in *Reardon Smith Line v. Ministry of Agriculture Fisheries and Food*.¹¹⁶ Willmer LJ considered that the basis of the decision in *Ciampa* was that having previously called at a plague port this made the vessel unseaworthy on the voyage in question which involved calling at Marseilles as an intermediate port where the lemons were damaged during fumigation. On this basis, the carrier would have a defence for loss caused by extended delay in discharging and the receiver would bear the loss. However, if a party's fault activates the governmental restriction the exception will be inapplicable.¹¹⁷ This means the carrier would be liable if additional quarantine becomes necessary due to crew being tested positive for COVID.

The 'quarantine' exception in paragraph (h) operates in a similar way and it is hard to see what it adds to the 'restraint of princes' exception. It may, however, operate whenever there is damage caused by a state of inevitable quarantine at the port of discharge at the time the contract of carriage is made and also a pre-existing state of quarantine.

Where goods are damaged due to delay at the discharge port, due to quarantine restrictions in force at the time the contract of carriage is made, there may also be a defence of 'inherent vice' in (m). This would be the case where a perishable cargo is shipped, and the additional voyage length means that it is likely to have deteriorated by the time discharge is completed. A carrier is under no obligation to refuse such a cargo¹¹⁸ but must care of it properly. The carrier cannot, however, do the impossible. In *The Maltasian* a cargo of fish deteriorated during the voyage. The fish contained an inherent vice in the shape of the dormant bacilli which became activated, unavoidably, during the voyage through Mediterranean waters in September where they were exposed to temperatures of 41 degrees Fahrenheit and over. The shipowner was not held liable. The damage was caused by the inherent propensity of the bacteria in the fish given certain temperature conditions, and the existence of those conditions.¹¹⁹

The carrier may also be free from liability for cargo loss or damage when the vessel is 'inevitably doomed' to be delayed by quarantine at the port of discharge under the catch-all defence in Article IV (2) (q)¹²⁰; this is assuming the carrier could show that no fault on its part or that of its servants or agents caused or contributed to the delay due to quarantine requirements at the port of discharge.

¹¹⁶ [1961] 1 Lloyd's Rep. 385; [1962] 1 Q.B. 42 (CA). The point did not arise when the case went to the House of Lords.

¹¹⁷ In *The Wondrous* [1991] 1 Lloyd's Rep 400 (QB), substantial delays occurred due to the vessel not having clearance under the local customs regulations to leave Bandar Abbas and the immediate cause of the detention was the failure to comply with the local customs laws. The causes were commercial, arising from the defaults of the charterers and the ordinary operation of Iranian law, and the dominant cause beyond the unwillingness of the owners to pay additional sums of money was the breaches of the charter-party by the charterers. The period of detention was not fortuitous and was not within the off-hire insurance which covered loss of or damage to the vessel caused by capture, seizure, arrest, restraint or detainment of the vessel.

¹¹⁸ *Gould v S.E & Chatham Rly* [1920] 2 K.B. 186.

¹¹⁹ It was argued that the carrier was bound to carry the goods properly, and this imposed on them an obligation to carry the fish at a temperature never higher than 41° F. This could only have been done by installing refrigerating plant on the vessel. Their Lordships rejected this argument. If special and unusual precautions were necessary for this particular consignment it appears to me that it was the duty of the shipper and not of the ship to stipulate for them. Here, the only notice of any special requirement was a notice stencilled on the cases of fish that they were to be stowed away from boilers and engines, which was done, and the ship was justifiably entitled to assume this was all that was required.

¹²⁰ (q) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

1.2 Unseaworthiness

Article III (1) imposes an obligation on the carrier of taking due diligence to ensure the vessel is seaworthy before and at the beginning of the voyage.¹²¹ The initial unseaworthiness of the vessel, if it is a cause of the loss or damage, will prevent the carrier relying on the exceptions in Article IV (2) unless it can show that it took due diligence to make the vessel seaworthy.¹²² Seaworthiness encompasses not just the state of the vessel and its cargo worthiness but also having a competent crew.¹²³ The obligation also encompasses the provision of any health documentation for the crew or vessel at the discharge port, such as a bill of health in a voyage charter in *Levy v. Costerton*¹²⁴ and a deratisation certificate in a time charter in *The Madeleine*.¹²⁵ A distinction may be made between a new crew coming on board the vessel who will be required to have had a recent COVID test which has come out negative, and the position of existing crew. Subject to availability of test kits, something which improved over summer 2020, the vessel may also be required to administer such tests and keep records of the results.

The consequences of getting this documentary requirement wrong can be severe. The International Transport Intermediaries Club has recently reported¹²⁶ on a case where all testing protocols were followed by the ship manager acting through its appointed agent at Manila where the documentation revealed that one crew member had tested positive for COVID-19. The authorities at the port of discharge required the vessel to return to Manila for further testing and taking on replacements as necessary, with the vessel being required to be disinfected. The resulting delay was six days in Manila and five days additional steaming time. The owners' claim against the ship managers for \$350,000 was eventually settled at 50%. It should also be remembered when considering the application of the due diligence defence in Article IV (1) that the carrier's obligation is non-delegable.¹²⁷ A failure of due diligence by sub-contractors, such as a ship manager, or by servants of the shipowner, the master and crew, which makes the vessel unseaworthy will be a failure of due diligence on the part of the carrier. This failure to take due diligence could arise from the owners not requesting testing of crew, COVID positive crew not revealing this to the master or from COVID positive crew not staying in quarantine.

Initial unseaworthiness will not debar reliance on the exceptions in Article IV (2) if it is not at least a cause of the loss or damage sustained during the voyage. In the context of the pandemic this could arise where some of the crew members test positive at the port of discharge and the vessel is quarantined for a further period and that delay then results in deterioration of the cargo. A similar position occurred in *Ciampa v. British India Steam Navigation Co. Ltd*,¹²⁸ the vessel loaded lemons in Naples to carry to London under a bill of lading allowing her to call at any French port en route in 1915. As intended by owners, the vessel called at Marseilles where the French authorities subjected the lemons to Sulphur fumigation, because of the vessel's previous call at a plague port. The lemons were damaged, and Rowlatt J held the vessel to be unseaworthy as being unfit to receive and carry the cargo. The vessel's call at a previous port made it inevitable that the carriage of a subsequent cargo would be affected adversely by fumigation at some stage on that voyage. Accordingly, owners were not able to rely on the

¹²¹ Article III (1). The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:

- (a) Make the ship seaworthy.
- (b) Properly man, equip and supply the ship.
- (c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

¹²² Article IV (1). The carrier's obligation is non-delegable. This means the negligence of servants, agents and sub-contractors which makes the vessel unseaworthy amounts to a failure by the carrier to take due diligence to ensure the vessel is seaworthy before and at the start of the voyage.

¹²³ Article III (1)(b). See *The Eurasian Dream* [2002] 1 Lloyd's Rep. 719.

¹²⁴ (1816) 4 Camp. 389.

¹²⁵ [1967] 2 Lloyd's Rep 224 (QB).

¹²⁶ <https://www.itic-insure.com/who-we-are/news-events/press-release-itic-warns-on-the-importance-of-checking-crew-covid-19-tests-155459/>.

¹²⁷ *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd (The Muncaster Castle)* [1961] A.C. 807.

¹²⁸ [1915] 2 K.B. 774.

defence of 'restraint of princes.' Similarly, if the result of calling at a port in a country affected by COVID-19 causes delay at a later port due to quarantine restrictions, the owner will be liable for damage caused by the rotting of a perishable cargo due to that extended delay in discharge.

It is unlikely that the routine safety requirements imposed in ports due to the pandemic could be said to make the vessel unseaworthy on the grounds that delay has now become inevitable. However, there may also be unseaworthiness if the quarantine is caused due to COVID being present in the crew, their having come aboard the vessel having contracted it unknowingly. The duty under the Hague Rules is non-delegable and a breach of Article III (1) would be established on the part of the carrier. There would, however, be a defence of due diligence under Article IV (1) which would depend on the due diligence of the crew members in question. Certainly, once the pandemic developed, the opportunity for contracting COVID-19 ashore would have been reduced, given restrictions on crew disembarkation at ports.

A further feature of the pandemic has been the difficulty in effecting crew changes with many countries not allowing crew to disembark for repatriation. A consequence has been that many seafarers have been at sea in excess of the eleven-month period stipulated by the Maritime Labour Convention 2006 which could make the vessel unseaworthy, by exposing the vessel to detention at the port of discharge, and delayed discharge leading to deterioration in a perishable cargo. However, the carrier might be able to rely on the due diligence provision in Article IV (1), by showing that re-crewing had become impossible due to national restrictions on crew changes at previous ports of call. In any event such detention is likely to occur after the vessel has discharged and will not have been a cause of any loss of or damage to the cargo.

1.3 Deviation and redirection to alternative discharge ports

At common law, there is an implied obligation that the vessel should navigate on the direct contractual route between the load and discharge port. Deviating from the route will reduce the carrier to the status of a carrier from the moment of deviation, depriving it of the right to rely on the terms of the contract of carriage.¹²⁹ However, deviation is permissible to save life and therefore a deviation to enable a crew member to obtain treatment may be made, although many ports will refuse to allow the crew member ashore. A deviation to a port of refuge due to a threat to the safety of the crew or vessel will be justified, even if caused by the initial unseaworthiness of the vessel.¹³⁰

Furthermore, Article IV (4) of the Hague and Hague-Visby Rules provides: "Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom." The test for determining a 'reasonable deviation' was set out in as something "...a prudent person controlling the voyage at the time [might] make and maintain, having in mind all the relevant circumstances existing at the time, including the terms of the contract and the interests of all parties concerned, but without obligation to consider the interests of any one as conclusive . . ." ¹³¹ A "reasonable deviation" within Article IV (4) can be a deviation planned before the voyage begins or the bills of lading are signed, but such a planned deviation is likely to be reasonable only where the deviation is planned in order to perform the contractual adventure.¹³²

1.4 Redirection clauses

Common to many bills of lading are clauses giving the carrier the option to discharge at an alternative port in the event of hazards, such as strikes, at the nominated discharge port. These clauses do not

¹²⁹ *Hain SS Co Ltd v Tate & Lyle* (1936) 41 Comm Cas 350.

¹³⁰ Dicta of Lord Porter in *Monarch Steamship Co. Ltd. v. Karlshamns Oljiefabriker*, (H.L.) [1949] AC 196,212 suggest that this would not be the case where the vessel starts on its voyage and the master knows that it is unseaworthy.

¹³¹ *Stag Line Ltd. v. Foscolo Mango & Co. Ltd.*, [1932] A.C. 328., 343, per Lord Atkin.

¹³² *The Al Taha* [1990] 2 Lloyd's Rep 117 (QB).

operate as exceptions to the carrier's obligations, but as clauses defining the contractual obligations undertaken by the carrier and are often referred to as "Caspiana" clauses, after the ship involved in *Renton v Palmyra*.¹³³ In that case, Clause 14 (c) and (f)¹³⁴ of the bill of lading gave the carrier the right to discharge at an alternative port in the event that the nominated port, London, was subject to a strike. During the voyage, a dock strike broke out in London and the carrier discharged the cargo on the continent.

The cargo owners then claimed the cost of transshipping their cargo to the UK. They based their challenge on two grounds. First, on common law principles of construction of such a clause, namely, that the goods were to be carried to London, and must accordingly be modified or rejected, in accordance with the principles stated in *Glynn and Others v. Margetson & Co. and Others*, relating to the "main object and intent of the contract".¹³⁵ Second, on the grounds that only 'reasonable deviations' were permitted under Article IV (4) of the Hague Rules, as applied under the incorporated Canadian Carriage of Goods by Water Act 1936, and this clause should be rendered null and void by Article III (8). The House of Lords rejected both grounds. The clause was not a deviation clause but a substituted discharge clause which was part of the definition of the voyage undertaken and, as such, was not a clause which would be struck out by Article III (8). Lord Kilmuir stated that the clause was operative only in the event of the occurrence of certain specified emergencies, was a special provision stating what the rights and obligations of the parties are to be in the event of obstacles beyond the control of either arising to prevent or impede the performance of the contract in accordance with its primary terms."¹³⁶ Lord Somervell of Harrow also stated that under the clause the master had to act reasonably. In deciding what was a convenient port, he must have regard to the consignee's convenience as well as the ship's.¹³⁷

These observations suggest that the effect of redirection clauses is qualified by their being triggered by obstacles beyond the control of the parties and that the alternative port must be chosen with the convenience of both the carrier and the consignee in mind. A clause which gives an unrestricted right to discharge elsewhere for any reason, such as the carrier's convenience, may well therefore be controlled either by Article III (8) or by canons of contractual construction. This may prove significant in later developments in the pandemic, where congestion at container ports in China and in the UK, most notably at Felixstowe, led container lines to divert to alternative ports, or to alternative ports in other countries.

Terms in MSC's standard bill of lading clause 9 give a wide liberty to divert to alternative ports without this constituting a deviation, and clause 19 goes on to provide that when the carriage is or is likely to be at any time "affected by any hindrance, risk, danger, delay, difficulty or disadvantage of whatsoever kind and howsoever arising which cannot be avoided by the Carrier by the exercise of reasonable endeavours", it has sole discretion, without notifying the merchant: to carry the goods by an alternative route; suspend the carriage of the goods and store them ashore or afloat upon the terms and conditions of the bill of lading and endeavour to forward them as soon as possible; abandon the carriage of the goods and place them at the Merchant's disposal at any place or port which the carrier may deem safe and convenient, or from which the carrier is unable by the exercise of reasonable endeavours to continue the carriage. Full freight is payable under any of these options with the merchant to pay

¹³³ [1956] 2 Lloyd's Rep. 379 (HL).

¹³⁴ 14. Government Directions, War, Epidemics, Ice, Strikes, etc. (...) (c) Should it appear that epidemics, quarantine, ice, labour troubles, labour obstructions, strikes, lockouts, any of which on board or on shore-difficulties in loading or discharging would prevent the vessel from leaving the port of loading or reaching or entering the port of discharge or there discharging in the usual manner and leaving again, all of which safely and without delay, the master may discharge the cargo at port of loading or any other safe and convenient port. (...).

(f) The discharge of any cargo under the provisions of this clause shall be deemed due fulfilment of the contract. If in connection with the exercise of any liberty under this clause any extra expenses are incurred, they shall be paid by the merchant in addition to the freight, together with return freight if any and a reasonable compensation for any extra services rendered to the goods.

¹³⁵ [1892] 1 Q.B. 337; [1893] A.C. 351.

¹³⁶ [1956] 2 Lloyd's Rep. 379, 387 Col. 1.

¹³⁷ *Ibid.*, at 393 Col 1.

additional costs pursuant to an abandonment. The bill of lading also contains a clause excluding consequential loss.¹³⁸

1.5 Container demurrage

Where containers have been provided by the carrier, bills of lading for carriage of containers will allow a certain ‘free time’ for return of the carrier’s container, following which demurrage will accrue on a daily basis. Problems will arise with the pandemic due to increased delays in unloading and return of containers for collections, entailing demurrage charges, and the possibility of insolvent consignees not taking delivery of the goods. Ports will usually dispose of uncollected goods within a period of time – in the EU it is 90 days¹³⁹ – but there remains the question of the uncollected containers that will be sitting at the port incurring daily demurrage charges.¹⁴⁰

The shipper will be liable and remain liable after transfer of the bill of lading.¹⁴¹ The consignee, indorsee or transferee of the bill of lading will also be liable if they take delivery, demand delivery, or make a claim against the carrier.¹⁴² A party who abandons the cargo will not trigger these conditions and will not become liable, so the shipper will be the sole party liable to the ocean carrier for container demurrage following the expiry of ‘free time’. The bill of lading may define ‘the merchant’ so as to extend liability to other parties. The freight forwarder, even if acting as agent, may therefore become liable depending on the wording of the definition of ‘merchant’ in the bill.¹⁴³ However, under English law, merely being named in a contract does not make one a party to that contract if one is not a genuine contractual counterparty.¹⁴⁴

Demurrage cannot run indefinitely and there will come a point when the shipper’s failure to arrange return of the container to the carrier will amount to a renunciation of the contract, following which demurrage will cease and the shipper’s outstanding liability in damages will be for the value of the container. The time before this situation arises will typically be substantial. In *MSC v Cottonex*,¹⁴⁵ the consignee had failed to take delivery of the cargo, which was discharged in May and June 2011, and at the time of the trial several years later, the containers were still languishing in the port in Bangladesh. The carrier was held to have no legitimate interest in keeping the contract alive following a renunciation by the shipper under a bill of lading which provided for demurrage in respect of detention of the carrier’s containers. Demurrage continued until termination of the contract by renunciation and thereafter the carrier’s claim was for the value of the containers, which was agreed to be about \$100,000. This point came in February 2012 when MSC offered to sell the containers to Cottonex as “the clearest indication

¹³⁸ Cl.8 SCOPE OF VOYAGE, DELAY, CONSEQUENTIAL DAMAGES ... 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, <https://www.msc.com/global-document-library/pdfs/terms-conditions/bl-standard-t-c>.

¹³⁹ Article 149 of the Union Customs Code (UCC) and this is also the position in Australia under Section 218A of the Customs Act, and Argentina.

¹⁴⁰ In the USA, most goods that have not been cleared within 15 days after arrival at the port will become eligible to be sent to a US Customs ‘General Order’ warehouse as unclaimed cargo, to be held at the risk of the for 6 months, following which it will be considered as abandoned.

¹⁴¹ Section 3 (3) COGSA 1992.

¹⁴² Section 3 (1) COGSA 1992.

¹⁴³ The forwarder may be expressly included or may fall within the definition as a party owning or entitled to possession of the cargo, which could, arguably, include the forwarder through any lien it has on the shipper’s cargo.

¹⁴⁴ *MVV Environment Devonport Ltd v NTO Shipping GmbH & Co. KG* [2020] EWHC 1371 (Comm). Party named as shipper in series of bills of lading covering waste shipments from UK to Netherlands held not to be liable under the bill of lading as not a party to the contract of carriage with the carrier evidenced by the bill of lading.

¹⁴⁵ [2016] EWCA Civ 789.

that the commercial purpose of the adventure had by then become frustrated.”¹⁴⁶ This indicates that demurrage for containers may continue for a substantial period of time, in this case eight months.

In the UK the Unfair Contract Terms Act 1977 applies a ‘reasonableness’ test to contractual terms under section 2 (2),¹⁴⁷ but contracts for carriage by ship, if they are not consumer contracts, are excluded, as is the maritime performance of a multimodal contract.¹⁴⁸ Dicta in *The Rigoletto* are to the effect that a period of storage prior to commencement of loading falls within this exclusion and on this basis, so too would container demurrage clauses in ocean and multimodal bills of lading.¹⁴⁹

1.6 Delivery of goods without production of bill of lading

One of the potential issues arising from the pandemic is delay in transmission of the bill of lading. In particular in connection with bulk cargoes which are traded in transit, problems arise when the cargo arrives at the discharge port before the bills of lading come into possession of the receiver. The problem is usually resolved by delivery of the cargo to the receiver against an indemnity to the carrier; if the vessel is chartered, such an indemnity may be provided by the charterer (with a back to back indemnity to the charterer from the receiver). Letters of indemnity will oblige the guarantor to put up security for the claim if the vessel is subsequently arrested.¹⁵⁰

The pandemic may well have exacerbated delays in transmission of bills of lading to the ultimate receiver due to lack of air capacity to courier documents and difficulties in processing paper documents due to the requirement for home working during the pandemic. Many charterparty clauses that require release of the cargo against provision of an indemnity will preclude owners from insisting on the production of an original bill of lading which may result in delay and cost, which may be only partially mitigated by demurrage. For cargo receivers, the position is that they will still obtain delivery of their cargo without having an original bill of lading but will have to give a letter of indemnity to the charterer or to the carrier. The letter of indemnity will also require the receiver to put up security if the vessel is subsequently arrested for misdelivery at the hands of the party, usually a bank, in possession of the bill of lading.

