

COVID-19 FD&D FAQs

Many ports around the world are imposing minimum 14-day quarantine restrictions for arriving vessels. Such restrictions are resulting in inevitable delays and uncertainty. Owners and charterers understandably wish to know whether they must continue to perform their contract, whether they are obliged to proceed to such ports and, if they do so, who is responsible for the financial consequences of any delays, including any additional costs and expenses. We discuss below some common concerns and invite our Members to contact their usual FD&D contact at North for advice on any specific issues.

Q Can I avoid performing the contract because of COVID-19 problems?

A The short answer in the vast majority of cases can be expected to be “no”, because of a strong legal presumption that contracts are made to be performed, not avoided. But, the correct answer in each case depends on the terms of the contract taken as a whole as set against all of the material facts. Accordingly, there is no simple answer because it depends on context.

The answer would only usually be expected to be “yes” where the facts are such that there is a contractual right to cancel or performance of the contract is frustrated. Another alternative would be if the situation is such that both parties do not wish to perform the contract, where the parties could be expected to be amenable to agreeing a “washout” of the contract.

A right to cancel could possibly arise if a laycan provision is not complied with, such as if the vessel cannot arrive or is not ready at the agreed place in time. A right to cancel could possibly also arise if there is a force majeure (or similar exceptions) clause containing an express right to cancel, which is not always the case. Any right to cancel would always be subject to the facts and the requirements of any such clause and would need careful consideration to determine if it is triggered.

While in principle frustration could arise that is very rarely the case, unless something unexpected happens, neither party is at fault, it is not addressed by the contract and it either makes performance impossible or performing the contract would entail

something radically different. The fact that performance would take much longer, or would be unprofitable, is unlikely to be enough.

Q Is the vessel obliged to go to a place where there are COVID-19 risks?

A As with many of the questions currently being asked in relation to COVID-19, the answer depends on what risks the vessel or the crew will be exposed to at the relevant port or place and whether these risks can be minimised to acceptable levels by reasonable precautions. It will also depend on the specific charter terms.

In order to comply with any safe port warranty, charterers have an obligation to nominate a port that is, at the time of nomination, prospectively safe. This primary obligation is in the case of a time charter followed by a secondary obligation, for charterers to cancel the original order and to issue new orders to another port that is prospectively safe if the original port is no longer safe.

Conversely, if a port is actually safe and owners refuse to comply with charterers’ legitimate voyage orders, this could result in owners being held in repudiatory breach of the charter (in the sense of “evincing an intention” not to perform it) and give rise to a claim for damages by charterers. If a dispute arises, charterers and owners may be asked to explain what risk assessment(s) they have done.

What risks might make the port legally unsafe? An obvious risk is that the vessel’s crew could become infected by COVID-19 if the vessel calls at an affected port. The fact a crew member has become infected does not

automatically prove the port was unsafe. It will be a matter of evidence: What was the cause of the infection? Was it due to lack of public health measures in the port (rendering the port unsafe) or was it due to some other reason? One of the leading English maritime law texts says “...contagious disease can in principle render a port unsafe but is unlikely to do so in fact...”.

COVID-19 may also pose a physical threat to the vessel if there is a risk of the vessel being detained or quarantined at the port to which she has been employed, or a risk of being quarantined on arrival at the next port or later ports of call. The fact that a vessel calls at a port which is subject to a mandatory “self-isolating period” or a quarantine period (incidental to visiting a COVID-19 affected port) may not, however, render a port unsafe. Possibly the answer may be different if the quarantine period is inordinate.

We recommend Members carry out ongoing risk assessments as part of their voyage planning and monitor factual circumstances carefully. In carrying out these risk assessments Members may make use of North’s new on-line risk assessment tool, MyGlobeView: www.nepia.com/members-area/globeview and North’s extensive correspondents’ network.

Q Who is responsible for any delays, costs and expenses which may arise under my voyage or time charter?

