

Shipping & International Trade

Contractual Clauses that Seek to Mitigate the Costs, Expenses or Liabilities of COVID-19 and Other Contagious Outbreaks: A Matter to Pay Heed to

Introduction

Since the outbreak of COVID-19 took hold, commercial parties in the shipping industry have increasingly incorporated clauses dealing with infectious diseases into their contracts. In the chartering context where such clauses are commonplace, they are primarily designed to deal with and allocate the risks (as between owner and charterer) of the vessel calling at a place where there is a risk of infection to the crew and vessel.

However, not all infectious diseases clauses are created the same, with some more equal than others. Apart from the 2015 Infectious or Contagious Diseases for Voyage Charter Parties Clause ("**BIMCO 2015 Clause**") and the recent 2022 Infectious or Contagious Diseases Clause for Time Charter Parties Clause ("**BIMCO 2022 Clause**") introduced by industry body Baltic and International Maritime Council ("**BIMCO**"), parties have been known to incorporate modified versions and, in certain cases, wholly bespoke infectious diseases clauses. Unsurprisingly, infectious diseases clauses have, in our recent experience, given rise to a trend of disputes surrounding the application and interpretation of such clauses.

It will thus be prudent for parties to conscientiously review the ambit and scope of such clauses prior to contract, to mitigate against the risk of unwittingly bearing responsibility for costs, expenses or liabilities related to COVID-19 and other contagious outbreaks.

Scope of Infectious Diseases Clauses

In the chartering context, infectious diseases clauses typically seek to transfer the risks and responsibility of the vessel calling at a port or place where there is a risk of infection to the crew and vessel, and/or a port or place which leads to the vessel and crew being at risk of quarantine or subject to other restrictions ("**Affected Area**").

Contribution Note: This Client Update was written with contributions from Rebecca Koh, Senior Associate, from Shipping & International Trade.



Client Update: Singapore

2023 OCTOBER

Shipping & International Trade

To ascertain whether a port or place is an Affected Area, a court or arbitral tribunal will likely look to official public health advisories or notifications as to disease transmission levels and risk levels in a particular area for guidance. For instance, the World Health Organisation ("**WHO**") publishes [situation reports](#) on the status of transmission across many countries, typically at the national level or down to provincial levels that may not be specific to different ports of call within a country.

Taking the BIMCO 2015 Clause (which appears to be widely used and adapted, although it was originally drafted to deal with epidemics during the Ebola outbreak) as an example, it permits shipowners to refuse to proceed to or continue to or remain at any place which, in their reasonable judgment, is an Affected Area. Should the vessel however proceed to sail to an Affected Area, any additional costs, expenses or liabilities whatsoever arising out of or in connection with the vessel visiting or having visited an Affected Area would be for the charterers' account and any time lost shall count as laytime or time on demurrage. The BIMCO 2022 Clause applies the same test, giving shipowners the prerogative to refuse to proceed to or continue to or remain at a place which, in their reasonable judgment, has a high risk from a disease to the crew or other persons on board which cannot be prevented by taking preventive measures.

The phrase "reasonable judgment" has been construed by the English courts to mean that the shipowner must make a judgment in good faith, making all necessary enquiries to ensure that his judgment is objectively reasonable.

The ambit of potential exposure is of considerable width. English case law authorities offer support that the phrase "arising out of or in connection with" requires proof of a lesser "causal connection" between the event and the loss, falling short of a direct proximate relationship.

The practical implication is that in order for the shipowner to claim for such costs or expenses, he would have to show that (i) the vessel called at an Affected Area; and (ii) there is a causal link between the costs or expenses being claimed and the vessel's call at the Affected Area. While causation is ultimately a fact-specific inquiry, this is in practice not a difficult threshold to cross, in any given case where say, serological evidence is available to enable the source of a shipboard outbreak to be traced to a particular port of call.

For example, if the shipowner is able to establish that the crew contracted an infectious disease such as COVID-19 due to the vessel's call to the charterers' nominated port which is known to have high transmission rates for such disease, the shipowner may cogently contend that such nominated port constituted an Affected Area. In that event, charterers would *prima facie* be liable for the additional costs, expenses and liabilities arising from the vessel having proceeded to such an Affected Area.