The pandemic may also provide an impetus towards the adoption of electronic bills of lading. In late March 2020, shortly after the UK government had brought in lockdown regulations, Evergreen UK sent out a customer advisory which said: “It will not be possible to issue export original bills of lading at London, and we will stop issuing paper invoices while these measures are in force.”

P&I cover now extends to seven electronic bill of lading systems,¹⁵¹ the latest of which is TradeLens. The characteristics of each of these systems is notified to members. By way of example, a circular by the Shipowners’ Club of 17 February 2020 states:

"From 20 February 2010 liabilities arising in respect of the carriage of cargo under such paperless trading systems were covered, provided that the system had first been approved by the Group. Since then, the Group has approved electronic systems administered by Electronic Shipping Solutions, by Bolero International Ltd (more specifically the Rulebook/Operating procedures September 1999.) E-titleTM

¹⁴⁶ The Court of Appeal overturned the finding of Leggatt J that renunciation had occurred on 27 September 2011, when Cottonex informed MSC that it did not have legal title to the goods, indicating that it could not or would not deal with the goods.

¹⁴⁷ The exclusion does not cover section 2 (1) which renders void exclusions of liability in respect of death and personal injury.

¹⁴⁸ See further, Sir Richard Aikens and others. *Bills of Lading* (3rd ed Informa Law from Routledge 2020) at 7-53-7.56.

¹⁴⁹ *Lotus Cars Limited v. Southampton Cargo Handling Plc* [2000] 2 All ER (Comm) 705 (CA) [34].

¹⁵⁰ *Trafigura Maritime Logistica Pte Ltd v Clear Lake Shipping Pte Ltd*. [2020] EWHC 726 per Henshaw J [26 to 32].

¹⁵¹ See UK Club Circular 0221 Electronic Paperless Trading, <https://www.ukpandi.com/news-and-resources/circulars/2021/uk-club-circular-0221-electronic-paperless-trading/>.

solution Global Share S.A. edoxOnline, WAVE and now CargoX been added to the list of IG approved systems.

CargoX describes itself a system which provides a Blockchain Document Transaction System (BDTS) online. It is based on blockchain technology that is intended for creating, tracking, managing, storing, and transferring the ownership of documents using blockchain technology to enable carriers, shippers, consignees, endorses, banks, freight forwarders and other parties to issue, exchange and sign, a variety of supply chain encrypted documents with no need for a central server or registry. The system is supported by a legal framework known as the Special Terms and Conditions (ST&C) that facilitates the transfer and endorsement of electronic bills of lading. While the system removes the need for a paper bill there is scope to revert to paper where it is necessary to do so. CargoX is the third system approved by the Group to use Blockchain technology. Further details can be found on the company's website www.cargox.io/platform/Smart-BL/.¹⁵²

It has been argued that Blockchain provides a means of replicating the document of title function of an electronic bill of lading which previous systems were unable to do, through an inability to extinguish the prior possessory rights of the shipper.¹⁵³ However, these concerns do not seem to have worried the International Group who have covered electronic bills of lading under Bolero and ESS for some time. The extinction of the shipper's right to possession would happen through the shipper being estopped from asserting its title against the next holder of the electronic document, and against the carrier.

The two blockchain systems, edoxOnline and CargoX rely on the principle of novation to transfer rights and obligations each time the eBL is transferred from one holder to the next. The two systems deal with transfer of title through attornment. For edoxOnline, the users agree in advance under the terms and conditions that there will be an attornment each time the eBL is transferred. With CargoX, the system generates an automatic notice from the carrier confirming that he holds the goods to the order of the new eBL holder. A further electronic bill of lading system, TradeLens, also based on blockchain was approved as of March 2021.¹⁵⁴

However, at present, electronic bill of lading equivalents are not yet in widespread commercial use and original paper bills of lading will be required under a documentary sale contract CIF or FOB. Apart from remaining legal uncertainties regarding the replication of the document of title function and full legal recognition of electronic equivalents to negotiable bills of lading across jurisdictions, the position of many national customs authorities in insisting on a paper bill of lading may be a further obstacle to widespread uptake of electronic documentation. For cargoes which are not going to be traded while in transit, no negotiable bill of lading is required,¹⁵⁵ the issue of a waybill rather than a bill of lading would avoid the delivery problem at the port of discharge as the document is not required to obtain delivery of the goods from the carrier, but only proof of identity by the named consignee.

¹⁵² The Shipowners' Club. News. IG circular: Electronic (paperless) trading update. 17 February 2020. <https://www.shipownersclub.com/ig-circular-electronic-paperless-trading-update-2/>.

¹⁵³ The authors of *Carver on Bills of Lading* (fn. 70) state at 8-096: "This concept of the transfer of possession cannot be applied, except by way of somewhat inexact metaphor, to electronic documents; for even if their transmission could be said to give the recipient of the electronic message a kind of possession of them, it would not of itself deprive the sender of such possession. The transmission of a paper document, by contrast, not only gives the recipient possession of it but necessarily deprives the sender of that possession." And at 8-097 "again where the requirements of the [1992 Carriage of Goods by Sea] Act are satisfied such rights will be vested in the transferee without the need to comply with any further requirements which might exist for their transfer under the general law relating to the assignment of choses in action (such as notice to the debtor, i.e. in this context, the carrier) or to the creation of new rights by way of novation, requiring the consent of all three parties involved in the process, i.e. of creditor (shipper) debtor (carrier) and third party (transferee)".

¹⁵⁴ The Shipowners' Club. News. IG Circular: Update on Electronic (Paperless) Trading. 29 March 2021. <https://www.shipownersclub.com/ig-circular-update-on-electronic-paperless-trading/>

¹⁵⁵ Where no sale in transit is envisaged but independent documentary security is required, a straight bill of lading may be used; this will still need to be physically transferred to the named consignee and/or bank(s) involved in a letter of credit, but any delay in transmission (involving fewer parties) is likely to be limited.

A report by the EU in September 2018¹⁵⁶ noted various legal obstacles within the EU to the use of eBLs, and also various regulatory obstacles with inspecting authorities in some Member States requiring sight of physical copies of bills of lading,¹⁵⁷ as well as a perception that the regulatory authorities of many third states would require production of paper bills of lading.¹⁵⁸ As regards legal obstacles, Romania requires paper bills of lading, while Greece and Belgium require bills of lading to be physically signed. In Italy, bills of lading are submitted in paper to banks, because the contract of carriage by sea can only be evidenced by submitting a manually signed bill of lading.

In June 2020 it was reported that the Indian Port Community System, covering, 19 ports in India, had entered a trial project with the blockchain platform CargoX and G2 Ocean.¹⁵⁹ Proof-of-concept tests and simulations were run with various use-case scenarios, including breakbulk and container shipments, export, and import from and into India. The CargoX Platform would be used at 19 ports in India, including the country's 13 major ports. The ports involved handle approximately 60 per cent of India's total cargo traffic.

In the UK, on 30 April 2021, the Law Commission published a consultation paper on and draft legislation on the digitisation of trade documents such as bills of lading and bills of exchange, including draft legislation, with its final recommendations due in early 2022.¹⁶⁰

1.7 Dangerous cargo

At common law and under Article IV (6) of the Hague Rules, the shipper is under an absolute obligation to disclose to the carrier any dangerous characteristics of the cargo to be loaded and to indemnify the carrier for loss or damage caused as a result of failing to do so. In some instances, in New Zealand and in China, it appears that COVID has been found on the packaging of certain cargoes,¹⁶¹ and any resulting costs to the carrier should be recoverable from the shipper and/or the 'lawful holder' of the bill of lading, although this is not conclusively established. It may be that COVID has contaminated the cargo through transmission by port workers during its loading in which case responsibility would fall on the carrier under a 'liner' bill of lading. However, given the scientific evidence that the coronavirus becomes inert on surfaces after 72 hours, it may be difficult to establish a link with the packaging of the cargo.

¹⁵⁶ State of play and barriers to the use of electronic transport documents for freight transport: Options for EU level policy interventions.

Final report (2018), <https://op.europa.eu/en/publication-detail/-/publication/b187493e-0349-11e9-adde-01aa75ed71a1>.

¹⁵⁷ 3.3.1. p48. "Authorities require transport documents to perform inspections. During the inspections, the documents are used to verify compliance with regulatory requirements. Currently, many authorities cannot or do not want to accept electronic transport documents and still accept only the paper versions of the required transport documents (i.e., bill of lading, airway bill, CMR, COTIF-CIM or CMNI document). Thus, operators continue to use paper documents in both Member States that still only accept paper transport documents as well as in Member States that also accept electronic equivalents of the paper transport documents."

¹⁵⁸ 3.3.2. p50. "The respondents to the targeted impact survey confirmed the presented view. Out of the 45 respondents, 30 indicated that the non-acceptance of electronic transport documentation in third countries contributes, at least moderately, to the problem (Figure 3.3). Only four respondents indicated that this root cause is not a significant contributor. These were all private stakeholders. Not only in the targeted survey the lack of acceptance of electronic transport documents in third countries is appointed as one of the underlying problems in the overall usage of electronic transport documents. Also, during the multiple targeted interviews, both authorities and private stakeholders frequently raised this issue."

¹⁵⁹ Smart Maritime Network. India moves forward with digital Bills of Lading. 11 June 2020. <https://smartmaritimetwork.com/2020/06/11/india-moves-forward-with-digital-bills-of-lading/>.

¹⁶⁰ Consultation Paper 254. Digital assets: electronic trade documents. 30 April 2021. <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/04/Electronic-trade-documents-CP.pdf>. See also <https://www.lawcom.gov.uk/project/electronic-trade-documents/>.

¹⁶¹ Reuters. Explainer: What we know about possible COVID-19 transmission from freight and packages. 13 August 2020. <https://www.reuters.com/article/us-health-coronavirus-packages-explainer/explainer-what-we-know-about-possible-covid-19-transmission-from-freight-and-packages-idUSKCN25918W>.

1.8 P & I Cover

The pandemic has not affected P&I cover which has remained in place although cover for quarantine expenses under some Club's rules may be subject to two limiting provisos: (i) the presence of an infectious disease on the ship itself, and (ii) the insured vessel be ordered to proceed to a port where it is known that she will be subjected to quarantine.¹⁶² The second proviso may effectively negate any claims by owners arising in connection with quarantine requirements after the WHO declaration of a pandemic on 11 March 2020, as practically every port in the world would be subjecting vessels to some form of quarantine. Some Clubs have an additional cover for any cargo liabilities arising solely due to deviations for crew changes but not covering operational costs such as fuel or loss of time.¹⁶³ Such cover is reassuring for Members, but would appear to be unnecessary, as any such deviations would be covered by Article IV (4) of the Hague/Hague-Visby Rules.

However, fixed premium and Charterers' P&I covers are reinsured outside the International Group's Pooling Agreement and with effect from 20.2.2021 and will be subject to the Coronavirus Exclusion Clause (LMA 5395) which excludes coverage for any loss, damage, liability, cost, or expense directly arising from the transmission or alleged transmission of COVID-19 or from any fear or threat of it. Gard have recently announced that they will offer Members a special extension of cover to comprise liabilities, losses, costs, and expenses falling within the scope of terms of entry agreed, but for the Coronavirus Exclusion Clause and subject to a sub-limit of USD 10 million per ship or vessel per event.¹⁶⁴

1.9 The operation of the courts during the pandemic

Time limits are important and may be affected by the pandemic. The one-year Hague Rule time bar (Article III (6)) is a substantive rule which means that if suit is not brought within one year of delivery or the time at which delivery should have been made, the claim is extinguished. The time limit applies also to claims arising out of the contract which are not covered by the Hague Rule obligations, such as a claim for misdelivery in *The Alhani*¹⁶⁵ and, probably, a claim for delay for breach of the common law obligation to proceed on the voyage with reasonable despatch. Time starts to run not from discharge but from the time the lawful holder of the bill of lading obtains legal, or physical, possession of the cargo. The former may happen before the latter which may make calculation of the starting date of the limit difficult to assess when the effect of the pandemic is to delay release of the cargo to the lawful holder. Where there is misdelivery the relevant time will be the time at which the cargo should have been delivered. In the light of the above, it would be important for any consignee who may be affected by the time-bar to try in good time to agree an extension with the carrier or its P&I Club.

Physical delivery is likely to be the relevant time under English law. Local law may regard legal possession as constituting delivery so that where a terminal receives cargo it does so on behalf of the receiver, and thus starts the 12 months running, even though the effect of the pandemic is that the receiver is unable to take physical delivery until some time later. The safest thing to do is to work on the assumption that the earliest time is the one that will start time running, and/or to seek a time extension.

¹⁶² Marsh. COVID-19 Marine P&I: How Club Rules Compare. <https://www.marsh.com/uk/industries/marine/insights/covid-19-how-shipowners-p-i-club-rules-compare.html>.

¹⁶³ UK P&I News. Covid-19: Deviation cargo liability cover now available. 9 July 2020. <https://www.ukpandi.com/news-and-resources/articles-new/covid-19-deviation-cargo-liability-cover-now-available/>.

¹⁶⁴ Gard. Member Circular No. 16/2020. January 2021. https://www.gard.no/Content/31036371/MemberCircular_16_2020.pdf.

¹⁶⁵ [2018] EWHC 1495 (Comm).

The first two paragraphs of Article III (6) of the Hague and Hague-Visby Rules state:

Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be prima facie evidence of the delivery by the carrier of the goods described in the bill of lading.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

The pandemic may make it impossible to give such a notice within three days, but the provision merely that acceptance of delivery of the goods, without more, amounts to *prima facie* evidence of proper delivery; that evidence may be countered by admissible contradictory evidence. The burden of proof is always on the cargo claimant to establish that the loss or damage took place within the carrier's period of responsibility.¹⁶⁶ The bill of lading statement will provide evidence of the quantity and condition of the goods at the start of this period. A survey will be required at discharge, to evidence the short delivery or damage claim. Delays in surveying the cargo after discharge, might lead to arguments that any damage occurred after the completion of discharge, but a surveyor is likely to be able to assess when the cargo was damaged and whether or not the loss or damage occurred after discharge.

Some countries such as Spain¹⁶⁷ and France¹⁶⁸ have imposed temporary suspensions on substantive time limits during the period of the initial lockdown. There have been no similar suspensions in the UK. The position in London Arbitration and in the High Court of England Wales is that proceedings have carried on as normal, but in virtual form. On 2 April 2020, the LMAA summarised the position regarding both arbitration and commercial court cases. LMAA arbitrators were functioning normally, mostly working from home and conventional hearings were rapidly being replaced by virtual hearings by video link. Arbitration applications and appeals continued to be heard in the business and property courts, including the Commercial Court.¹⁶⁹ The LMAA published a revised version of its terms of procedure that became effective in respect of all arbitrations commenced on or after 1 May 2021.¹⁷⁰ The updated Terms expressly recognise in paragraphs 15 (c), 15 (d) and the Questionnaire in the Third Schedule that hearings may take place virtually. A new sixth Schedule has added a set of Guidelines for the Conduct of Virtual and Semi-Virtual Hearings.

¹⁶⁶ The authors of *Voyage Charters*, (fn. 114) state, at 85.167: "The effect of the first two paragraphs seems very limited, since they do little more than describe in specific and formal terms a position similar to that which would probably prevail at common law even in their absence.²⁸⁸ It provides merely that acceptance of delivery of the goods, without more, amounts to *prima facie* evidence of proper delivery; but that evidence may be countered by admissible contradictory evidence and the burden of proving that loss or damage to the goods has happened rests on the receiver in any event. The rule does not create an irrebuttable presumption, nor does it place the burden of positively proving right and true delivery upon the carrier."

¹⁶⁷ Royal Decree 463/2020 of 14 March 2020 which suspended time periods for the application of the statute of limitations and expiration of actions and rights until 5 June.

¹⁶⁸ Order No. 2020-306 of 25 March 2020 which specifically applies to acts: "prescribed by law or regulation" – excluding acts provided for by contractual stipulations: time-limits, payment due dates, etc. – and; which should have been performed between 12 March and 24 June 2020 – i.e. 'the legally protected period'. These acts "prescribed by law or regulation" will not be considered to be late as long as they are performed within their respective legally prescribed period, within a two month time limit beginning on 24 June 2020. A hard deadline of 24 August 2020 therefore applied. There have been no further suspensions.

¹⁶⁹ https://www.ukdefence.com/fileadmin/uploads/uk-defence/Documents/Coronavirus_Litigation/COVID-19_Litigation_-_Arbitration_Hearings.pdf.

¹⁷⁰ <https://lmaa.london/wp-content/uploads/2021/04/LMAA-Terms-2021.pdf>.

The position on High Court proceedings in England and Wales is very similar, with online hearings taking place, thanks to the use of platforms such as Zoom.¹⁷¹ In May 2021 the Commercial Court indicated that there would be a return to in-person trials as England lifted its lockdown, apart from Fridays which would stay remote for the foreseeable future.¹⁷² On 15 September 2021 the Commercial Court stated: “Until further notice, the default position will be that hearings under half a day will be conducted remotely. This is subject to the Court’s discretion to make alternative directions, but the Court will only direct a live hearing if there is a particular reason why that is more appropriate.

For longer hearings, the Court will determine the format on the basis of the circumstances of each case. The parties will be asked by the Listing Office to express their preferences, but the Court’s decision will ultimately be determined by the interests of justice in all of the circumstances.”

2. Voyage Charters

As already noted, apart from the obligation to pay freight, the principal obligations of a charterer under a voyage charter are (a) to have a cargo available for loading on the vessel’s arrival at the load port, and (b) to load and discharge the cargo within the laytime allowed. Laytime will start on the giving of a notice of readiness (NOR) on arrival at the place specified for loading or discharge.¹⁷³ The notice of readiness will inform the charterer that the vessel is physically and legally ready to load/discharge the cargo and is at the immediate and effective disposition of the charterer.

A shipowner must provide a seaworthy ship, must proceed on the approach voyage and the carrying voyage with reasonable despatch, must set out on the carrying voyage at such a time as it could reasonably be expected to arrive at the load port at the date specified in any provision as to vessel’s estimated time of arrival or estimated readiness to load, to proceed on the customary geographical voyage between the loading and discharging ports without deviation, express and implied warranties as to the safety of the ports of loading and discharge. The pandemic may have an effect on all of these obligations.

2.1 Availability of cargo

The charterer owes an absolute duty to provide a cargo available for loading at the time the vessel gives notice of readiness to load. Where the lack of cargo prevents laytime from starting, the charterer will be liable in detention.¹⁷⁴ Where laytime starts, laytime exceptions such as “However, where delay is caused to vessel getting in to berth after giving notice of readiness for any reason over which Charterers have no control, such delay shall not count as used laytime or demurrage” do not apply to breach of the duty to provide a cargo. This was the clause in *The Nikmary*, where the vessel arrived at the load port in December 2000 with dirty tanks which needed cleaning.¹⁷⁵ The charterers could have cancelled but did not. At the cancellation date, the charterers had cargo ready for loading but, shortly after, their supplier decided not to make their cargo available. A few days later, the tanks were passed ready to load and the master gave NOR. The vessel waited at berth until 2 January 2001. The charterer’s contractual arrangements with its supplier meant that it had no cargo available for loading until early January. This was not something over which charterers had no control, and as a result, once laytime began when the vessel retendered NOR after the tanks had been cleaned, the laytime exception did not apply.

¹⁷¹ The Lord Chief Justice’s Report 2020. https://www.judiciary.uk/wp-content/uploads/2020/11/6.6901_JO_Lord_Chief_Justices_AR_2020_WEB2.pdf.