A As with performance of the contract discussed above, the short answer to this question is “it depends”, and the correct answer will turn on the terms of the particular contract and the specific

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facts. Costs and expenses related to operational matters are often expressly allocated as between the parties in voyage and time charters. However, charters may not necessarily explicitly deal with less common costs and expenses that could arise as a result of COVID-19 related issues.

Voyage Charters

If you are fixing on voyage charter terms, check carefully whether the vessel can tender a valid notice of readiness (NOR) at the first (or subsequent) ports. A key consideration will be whether the vessel can obtain free pratique. In pre-COVID-19 times the granting of free pratique would ordinarily have been treated as a mere formality. However, in current times it appears unlikely this will still be the case. Whilst it is common to see the use of WIFPON ("whether in free pratique or not") provisions, this may not protect owners where the granting of free pratique is no longer a mere formality and the vessel is not "ready" in the sense of not being available for charterers' use because of the restrictions applying.

If laytime commences under your voyage charter, check carefully whether the contract expressly provides for how laytime or demurrage is intended to count if there are delays caused by quarantine or other operational matters impacted by COVID-19 (for example, insufficient stevedores). Check carefully for any express epidemics clauses, as well as any other clauses which may provide an exception to the running of laytime or demurrage. In the absence of any such exceptions to the running of laytime/demurrage, time may continue to count to the benefit of owners.

Time Charters

What is the position under a time charter? Is the vessel off-hire during any delays? Hire will usually be payable continuously unless there is a specific off-hire provision absolving charterers from the obligation to pay hire. It is important therefore to check the

off-hire clause(s) in your charter. Does your contract have a standard "deficiency of men" provision? This may apply if the crew is unwell. Has the off-hire clause been amended to include "any other cause whatsoever"? Is there an express epidemics clause which allocates the risk of time and expense for COVID-19 related delays as between owners and charterers?

Finally, if quarantine restrictions cause loss or damage to owners under a time charter, they may claim against charterers by relying upon any safe port warranties or upon the implied indemnity for losses resulting from compliance with charterers' orders. Similarly, if owners face a claim for breach of charter they may be able to rely upon other common exclusions for losses (for example "restraint of princes").

Q Are there any industry clauses to assist with allocation of risk, delay and expense in relation to COVID-19 issues?

A Both BIMCO and Interanko have published clauses for voyage and time charters intended to deal with the outbreak of infectious diseases. BIMCO's "Infectious or Contagious Diseases" clauses were published in 2015 in response to the Ebola outbreak. Intertanko have published bespoke COVID-19 clauses in response to the current crisis.

If these clauses appear in the charter terms then owners may be able to rely on such clauses to refuse to go to a place where there are COVID-19 risks: for example, the Intertanko COVID-19

clauses say that "...the Vessel will not be required to call at any port, place, country or region if in the Master's or Owner's reasonable judgement there may be a risk of exposure of the crew...". Likewise, the BIMCO clauses define an "Affected Area" as one where there is a risk of exposure to the vessel, crew or other persons on board to infectious diseases. The BIMCO clauses do, however, require owners to "...endeavour to take such reasonable measures in relation to the Disease as may from time to time be recommended by the World Health Organisation...", and arguably when deciding to proceed to a particular place or port, owners/the Master should have regard to the preventative measures that could be applied (although the clause does not say this).

The BIMCO and Intertanko clauses set out the consequences of owners proceeding to what may be an affected port. The BIMCO clauses expressly say that "...Owners shall not be deemed to have waived any of their rights..." under the charter, including to claim damages.

If these clauses are not incorporated in the charter, the position is likely to be less straightforward. Owners would need to rely on the safe port warranty or other relevant terms of the charter to seek to recover any losses from charterers. Owners may have a basis to claim against charterers under the implied indemnity for complying with charterers' orders. In response, charterers may make the counter argument that owners were aware of the COVID-19 risk and should be deemed to have assumed the risk of proceeding to the port in question.

North FD&D: On your side

The crisis is fast moving and evolving rapidly. For more information and advice on specific queries, please approach your usual North FD&D contact, who will be happy to assist.



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