



## NORDISK CIRCULAR – THE COVID-19 EDITION

We live in strange and difficult times with information changing on an hourly basis. Now, more than ever, it is virtually impossible to cover every eventuality when drafting new contracts, much less successfully navigate the hurdles faced under existing contracts.

We have assisted our members with an unprecedented number of enquiries in recent weeks relating to the COVID-19. While the advice given is guided by, and tailored to, the facts of individual circumstances there are some common issues that frequently arise. Those questions are shared below and will hopefully be of assistance in the days ahead.

As always, if you have a general or specific question relating to the COVID-19, or otherwise, we remain ready and willing to help. On a practical note, most of us are now working from home but have the same capabilities that we did in the office. General and specific contact details are located on our website [www.nordisk.no](http://www.nordisk.no).



BY EILEEN LAM

### 1) Are ports in affected countries “safe ports”?

The definition of safety was established in *The Eastern City* [1958]: “... a port will not be safe unless, 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 ...” The focus is thus usually on the ship, although it has been suggested that risks to the crew can render a port unsafe even where there is no risk of damage to the ship itself.

As we learned from the Ebola virus, under English law the threshold for a port to be determined unsafe due to illness is quite high. Whether or not a port is “unsafe” due to COVID-19 will require a factual inquiry based on the risk factors of the port including, inter alia:

- (1) What measures are currently in place in the port to reduce or avoid the risk of infection?
- (2) In calling at the port would the crew members be likely to be exposed to the virus?
- (3) What would be the proximity of the vessel to the shore / likelihood of the vessel’s crew coming

into contact with possible sources of infection?

(4) Is there a risk of quarantine or detention at the port?

In short, Owners will have to prove a very high risk of infection for a port to be deemed unsafe.

Whilst measures may vary between ports, and even terminals within the same port, measures that might be taken to reduce the risk of contamination include: (1) provision of health information on crew members prior to berthing, (2) prohibitions on crew changes or disembarkation, (3) daily monitoring and reporting of crew's health and temperature during the ship's stay in port, and (4) wearing of face masks or similar protective devices by crew members during the ship's stay in port etc.

As matters stand, it would seem to us that it is difficult for an owner to refuse to call at a port in a COVID-19 affected country for fear of unsafety, particularly where adequate preventive measures (as outlined above) are in place. However, this may change in the event of a significant escalation of the spread of COVID-19.

## 2) Can owners refuse to proceed on the basis that the Vessel will be subject to quarantine?

Whilst some printed forms include a Quarantine Clause, they do not as a rule, grant owners the right to refuse to go to a port where there are quarantine rules in place. These clauses simply allocate the risk of delay incurred as a result of the quarantine.

In simple terms, the general regime is that if charterers knowingly send the vessel to a port affected by quarantine, i.e. the quarantine exists at the time the port is nominated or the vessel is ordered there, the delay falls on charterers and vice versa, the delay falls on the owner if the quarantine is declared after the port has been nominated or the order to go there is given.

By now, quarantine restrictions are already in place in various ports around the world, commonly



BY PAIGE HALVORSEN

for ships that have called in China, Iran, Republic of Korea and/or Italy. However, as the COVID-19 spreads, the quarantine restrictions will inevitably be continually updated to include more countries within the restrictions.

Note, also, that where the Hague-Visby rules are incorporated, Art.IV Rule 2(h) excludes liability for loss/damage arising out of quarantine.

## 3) Indemnity Claims – Can owners claim an indemnity for complying with charterers' orders and calling at an affected port?

Some time charters contain an express indemnity clause. For example, clause 13(a) of the "Shelltime 4" form states, inter alia, as follows: "The master (although appointed by Owners) shall be under the orders and direction of Charterers as regards employment of the vessel... Charterers hereby indemnify Owners against all consequences or liabilities that may arise... from the master otherwise complying with Charterers' or their agents' orders".

If the loss falls within the ambit of the indemnity clause and can be said to have been effectively caused by owners complying with charterers' order (i.e. there is no break in the chain of causation), then owners should be entitled to be indemnified. However, the extent of protection afforded to an owner will in all cases depend on the exact language used in the indemnity clause, and which has to be read in the context of the charter as a whole.