¹⁷² The Law Society Gazette. Commercial court to return to in-person trials – except on Fridays. 11 May 2021. <https://www.lawgazette.co.uk/news/commercial-court-to-return-to-in-person-trials-except-on-fridays/5108447.article>.

¹⁷³ For a berth charter this is the berth, for a port charter it is the usual waiting place within the legal and commercial limits of the port, unless the vessel is able to proceed straight to her berth, in which case it will be the berth.

¹⁷⁴ *The Aello* [1961] A.C. 135. Damages are at large although are often claimed at the demurrage rate.

¹⁷⁵ *Triton Navigation Ltd v Vitol SA (The Nikmary)* (CA) [2003] EWCA Civ 1715; [2004] 1 Lloyd’s Rep 55.

Laytime will cease to run due to delays caused by the vessel's fault, but the relevant obligation here was to proceed to the load port with reasonable despatch, which had not been broken. Presentation after the cancellation date was not a breach. Even if it were a breach, it had no causative effect. The vessel would have properly cleaned her tanks before giving NOR, at a time when the charterers only had a cargo available to load in January.

2.2 Laytime and demurrage

The current public health emergency will have a marked impact on the incidence of laytime and demurrage under voyage charters. The restrictions in ports throughout the world, outlined in the introduction, have inevitably impacted on when laytime starts. A ship will not be 'ready' and in a position to give notice of readiness, NOR, until the crew have had the necessary testing for COVID. This leads to a consideration of the requirement of free pratique.

In 2010 in *The Eagle Valencia* this was defined as: "official permission from the port health authorities that the ship is without infectious disease or plague and the crew is allowed to make physical contact with the shore; otherwise, the ship may be required to wait at quarantine anchorage for clearance."¹⁷⁶ If the obtaining of free pratique is a mere formality a valid NOR can be given before free pratique is obtained. In 1971 in *The Delian Spirit* Lord Denning MR said, *obiter*,

"I can understand that if a ship is known to be infected by a disease such as to prevent her getting her pratique, she would not be ready to load or discharge. But if she has apparently a clean bill of health, such that there is no reason to fear delay, then even though she has not been given her pratique, she is entitled to give notice of readiness, and lay time will begin to run."¹⁷⁷

Obtaining free pratique is no longer a mere formality in the new normal of COVID-19. The resultant delays will fall to owners' account. In the absence of a specific clause to the contrary,¹⁷⁸ the vessel will not be ready until free pratique is obtained and will not be able to give a valid NOR until that time. It is unlikely that the position is changed by a 'whether in free pratique or not' clause. The tribunal in London Arbitration 11/00¹⁷⁹ considered the clause in circumstances where after NOR was tendered, it became clear that four crew members did not have valid vaccination certificates. This delayed the grant of free pratique for 13 days. The tribunal held that the clause assumed that the vessel obtaining free pratique was a mere formality. As it was not, the NOR given was invalid.

The position, at least as regards the start of laytime, will be different if the charter contains a clause of the type seen in *The Linardos*¹⁸⁰ and *The Jay Ganesh*¹⁸¹ which permits NOR to be given if the vessel is prevented from berthing due to congestion, but the actual time lost until the vessel was in fact ready would not count as laytime or as time for demurrage. However, a NOR proved to be given by the master or chief officer with the knowledge that it was untrue i.e., in the knowledge that the vessel was not then ready, would be ineffective to start time running. It is possible, by analogy, that this may also mean that charterer's right to cancel would not arise until the subsequent discovery of unreadiness. In the context of the pandemic and the crew's health, there are currently no vaccines being made available for seafarers, so vaccine certificates would not be available, but a master whose vessel had been at sea for the previous fourteen days, and whose crew had not shown symptoms of COVID-19, would be reasonable in assuming that free pratique through testing of the crew would be a "mere formality".

¹⁷⁶ [2010] 2 Lloyd's Rep 257.

¹⁷⁷ [1972] 1 QB 103, 124.

¹⁷⁸ See Part D, below.

¹⁷⁹ (2000) 545 LMLN 3.

¹⁸⁰ [1994] 1 Lloyd's Rep 28, CA.

¹⁸¹ [1994] 2 Lloyd's Rep 358, QB.

As well as delays in obtaining free pratique, vessels may face quarantine either because of a finding of COVID-19 infection among the crew during the health inspection, or as a routine measure on incoming vessels or vessels coming from particular countries. The Scottish decision of *White v Winchester* in 1886 shows that where a quarantine restriction is placed on a vessel, she cannot be considered ready to load or discharge.¹⁸² The result of the restriction is that the work is prevented and laytime cannot begin to run. Various tanker charters provide for quarantine to count against laytime where the charterers order the vessel to a port which is already quarantined, but not when the port nominated subsequently becomes subject to quarantine.¹⁸³ A similar provision exists in clause 17(a) ASBATANKVOY form, but the reference to charterers 'sending' a vessel to a port means that the clause would not apply to ports stipulated in the charter.

Obtaining free pratique and any period of quarantine will delay the start of laytime. Once laytime starts, it will continue running unless interrupted by an event falling within a laytime exception or a delay caused by the fault of the shipowner. General charter exceptions will not suspend the running of laytime.¹⁸⁴ The provisions of the Hague Rules incorporated under a clause paramount are also irrelevant to the running of laytime and demurrage.¹⁸⁵ Nor will restrictions on loading or discharge imposed by the port authority affect the running of laytime and demurrage. In *The Maria G* the harbour master at Calcutta, fearing the effect of an expected bore, ordered the ship to shift from an alongside berth to buoys.¹⁸⁶ On the basis that the local law made it an offence for the charterers to attempt to load during the period the vessel was away from the berth, laytime continued to run. Schofield on *Laytime and demurrage* concludes: "It therefore seems that to stop laytime on the basis of illegality, any prohibition must be of a permanent or, at least, indefinite nature."¹⁸⁷ Once laytime expires and the vessel goes on demurrage, demurrage will continue until the completion of loading or discharging, as the case may be. It will not be interrupted by the laytime exceptions but will be interrupted by delays caused by fault of the shipowner. This is the famous maxim 'Once on demurrage always on demurrage'.

Laytime will cease to run if there is a specific laytime exception covering event, such as shortage of port labour in the case of the pandemic, which is delaying the loading or discharging operations. In *Leonis Steamship Company, Ltd. v. Joseph Rank, Ltd. (No. 2)*, (1908) 13 Com. Cas. 161, Bigham J held that an obstruction was caused where there was a delay outside the control of the charterer in loading due to congestion in the port. In *The Radauti*¹⁸⁸ the Court of Appeal held that "obstruction" in a force majeure clause¹⁸⁹ covered the inability of a vessel to get to her berth because of congestion; the degree of congestion was clearly irrelevant as was the likelihood of congestion. Obstructions in getting the cargo to the port will not be covered by such a laytime exception¹⁹⁰ unless there are no storage facilities at the port for the particular cargo.¹⁹¹

The knock-on effects of antecedent events such as a strike may also delay loading or discharge and such a clause will provide an exception, if the charterer can prove that loading or discharging was delayed by

¹⁸² (1886) 23 SLR 342.

¹⁸³ For example, ASBATANKVOY cl.17(a), BP Voy 5 cl.37, Exxonmobilvoy 2012 cl.23.

¹⁸⁴ *The Johs Stove* [1984] 1 Lloyd's Rep 38.

¹⁸⁵ *Leeds Shipping v Duncan, Fox & Co* [1932] 42 Ll.L. Rep 123.

¹⁸⁶ [1958] 1 Lloyd's Rep. 616.

¹⁸⁷ John Schofield. *Laytime and Demurrage* (8th ed Informa law from Routledge 2021) at 4.537.

¹⁸⁸ [1988] 2 Lloyd's Rep. 416.

¹⁸⁹ Clause 33 "Force majeure: . . . or any other . . . hindrances happening without the fault of the Charterers . . . delaying . . . discharging . . . of the cargo are excepted and neither the charterers nor the shippers should be liable for any loss or damage resulting from any such exempted clause and time lost by reason thereof shall not count as laydays or days on demurrage."

¹⁹⁰ *Grant v Coverdale* (1884) 9 App Cas 470. Similarly, in *Bunge y Born v. Brightman* (1925) 22 Ll.L.Rep. 395 the House of Lords held that an exception of strikes, obstructions, or stoppages "on the railways or in the docks or other loading places" did not exonerate the charterers from liability for delay in loading caused by a strike on a railway between the place of storage and the port, since "railways" referred only to railways within the port.

¹⁹¹ *Hudson v Ede* (1868) L.R. 3 QB 412 where no facilities for storing grain at the load port and delay due to ice in bringing them down river to the port counted as a loading exception.

an event taking place prior to the vessel getting to the port. *Carboex S.A v Louis Dreyfus Commodities Suisse S.A*¹⁹² involved clause 9 of the Amwesh form which provided: "9....In case of strikes, lock-outs, civil commotions or any other causes included but not limited to breakdown of shore equipment or accidents beyond the control of the Charterers consignee which prevent or delay the discharging, such time is not to count unless the vessel is already on demurrage." The issue was whether strikes only delayed discharging when the vessel was in berth, or whether it covered delay in berthing, as a result of antecedent strikes. It was held that there was nothing in clause 9 to support the conclusion that its operation was limited to interruptions and delays occurring during the period of the excepted causes. In order to obtain the protection of clause 9, the charterer must establish that the event on which he relies falls within the clause and was the effective cause of delay to the vessel. The clause therefore excludes time actually lost to the vessel by reason of strikes, not merely time during which the vessel is prevented from entering berth by reason of strikes

In *Reardon Smith Line v. Ministry of Agriculture Fisheries and Food*¹⁹³, it was held that exceptions can be successfully relied upon even though the event preventing performance is operating at the date of the contract. An exception relating to obstructions in the port will not cover delays in bringing the cargo to the port¹⁹⁴ unless there are no storage facilities at the port and cargo cannot be brought from the inland facilities to the port.¹⁹⁵

Laytime will also be suspended due to delays attributable to fault on the part of the shipowner. This will be the case even though the shipowner's fault is non-actionable.¹⁹⁶ Unless the shipowner is responsible for providing stevedores,¹⁹⁷ delays due to shortage of labour in the port will not amount to fault of the shipowner and laytime will not be interrupted, absent some relevant laytime exception.¹⁹⁸

Demurrage is the exclusive remedy for the shipowner for breaches by the charterer of loading and discharging within the specified laytime. Until recently there had been uncertainty as to whether this was the case, or whether demurrage only liquidated 'detention' losses, where the loss is the deprivation of the shipowner of the use of its vessel. The issue arose in *K Line PTE Ltd v Priminds Shipping (HK) Co, Ltd (The Eternal Bliss)*¹⁹⁹ which involved a claim by shipowners against charterers arising out of delay where the vessel was kept at the anchorage for some 31 days due to port congestion at the Chinese discharge port and lack of storage space ashore for the cargo. In consequence, when the cargo of soyabeans was discharged, it exhibited substantial mould and caking. This led to a cargo claim against owners, who then settled and sought to recover from voyage charterers by way of damages for breach of their obligation to discharge within the laydays.²⁰⁰ As a preliminary point of law, acting on the assumption that the delay had caused the deterioration of the cargo, at first instance Andrew Baker J held that damages could be claimed for the cargo claim resulting from the delayed discharge, notwithstanding the demurrage provision. He added that had he come to a different conclusion, there would have been no scope for implying an indemnity the owners' 'second string' to their bow. The Court of Appeal reversed the decision and held that demurrage liquidated all claims arising out of charterers' breach of their obligation to load/discharge the vessel within the agreed laydays.²⁰¹ Accordingly, all losses sustained by owners due to delays in loading and/or discharging, will be covered exclusively by demurrage. There is no scope for damages claims by owners for loss of subsequent

¹⁹² [2012] EWCA Civ 838.

¹⁹³ [1961] 1 Lloyd's Rep. 385; [1962] 1 Q.B. 42 (CA). The point did not arise when the case went to the House of Lords.

¹⁹⁴ *Grant v Coverdale* (1883-4) L.R. 9 App, Cas 470.

¹⁹⁵ (1867-68) L.R. 3 QB 412.

¹⁹⁶ *The Union Amsterdam* [1982] 2 Lloyd's Rep. 432.

¹⁹⁷ As was the case in *Harris v Best, Ryley & Co* (1892) 68 LT 76 (CA).

¹⁹⁸ *William Alexander & Sons v Aktieselskabet Dampskabet Hansa and others* [1920] AC 88 (HL).

¹⁹⁹ [2020] EWHC 2373 (Comm). 7 September 2020.

²⁰⁰ A surprising feature of the case was that owners had settled the cargo claim; under the Hague Rules, they would have had a good chance of resisting under Article IV (2) (q) (see fn. 120, above). Deterioration of the cargo due to delay in discharge due to congestion would very likely constitute such a cause.

²⁰¹ [2021] EWCA Civ 1712.

fixtures due to delay, nor for recovery of cargo claims due to deterioration of cargo as a result of delay in discharge.

As well as laytime, charterers may incur a liability for detention in respect of delays antecedent to the vessel's arrival at the load or discharge port, such as delays in nomination²⁰², delays in being able to become arrived due to charterers' lack of cargo.²⁰³ Some tanker charters, such as ASBATANKVOY, contain a warranty by charterers to nominate a berth that is "reachable on arrival" the effect of which would be to make the charterers liable for detention damages from the time the vessel arrived in a general sense at the port²⁰⁴, rather than arriving as an arrived ship to the time at which NOR can be given from when delay will be subject to the laytime and demurrage regime.

Charterers would be liable whatever the cause of the vessel not being able to reach the nominated berth on arrival, and this would cover waiting outside the port limits due to quarantine. The position would be different if the vessel was kept waiting due to quarantine due to the presence of COVID among persons on board – crew or stowaways – as this would be regarded as due to the fault of owners in respect of their obligation of providing a seaworthy vessel, irrespective of the fact that the fault might be non-actionable. It would be more difficult to assess this issue if the vessel was quarantined as a result of its trading previous to the voyage charter in question. A similar clause requires nomination of a berth that is 'always accessible' which will require the charterer to ensure that the berth can be left without delay at the completion of discharge.²⁰⁵

The pandemic may create difficulties for owners in providing supporting documents within the time stipulated in a demurrage time bar clause, usually 90 days from completion of discharge. However, owners cannot be required to do the impossible. In London Arbitration 18/89,²⁰⁶ the clause provided: 'Demurrage, if any, shall be payable by the charterer against owners' invoice supported by notices of Readiness and Statements of Facts from loading and discharge ports duly signed by shippers/receivers respectively'. The tribunal noted that there had to be read into the second sentence of the clause the qualification, after the recital of the required documents, 'if such exist'. Similarly, in *The Sabrewing*²⁰⁷ Gloster J stated that where the clause required presentation of documents signed by the terminal, if owners could not obtain the signatures within the 90 days, they could present letters or protest instead.

2.3 Safe berths, safe ports

Under voyage charters there is no warranty of safety as regards named ports or the approach to them and when the charterer is given an option to nominate from a range of named ports, the position will normally be the same; the nominated port will be treated as safe, as if it had been agreed and written into the contract ab initio. It is possible that a warranty of safety may be implied where the charter contains for nomination of a port within a range which is not specified by name.²⁰⁸ However, a nomination of a port that is impossible to enter will be illegitimate and a breach of contract by the charterer.²⁰⁹

²⁰² *The Timna* [1970] 2 Lloyd's Rep 409.

²⁰³ *The Aello* [1961] AC 135. *The Nikmary* [2003] EWHC 46 (Comm); (CA) [2003] EWCA Civ 1715.

²⁰⁴ Such as where the vessel reaches a waiting place which is outside the commercial and legal limits of the port. *The President Brand* [1967]. 2 Lloyd's Rep 338, QB.

²⁰⁵ *The Aconcagua Bay* [2018] 2 Lloyd's Rep. 381.

²⁰⁶ (1989) 254 LMLN 4.

²⁰⁷ [2008] 1 Lloyd's Rep 286.

²⁰⁸ See dicta of Donaldson J in *The Evaggelos Th*, 1971 2 Lloyds Rep 200, 204, a time charter case.

²⁰⁹ *The Springbank* [1919] KB 162. In *Mediterranean Salvage & Towage Ltd v. Seamar Trading & Commerce Inc (The Reborn)*, [2009] EWCA Civ 531 [55] and [58] Rix L.J. noted that, even in the absence of a warranty of safety, it may well be a breach of contract to order the vessel to a port or berth known to be unsafe, or obviously unsafe, because such an order is to an impossible port or berth; if such an illegitimate order is persisted in, that might amount to a repudiation of the contract.

There may be a safe berth warranty, but this will not import a warranty as to the safety of the port.²¹⁰ In the absence of a safe berth warranty, it is unlikely that one will be implied.²¹¹ For the same reason, there is no duty to renominate, if the charter port subsequently becomes unsafe, a position left open by the House of Lords in *The Evia (no 2)* which involved a time charter.²¹² The charterparty will either become frustrated, depending on the effects of the unsafety, or there may be the possibility of the shipowner proceeding to an alternative port if there is a relevant clause (e.g. 'as near as she may safely get'). The authors of *Voyage Charters* are of the view that no general duty or right of renomination exists once a nominated safe port becomes unsafe.²¹³

However, irrespective of any warranty of safety, the shipowner would not be required to enter an unsafe port and in the absence of a relevant clause (e.g. 'as near as she may safely get') the charter would be frustrated. If the charter provided for a range of ports to be nominated by the charterer based on *The Teutonia*, the owner would be entitled to discharge at another port within the discharge range and claim full freight.²¹⁴ The basis of this right seems to be due to the application of equitable principles, rather than any right or duty on the part of the charterer to renominate.²¹⁵

2.4 The Shipowner's obligations

2.4.1 Cancellation

Most voyage charters will provide an option for the charterer to cancel the charter if the vessel is not ready to load at the first load port by a specified date. The option to cancel is not qualified by any exceptions in the charterparty.²¹⁶

If a vessel is quarantined at the load port it will not be 'ready' to load and the owners will face the risk of cancellation by the charterers. In *The Austin Friars*,²¹⁷ the port authority prohibited loading until the doctor had visited the vessel and pronounced her free from infection. That occurred after the date in the cancelling clause, and the charterers had therefore validly brought the contract to an end.

The requirement of quarantine inspection in *The Austin Friars* would seem to mean that the charterers can cancel if the vessel has physically arrived at the loading port by the cancelling date, but free pratique has not yet been given. However, in *The San George*²¹⁸ the fact that the ship's gear was not ready at the cancelling date but could be made ready by the time the loading operations began, did not mean that the vessel was unready to load at the cancelling date. Applying this to free pratique at a load port where vessels are waiting at anchorage due to congestion, it could be argued that the vessel would be regarded as ready under the cancelling clause if free pratique would be achieved before the vessel could berth, or any quarantine imposed would have expired before that time. This may well be the case if, as Lord Denning stated in *The Delian Spirit* in distinguishing *The Austin Friars*, in connection with the vessel's entitlement to give notice of readiness: "It was a very special case. I can understand that, if a ship is known to be infected by a disease such as to prevent her getting her pratique, she would not be ready

²¹⁰ *The A.P.J. Priti* [1987] 2 Lloyd's Rep. 37 (C.A.).

²¹¹ *The Reborn*, [2009] EWCA Civ 531.

²¹² *Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes*, [1983] 1 A.C. 736 (1982).

²¹³ *Voyage Charters*, (fn. 114) at 5.56.

²¹⁴ *Duncan v. Koster (The Teutonia)* (1872) L.R. 4 P.C. 171.

²¹⁵ *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries* [1962] 1 Q.B. 42 (CA).

