

Covid-19 crew-change crisis poses ongoing challenge

Shipowners continue to fall foul of logistical and legal uncertainties associated with Covid-19. **Will Pyle**, of Campbell Johnston Clark, explores issues and clauses arising from shipping's resulting crew-change crisis – one of the industry's most pressing predicaments

The impact of the pandemic on crew changes has been a major challenge for the maritime sector. This challenge looks set to continue into the second quarter of 2021, with several countries recently adopting more stringent crew-change restrictions in light of the new coronavirus strains discovered in South Africa, the UK and Brazil.

Crew changes now require significant planning, with many ports imposing requirements on both on-signers and off-signers, including quarantine periods and negative tests. Some ports do not accept foreign off-signers and there are also bans based on recent travel history. For shipowners, it is a logistical minefield. Crew changes must be arranged to coincide with the vessel's itinerary, often dictated by a charterer, sometimes without much advance notice.

Charterers understandably view crew changes as an inconvenience. It has been reported that many charterers have insisted on "no crew change" clauses in charterparties – a move that has been heavily criticised by the IMO. In an attempt to address this, BIMCO released the "Covid-19 Crew Change Clause" in June 2020. When incorporated into a charterparty, this gives the owners the liberty to deviate for crew changes but only under quite tightly defined circumstances (discussed further below).

In December 2020 the IMO released a recommended protocol for crew changes. A uniform global approach to this issue would be welcomed. However, this currently seems a remote possibility, and for the time being, we are stuck with the status quo: an ever-changing set of local rules and regulations.

The upshot is that many vessels are sailing with crew with expired contracts, some exceeding the maximum 12-month period specified under the Maritime Labour Convention (MLC). A recent estimate of the number of seafarers "stranded at sea" puts the figure at 400,000. This gives rise to justifiable concerns regarding crew fatigue and motivation, which could impact on seaworthiness and play a role in increasing the number of casualties and near-misses. It is important not to lose sight of the fact that this is not only a logistical and legal problem but also one of crew welfare.

Despite stringent protocols, there are numerous examples of on-signers or shore visitors bringing infections on board. This poses yet further logistical difficulties because many countries will not accept off-signers with positive tests – unless in the case of a medical emergency. Furthermore, testing is not always accurate. There can be false positives and false negatives, while positive tests can result from past infections. The consequence is uncertainty and delay, which often culminate in legal disputes.

Charterparty disputes

We have seen numerous disputes arising both directly and indirectly from Covid-19, many of them relating to crew changes. The most common disputes concern the location of crew changes and responsibility (as between owner and charterer) for periods of compulsory quarantine, as well as costs and delays arising from positive crew tests. Many of these disputes could have been avoided, or mitigated, by incorporating well-drafted clauses into charterparties. However, we continue to see disputes arising under charterparties based on pre-pandemic standard terms, often ill-suited to the current circumstances.

Below is a commentary on common issues/clauses based on the position under English law. These are only intended as a guide and the legal position will depend on specific terms and particular factual circumstances.

Responsibility for quarantine delay

General position

Under time charterparties, the charterers are obliged to pay hire unless the off-hire clause operates.

Most industry standard off-hire clauses (with the exception of the Shelltime form) do not expressly mention quarantine delays. Hence it is often a question of whether a quarantine delay, or an outbreak on board, can qualify as a "deficiency of men" or falls within the sweep-up wording of "any other (similar) cause (whatsoever)". There is also a requirement that the event prevents the "full" (or sometimes "efficient") working of the vessel.

The term "deficiency of men" has been held to relate to a numerical deficiency. Therefore, it is unlikely to apply unless crew infections result in there being an insufficient number of crew. However, it could be argued that the infection, or suspected infection, of crew resulting in a quarantine requirement imposed against the vessel, is a cause that is sufficiently "similar" to a "deficiency of men". This is on the basis that the quarantine requirement relates to the characteristics (or suspected characteristics) of the crew and having a full complement of crew who are precluded from performing the duties required of them is the functional equivalent of having no crew at all. If the word "whatsoever" is included in the sweep-up wording, this argument is much stronger.

If, however, the situation arose as a natural consequence of the charterers' employment orders, this may in certain circumstances give rise to an indemnity in the owners' favour ousting the off-hire provision.

Shelltime

Under the Shelltime standard form, clause 21(a)(iv) provides that the vessel shall be off hire in respect of any loss of time "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”.

This wording covers shore contact by the crew at an “infected area” without the charterers’ consent. It is uncertain whether this could apply to a crew change, as it appears to be directed at shore contact by existing crew. There could also be disputes concerning whether an area qualifies as an “infected area” under this clause.

BIMCO Infectious or Contagious Diseases Clause

The BIMCO Infectious or Contagious Diseases Clause was not designed with a severe global pandemic in mind. It gives very wide discretion to the owner to refuse employment orders where in their “reasonable judgement, [...] 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”. It also apportions “any additional costs, expenses or liabilities whatsoever” arising from the vessel visiting an “affected area” to the charterers.

It is difficult to conceive of any port which currently poses zero risk of exposure to Covid-19. However, interestingly, BIMCO have issued Q&As on the interpretation of this clause in the context of Covid-19 and have suggested that it may be difficult to classify any ports as “affected areas” because, in their view, the risk of infection could be avoided by following appropriate protocols, including safe distancing and use of personal protective equipment. However, these Q&As were issued in March 2020, when the pandemic was in its infancy. It would now seem strange to suggest that these methods are foolproof and, if followed, pose zero risk to the vessel/crew.

There is also a question under this clause as to what steps the owners should take to reduce the risk of contagion. This gives rise to potential disputes concerning whether the clause should operate in circumstances where the charterers allege that the infection arose from inadequacies in the owners’ onboard procedures.

It is also unclear whether this clause applies to infections resulting from crew changes that the owners have conducted at a port to which the charterers have directed the vessel for the purpose of her employment.

Other bespoke clauses

We have seen various charterparties incorporating bespoke clauses purporting to allocate responsibility for quarantine delays and/or the risk of an outbreak onboard. For example, some clauses require the owners to warrant that the crew will remain Covid-negative throughout the duration of the charter. Others are more vague, for example requiring the owners to “apply strict and effective methods to ensure all crew are clear of coronavirus”. The construction of these terms will depend on their wording and the interaction with other terms in the charterparty.

Deviation for crew changes

Under most standard time charter forms, the owners have a liberty to deviate for the purpose of saving life. A similar liberty is included in article IV, rule 4 of the Hague/Hague-Visby Rules, which may apply if incorporated into the charterparty. However, these provisions are unlikely to apply if the crew are healthy.



As mentioned above, BIMCO have released a clause addressing the issue of crew changes. The “BIMCO Covid-19 Crew Change Clause” operates if Covid-19 restrictions “prevent” crew changes from being conducted at the ports to which the vessel has been ordered. This is a high standard and (arguably) does not cover circumstances where crew changes are merely rendered more difficult or expensive – perhaps even if prohibitively so.

With the ongoing situation surrounding crew changes showing no immediate signs of abating, further clarification is needed regarding protocols that minimise the risks – legal and otherwise – of changing crew in the midst of a pandemic. A standard global approach such as that recommended by the IMO would be a welcome boost, but the most likely solution for now appears to be the gradual easing of restrictions as vaccines are rolled out and Covid-19 cases continue to fall. In the meantime, parties should carefully review their contracts to ensure that they are sufficient to deal with these ongoing risks. [MRI](#)



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