Another not uncommon situation is where a ship calls at a port that imposes quarantine on vessels until the crew provide a negative PCR test result. An example of this practice that we have encountered was at Ulsan Port in South Korea. In that case the shipowner will *prima facie* be entitled to recover the costs of administering the PCR tests and demurrage (if any) during the period of quarantine.

Client Update: Singapore

2023 OCTOBER

Shipping & International Trade

A further example would be the restrictions imposed on vessels entering Chinese ports. Currently, following the country's downgrade of COVID-19 from Class A to Class B and its removal from quarantinable infectious disease management in January 2023, port restrictions have been significantly relaxed, including the removal of COVID-19 testing and quarantine requirements at most ports. However, it should be remembered that circumstances can often quickly turn, and that at one point during the COVID-19 pandemic, Chinese ports had imposed as long as a seven-week mandatory quarantine for returning Chinese seafarers, with even vessels that had refreshed their crew elsewhere having to wait two weeks before being allowed entry.¹

If the BIMCO 2015 Clause applies, the potential exposure to charterers could be very wide and may include: -

- (a) Demurrage;
- (b) Detention damages;
- (c) Costs to screen and test the crew;
- (d) Disinfection or fumigating costs;
- (e) Berthing fees and port dues;
- (f) Fees to local agents at port of call;
- (g) Medical expenses of the crew; and
- (h) Transportation costs if the crew need to be disembarked for treatment at a medical facility.

The regime under the BIMCO 2022 Clause simplifies the process by which the shipowner may seek recovery for costs or expenses incurred when the vessel sails to a port or place with a risk of exposure to disease. A shipowner may seek recovery in one of two ways.

Under the first option, the shipowner is primarily responsible for all reasonable, applicable and available measures to prevent exposure to the vessel, its crew or other persons on board (defined as "**Preventive Measures**") throughout the charter. However, the shipowner may look to the charterer for recourse when the costs for such Preventive Measures are more than a pre-agreed sum for the charter.

Alternatively, the shipowner may simply recover for all direct losses, damages and/or expenses so incurred if, in connection with a disease, the vessel is quarantined, or refused admission at any port or otherwise delayed. In such a situation, the vessel shall remain on-hire throughout. In contrast, a vessel shall be regarded as off-hire for time lost (if any) if any such quarantine, refused admission or delays are caused by owners' acts or omissions prior to the charter, in which case, the shipowner shall be liable for any direct losses, damages and/or expenses incurred by charterers.

¹ <https://www.straitstimes.com/asia/east-asia/chinas-seven-week-covid-19-port-quarantine-snarls-supply-chains-further>

Client Update: Singapore

2023 OCTOBER

Shipping & International Trade

The two options above strike a better balance between owners and charterers in the allocation of risks, responsibilities, and costs which will be applicable not only to COVID-19, but also to future epidemics and pandemics.

Key Consideration

Given that the situation involving contagious outbreaks is constantly evolving globally and countries have been observed to adopt reactive shifts by way of local regulations to deal with the situation, it would be sensible for commercial parties to carefully assess the public health situation and relevant regulations at the intended ports of call prior to contract and/or prior to making the voyage orders. Relevant considerations include: -

- (a) Guidance or situation reports of the prevalence of outbreaks such as COVID-19 cases at the port or place as issued by specialist intergovernmental organisations such as WHO or by national public health ministries²;
- (b) The precautions and measures taken by the port such as protocols for ship and shore interaction, refusing disembarkation and crew change;
- (c) The measures taken by the vessel and the crew to prevent infection, such as wearing personal protective equipment and masks, maintaining social distancing with shore personnel and minimising physical interaction with shore personnel;
- (d) The operative regulations of the port e.g. pertaining to quarantine and/or other restrictions; and
- (e) Guidance from regulatory or advisory bodies in the vessel's flag state.

When negotiating the infectious diseases clause, to allow for greater flexibility, parties can consider the option of permitting charterers to nominate an alternative port if, prior to or after arrival, the nominated port becomes an Affected Area. This approach is aligned with the BIMCO 2015 Clause and the BIMCO 2022 Clause, which afford such latitude. It bears noting that under both the BIMCO 2015 Clause and the BIMCO 2022 Clause, charterers are to bear the extra expense of discharging at the alternative port.