²¹⁶ *Smith v Dart* (1884) 14 Q.B.D. 105. Bad weather delayed the vessel from entering the port and obtaining free pratique. The cancelling clause provided: "should the steamer not be arrived at first loading port free of pratique and ready to load on or before the 15th of December next, charterers have the option of cancelling or confirming this charterparty." The vessel arrived off the first loading port on 15th December, but free pratique could not be obtained as bad weather prevented the master from going ashore. The charterers therefore cancelled the charterparty. The exception of perils of the sea in the charter did not prevent the charterers from cancelling.

²¹⁷ (1894) 10 T.L.R. 633.

²¹⁸ [1951] 1KB 223.

to load or discharge. But if she has apparently a clean bill of health, such that there is no reason to fear delay, then even though she has not been given her pratique, she is entitled to give notice of readiness, and laytime will begin to run.”²¹⁹ However, in the continuing pandemic it would be difficult to show that the vessel did have an apparent clean bill of health such that there was no reason to fear delay so that obtaining free pratique could be regarded as a mere formality.

2.4.2 The approach voyage

The owner’s obligation is to commence the approach voyage at a time at which it could be reasonably expected to arrive at the load port by the date specified in the ‘ETA’ (estimated time of arrival) or ‘estimated ready to load’ statement in the charterparty. Exceptions clauses will not protect the owner from delays in leaving the previous port of discharge to commence the approach voyage, unless specifically worded to do so, and will only cover delays occurring during the approach voyage.²²⁰

2.4.3 Deviation and Redirection. The effect of a ‘near clause’

The obligation not to deviate is implied into voyage charters and its effects are as discussed under this heading in the section on ocean bills of lading. It is questionable whether a deviation to effect a crew change, would be permissible. In the context of a departure from a waiting anchorage to another port to do so, laytime and demurrage would be interrupted for the time taken from leaving anchorage to returning there, as held in *The Stolt Spur*.²²¹

Some redirection may be possible through the operation of a ‘near’ clause, which qualifies the discharge port nominated in the charter with the following words: ‘. . . or so near thereto as she may safely get and lie always afloat’. In certain circumstances, the clause will entitle the shipowner to discharge at a nearby alternative port if the charter port is unusable and thereby claim the freight due on ‘right and true delivery’ of the cargo. It will also entitle it to claim demurrage if loading or discharge at the alternative port exceeds the permitted laytime.

To rely on the clause, the alternative port must be within the ‘ambit’ of the named port. The meaning of this term was considered in *The Athamas*.²²² The vessel was chartered for a voyage from India to two named ports in South East Asia – Saigon and Phnom Penh. After discharging about two-thirds of her cargo in Saigon in March 1959, the local pilotage authority unexpectedly refused to take the vessel up the Mekong River to Phnom Penh during the low-water season, which lasted until August. The reason was that the pilotage authority required the vessel to maintain a minimum speed of 10 knots, which was beyond her capacity. The shipowners accordingly discharged the balance of the cargo in Saigon. The Court of Appeal held that they were entitled to rely on the near clause because Saigon, although 250 sailing miles distant from Phnom Penh, was the nearest safe port that was a viable alternative discharge port for this particular cargo off this particular vessel. It also held that where the charter provides for discharge at two named ports, discharge at the first named port can entitle the shipowner to claim freight under the clause if discharge at the second named port is prevented.

²¹⁹ [1972] 1 QB 103, 124.

²²⁰ *Monroe Brothers Ltd v Ryan* [1935] 2 KB 28, *Evera SA Commercial v North Shipping* [1956] 2 Lloyd’s Rep 367 (*The North Anglia*) and *The Myrtos* [1984] 2 Lloyd’s 449.

²²¹ [2001] EWHC 522 (COMM) [2002] 1 Lloyd’s Rep 786.

²²² [1963] 1 Ll. Rep. 287. CA.

In contrast, in *Metcalfe v Britannia Ironworks*, the shipowner was not entitled to rely on the clause when faced with a similar period of delay in getting to the charter discharge port of Taganrog.²²³ This was located in the Sea of Azov which had frozen up and would remain so for three months. This eventuality was foreseeable by both parties, unlike the requirement by the port authorities in *The Athamas*, that the vessel maintain a minimum speed of 10 knots when navigating in the low-water season. Moreover, the parties had addressed this eventuality by inserting ice clauses into the charter.

Even if the clause appears to cover the facts of the case, there is still a further hurdle that the shipowners must surmount if they are to be able to rely on it to claim their freight. The shipowners must establish that the time they would have to wait before they could enter the contractual port would amount to an 'unreasonable' period of delay. In deciding this, the court must balance out the costs to the shipowners in lost time if they have to wait for the obstacle to clear, against the trans-shipment costs to charterers in allowing discharge to take place at a non-contractual port or berth.²²⁴

In the pandemic, a 'near' clause may operate in cases of unforeseen obstacles arising at the port of discharge, so entitling the shipowner to discharge elsewhere and claim freight.

2.4.4 Non-contractual services

The pandemic may lead to agreed variations in discharge ports or rotation under both time and voyage charters. In a voyage charter, if remuneration is not expressly agreed, this will lead to an award of quantum meruit to the owners in respect of the additional services performed by owners. In *The Saronikos*,²²⁵ Savile J awarded compensation on the basis of bunkers, plus running costs, plus estimated profit for the time in question. The decision was applied by the arbitrator, Mr Schofield, in *Ameropa SA v Lithuanian Shipping*,²²⁶ where the rotation of ports was varied during the Ebola epidemic of 2014 in West Africa, at owner's suggestion. The arbitrator had found that this gave rise to a claim for quantum meruit compensation, which should be based on the time charter equivalent in the present charter, plus the bunkers consumed, but limited this to the voyage from Douala back to Monrovia. The compensation would not include the extended approach voyage for a subsequent charter which had not even been entered into when the parties agreed to vary the present charter.

3. Time Charters

Time charters are contracts for the use of a vessel for a specified period of time. Five issues need consideration in connection with the pandemic: unsafe ports; off-hire; deviation; delivery and cancellation; and redelivery.

3.1 Unsafe ports

A key question arising is whether the outbreak of COVID-19 in a country would make its ports unsafe, so as to require the charterer to renominate a port. This is an issue that would have been particularly important at the start of the pandemic. The possible risks to the vessel are that if it proceeds into a port affected by a potential outbreak, there is risk that the crew may get infected with this new virus, and also the possibility of the ship getting blacklisted in other countries, as yet unaffected by the virus. Under a time charterparty there will usually be an express safe port warranty, but in the absence of a relevant clause, there may be an implied, strict warranty that the ports nominated by the charterer are safe for

²²³ [1877] 2 QBD 423.

²²⁴ *Dahl v Nelson* (1881) 6 App. Cas 38 (HL).

²²⁵ [1986] 2 Lloyds Rep 277.

²²⁶ [2015] EWHC 3847 (Comm).

the vessel;²²⁷ and a continuing obligation on the charterer to renominate²²⁸, if the port it had ordered the vessel to subsequently becomes unsafe.

The classic definition of an “unsafe port” was provided by Sellars LJ in *The Eastern City*²²⁹: a port nominated by charterers is safe if “in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship...”.

It is uncertain whether potential exposure of the crew could amount to unsafety, but the knock-on effects of going into such a port, could amount to rendering it legally unsafe for the vessel. First, there is the risk of subsequent blacklisting of the vessel in other countries, and second, there is the risk of delays due to quarantine measures in the affected port itself or in subsequent ports which the vessel visits.

On what we know of the effects of the pandemic, none of these risks eventuated. Crew safety could be assured by protective measures in the port in question, and there seem to have been no incidents of blacklisting. The worst that appears to have happened is that ships calling at ports (potentially) affected by an outbreak have been subjected to mandatory 14 day quarantines when arriving at certain other ports in their trading. This type of delay is not enough to render a port unsafe. To do that, the delay must be so substantial as to frustrate the contract. In *Unitramp v. Garnac Grain (The Hermine)*,²³⁰ a charter was entered into on the Baltimore Form C, for ships to be nominated, for three voyages from the U.S. Gulf to north Europe. The vessel was ordered to Destrehan, a port on the Mississippi River about 140 miles from the open sea. She loaded safely and departed safely but was then held up about 115 miles downriver from Destrehan because of silting at the Southwest Pass. The usual time to reach the open sea from Destrehan was 10 to 12 hours, but because of the silting the ship was held up for about 30 days. The Court of Appeal held that delay caused by an obstruction, would render a port unsafe only if it was so long as to amount to frustration of the adventure, which was acknowledged not to be the case here. The Court of Appeal made no decision on the issue of whether an obstruction 100 miles out from the port, could constitute unsafety.

Getting this issue wrong and refusing to proceed to the nominated port in early 2020 for instance, would have entailed severe consequences for the shipowner. Certainly, a liability in damages and also the possibility that this would constitute repudiation of the charter.²³¹

3.2 Off-hire

An important question in this context is: to what extent will delays in performance of the charterer’s orders, due to the effect of the pandemic, put the vessel off-hire? This requires analysis of three questions. Is time lost due to prevention of the full working of vessel? If so, is this due to an off-hire event? If so, how much time is lost? This will require analysis of the nature of the off-hire clause, whether a net or a period clause. What is the effect if the off-hire event is due to charterer’s breach?²³²

²²⁷ *The Evaggelos Th* [1971] 2 Lloyd’s Rep 200, 204, a time charter case. Where the charterparty leaves it to charterers to nominate load and discharge ports or (as in a time charter) to decide more generally where to send the vessel, then a safe port warranty may be implied. For a discussion of the question in the light of developing case law, see R. Gay, Safe port undertakings: named ports, agreed areas, and avoiding obvious dangers – *The Archimidis*, [2010] LMCLQ, 119 and C. Ward, Unsafe berths and implied terms reborn [2010] LMCLQ, 489.

²²⁸ *Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes (The Evia (no 2))*, [1983] 1 A.C.

²²⁹ [1958] 2 Lloyd’s Rep 127. The definition has been so widely used subsequently that it has attained a standing equivalent to a statutory definition. It certainly appears at the start of any discussion of unsafe ports in papers on the pandemic – including this one.

²³⁰ [1979] 1 Lloyd’s Rep. 212 (C.A.).

²³¹ As in *The Nanfri* [1979] AC 757 with the owners’ wrongful refusal to obey charterers’ orders to issue freight prepaid bills of lading.

²³² *Lensen v Anglo-Soviet* (1934) 50 Ll. L. Rep 62; (1935) 52 Ll. L. Rep 141.

A very widely used time charter form, NYPE 1946, contains this off-hire clause:

15. That in the event of the loss of time from deficiency of and/or default of men or stores, fire, breakdown or damages to hull machinery or equipment, grounding, detention by average accidents to ship or cargo, dry-docking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost...

Under English law, 'deficiency and/or default of men' will not cover crew illness, although this is the position in the US, but it will come within 'any other cause preventing the full working of the vessel' as will detention of the vessel due to the fact that it has crew on board that have exceeded the maximum time at sea permitted under the Maritime Labour Convention 2006. In *The Apollo*,²³³ two crew discharged in Naples with suspected typhus. At next load port in Liberia, health officers inspected the ship and were informed of what had happened in Naples. The examination was completed at 03:30 hours on 28 March, but free pratique was not granted until 10:30 on 29 March. At 10:36, on 29 March, the vessel proceeded towards the loading berth and began loading at 11:18 hours. The charterers subsequently claimed that the vessel was off hire from 03:30 hours on 28 March to 10:30 hours on 29 March, together with small items in respect of bunker consumption and stamp duties during the same period. Mocatta J held that the vessel would go off-hire under the "any other cause" provision.

In *The Laconian Confidence*,²³⁴ normal discharge ended at 23:25 hours on 26 May, and a joint survey established the presence remaining on board of 15.75 tons of rejected residue sweepings. The Bangladesh port authorities refused to allow *Laconian Confidence* to proceed to her next business because of the presence remaining on board of the residue sweepings. As a result, the vessel was delayed for nearly 18 days, until she was finally allowed to dump those residues and thereafter, to sail. Rix J noted that 'any other cause' was not limited to defects inherent in the vessel itself and could encompass legal restrictions, of the sort seen in *The Apollo*. Rix J stated that: "it is well established that those words, in the absence of "whatsoever", should be construed either ejusdem generis or at any rate in some limited way reflecting the general context of the charter and clause... A consideration of the named causes indicates that they all relate to the physical condition or efficiency of either vessel (including its crew) or, in one instance, cargo. There is, moreover, the general context, emphasized for instance by Mr. Justice Kerr in *The Mareva AS* (at p.382), that it is for the owners to provide an efficient ship and crew.²³⁵ In such circumstances, it is to my mind natural to conclude that the unamended words "any other cause" do not cover an entirely extraneous cause, like the boom in *Court Line*, or the interference of authorities unjustified by the condition (or reasonably suspected condition) of ship or cargo."

Under a standard off-hire clause, an owner would not take the risk of delay due to the interference of authorities, at any rate where that interference is something beyond the natural or reasonably foreseeable consequence of some named cause. The position would be different with the amendment of the clause to include the word "whatsoever", which would cover delay due to unexpected or capricious actions of port authorities.

3.2.1 Effect of the extra word 'whatsoever'

These words were added to the clause in *The Apollo* but their presence made no difference to the conclusion that the vessel had gone off hire. They might make a difference in connection with automatic quarantine restrictions based on the vessel's previous ports of calls in circumstances where arguably this detention would not fall under the 'any other cause' provision in the NYPE clause. This is because

²³³ [1978] 1 Lloyd's Rep. 200.

²³⁴ [1997] 1 Lloyd's Rep 139.

²³⁵ Although the words 'whatsoever' were added to the clause in *The Apollo* their presence made no difference to the conclusion that the vessel had gone off hire.

the quarantine is not based on crew illness but merely on the COVID situation in the previous port of call.

Other wordings can be found in NYPE 1993 clause 17 which lists as off-hire events: “deficiency (and/or default) of men” fire, breakdowns or damage to the vessel, drydocking or “any other (similar) cause preventing the full working of the vessel”. The Baltimore form further states that any ‘detention’ will be for the charterers’ account (unless caused by the negligence of owners). The Shelltime 4 form clause 21 puts the vessel off-hire “on each and every occasion that there is loss of time (whether by way of interruption in the vessel's service or, from reduction in the vessel's performance, or in any other manner); [...]

(iii) for the purpose of obtaining medical advice or treatment for or landing any sick or injured person (other than a Charterer's representative carried) or for the purpose of landing the body of any person (other than a Charterer's representative), and such loss continues for more than three consecutive hours; or

(iv) due to any delay in quarantine arising from the master, officers or crew having had communication with the shore at any infected area without the written consent or instructions of Charterers or their agents, or to any detention by customs or other authorities caused by smuggling or other infraction of local law on the part of the master, officers, or crew, or to any detention by customs or other authorities caused by smuggling or other infraction of local law on the part of the master, officers, or crew;”

Bunkers and port charges relating to the period of off-hire will not be deductible unless the clause specific provides for this. They can be recovered only if the period of delay can be shown to have been a breach of charter by owners, for instance, by unseaworthiness through having COVID crew on board, an issue which will be discussed later.

3.2.2 Indemnity claims against time charterers

An express indemnity against the consequences of following charterers’ orders is common to many forms of charter such as the Baltimore form and the 1993 and 2015 NYPE forms. In the absence of such an express indemnity in a time charter, as is the case with the NYPE 1946 form, the Court of Appeal held in *The Island Archon*, that an indemnity would be implied as the corollary of the right of charterers to give orders as to the employment of the vessel.²³⁶ The right of recovery under the time charter indemnity is not dependent on any fault on the part of charterers, although the burden of proof is on owners to show that compliance with charterers’ order as to employment was the cause of the loss or damage sustained. Recovery by owners under the indemnity requires an unbroken chain of causation between the charterer’s order and the loss sustained. This may be broken by intervening events, such as the negligence of the master.

Not every loss sustained in compliance with charterer’s orders will be recoverable by way of indemnity. Losses which the shipowner has agreed to bear will not be recoverable. This was a point stressed in *The Island Archon*. Determining the risks owners have agreed to bear depends upon the foreseeable risks of trading under the charterparty limits at the date the charter was entered. In determining what risks the owners have assumed, account must be taken of the provisions of the charter.

It has been suggested that off hire due to automatically imposed quarantines of this type, assuming there is the addition of the word ‘whatsoever’ to ‘any other cause’, will be recoverable by way of the express or implied indemnity under a time charter, as a direct consequence of the charterers ordering the vessel to that particular port. Only if the vessel were ordered to such a port under a previous charter, would there be no indemnity against a new time charterer in respect of the quarantine at the subsequent port imposed as a result of past trading to that port. The indemnity could, however, form the basis of a claim against the previous charterer. As against this, it could be argued that such quarantines and the epidemics, or pandemics that give rise to them, are foreseeable risks of trading

²³⁶ [1994] 2 Lloyd’s Rep 227 (CA).

which the owner has voluntarily undertaken. Epidemics are hardly unexpected given SARS in 2002 and Ebola in 2014. In any case, for time charters concluded after the declaration of a global pandemic, owners must surely be taken to have voluntarily assumed such risks in allowing the vessel to be employed at such places.

3.3 Deviation

The obligation not to deviate is not implied into time charters. The relevant obligation of the master is to follow charterer's employment instructions, including those as to the route to be taken, and with 'utmost despatch', but subject to his responsibility for the safety of ship, crew and cargo.²³⁷ The master's responsibility for the safety of the crew would justify a departure from the charterer's employment instructions in deviating to a port at which the sick crew member could obtain treatment. Additionally, many charterparties will incorporate some version of the Hague Rules, which will bring in a 'liberty to deviate' under Article IV (4).²³⁸ Therefore, a deviation to enable a crew member to obtain treatment may be made, although many ports will refuse to allow the crew member ashore. In such circumstances, the vessel would probably not go off-hire for the period of the deviation, unless the words 'whatsoever' were added to the standard NYPE 1946 off hire clause, or unless there is specific reference to this in the off-hire clause in question, as with clause 21(iii) of Shelltime 4. However, a deviation to effect a crew change would probably place the vessel off-hire, heading of 'any other cause preventing the full working of the vessel' in the off-hire clause in NYPE 1946. BIMCO²³⁹, one of the main global shipping industry associations, have recently drafted a clause to deal with such deviations.

Many charters have specific deviation clauses which will put the vessel off-hire for the period of such a deviation. Specific COVID-19 clauses that were agreed, would take precedence over such clauses in the event of a deviation, to enable a crew member to obtain medical treatment. Charterers would not be able to claim for additional bunkers consumed during such a deviation, and even if the vessel were to go off-hire for the period of deviation, unless specifically stated in that clause, bunkers consumed will not be claimable. Charterers would have to establish a breach of contract by the owners.

3.4 Delivery and cancellation

The time charter will provide that it begins with the delivery of the vessel into the charterer's service at a specified time and place and will generally contain a right to cancel if the vessel is not so delivered. The vessel must be 'ready' on delivery and, by reference to the voyage charter case of *The Austin Friars*²⁴⁰, this would not be the case were the vessel to arrive and be placed in quarantine pending the results of test on the crew.

3.5 Redelivery

Redelivery of the vessel by time charterers at the end of the charter-period may be late as a result of quarantine delays at the final discharge port. Absent an exception clause covering late redelivery, charterers will be liable in damages, based on the difference between the market rate and the contract rate, together with hire continuing until the date of actual redelivery.²⁴¹ The position may be different if the delay at the final discharge port is due to quarantine being imposed on the vessel due to fault of the owners. This may be made out if the quarantine was imposed by reason of discovery of COVID-19 in crew members during medical inspection, which would have rendered the vessel legally unseaworthy

²³⁷ *The Hill Harmony* [2001] 1 AC 638.

²³⁸ "Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom."

²³⁹ Baltic and International Maritime Organisation (BIMCO), <https://www.bimco.org/>.

²⁴⁰ (1894) 10 T.L.R. 633. See page 46.

²⁴¹ *The Achilles* [2008] UKHL 48.

at the start of the last voyage or have amounted to a failure to maintain the efficiency of the vessel. If the time charter contains a clause paramount, the owners might have a defence to breach on the basis of due diligence, but it is arguable that delay due to non-actionable fault should still not be for charterer's account, by analogy with the position as regards delays in voyage charters and their impact on the laytime and demurrage regime.

4. Multimodal carriage of goods

4.1 Introduction

Multimodal Transport (or Combined Transport or Integrated Transport) is where goods are delivered door to door, by a combination of at least two transport modes – e.g., road/rail/sea/air. It will involve a Multimodal Transport Operator (MTO) who assumes contractual responsibility as a principal throughout, irrespective of whether it is also the party who actually performs the different stages of the transport. The MTO may actually perform only part of the carriage, such as the sea carriage, or may be a non-vessel owning carrier (NVOCC) and actually perform no part of the carriage. The MTO will issue a transport document, a Multimodal Transport bill of lading (MT Bill) or seawaybill (MT Sea Waybill) to the shipper which covers the entire transport operation.

The MTO will also take, as shipper, separate bills or transport documents—such as, with international road carriage, a CMR consignment note—from its subcontracting carriers. If the cargo is lost or damaged or delayed, the cargo interests will sue the MTO in contract and the MTO will in turn exercise a right of redress against its negligent subcontractor(s) under its separate contract with them, to which the cargo interests will not be party. The MTO will also wish to protect itself from indemnity claims from its subcontractors, in the event that the shipper or consignee brings a non-contractual action against them. This will be achieved by the inclusion in the multimodal transport document of the 'Himalaya' and Circular Indemnity clauses. The 'Himalaya' clause extends the protection of the carrier's exceptions and limitations to its sub-contractors and servants as regards that part of the contract of carriage that they perform. The Circular Indemnity clause constitutes a promise by the merchant under the bill of lading to the carrier not to sue the carrier's subcontractors and servants and to indemnify the carrier in the event that it does sue these parties. These clauses are ubiquitous in ocean bills of lading.

There is currently no international convention in force in relation to multimodal carriage. The 1980 United Nations Convention on International Multimodal Transport of Goods (the 1980 MT Convention)²⁴² failed to gather the required number of 30 ratifications; and the 2008 United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules)²⁴³ has to date obtained only five of the required 20 ratifications necessary for its coming into force. In the early 1990s, a set of standard contractual terms was prepared for incorporation into commercial contracts, namely the UNCTAD/ICC Rules for Multimodal Transport Documents 1992.²⁴⁴ These rules are, however, contractual in nature and, therefore, are subject to any applicable mandatory law. Thus, the international legal framework governing multimodal transportation consists of a complex array of international conventions designed to regulate unimodal carriage, diverse regional/subregional agreements, national laws (many of which are based on the 1980 MT Convention and/or the UNCTAD/ICC Rules), and standard term contracts.²⁴⁵

²⁴² For further information, see the UNCTAD website at <https://unctad.org/topic/transport-and-trade-logistics/policy-and-legislation/maritime-conventions>.

²⁴³ See the UNCITRAL website at https://uncitral.un.org/en/texts/transportgoods/conventions/rotterdam_rules. See also the UNCTAD website at <https://unctad.org/topic/transport-and-trade-logistics/policy-and-legislation/rotterdam-rules>.

²⁴⁴ For further information, see the UNCTAD website at <https://unctad.org/topic/transport-and-trade-logistics/policy-and-legislation/non-mandatory-rules>.

²⁴⁵ For an overview of the complex international liability framework, see the UNCTAD report Multimodal Transport: The Feasibility of an International Legal Instrument, UNCTAD/SDTE/TLB/2003/1. https://unctad.org/system/files/official-document/sdtetlb20031_en.pdf.

4.2 Liability regimes under the unimodal carriage conventions

Liability for multimodal transport will depend in any given case on contractual agreement, subject to domestic and/or regional or sub-regional law on multimodal transport – where applicable, and/or the international unimodal carriage conventions, operating either mandatorily or by contractual incorporation, in cases where the stage of transport where a loss occurred can be localized.²⁴⁶ The unimodal sub-contracts made by the MTO with the actual carriers will be subject to the unimodal conventions applicable to each stage. Apart from the three conventions for international sea carriage, there are unimodal conventions in force for international carriage of goods by road (CMR), rail (COTIF/CIM), inland waterways (CMNI) and air (Warsaw and Montreal Convention²⁴⁷).²⁴⁸ The conventions clearly apply to the contracts of carriage with the actual carrier and may also extend to those portions of the head contract for the multimodal carriage that are performed by international carriage covered by those unimodal conventions. For example, international road carriage within Europe will be subject to the mandatory application of the CMR,²⁴⁹ and international sea carriage will, generally, be subject to the mandatory application of whichever sea carriage convention is in force at the port of loading which will generally be either the Hague or Hague-Visby Rules, or national law implementing them, such as the US Carriage of Goods by Sea Act 1936.²⁵⁰ Under English law, it is widely accepted, but not definitively established, that multimodal bills of lading and waybills fall under the provisions of COGSA 1992²⁵¹ as regards title to sue.²⁵²

²⁴⁶ Ibid.

²⁴⁷ For an analytical overview of relevant liability regime for carriage of goods by air, see also an UNCTAD Report, Carriage of Goods by Air: a Guide to the International Legal Framework, UNCTAD/SDTE/TLB/2006/1. https://unctad.org/system/files/official-document/sdtetlb20061_en.pdf.

²⁴⁸ These are: Convention on the Contract for the International Carriage of Goods by Road (Geneva, 19 May 1956) (CMR); Appendix B to the Convention concerning International Carriage by Rail (COTIF) of 9 June 1999; Uniform Rules Concerning the Contract of International Carriage of Goods by Rail (CIM), applicable with effect from 1 July 2006 (COTIF/CIM); Budapest Convention on the Contract for the Carriage of Goods by Inland Waterways (Budapest, 3 October 2000) (CMNI); Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw, 12 October 1929) (Warsaw Convention); Convention for the Unification of Certain Rules for International Carriage by Air (Montreal, 28 May 1999) (Montreal Convention).

²⁴⁹ Article 1 (1) provides: "This Convention shall apply to every contract for the carriage of goods by road in vehicles for reward, when the place of taking over of the goods and the place designated for delivery, as specified in the contract, are situated in two different countries, of which at least one is a contracting country, irrespective of the place of residence and the nationality of the parties."

In the UK, in *Quantum Corp v Plane Trucking* [2002] EWCA Civ 350, and in many other CMR countries, article 1 (1) has been interpreted as applying the CMR to the international road leg of a multimodal contract for the carriage of goods falling within article 1 (1), whether before or after the carriage by the other mode of transport. However, the Courts of Germany and the Netherlands have interpreted the article 1 of the CMR as meaning that the Convention does not apply to multimodal contracts, respectively: BGH 17.7.2008, I ZR 181/05 (2009) *European Transport Law* 196 (Germany); Hoge Raad 1.6.2012, SS 2012, No 95 (Godafoss).

²⁵⁰ Article I (b) of the Hague and Hague-Visby Rules provides that "Contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document *relates to the carriage of goods by sea*' (emphasis added). Under English law this has been interpreted as a clarification that the Rules apply to sea legs of a multimodal transport operation covered by a multimodal bill and not as a prohibition of the application of the rules to multimodal carriage. *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 QB 402 (QB); *Mayhew Foods Ltd v Overseas Containers Ltd* [1984] 1 Lloyd's Rep 317 (Com Ct).

²⁵¹ See fn. 61 above and accompanying text.

²⁵² David Foxton and others. *Scrutton on Charterparties and Bills of Lading*, (24th ed. Sweet & Maxwell 2020), at 18-015, is of the view that there is no reason to doubt that such bills are within COGSA 1992 whereas Sir Guenter Treitel and Professor Francis M B Reynolds. *Carver on Bills of Lading* (4th ed Sweet & Maxwell 2017), at 8-081, is of the contrary view, given that at common law 'bill of lading' entails a sea carriage document and the 1992 Act gives no indication of any legislative intent to depart from this common law concept.

The mandatory unimodal carriage conventions are based on a presumption of fault on the part of the carrier (see e.g. Hamburg Rules,²⁵³), typically with specific provisions on delay, and varying forms of exceptions. These excepted perils differ between conventions, but, except in the case of the Hague and Hague-Visby Rules, they are restricted to instances where a loss occurs without the fault of the carrier or its servants, agents, and subcontractors. Under the Hague and Hague-Visby Rules, in contrast to the other unimodal conventions, there are two defences on which the carrier can rely which involve fault on the part of these parties – the so-called nautical fault exception in Article IV (2) (a) (negligence in the navigation or management of the ship), and the fire exception in Article IV (2) (b)²⁵⁴. A further difference to all other unimodal conventions is that the Hague and Hague-Visby Rules do not provide for the carrier's liability as regards delay in delivery of the cargo.

The MTO's contract with the shipper will be a segmented contract with different provisions on liability depending on whether the loss or damage can be localised to a particular stage of the carriage or whether the loss or damage is unlocalised. Most bills of lading in use for multimodal transport will contain a contractual default regime for unlocalised loss and then provide that for localised loss the applicable international mandatory convention or national law will govern. Most losses due to delays sustained by pandemic regulations, will probably be localized and often subject to the specific unimodal regimes set out below, but in cases of unlocalised loss where there is delay at different modes of the multimodal contract, the carrier would have a defence based on the contractual default regime.

There are major variations when it comes to limitation of liability. At the lower end of the scale there is sea carriage. Under the Hague Rules, the limits are £100 per package or unit, gold value,²⁵⁵ whilst under the Hague-Visby Rules they are 666.67 special drawing rights (SDR) per package or unit or 2 SDR per kg gross weight lost or damaged, whichever is the higher.²⁵⁶ Under the Hamburg Rules, the limits are 835 SDR per package or other shipping unit or 2.5 SDR gross weight of the goods lost or damaged, whichever is the higher.²⁵⁷ CMNI adopts the Hague-Visby limits, but with special provisions for containers.²⁵⁸ The CMR limit is 8.33 SDR gross weight,²⁵⁹ while the highest terrestrial limit is under the COTIF/CIM for international rail carriage, with a limit of 17 SDR per kg of gross mass short.²⁶⁰ The highest limitation figure is that in the Montreal Convention, which provides an unbreakable limit of 22 SDR per kg for carriage of goods.²⁶¹

Similar variation can be seen with regard to the relevant time allowed for bringing suit. For the sea carriage conventions, under both Hague and Hague-Visby Rules, suit must be commenced within one year from delivery or date when goods should have been delivered, failing which the claim is barred.²⁶² Under the Hamburg Rules, the period is two years.²⁶³ CMR provides a one year time limit, but three years in cases of wilful misconduct.²⁶⁴ The Montreal Convention and Warsaw Convention both have a

²⁵³ See e.g. Hamburg Rules, Article 5.1 "1. The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in Article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences."

²⁵⁴ The 'fire' exception to liability is not available in cases of negligence (i.e. fault) at management level.

²⁵⁵ Hague Rules, Article IV (5).

²⁵⁶ Hague-Visby Rules, Article IV (5) (a).

²⁵⁷ Hamburg Rules, Article 6 (1) (a).

²⁵⁸ CMNI, Article 20 (1): 'If the package or other loading unit is a container and if there is no mention in the transport document of any package or loading unit consolidated in the container, the amount of 666.67 [SDR] shall be replaced by the amount of 1,500 [SDR] for the container without the goods it contains and, in addition, the amount of 25,000 [SDR] for the goods which are in the container.'

²⁵⁹ CMR, Article 23 (3).

²⁶⁰ COTIF/CIM, Article 30 (2).

²⁶¹ Montreal Convention, Article 22 (3). The figure under the Warsaw Convention, subject to the 1955 Hague Protocol, is 17 SDR per kg. This was also the figure under the Montreal Convention, Article 22 (3), until it was raised at the end of 2009.

²⁶² Hague Rules, Article III (6); Hague-Visby Rules, Article III (6).

²⁶³ Hamburg Rules, Article 20.

²⁶⁴ CMR, Article 32 (1).

two year time limit.²⁶⁵ CMNI has a one year time limit.²⁶⁶ COTIF/CIM has a one year limit,²⁶⁷ but with a two year limit period in four specific instances.²⁶⁸

All the conventions have a provision rendering null and void express provisions of the contract that derogate from the convention to the benefit of the carrier – such as Article III (8) of the Hague and Hague–Visby Rules, Article 26 of the Montreal Convention and Article 5 of COTIF/CIM and Article 25 of CMNI. Under the Hamburg Rules, Article 23 (1) renders null and void any stipulation which derogates directly or indirectly from its provisions, but Article 23 (2) expressly permits the carrier to increase its responsibilities and obligations under it. In contrast, Article 41 (1) of CMR precludes any contractual derogation: ‘any stipulation which would directly or indirectly derogate from the provisions of this Convention shall be null and void’.

A further complication in the multimodal jigsaw is that some of the unimodal conventions make provision for limited application of their terms to other modes of carriage. Article 2 (1) of CMR deals with ‘roll-on, roll-off’ road carriage over another mode of transport and applies the convention to the whole of the carriage. This is subject to a proviso that applies if the damage, loss, or delay in delivery of the goods occurred during the other mode of carriage due to fault of the road carrier or by an event that could not have occurred solely in the course of and by reason of the other mode of carriage. In this event, CMR may be displaced and, instead, the carrier’s liability will be determined in the manner in which the liability of the carrier by the other means of transport would have been determined if a contract for the carriage the goods alone had been made by the sender with the carrier by the other means of transport in accordance with the conditions prescribed by law for the carriage of goods by that means of transport.

4.3 Rights of disposal, and redirection, under the unimodal carriage conventions

The non-sea unimodal conventions all contain some form of provision regarding the right of disposition by the consignor/consignee as well as stipulating for situations where delivery of the goods becomes impossible or is prevented. For example, CMR contains provisions on the right of disposition, which will be relevant to rerouting due to pandemic restrictions. Article 12 (2) gives a consignee with the second copy of the consignment note the right of disposition before the goods arrive at their destination. Either the consignor or consignee may change the destination while the goods are in transit. Article 14 deals with impossibility of carrying out the contract before the goods reach the delivery place. Article 15 deals with circumstances which prevent delivery of the goods at place designated for delivery. Article 16 entitles the carrier to recover cost of his request for instructions and expenses in carrying them out, unless caused by his wrongful act or neglect.

With air carriage, Articles 12 and 13 of the Warsaw and Montreal Conventions give the right of disposition to the consignor and the carrier may only receive instructions from the consignor until prompt notice of arrival at destination is given to the consignee at which time rights of disposition vest in the consignee. In the absence of such instructions or the consignee refusing to accept the consignment the right of disposition reverts to the consignor. The two air Conventions do not allow the diversion of cargo to a new destination upon the instruction of the consignor, although they do permit the delivery of the cargo to a person other than the consignee originally designated, provided the new delivery takes place at the original destination or in the course of the journey. However, rerouting by a substituted mode of performance, with the consent of the consignor is contemplated by Article 18 (4)

²⁶⁵ Montreal Convention, Article 35: Warsaw Convention, Article 29.

²⁶⁶ CMNI, Article 24.

²⁶⁷ COTIF/CIM, Article 48 (1).

²⁶⁸ Ibid, providing a two-year period in cases of action: ‘a) to recover a cash on delivery payment collected by the carrier from the consignee; b) to recover the proceeds of a sale effected by the carrier; c) for loss or damage resulting from an act or omission done with intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result; d) based on one of the contracts of carriage prior to the reconsignment in the case provided for in article 28’.

which provides: "If a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air."

Under the CMNI the shipper's rights of disposal are covered by Article 14²⁶⁹ which works in a similar fashion to the common law rules on the shipper's right to change the consignee under a bill of lading, in *Mitchell v Ede*.²⁷⁰ The exercise of the right is subject to the shipper reimbursing the carrier for all the costs and damages entailed in carrying out such instructions.²⁷¹ There is no right to redirect the destination of the cargo in the Convention.

4.4 Contractual regimes under MULTIDOC and COMBICONBILL²⁷²

BIMCO have produced two contractual forms for multimodal bills of lading – MULTIDOC and COMBICONBILL – both of which are available in bill of lading and waybill formats.²⁷³ Both forms adopt the presumed fault liability scheme that is inherent in the MT Convention and Hamburg Rules. This will apply as regards unlocalized loss, or loss which is localized at a stage which is not subject to any mandatory international carriage convention or national law. MULTIDOC provides that the MTO shall be responsible for the acts and omissions of his servants or agents when any such servant or agent is acting within the scope of his employment, or of any other person of whose services he makes use for the performance of the contract as if such acts and omissions were his own. There is a similar provision in COMBICONBILL as regards the responsibility of the carrier. Both spell out the common law delivery obligations of the carrier when in bill of lading format and set out special liability rules in cases of localized loss during sea carriage and inland waterway carriage, which include defences under the Hague-Visby Rules. A potentially significant difference between the forms is the express reference in MULTIDOC to liability for delay in delivery of the goods, provided the Consignor has made a written declaration of interest in timely delivery, which also applies in case of a loss arising during sea carriage (Clauses 10b and 11). This purely contractual liability, which is limited to the cost of the freight, would not be covered by a carrier's P&I Club which provides cargo liability cover only in accordance with the Hague and Hague-Visby Rules (which do not provide for liability for delay),²⁷⁴ or any other compulsorily applicable rules of law (i.e. only in cases where the Hamburg Rules, which envisage such liability, apply mandatorily).²⁷⁵

²⁶⁹ "14. Holder of the right of disposal

1. The shipper shall be authorized to dispose of the goods; in particular, he may require the carrier to discontinue the carriage of the goods, to change the place of delivery or to deliver the goods to a consignee other than the consignee indicated in the transport document.

2. The shipper's right of disposal shall cease to exist once the consignee, following the arrival of the goods at the scheduled place of delivery, has requested delivery of the goods and, (a) Where carriage is under a consignment note, once the original has been handed over to the consignee; (b) Where carriage is under a bill of lading, once the shipper has relinquished all the originals in his possession by handing them over to another person.

3. By an appropriate entry in the consignment note, the shipper may, when the consignment note is issued, waive his right of disposal to the consignee."

²⁷⁰ (1840) 11 Ad & El 888.

²⁷¹ Article 15 (c).

²⁷² Other forms for multimodal transport bills of lading exist, such as the FBL, developed by FIATA, the International Federation of Freight Forwarders Associations. Similar to MULTIDOC, the FIATA FBL incorporates the UNCTAD/ICC Rules for Multimodal Transport Documents. See <https://fiata.org/resources/fiata-documents.html>.

²⁷³ The latest versions are COMBICONBILL 2016 and MULTIDOC 95. Sample copies are accessible at: <https://www.bimco.org/contracts-and-clauses/bimco-contracts/combiconbill-2016>. and <https://www.bimco.org/Contracts%20and%20clauses/BIMCO%20Contracts/MULTIDOC%2095>.

²⁷⁴ A carrier may still be liable for delay in a cargo claim to which the Hague or Hague-Visby Rules apply, but this would be under national law; in the absence of mandatory liability for delay, the carrier will have complete freedom of contract to limit or exclude this liability. See S Ciger, 'Claims for Compensation for Delay in Delivery and Notice Requirements under article 23.4 of the Rotterdam Rules' (2015) 21 *Journal of International Maritime Law* 39.

²⁷⁵ See for instance Rule 34 Cargo liability of the GARD Rules on P&I Cover, https://www.gard.no/web/publications/document/chapter?p_subdoc_id=20747996&p_document_id=20747880.