Additionally, when it comes to voyage charters, it may be practical to specify a range of load and discharge ports in the charterparty, with the option for charterers to elect an alternative range of load and discharge ports in the event that the nominated port becomes an Affected Area.

² See, for example, the COVID-19 portals for countries of major ports such as [Singapore](#), [Malaysia](#), [South Korea](#), [the Netherlands](#), and [UAE](#).

Shipping & International Trade

Concluding Remarks

Infectious diseases clauses are likely to be routinely inserted in charterparty contracts, as a measure to safeguard the risks of exposure to the vessel, crew or other persons on board to highly infectious or contagious diseases such as COVID-19.

Given that the potential exposure should such clauses be invoked is wide ranging, they warrant especial attention during negotiations and prior to contract. With careful consideration of the parties' respective interests, infectious diseases clauses may be drafted in a well-balanced manner, such that the risks of the vessel's activities during the charter are fairly allocated between the parties.

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Client Update: Singapore

2023 OCTOBER

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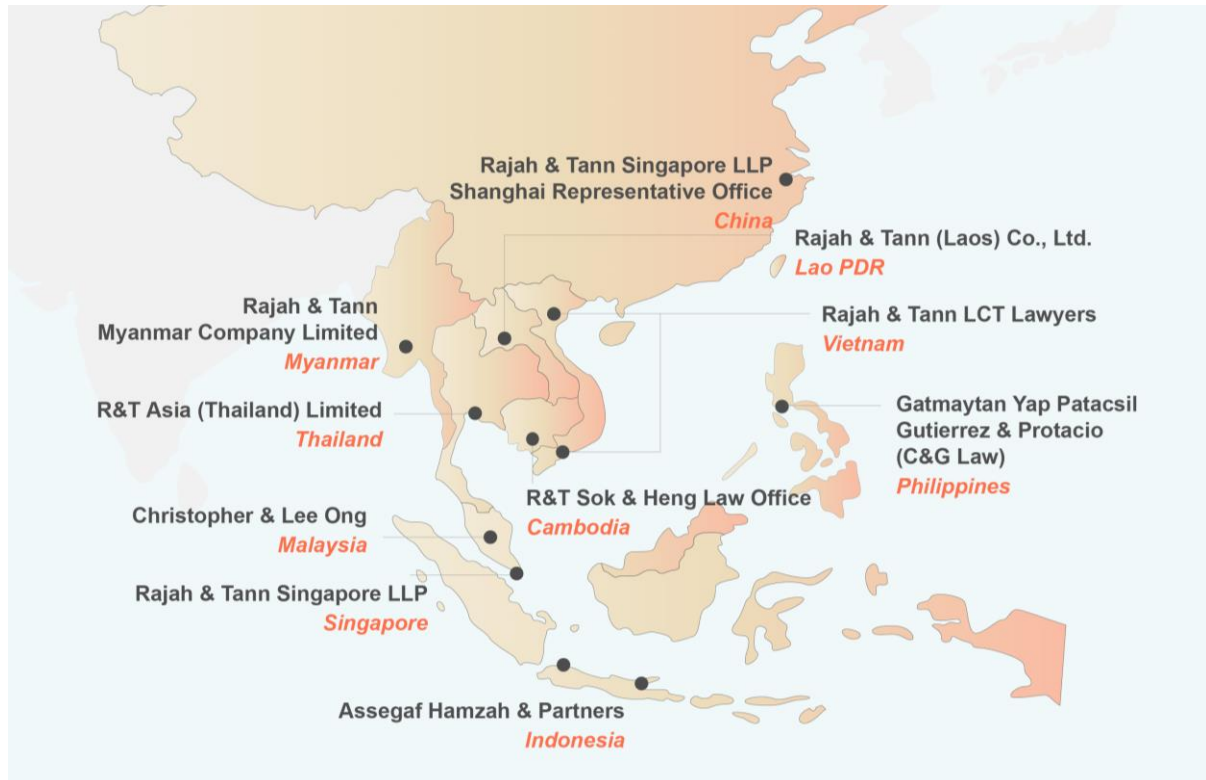
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