Under MULTIDOC, the front of the bill incorporates the UNCTAD/ICC Rules. The default position is that the MTO is liable if the occurrence which caused the loss, damage or delay in delivery took place while the goods were in the MTO's charge, unless the MTO can disprove negligence.²⁷⁶ In addition, MULTIDOC brings in specific defences for goods carried by sea or by inland waterway, adding in the additional Hague-Visby defences found in Article IV (a) and (b) (nautical fault and fire), as well as IV (2) (c)-(p), but not (q), subject to requirement of the proof of exercise of due diligence to provide a seaworthy vessel.²⁷⁷ For limitation of liability, MULTIDOC adopts the twofold sea and road scheme of the UNCTAD/ICC Rules, with liability limits in accordance with the Hague-Visby Rules (subject to a limit of \$500 per package or customary freight unit where US Carriage of Goods by Sea Act 1936 (COGSA 1936) applies), except in cases not involving carriage by sea or inland waterways, where the liability limit of the CMR applies; liability for delay is limited to the cost of freight for the MT contract.²⁷⁸

Under COMBICONBILL,²⁷⁹ which can be used for either port-to-port or multimodal carriage, the carrier is liable for loss or damage to the goods occurring between the time when it receives the goods into its charge and the time of delivery. Eight specific defences are provided, based on the defences specified in CMR Article 17 (2), some of the special defences specified in CMR Article 17 (4) and the Hague Rules strike clause found in Article IV (2) (j). Where a loss occurs during sea carriage or carriage by inland waterways, the defences in the Hague-Visby Rules, including the nautical fault and fire defences, as well as the relevant liability limits apply.²⁸⁰ In other cases, liability is limited to 2 SDR per kg of weight, unless a higher value has been declared.²⁸¹ Liability for delay, if any, is limited to the cost of the freight for the transport²⁸².

Both BIMCO forms contain the following wide rights of redirection:

Clause 6 COMBICONBILL "Methods and Routes of Transportation" provides:

"(1) The Carrier is entitled to perform the transport and all services related thereto in any reasonable manner and by any reasonable means, methods and routes."

Clause 8 COMBICONBILL "8. Hindrances etc. Affecting Performance"²⁸³ provides:

"(1) The Carrier shall use reasonable endeavours to complete the transport and to deliver the goods at the place designated for delivery.

(2) If at any time the performance of the contract as evidenced by this Bill of Lading is or will be affected by any hindrance, risk, delay, difficulty or disadvantage of whatsoever kind, and if by virtue of sub-clause 8 (1) the Carrier has no duty to complete the performance of the contract, the Carrier (whether or not the transport is commenced) may elect to:

(a) treat the performance of this Contract as terminated and place the goods at the Merchant's disposal at any place which the Carrier shall deem safe and convenient; or

(b) deliver the goods at the place designated for delivery.

(3) If the goods are not taken delivery of by the Merchant within a reasonable time after the Carrier has called upon him to take delivery, the Carrier shall be at liberty to put the goods in safe custody on behalf of the Merchant at the latter's risk and expense.

(4) In any event the Carrier shall be entitled to full freight for extra costs resulting from the circumstances referred to above."

²⁷⁶ MULTIDOC, clause 10.

²⁷⁷ MULTIDOC, clause 11. It should be noted that this goes beyond the UNCTAD/ICC Rules: these include the special exception for nautical fault and fire on board a ship, but do not include the other Hague-Visby Rules exceptions which this clause introduces.

²⁷⁸ MULTIDOC, clause 12(e).

²⁷⁹ COMBICONBILL, clause 9.

²⁸⁰ COMBICONBILL, clause 11.

²⁸¹ COMBICONBILL, clause 10.

²⁸² COMBICONBILL, clause 12. This is in line, for instance with the liability limit for delay under the CMR, Art. 23 (5).

²⁸³ Clause 9 of MULTIDOC is to similar effect.

There are also similar provisions in both forms as regards the consignor's and consignee's obligations in relation to the return of containers supplied by or on behalf of the Carrier/MTO.

Clause 18 of MULTIDOC "Return of Containers" provides²⁸⁴:

(a) Containers, pallets or similar articles of transport supplied by or on behalf of the MTO shall be returned to the MTO in the same order and condition as when handed over to the Merchant, normal wear and tear excepted, with interiors clean and within the time prescribed in the MTO's tariff or elsewhere.

(b)(i) The Consignor shall be liable for any loss of, damage to, or delay, including demurrage, of such articles, incurred during the period between handing over to the Consignor and return to the MTO for carriage.

(ii) The Consignor and the Consignee shall be jointly and severally liable for any loss of, damage to, or delay, including demurrage, of such articles, incurred during the period between handing over to the Consignee and return to the MTO.

Any (container) demurrage incurred under the ocean bill by the MTO can be recovered from the consignor/consignee under the MT Bill on a back-to-back basis.

4.5 Liability for delays due to the pandemic

The liability regime under the default regime of the bills and that for localised loss under the relevant applicable unimodal convention, is likely to be the same as regards loss or damage due to pandemic-related delays. As already mentioned, the Hague-Visby Rules do not envisage liability for delay in delivery, but liability may arise if delay has caused a cargo loss or damage. In the CMR, Article 17 (1) provides the general rule on liability: "The carrier shall be liable for the total or partial loss of the goods and for damage thereto occurring between the time when he takes over the goods and the time of delivery, as well as for any delay in delivery". Liability for delay is dealt with by Article 19 which states that a delay in delivery may occur when:

– the goods have not been delivered within the agreed time-limit; or – failing an agreed time-limit, the actual duration of the carriage in regard to the circumstances of the case, and in particular, in the case of partial loads, the time required for making up a complete load in the normal way exceeds the time it would be reasonable to allow a diligent carrier.

Delay at borders was particularly acute in the early stages of the pandemic. Claims for damage to goods arising therefrom would probably be met by the road carrier raising the defence in Article 17 (2) of the CMR. This provides:

The carrier shall, however, be relieved of liability if the loss, damage or delay was caused by the wrongful act or neglect of the claimant, by the instructions of the claimant given otherwise than as the result of a wrongful act or neglect on the part of the carrier, by inherent vice of the goods or through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent.

Cases on the defence have up to now been seen in the context of cases of theft and armed robbery, and the English courts require the carrier to demonstrate utmost care, namely a "standard somewhere between, on the one hand, a requirement to take every conceivable precaution, however extreme, within the limits of the law, and on the other hand a duty to do no more than act reasonably in accordance with prudent current practice".²⁸⁵

In essence, the carrier must take measures that are 'feasible or practicable or sensible', considering the likelihood of the loss, as determined by the value of the cargo and the journey, as well as industry knowledge regarding, inter alia, available routes. The defence is likely to be successfully invoked in the context of loss of, damage to or delay in delivery of cargo due to government restrictions during the pandemic. Examples of such restrictions would be mandated rerouting to avoid quarantined areas, or by the sudden shortage of drivers due to isolation requirements or by the closure of borders, although

²⁸⁴ A similar provision is contained in COMBIDOC, clause 20.

²⁸⁵ *J. J. Silber Ltd. v. Islander Trucking Ltd.*, [1985] 2 Lloyd's Rep. 243, at 247.

closure of borders, alone, is unlikely to suffice if the carrier continued to accept consignments with knowledge that they would not be processed by customs' authorities.

However, a carrier may be required to take into account increasing actual or potential waiting times due to delays at or closing of borders, and plan in advance to avoid routes and border crossings that are known to cause significant delays. Failure to do so, may lead to the inapplicability of the defence in cases of loss due to border delays in transit.²⁸⁶ The position is different with unexpected governmental measures causing delay, such as the sudden border checks in Europe at the start of the pandemic, or the temporary French ban on allowing entry to accompanied road freight from the UK in December 2020.

Delay may also occur due to compulsory hospitalisation of the driver, following quarantine tests at the border. In this event, the carrier should take all possible steps either to designate substitute carriage or to send a new driver. Reliance on Article 17 (2) may not be possible if the carrier has not taken available steps to ensure its international drivers do not display any manifestation of infection. In the early months of the pandemic, COVID-tests would not be widely available, but the carrier could arrange temperature tests for its drivers.

For carriage of goods by air, the original Warsaw Convention 1929 provided two defences in Article 20:

1. The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.
2. In the carriage of goods and luggage the carrier is not liable if he proves that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

The defence of "negligent pilotage" has not been reproduced in subsequent protocols to the Convention and is only available in cases where the unamended Warsaw Convention 1929 applies.

Articles 18 (2) and 19 of the Montreal Convention set out the carrier's available defences for loss, damage, destruction, or delay of or to cargo. In connection with the effect of the pandemic on air carriage contracts, the significant defence in Article 18 (2) is that in heading "d" which is a defence for loss, damage, or destruction resulting from the 'act of public authority in connection with the entry, exit, or transit of the cargo', a defence not contained in the Warsaw Convention, and this could cover a governmental decision to suspend the import of non-essential cargo which leads to loss, damage, or destruction.

Article 19 MC gives a defence to the carrier if it proves that it and its servants and agents "... took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures". This wording is probably broad enough to include force majeure events related not only to acts of governmental customs authorities, but also situations involving the inability to operate aircraft due to crews isolating, governmental restrictions in the movement of people, or airports reducing the number of flight movements.²⁸⁷

²⁸⁶ See the French Case of *Comm. Carpentras*, 19.2.93 (1994) B.T. 636, where a carrier refused to continue carriage due to the tension in the Gulf, but where those risks were known when the contract was made. The carrier was unable to rely on the defence of unavoidable circumstances. See, too App. Paris, 27.5.80 (1980) B.T. 435 where a strike of customs staff occurred at one office, but the carrier could have put the goods through another office not affected by the strike and was not able to rely on the defence of unavoidable circumstances.

²⁸⁷ Leloudas, G, Soffin D "International Air Cargo in Time of Crisis: Global Challenges and Modal Shift Provide Transformational Opportunity in Commerce and Law". *Air and Space Law*, Volume 45, Issue 6 (2020) 563, 587.

With unlocalised loss due to quarantine delays at various stages in the multimodal contact, the carrier will escape liability on proof of such delays and on proof that these delays were not caused by any fault on its part – such as a road driver failing to obtain proof of a negative test in advance of starting on the international road journey and being required to take a test at the border, so contributing to delay, a delay which would be exacerbated if the test proved positive and a replacement driver had to be found.

D. Bespoke pandemic clauses

1. Introduction

In order to provide for appropriate allocation of the commercial risks associated with the pandemic, contracting parties may consider contractual approaches, in particular the development and use of appropriate contractual clauses and terms for incorporation into contracts. Relevant considerations vary, however, depending on the type of contract of carriage concerned and the relative bargaining power of the parties.

In the context of liner carriage, a highly concentrated industry, dominated by few global carriers, it is important to note that relevant contracts are not individually negotiated but are typically on the carrier's standard terms, often subject to one of the international mandatory cargo-liability regimes. Thus, the capacity of parties to introduce clauses into their contract of carriage to regulate the effects of a pandemic or epidemic, is limited in respect of clauses modifying the provisions of a relevant international carriage convention in favour of the carrier [or, in the case of CMR, in favour of both parties]. This is the case for contracts that are subject to the mandatory application of one of the unimodal international conventions on carriage of goods by sea, road, rail, air and inland waterways.

However, there is scope, apart from international road carriage subject to the mandatory application of CMR, for provision of clauses in favour of the shipper/consignee, and also for clauses governing periods outside the ambit of the relevant convention. So-called "Caspiana" clauses in bills of lading, permitting the carrier to discharge at an alternative port in the event of delays at the designated port of discharge, could for instance be modified, so as to provide for some apportionment of transshipment costs in the event of discharge at an alternative port. A contractual cap could also be provided on container demurrage, and provision for extension of free time, when the port of discharge is subject to delays in returning containers. However, given the significant imbalance in the respective bargaining power of the parties where cargo is carried on the carrier's standard terms, it is unlikely that in practice a carrier would agree to an increase in its liability beyond the mandatory levels set out in any applicable international convention. This consideration applies not only to in-house bills of lading and multimodal transport documents, but also to other standard form documents in commercial use, which have been developed by industry associations that are representing primarily carrier interests. Therefore, in practice, the scope for equitable allocation of commercial risks associated with the pandemic in respect of ocean bills of lading and multimodal transport documents is likely to be very limited.

Charterparties are freely negotiated and, therefore, contractual provisions agreed between the parties are not subject to the mandatory rules of the sea-carriage conventions. However, charterparty terms may be incorporated into bills of lading so as to affect the holder of the bill of lading. This needs to be borne in mind in considering the two principal infectious disease clauses that have been produced. First, in 2015, BIMCO produced an Infectious Diseases Clause, with a version for voyage²⁸⁸ and time charters,²⁸⁹ in response to the 2014 Ebola outbreak in West Africa. This clause is currently under review and a new version is expected to be available soon. Second, in February 2020, INTERTANKO²⁹⁰ produced its own bespoke Coronavirus clause, again with a version for voyage²⁹¹ and time charters²⁹², together

²⁸⁸ Available at https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/infectious_or_contagious_diseases_clause_for_voyage_charter_parties_2015.

²⁸⁹ Available at https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/infectious_or_contagious_diseases_clause_for_time_charter_parties_2015.

²⁹⁰ <https://www.intertanko.com/>.

²⁹¹ Available at <https://www.intertanko.com/info-centre/model-clauses-library/templateclausearticle/intertanko-covid-19-coronavirus-clause-voyage-charterparties>.

²⁹² Available at <https://www.intertanko.com/info-centre/model-clauses-library/templateclausearticle/intertanko-covid-19-coronavirus-clause-time-charterparties>.

with some explanatory notes;²⁹³ subsequently, INTERTANKO also published a crew change clause for use in time charterparties. Both BIMCO and INTERTANKO are shipowner associations, and the provisions of the clauses are, therefore, heavily skewed in favour of the shipowners, effectively shifting main risks and costs to the charterers.

2. Voyage charter clauses: BIMCO and INTERTANKO

The normal allocation of risk for delay under a voyage charter is that the shipowner is responsible for the approach and carrying voyages and the charterer is responsible for the loading and discharging operations.²⁹⁴ These two stages start from the giving of a notice of readiness at berth under a berth charter and from the giving of a notice of readiness at a usual waiting place within the legal and commercial limits of the port under a port charter. In both cases the vessel must be legally and physically ready to load or discharge at the time notice is given and the requirement of free pratique (see Section C.2.2, above) and quarantines at ports will hinder the giving of a valid NOR and therefore delay the start of laytime. Once laytime begins, the risk of delay, such as slow operations in loading and discharge as a result of working practices mandated by the pandemic, will fall on charterers (and potentially on any third-party holder of a bill of lading that effectively incorporates the terms of the charterparty).

The BIMCO and INTERTANKO clauses, which will be considered further below, seek to push the risk and costs of delay in giving NOR and starting laytime back onto charterers. Additionally, both clauses seek to clarify when the master may decide not to enter a port that may be affected by COVID-19, or to leave such a port, and when the master may decide to discharge at an alternative port to the contractual port, due to the effect of COVID-19 on the contractual port. These provisions to some extent reiterate the effect of the existing legal framework, as set out in *The Teutonia* (see Section C.2.3, above.) as well as the framework provided by the ‘near’ clause (see Section C.2.4.3, above). The clauses also aim to make charterers liable to indemnify owners for future adverse consequences they may suffer as a result of visiting a contractual port that is subject to COVID-19, something which owners would otherwise be unable to obtain.²⁹⁵

Both voyage charter clauses operate in stages when the load/discharge port is in or becomes an ‘affected area’.

- i. Owners’ right to cancel before getting to the load port – a right given only in the BIMCO form.
- ii. Owners’ right to sail away from the load port with or without laden cargo.
- iii. Owner’s right to sail away to discharge at an alternative safe port.

These rights are exercisable only when entering into or remaining in an ‘affected area’ poses a risk to the vessel or crew in the reasonable judgment of the master. Under both the BIMCO and INTERTANKO clauses the associated costs and time lost which result from these potential variations in performance of the contract are recoverable from charterers. Where the contract is performed in the affected area/s,

²⁹³ The explanatory notes are available at <https://www.intertanko.com/info-centre/model-clauses-library/templateclausearticle/intertanko-covid-19-coronavirus-clause-voyage-charterparties-explanatory-notes>; and at <https://www.intertanko.com/info-centre/model-clauses-library/templateclausearticle/intertanko-covid-19-coronavirus-clause-time-charterparties-explanatory-notes>. INTERTANKO has also produced Guidance on Chartering Issues related to COVID-19 for its Members, which reflects the perspective of the Association. This is available at https://safety4sea.com/wp-content/uploads/2020/05/Intertanko-COVID-charterparty-issues-2020_04.pdf.

²⁹⁴ See e.g. Professor Howard Bennett and others. *Carver on Charterparties* (2nd ed Sweet and Maxwell 2020) at 1-027: “Delay at sea, extending the duration of either the loading or carrying voyage beyond that expected, is for the account of the owner. Delay in port because of berth unavailability is addressed by the concept of “laytime”, namely a specified period of time for loading at the port of loading or unloading at the port of discharge. Should the vessel exceed this permitted time, the charterer incurs liability in damages in a stated amount (known as “demurrage”). Demurrage liability places on the charterer the risk of delay beyond the permitted laytime.”

²⁹⁵ *Ben Shipping v An Board Baine (The “C. Joyce”)* [1986] 2 Lloyd’s Rep. 285 (QB).

owners are entitled to recover associated costs and to be indemnified by charterers for potential future costs due to having called at a port in an affected area. The two clauses will now be considered in turn.

2.1 BIMCO Infectious or Contagious Diseases Clause for Voyage Charter Parties 2015

(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.

The clause applies when the relevant threshold is reached and there is an ‘affected area’ posing a risk to vessel, crew, to other persons on board and/or risk of quarantine and other restrictions being on the vessel due to the ‘disease’. In the BIMCO form this is a ‘highly infectious diseases that is seriously harmful to humans’.

(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*

The BIMCO clause is limited to events happening after the date of the charter and does not apply to pre-existing events.

(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;

The first right given to Owners is the right not to allow the vessel to proceed, continue or remain at any place that becomes an affected area. If there is such a risk, then under the BIMCO form, the Owners can cancel at any time before the start of loading.

(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.

If the risk materialises after loading starts the vessel can leave the place, with or without cargo. If there is a range of permitted ports the Owners must notify Charterers to nominate an alternative load port within 48 hours, failing which owners may leave, with or without cargo, or may cancel. This is a separate cancellation right to the right to cancel previously given which operates prior to the start of loading.

(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.

If, prior to or after arrival, the discharge port is at risk, Owners may give 48 hours notice to charterers to nominate an alternative safe port from the charter range, failing which Owners may discharge the cargo, or cargo remaining on board, at any safe port of their choice, including the port of loading. If that port is outside the charter range, Owners may claim expenses, full freight, plus extra pro rata freight, if that port is more than 100 miles away, and are granted a lien for these items.

(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.

Owners' conduct may waive their right to reject the order to enter an unsafe port, but not the right to claim damages for consequent losses.²⁹⁶ Further, in *The Stork*²⁹⁷, Devlin J suggested that, if the port was obviously unsafe and damage was bound to result, then the owner's action in continuing with the voyage might break the chain of causation so that the owner would thereby forfeit his right to damages. This provision makes clear that entering an 'affected area' will not amount to a waiver by the Owners of either of these rights.

(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.

Owners' obligation is one taking 'reasonable measures' in line with WHO recommendations.

(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.

This sub-paragraph provides a comprehensive right to Owners to recover from Charterers any additional costs, etc, from the vessel visiting an affected area, including any quarantine of vessel and crew, with any time lost to count as laytime or time on demurrage. The risk of delay in giving NOR pending free pratique is therefore transferred from Owners to Charterers.

(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.

This provides that complying with the clause does not constitute a deviation, and the clause prevails over express or implied provisions of the charter in the event of a conflict.

(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.

²⁹⁶ *The Kanchenjunga* [1990] 1 Lloyd's Rep. 391 (HL).

²⁹⁷ [1954] 2LI LR 397.

This provides Owners an indemnity from Charterers for claims that may be brought under bills of lading, waybills and other carriage documents in respect of losses arising from the vessel proceeding to alternative places of loading and discharge in accordance with the rights detailed in sub-clauses (b) to (h).

(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.

The provision requires the clause as a whole to be incorporated into all bills of lading, waybills or other documents evidencing contracts of carriage issued 'pursuant to this Charter Party'; as noted above, sub-clause (e) also states that "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". Once incorporated, the clause will affect third party holders of charterparty bills of lading and waybills as regards the rights of redirection given to owners if the port of loading or port of discharge are determined to be in an 'Affected Area'. This will be a "Caspiana" clause and treated as setting out the obligation of the voyage undertaken by the Owners, as with the strike clause in *Renton v Palmyra*²⁹⁸ and will not be rendered null and void by Article III, (8) of the Hague and Hague-Visby Rules. However, the indemnity provision in sub-clause (i) will not be effective against third party holders of such documents as it specifically provides that "Charterers" are to provide the indemnity.²⁹⁹ As already mentioned, the clause provides for it to have paramount effect over other clauses in the charter.

2.2. INTERTANKO COVID-19 ('Coronavirus') Clause – Voyage charterparties³⁰⁰

The clause was drawn up by INTERTANKO on 21 February 2020, at a time when there was still doubt as to whether COVID-19 (coronavirus) would qualify under the definition of 'disease' in the BIMCO clause considered above. It expressly refers to 'coronavirus', and to no other infectious diseases.

1. Notwithstanding any other term to the contrary in this charterparty, the Vessel will not be required to call at any port, place, country or region if in the Master's or Owners' reasonable judgement there may be a risk of exposure of the crew or other persons on board to Covid-19 ('Coronavirus').

The provision applies when the relevant threshold is reached and there is a risk of exposure of the crew or other persons on board to Coronavirus. There is no reference to the risk of subsequent quarantining of the vessel, as per the definition of 'affected area' in the BIMCO clause. The assessment of risk is based on the reasonable judgement of the master or owners. The vessel is not required to call at any such port if there is such a risk of exposure to Coronavirus.

2. Should Charterers order the Vessel to a port, place, country or region which is presently or subsequently becomes affected by the Coronavirus virus (the 'Coronavirus Affected Area') and if such order has not been refused in accordance with sub-clause 1 hereof, then the following provisions to apply:
 - a) If, prior to reaching the load or discharge port, in the reasonable judgement of the Master or Owners, the level of risk of exposure of the crew and other persons on board to the Coronavirus virus becomes unacceptable, Owners shall be entitled to request fresh voyage orders from Charterers.

²⁹⁸ [1956] 2 Lloyd's Rep. 379 (HL). See Section C.1.4, above.

²⁹⁹ See *The Miramar* 1984 AC 676 where a bill of lading incorporated a voyage charterparty which provided for charterers to pay demurrage. The House of Lords rejected any manipulation of language to extend the liability for demurrage to the bill of lading consignee. See also *The Polar* [2021] EWCA Civ 1828 as to the effect of the incorporation of a war risks and a Gulf of Aden clause into the bills of lading. The liberties given to the shipowner not to continue with the voyage or to deviate from the usual route were germane to the loading, carriage and discharge of the cargo and were therefore incorporated into the bills of lading, but the obligation of the "charterer" to bear the expenses caused by the exercise of such liberties was not incorporated and the court declined to manipulate the language of the charter so as to impose an obligation on the bill of lading holders.

³⁰⁰ Available at <https://www.intertanko.com/info-centre/model-clauses-library/templateclausearticle/intertanko-covid-19-coronavirus-clause-voyage-charterparties>. An explanatory note is available at <https://www.intertanko.com/info-centre/model-clauses-library/templateclausearticle/intertanko-covid-19-coronavirus-clause-voyage-charterparties-explanatory-notes>.

b) If, following tender of notice of readiness, either prior to or during loading or discharge, in the reasonable judgment of the Master or Owners, the level of risk of exposure of the crew or other persons on board to the Coronavirus becomes unacceptable, the Vessel may proceed to a safe waiting place and Owners shall be entitled to request fresh orders from Charterers.

Paragraphs (a) and (b) deal with Owners' rights if the level of risk of exposure to Coronavirus becomes unacceptable, in the reasonable judgment of the Master/Owners. If that is the case, Owners may request fresh orders, prior to reaching the load or discharge port, and similarly, if the risk becomes unacceptable following tender of NOR point, the Owners have the liberty of proceeding to a waiting place to await fresh orders from the Charterers. The BIMCO clause, by contrast, gives Owners these rights when there is an order to go to an 'Affected Area' with no reference to the risk of exposure being unacceptable. The BIMCO clause also provides for two instances of cancellation by Owners as a result of risks in the 'Affected Area'. There are no rights to cancel in the INTERTANKO clause.

c) Any time taken for the purposes of obtaining free pratique shall be for Charterers' account and shall not prevent the tender of a valid and effective notice of readiness.

Specific reference is made in (c) to time taken for the granting of free pratique³⁰¹ to be for the account of charterers and not to prevent the valid tender of NOR. This means the relevant risk of delay is shifted from the Owners to the Charterers. Once laytime has started the form is silent and therefore the risk of slow operations in the port remains with Charterers. This is also the cases with the BIMCO form.

d) Charterers shall arrange at their time and expense for all appropriate inspections and certification, including but not limited to screening, cleaning, fumigation, quarantine of the Vessel and/or crew or other persons on board and the obtaining of medical advice and/or treatment, as required at any port or place where the Vessel calls under this charterparty.

This sets out Charterers' obligations as regards arranging and paying for all 'appropriate inspections and certification'... 'as required at any port ...'. While it is clear that the intention of the clause is for the Charterers to be responsible for the related costs, some of the wording of the clause may be open to interpretation. For instance, what specific obligations the clause entails regarding 'quarantine of the Vessel and/or Crew' and 'obtaining of medical advice and/or treatment', is not entirely clear, given that Owners' are responsible for the ship and crew, including in respect of health and safety and any related requirements by port authorities.

e) Owners shall promptly provide any recent crew health records, evidence of the Vessel's prior trading pattern, and other existing documentation required by the port authorities for the purposes of free pratique. Owners shall ensure that shore leave for any crew member in a Coronavirus Affected Area shall be prohibited.

This paragraph provides for Owners' obligations to promptly provide documentation required by the port authorities for the purposes of free pratique. This is important for Charterers in the light of sub-clause (c). A breach of this obligation would mean that laytime would be suspended for any time lost thereby due to the fault of the shipowner. Significantly, Owners must prohibit shore leave for any crew member in a Coronavirus Affected Area, something which is not provided for in the BIMCO clause.

f) In the event Charterers fail to provide alternative voyage orders as required in sub-clause 2 (a) or (b) above within 48 hours of receiving the request for new orders, Owners shall be entitled to discharge the cargo at any safe port of their choice (including at the loading port) which shall be considered as complete fulfilment of this charterparty. Owners shall be entitled to recover from Charterers the extra expenses of such discharge and to receive the full freight as though the cargo had been carried to the discharge port, Owners shall have a lien on the cargo for such expenses and freight.

³⁰¹ See Section C.2.2, above.

This paragraph provides for the rights of Owners to discharge at an alternative safe port of their choice in the event that Charterers do not respond within 48 hours for Owners' request for new orders. Similar to the BIMCO clause, the Owners' choice of an alternative safe port appears to be entirely free, i.e. not limited to any safe port that is 'near'; this could be problematic for the Charterer, as well as any third-party holder of a charterparty bill of lading, such as a CIF buyer, whose cargo may be affected by the Owners' contractual lien. The INTERTANKO form makes no reference to the right to claim additional pro rata freight in the event of the vessel discharging at a distant alternative safe port.

3. Should the Vessel be boycotted, refused admission to port, quarantined, or otherwise delayed in any manner whatsoever by reason of having proceeded to a Coronavirus Affected Area, for all time lost Owners to be compensated by Charterers at the demurrage rate and all direct losses, damages and/or expenses incurred by Owners shall be paid by Charterers. In the event that the Vessel is boycotted, refused admission, or otherwise delayed as stated above within 30 days after having completed discharge under this charterparty, then Charterers are to compensate Owners for all time lost as a result at the demurrage rate in addition to compensating Owners for all direct losses, damages, and or expenses which may arise as a result of the above.

This sub-clause provides for Charterers to compensate Owners at the demurrage rate for all time lost as a result of going to a Coronavirus affected area, as well as to pay for all direct losses, damages and/or expenses. In addition, Charterers must compensate for lost time at the demurrage rate, as well pay for all direct losses, damages and/or expenses, in the event of boycotts, or refusal of admission, of the vessel or other delays as a result of having proceeded to a Coronavirus affected area, which occur within 30 days of completion of discharge under the present charter. This is a liability that would not exist under a normal voyage charter and may include delays or expenses under a subsequent fixture.

4. Owners and Charterers agree that the outbreak of Coronavirus virus shall not be considered as force majeure or as a frustrating event of the charterparty.

This provision aims to exclude the effect of any force majeure exception clause or of the doctrine of frustration in relation to the outbreak of Coronavirus. There is no equivalent in the BIMCO form.

5. The Vessel shall have liberty to comply with all orders, directions, recommendations, precautionary measures or advice of any governmental or International authority and/or the Flag State of the Vessel relating to or arising as a result of the Vessel being ordered to a Coronavirus Affected Area.
6. Charterers shall ensure that all Bills of Lading for cargo to be carried under this charterparty shall incorporate the above provisions.

As with the BIMCO clause, bill of lading holders will be affected by the redirection provisions of the incorporated clause, but will not be subject to any of the liabilities which are imposed on 'Charterers'.

3. Time charter clauses: BIMCO and INTERTANKO

BIMCO and INTERTANKO have also produced time charter clauses for Infectious or Contagious Diseases, or for Coronavirus, respectively.

Under a time charter the incidence of delay will primarily be determined by the off-hire clause, although the risk of delay in delivery falls upon the shipowner. The effect of quarantines on off-hire will be mixed with quarantines due to matters relating to the crew constituting an off-hire event under 'any other cause preventing the full working of the vessel', but not routine quarantines or quarantines related to the vessel's previous ports of call, unless the word 'whatsoever' is added or the off-hire clause specifically addresses quarantine as with Shelltime. Deviations to take sick crew to hospital on shore will probably not amount to off-hire events, absent the word 'whatsoever' but deviations for crew changes probably will. The BIMCO and INTERTANKO clauses clarify the situation as regards quarantine, to the advantage of the shipowner, and to provide owners with an indemnity for consequential losses of such delays that would not necessarily be available under existing express, and implied, rights of indemnity.

BIMCO's crew-change clause seeks to provide an apportionment mechanism for time and expenses incurred due to deviations to effect crew changes.

3.1 BIMCO Infectious or Contagious Diseases Clause for Time Charter Parties 2015

(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

The relevant definitions are the same as in the Voyage Charter form.

(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, is an Affected Area.

(c) If the Owners decide in accordance with Sub-clause (b) that the Vessel shall not proceed or continue to an Affected Area they shall immediately notify the Charterers.

(d) If the Vessel is at any place which the Master in his reasonable judgement considers to have become an Affected Area, the Vessel may leave immediately, with or without cargo on board, after notifying the Charterers.

(e) In the event of Sub-clause (c) or (d) the Charterers shall be obliged, notwithstanding any other terms of this Charter Party, to issue alternative voyage orders. If the Charterers do not issue such alternative voyage orders within forty-eight (48) hours of receipt of the Owners' notification, the Owners may discharge any cargo already on board at any port or place. The Vessel shall remain on hire throughout and the Charterers shall be responsible for all additional costs, expenses and liabilities incurred in connection with such orders/delivery of cargo.

(f) In any event, the Owners shall not be obliged to load cargo or to sign, and the Charterers shall not allow or authorise the issue on the Owners' behalf of, bills of lading, waybills or other documents evidencing contracts of carriage for any Affected Area.

(g) The Charterers shall indemnify the Owners for any costs, expenses or liabilities incurred by the Owners, including claims from holders of bills of lading, as a consequence of the Vessel waiting for and/or complying with the alternative voyage orders.

Owners' rights in (b) to (g) in respect of whether or not to go into, or to stay, in an affected area, and the regime for requiring alternative orders from charterers, are essentially the same as in the voyage charter clause. However, no rights of cancellation are given to owners. Owners are also given an indemnity from Charterers in (g) in respect of claims arising under any bills of lading, waybills or other documents evidencing contracts of carriage in connection with claims arising out of owners exercising their rights under the clause.

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

This provision now deals with what happens if the vessel does go to 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 the Vessel shall remain on hire throughout.

This provision makes charterers responsible for any additional costs, expenses or liabilities whatsoever arising out of the Vessel visiting or having visited an Affected Area and provides for the vessel to remain on hire throughout. Specific reference is made to screening, cleaning, fumigating and/or quarantining the Vessel and its crew.

(i) 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.

(j) If in compliance with this Clause anything is done or not done, such shall not be deemed a deviation, nor shall it be or give rise to an off-hire event, 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.

This paragraph provides that acts done in compliance with the clause do not constitute a deviation and do not give rise to an off-hire event.

(k) The Charterers shall indemnify the Owners if after the currency of this Charter Party any delays, costs, expenses or liabilities whatsoever are incurred as a result of the Vessel having visited an Affected Area during the currency of this Charter Party.

This paragraph contains an indemnity in respect of delays, costs, expenses or liabilities incurred by Owners at any time after the currency of the charter, and not limited to thirty days after discharge as with the voyage charter form, due to the vessel visiting an affected area during the currency of the time charter.

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

3.2 INTERTANKO Covid-19 ('Coronavirus') Clause – Time charterparties³⁰²

1. Notwithstanding any other term to the contrary in this charterparty, the Vessel will not be required to call at any port, place, country or region if in the Master's or Owners' reasonable judgement there may be a risk of exposure of the crew or other persons on board to Covid-19 ('Coronavirus').
2. Should Charterers order the Vessel to a port, place, country or region which is presently or subsequently becomes affected by the Coronavirus virus (the 'Coronavirus Affected area'), and if such order has not been refused in accordance with sub-clause 1 hereof then the following provisions to apply:
 - a) If, prior to reaching the load or discharge port, in the reasonable judgement of the Master or Owners, the level of risk of exposure of the crew and other persons on board to the Coronavirus virus becomes unacceptable, Owners shall be entitled to request fresh voyage orders from Charterers.
 - (b) If, following tender of notice of readiness, either prior to or during loading or discharge, in the reasonable judgment of the Master or Owners, the level of risk of exposure of the crew or other persons on board to the Coronavirus virus becomes unacceptable, the Vessel may proceed to a safe waiting place and Owners shall be entitled to request fresh orders from Charterers.
 - (c) Any time taken for the purposes of obtaining free pratique shall be for Charterers' account and shall not prevent the tender of a valid and effective notice of readiness.
 - (d) Charterers shall arrange at their time and expense for all appropriate inspections and certification, including but not limited to screening, cleaning, fumigation, quarantine of the Vessel and/or crew or other persons on board and the obtaining of medical advice and/or treatment, as required at any port or place where the Vessel calls under this charterparty.
 - (e) Owners shall promptly provide any recent crew health records, evidence of the Vessel's prior trading pattern, and other existing documentation required by the port authorities for the purposes of free pratique. Owners shall ensure that shore leave for any crew member in a Coronavirus Affected Area shall be prohibited.
3. Should the Vessel be boycotted, refused admission to port, quarantined, or otherwise delayed in any manner whatsoever by reason of having proceeded to an Coronavirus Affected Area, the Vessel shall remain on-hire for all time lost and any direct losses, damages and/or expenses incurred by Owners as a result shall be paid by Charterers. In the event that the Vessel is boycotted, refused admission, or otherwise delayed as stated above within 30 days after having been redelivered under this charterparty, then Charterers are to compensate Owners for all time lost as a result as if the Vessel is still on hire, in addition to compensating Owners for all direct losses, damages, and or expenses which may arise as a result of the above.

The sub-clause deals with hire and coronavirus related, liabilities, expenses, and compensation in the same way as sub-clause 3 of the voyage charter form but with a reference to the vessel remaining on-

³⁰² Available at <https://www.intertanko.com/info-centre/model-clauses-library/templateclausearticle/intertanko-covid-19-coronavirus-clause-time-charterparties>. An explanatory note is available at <https://www.intertanko.com/info-centre/model-clauses-library/templateclausearticle/intertanko-covid-19-coronavirus-clause-time-charterparties-explanatory-notes>.

hire for all time lost and similarly with any coronavirus related time lost occurring within 30 days of redelivery.

4. Owners and Charterers agree that the outbreak of Coronavirus virus shall not be considered as force majeure or as a frustrating event of the charterparty.

This provision aims to exclude the effect of any force majeure exception clause or of the doctrine of frustration in relation to the outbreak of Coronavirus. There is no equivalent in the BIMCO form.

5. The Vessel shall have liberty to comply with all orders, directions, recommendations, precautionary measures or advice of any governmental or international authority and/or the Flag State of the Vessel relating to or arising as a result of the Vessel being ordered to a Coronavirus Affected Area.
6. Charterers shall ensure that all Bills of Lading for cargo to be carried under this charterparty shall incorporate the above provisions.

As with the BIMCO clause, bill of lading holders will be affected by the redirection provisions of the incorporated clause, but will not be subject to any of the liabilities which are imposed on 'Charterers'.

INTERTANKO Covid-19 ('Coronavirus') Additional Vetting Inspection Clause

In the event of cancelled SIRE/CDI inspections in a Coronavirus Affected Area, the SIRE/CDI requirements in this charterparty shall be suspended and shall not be re-instated until the Vessel's trading pattern permits such inspection.

This clause is presented by INTERTANKO in the context of Time Charterparties. An explanation and further information regarding this issue is provided in the Explanatory Notes.³⁰³

3.3 BIMCO COVID-19 Crew Change Clause for Time Charter Parties 2020

One effect of the pandemic has been the refusal of many countries to allow crew changes, with the result that some crew are exceeding their maximum time at sea under the Maritime Labour Convention 2006. In response, BIMCO in 2020 introduced a crew change clause for time charters.

There is some uncertainty as to the effect of deviations to implement crew changes on off-hire and the cost of bunkers and the clause aims to address that. It gives owners a liberty to make such deviations, subject to notification to charterers in writing as soon as possible, and the exercise of this right with due regard to charterers interests. The right to deviate is to be incorporated into all relevant carriage documents such as bills of lading, waybills, and sub-charters. During deviation there are two alternative regimes. The first is that the vessel stays on-hire but at a reduced rate to be agreed, 50% by default, with an equal split between Owners and Charterers of bunkers consumed. The second is that both off-hire and bunkers are to be for Owners' account. Port charges, pilotage and other expenses at the port of deviation are for Owners' account. If no choice is made between the alternatives, the first alternative applies.

³⁰³ Available at <https://www.intertanko.com/info-centre/model-clauses-library/templateclausearticle/intertanko-covid-19-coronavirus-clause-time-charterparties-explanatory-notes>.

It should, however, be noted that some charterers have been insisting on inserting a clause into the charterparty prohibiting crew changes during the charterparty,³⁰⁴ while others are requiring details of owners' plans for future crew changes during fixture negotiations.³⁰⁵

BIMCO COVID-19 Crew Change Clause for Time Charter Parties 2020

(a) In addition to any other right to deviate under this contract, the Vessel shall have liberty to deviate for crew changes if COVID-19-related restrictions prevent crew changes from being conducted at the ports or places to which the Vessel has been ordered or within the scheduled period of call. Any deviation under this clause shall not be deemed to be an infringement or breach of this contract, and Owners shall not be liable for any loss or damage resulting therefrom.

(b) Owners shall exercise the right under subclause (a) above with due regard to Charterers' interests and shall notify Charterers in writing as soon as reasonably possible of any intended deviation for crew changes purposes.

(c) Charterers shall procure that subclause (a) shall be incorporated into any and all sub-charter parties, bills of lading, waybills or other documents evidencing contracts of carriage issued pursuant to this Charter Party.

(d) During the period of such deviation the Vessel shall:

(i) * remain on hire, but at a reduced rate of hire of USD ... per day. In the absence of an agreed amount, fifty per cent (50%) of the hire rate shall apply. The cost of bunkers consumed shall be shared equally between Owners and Charterers.

(ii) * be off-hire and the cost of bunkers consumed shall be for Owners' account.³⁰⁶

(e) While the Vessel is at the port of deviation all port charges, pilotage and other expenses arising out of such crew changes shall be for the Owners' account.

3.4 INTERTANKO Owners' Right to Change Crew Clause – Time Charterparties³⁰⁷

Charterers warrant that:

(i) they are aware of and support the aims of the Neptune Declaration on Seafarer Wellbeing and Crew Change; and

(ii) they shall not object to and/or impose any restriction owners' right to change crew where such change is allowed by local or national laws or regulations applicable to intended port calls.

Any time lost solely caused by crew change to be for Owners' account.

The clause seeks to ensure that Owners are not precluded from the making crew changes, which is in line with the Neptune Declaration on Seafarer Wellbeing and Crew Change,³⁰⁸ to which express reference is made. Importantly, any time lost solely as a result of crew change remains for the Owners' account.

4. Charterers Club clauses

The BIMCO and INTERTANKO clauses are very owner-focused. By contrast the *Charterers Club*³⁰⁹ have provided a contagious disease clause for voyage charters and time charters as well as an adaptation of BIMCO's clauses. These are set out below.

4.1 Voyage Charterparty Contagious Disease Clause

Notwithstanding any other provision in this charter party the Charterers shall not be liable for any damage and/or delay due to voyage orders that result in the Vessel calling at a port where fever and/or epidemics and/or contagious disease are prevalent in the circumstances where such fever and/or epidemics are widely publicised. It will be the

³⁰⁴ IMO Press Briefing. IMO Secretary-General denounces "no crew change" clauses. 21 December 2020.

<https://www.imo.org/en/MediaCentre/PressBriefings/pages/46-no-crew-change-clause.aspx#:~:text=So%2Dcalled%20%E2%80%9Cno%20crew%20change,crew%20changes%20could%20take%20place.>

³⁰⁵ Lloyd's List. Tensions rise as charterers refuse to fix ships with crew-change commitments. 15 January 2021.

[https://lloydlist.maritimeintelligence.informa.com/LL1135413/Tensions-rise-as-charterers-refuse-to-fix-ships-with-crew-change-commitments.](https://lloydlist.maritimeintelligence.informa.com/LL1135413/Tensions-rise-as-charterers-refuse-to-fix-ships-with-crew-change-commitments)

³⁰⁶ *(d)(i) and (d)(ii) are alternatives. Delete whichever is not applicable. In the absence of deletions alternative (d)(i) shall apply.

³⁰⁷ <https://www.themecogroup.co.uk/charterers-liability-insurance/>. The text of the clause here considered is available at <https://www.themecogroup.co.uk/charterers-liability-insurance/publication/covid-19-qa/>.

³⁰⁸ See fn.30, above.

³⁰⁹ <https://www.themecogroup.co.uk/charterers-liability-insurance/>.

responsibility of the Master and/or crew to maintain an up to date knowledge of the spread of these fevers and/or epidemics and/or contagious disease and advise the Charterers of any issues with the voyage order as soon as possible once the voyage order has been made. Should any other provision in this charter party conflict with this clause then this clause shall be considered paramount and as such will override any contrary provision.

The clause ensures that Charterers incur no liability due to voyage orders for a port where “*fever and/or epidemics and/or contagious disease are prevalent in the circumstances where such fever and/or epidemics are widely publicised.*” The existing charter laytime and demurrage is unaffected and delays in giving NOR and starting laytime will continue to be at Owners’ risk.

4.2 Time Charterparty Contagious Disease Clause

Notwithstanding any other provision in this charter party the Charterers shall not be liable for any damage and/or delay due to voyage orders that result in the Vessel calling at a port where fever and/or epidemics and/or contagious disease are prevalent in the circumstances where such fever and/or epidemics are widely publicised. Should there be any delay and/or damage to the Vessel due to calling at a port where fever and/or epidemics and/or contagious disease are prevalent then the Vessel will be off-hire until the full working of the Vessel is restored to Charterers. It will be the responsibility of the Master and/or crew to maintain an up to date knowledge of the spread of these fevers and/or epidemics and/or contagious disease and advise the Charterers of any issues with the voyage order as soon as possible once the voyage order has been made. Should any other provision in this charter party conflict with this clause then this clause shall be considered paramount and as such will override any contrary provision.

This contains similar non-liability provisions as regards orders to go to a port where fever and epidemics are widely publicised. Delays and or damage due to such prevalent fevers and epidemics will result in the vessel being off-hire until the full working of the vessel is restored to the Charterers and the paramount clause in the final sentence ensures that this will be the case notwithstanding any other clause, such as the off-hire clause, is to the contrary. Not surprisingly, risks of pandemic related delays are allocated to Owners to the extent that such is not already the case under existing provisions of the time charter.

4.3 Adapted Contagious Disease Clause

a) The Vessel shall not be obliged to proceed to or from, or continue to, or through, or remain at, any port, place, area or country (hereinafter “Affected Area”) which will expose the Vessel and crew, or other persons on board the Vessel, to the risk of infection from highly infectious diseases as determined and notified by the World Health Organization to be harmful to human health;

The threshold here for Owners being allowed not to proceed to an affected area is exposure to the risk of infection from highly infectious diseases as determined and notified by the World Health Organization to be harmful to human health and, in contrast to the BIMCO and INTERTANKO clauses, is not based on the reasonable judgement of the master.

b) The Vessel should not proceed, or continue to, or through, or remain in an Affected Area provided Owners are able to document through competent international authorities the risk of infection in which case they must immediately contact the Charterers. Wherever legally permissible, bearing in mind obligations under insurances and other contracts, including but not limited to Bills of Lading (under which Owners may also have binding obligations and a need to maintain insurance coverage) Charterers shall use reasonable endeavours [sic] to issue alternative voyage orders;

Owners' rights as regards affected areas are subject to Owners documenting of the risk of infection through competent international authorities, rather than by reliance on the reasonable judgment of the master. Charterers’ obligation to issue alternative voyage orders is one of ‘reasonable endeavours’.

c) 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 ordered to an Affected Area;

d) Any additional costs and expenses arising out of the Vessel visiting an Affected Area, including but not limited to screening, cleaning, fumigating and/ or quarantining the Vessel and its crew for such diseases either in the Affected Area, or at subsequent ports of call, shall be for the Charterers' account provided said costs are reasonably incurred and are fully documented and provided further they have not been generated by Vessel/Crew/Owners' fault or negligence in complying with this Clause.

e) 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 the Charter Party, this Clause shall prevail to the extent of such conflict, but no further.

The provision is similar to the respective BIMCO and INTERTANKO clauses in terms of allocation of responsibility. However, the wording in sub-clause (d) reflects a more balanced approach, as Owners' additional costs and expenses are only for the Charterers' account if reasonably incurred, fully documented and not resulting from negligence.

E. Recommendations for commercial parties and related considerations for policymakers

1. Recommendations for commercial parties

As the analysis has shown, there are a number of implications arising from the pandemic for different types of contracts of carriage:

Voyage charters

The main issues here will be the allocation of risk as regards delays in entering ports and in loading/discharging once there. Initially, delay will fall on owners as until free pratique is obtained and the vessel is out of quarantine, owners will be unable to give a valid NOR. Thereafter the risk of delay will be on charterers. For charters negotiated after the emergence of port delays and restrictions following the declaration of the pandemic on 11 March 2020 these risks can be addressed by negotiation as to laytime allowed and clauses regarding the start of laytime. The start of laytime and the readiness of the vessel will also be an issue as regards cancellation.

Time charters

The outbreak of COVID in a country to where the charterer has ordered the vessel to load or discharge will not make that port unsafe as safety precautions have been put in place which should protect the health of the crew, and any call at such port would not result in the barring of the vessel from access to ports in other countries; the fact that it may be subject to quarantine would seem to be insufficient to make the first port unsafe. The effect of quarantine periods on off-hire will depend on the wording of the particular off-hire clause. Looking at NYPE 1946 clause 15, the vessel would go off-hire for any quarantine related to crew testing positive for COVID-19 under the wording 'any other cause preventing the full working of the vessel'. More generally imposed quarantines, such as a routine 14-day quarantine on all incoming vessels, would need the addition of 'whatsoever' to 'any other cause'.

Bills of lading

The Hague and Hague-Visby Rules defences in Article IV (2) of restraint of princes (g), quarantine (h), and the 'catch all' defence in (q) should be applicable in cases of physical or economic loss caused by delays in loading or discharging the cargo, but it is possible that if quarantine is imposed due to crew testing positive for COVID at the discharge port, that the vessel could be regarded as unseaworthy before and at the start of the voyage; if that quarantine was a cause of the loss or damage then the carrier would not be able to rely on the defences in Article IV (2) unless it could show that it had exercised due diligence to make the ship seaworthy before and at the start of the voyage. This is a non-delegable duty, so fault on the part of crew members – coming back from shore leave knowing that they may have contracted COVID – would be attributable to the carrier. This possibility recedes as the pandemic continues and many countries have taken measures to restrict or prohibit the crew from coming ashore; measures taken by the carrier (e.g. testing of crew before commencement of the voyage and mitigation measures on board in line with relevant sector-specific WHO guidance³¹⁰) could also be relevant in this context.

Deviation

This is an issue common to all contracts. At common law, a deviation to save life would be justified and this could justify a deviation to take sick crew members to a port for treatment. For contracts subject to the Hague and Hague-Visby Rules, Article IV (4) would also permit deviations to save property as well as reasonable deviations.³¹¹ In time charters the master retains responsibility for the safety of crew and the vessel; this would justify a departure from charterer's orders to proceed with despatch to a specified port and would not put the vessel off-hire, subject to the wording of the clause in question.

Additional costs may fall on cargo interests in two situations. First, under so-called ‘Caspiana’ clauses which will allow the carrier to discharge at an alternative port with resulting transshipment costs falling on cargo interests. Second, additional container demurrage may result as a consequence of excessive time for return of containers due to delays at port of discharge. Shippers should try to negotiate additional free time for returning containers at ports that are experiencing such delays.

Multimodal cargo

Liability for loss due to delays in transit will depend on whether this is localised or unlocalised. Localised loss will fall under the relevant unimodal cargo convention for the transport leg during which the loss occurred. Unlocalised loss will fall under the default regime in the multimodal bill of lading or waybill. In either eventuality, loss resulting from delays due to government action – e.g. quarantines at ports, checks on road borders - the carrier should be able to rely on a defence similar to that in the UNCTAD/ICC Rules for unlocalised loss or damage, that ‘he, his servants or agents or any other person referred to in rule 5.2 took all measures that could reasonably be required to avoid the occurrence and its consequences’. Similar defences apply in case of localised loss falling under the unimodal conventions such as that provided by Article 17 (2) of the CMR.

In this respect, the following contractual recommendations can be made.³¹²

- Contracting parties may consider inclusion of certain types of clauses as part of their contracts. Ideally, the risks of pandemic delays should be equitably apportioned between the parties to the charterparty. This is done with one of the options in the BIMCO Crew Change Clause but otherwise the BIMCO and INTERTANKO clauses very much shift the risk of delay to the charterer. These clauses can also affect parties to bills of lading and sub-charters involved in the charter, as the clauses mandate their incorporation into these third-party contracts. A result may be, that consignees and indorsees become subject to the indemnity obligations imposed on the charterer under the clauses, and the clauses should be amended so as to ensure that clause 3 which imposes indemnity obligations on the charterer is not subject to incorporation. Not surprisingly, the three clauses made available by Charterers Club shift or maintain the risk of delay onto owners.
- To facilitate effective dispute resolution, parties may consider to contractually agree on jurisdiction or arbitration in a forum which enables hearings to continue online throughout the current pandemic; examples are the UK, the US, or Singapore.

Contracting parties may also consider:

- Using amended force majeure clauses which refer to performance being ‘hindered’ rather than ‘prevented’ by the force majeure events. Voyage charterers should consider aiming to conclude clauses which cover both provision of cargo and loading/discharging of cargo. For use of a force majeure clause during the ongoing pandemic, it would be important to be as clear as possible, so as to ensure that the operation of the clause is not limited to force majeure events that ‘could not reasonably have been foreseen at the time of the conclusion of the contract’.

³¹⁰ It is important to note that relevant WHO guidance was recently updated, see WHO Implementation guide for the management of COVID-19 on board cargo ships and fishing vessels, published in December 2021; available at https://www.who.int/publications/i/item/WHO-2019-nCoV-Non-passenger_ships-2021-1.

³¹¹ See Section C. 1.3, above.

³¹² See also the concluding recommendations in an earlier related publication by UNCTAD, which highlights the need to develop mutually acceptable clauses in standard form contracts to cover issues such: as 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. See COVID-19 implications for commercial contracts: carriage of goods by sea and related cargo claims. UNCTAD/DTL/TLB/INF/2021/1. https://unctad.org/system/files/official-document/dtltlbinf2021d1_en.pdf.

- Including an infectious diseases clause to deal with the allocation of risks due to pandemic/epidemic delays. In particular, some form of provision for apportionment of costs in the event of redirection caused by restrictions in the nominated discharge port. The costs of transshipment should not fall wholly on the cargo owner.
- Including a deviation clause to deal with crew changes and taking sick crew to a hospital on shore, and an apportionment mechanism for related costs.

For voyage charters, parties may consider appropriate clauses to share the risk of delay arising in connection with the pandemic and relevant response measures; for instance, by using the NOR provisions in cases like *The Linardos*,³¹³ so that time can start on giving NOR at the relevant place but laytime will cease to count for time lost due to vessel not actually being ready. In the context of COVID, this means start of laytime would not be delayed by quarantine, and if there was a further delay due to the need to quarantine because crew have tested positive, laytime will still run if the vessel would be waiting anyway during this time due to congestion at the port. Such a clause would place the risk of delay due to congestion on charterers, but with laytime interrupted for any additional delay caused by fault of the owners leading to additional quarantine due to crew testing positive. The risk of delay due to slower working practices at the port in loading and discharging operations would be on the charterer, but this could be assessed in negotiating the amount of laytime available to charterers when the fixture was being negotiated.

For time charters, the charterers may wish to try to negotiate for off-hire clauses to have the word ‘whatsoever’ added after ‘any other cause’.

In addition, parties may consider including requirements in new charterparties that all crew have received coronavirus vaccinations. This may not be practical at the moment, due to supply problems, but once universal global vaccination becomes possible, such a clause would become workable and useful. Clarity is also required from governments as to when and how seafarers, whom the IMO has called to be designated as key workers, will be able to be vaccinated.

Finally, in the light of the extra-ordinary circumstances of the ongoing COVID-19 pandemic, it would be hoped that commercial parties, in appropriate cases, also consider showing some restraint in exercising some of their legal rights and claims, so as to limit the need for costly legal disputes

2. Related considerations for policymakers

In April 2020 UNCTAD prepared a Policy Brief in which it outlined ten action points to support the logistics of international trade in the light of the COVID-19 crisis.³¹⁴ Bearing these in mind in relation to the issues covered in this report, considerations for policymakers going forward in this pandemic and in respect of future epidemics and pandemics would be the following:

³¹³ [1994] 1 Lloyd's Rep. 28(QB). The clause provided: “4. Time commencing . . . 18 hours after Notice of Readiness has been given by the Master, certifying that the vessel has arrived and is in all respects ready to load whether in berth or not . . . Any time lost subsequently by vessel not fulfilling requirements for . . . readiness to load in all respects, including Marine Surveyor’s Certificate . . . or for any other reason for which the vessel is responsible, shall not count as notice time or as time allowed for loading . . .”

³¹⁴ Covid-19: A 10-Point Action Plan to Strengthen International Trade and Transport Facilitation in Times of Pandemic. UNCTAD Policy Brief 79. https://unctad.org/system/files/official-document/presspb2020d3_en.pdf. UNCTAD published a further relevant Policy Brief in December 2021. Strengthening international response and cooperation to address the seafarer crisis and keep global supply chains open during the ongoing COVID-19 pandemic. UNCTAD Policy Brief 91. <https://unctad.org/webflyer/strengthening-international-response-and-cooperation-address-seafarer-crisis-and-keep>.

First, crew changes should be allowed and facilitated at all times, to ensure that no crew are forced to remain at sea for longer than the maximum period stipulated in the Maritime Labour Convention 2006.³¹⁵ Governments, international organizations and industry need to collaborate in this respect and accelerate their efforts to address the ongoing crew change crisis. Countries should also consider the issue of giving seafarers priority access to vaccinations, both in the interests of public and seafarer health, and to facilitate the logistics of international trade and transport, including in respect of essential goods and medical supplies.

Secondly, to address the issue of delayed documents and avoid the incidence and costly resolution of related legal disputes, the remaining legal and regulatory obstacles to the adoption of electronic documents in international trade need to be removed. Progress has been made with the recognition of electronic documentation in the Montreal Convention 1999, the widespread adoption of the IATA electronic waybill, and the provision for electronic documents in the CMR, but more needs to be done as regards electronic alternatives to sea transport documents such as bills of lading and waybills. The UK Law Commission's current consultation on this issue is encouraging and it is possible that its suggested draft bill may be enacted in 2022.

Thirdly, governments could consider mandatory controls on container demurrage accruing at ports whose operation is affected by pandemic/epidemic restrictions in that particular country. In March 2020, the Indian government made recommendations to this effect³¹⁶ and in April 2020, the US issued its amended guidelines under the Shipping Act.³¹⁷ Countries could also consider extending statutory protection against unfair contract terms, like the Unfair Contract Terms Act 1977 in the UK, to container demurrage provisions in bills of lading during times of (future) epidemics and pandemics.

Fourthly, governments should strive to ensure that cross-border checks applicable to freight transport are kept to a minimum to avoid delay, in particular in the transit of goods by road.

Finally, governments should consider strengthening institutions and mechanisms for formal and informal dispute resolution, to ensure these are able to cope with a likely increase in contractual disputes in the context of the COVID-19 pandemic.

³¹⁵ The current position as to crew changes allowed as of 21 January 2022 is set out here: https://www.atpi.com/fr/marine-travel/coronavirus-covid-19-is-your-crew-change-possible/?_locale=en_GB.

³¹⁶ See, Shipping Lines advised not to impose container detention charges on import and export shipments at Ports. 29 March 2020. Available on the website of the Indian Ministry of Ports, Shipping and Waterways, at <http://sagarmala.gov.in/sites/default/files/PR%20Shipping%20lines%20advised%20not%20to%20imposed%20container%20detention%20charges%20%26%20Exports%20at%20all%20ports-converted.pdf>.

³¹⁷ See "FMC Issues Final Guidance on Unreasonable Demurrage and Detention Practices to Improve Ocean Freight Fluidity". 30 April 2020. <https://www.lexology.com/library/detail.aspx?g=0b639d0b-d340-4ecc-b450-d977edb2feb7>.