If there is no express indemnity given to owners (as in the "NYPE 93" form), then the owners' claim will depend on whether an indemnity can be implied. An indemnity will usually be implied against loss or damage suffered by the owners as a consequence of complying with the charterers' orders unless the owners have, by other clauses in the charter, agreed to bear the loss or damage in question. If the loss in respect of which the indemnity is sought arises from a risk which is notorious at the date of the relevant charter, for example COVID-19 being widespread in South Korea, the owner may also be taken to have assumed the risk associated with calling at a South Korean port.

Absent any express wording in the charter, there is generally no implied indemnity in a voyage charter.

That said, we are increasingly seeing parties incorporate bespoke COVID-19 or epidemics clauses which deal with the allocation of risks consequent upon having ships call at ports and or places affected by COVID-19 (see more below).

## 4) When is the vessel off-hire?

A frequent question raised is whether a vessel will be off-hire under an existing time charterparty when time is lost by reason of COVID-19 issues.

The starting point for time charters is that hire runs continuously unless a provision suspends hire. It is charterers' burden to bring themselves within the ambit of such provision, typically an off-hire clause. As will be understood, the precise wording of such clauses will be of utmost importance. The off-hire clauses in the various charterparties are all different. The pivotal criteria for placing the vessel off-hire is that an off-hire event must have occurred. In the COVID-19 context the most relevant off-hire events are deficiency of crew and quarantine, assuming they are listed in the off-hire clause.

If a sufficient number of crew fall ill due to the COVID-19 and as a consequence the vessel is unable to perform the services required there is likely to be "a deficiency of men". If, on the other hand, the healthy crew is able to perform the services without any loss of time, the vessel will not be off-hire.

The off-hire clauses that contain "quarantine" as an off-hire event usually limit off-hire to situations 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 means that if the vessel is quarantined in the next port after having traded to an affected area, the vessel will remain on-hire. More problematic is the situation where the vessel is delayed in connection with a crew change where the incoming crew is placed in quarantine. The quarantine of the incoming crew is owners' risk and if this causes the crew to be deficient, the vessel will be off-hire

It should be mentioned that some off-hire clauses contain extensive sweep-up wording, i.e. "any other cause whatsoever". Such language often proves to be the most realistic alternative for charterers to rely on. The term "whatsoever" is held to mean what it says. It would most likely cover COVID -19 related delays if there has been loss of time.

When it comes to off-hire, the importance of the precise wording of the relevant clause cannot be underestimated. For a more detailed analysis of the position under Shelltime 4, BP Time 3 and ExxonMobil Time

2012, please see NOTE on page 6.

### **5) Laytime and demurrage regimes – is time going to count?**

The starting point for laytime is the tender of a valid NOR. Under common law, obtaining free pratique is considered a mere formality and NOR can (in the absence of express clauses) be validly tendered despite free pratique not having been granted. In the midst of COVID-19, that is most likely no longer the case. In all situations, where there is a delay in obtaining free pratique, we recommend that owners re-tender NOR on a without prejudice basis as soon as free pratique is granted.

The position under the various printed forms regarding tender of NOR in the absence of free pratique varies. In general terms, the dry charterparties tend to allow tender of NOR WIFPON if the berth is congested /unavailable on arrival, see e.g. Gencon, Amwelsh. There is more disparity amongst the wet charterparties, ranging from the more owner friendly Asbatankvoy to the more charterer friendly oil major charterparties which place the risk of obtaining free pratique on the owner. See for example Shellvoy6, under which NOR is invalid if free pratique has not been obtained within 6 hours.

When it comes to excluding periods from laytime/demurrage once valid NOR has been tendered, the position is governed by the terms of the contract. Aside from a Quarantine Clause, there may be an exclusion for time lost/delays due to the orders of the Health or Port Authorities. There may also be a catch all provision for time lost beyond the control of the charterer.

The laytime analysis depends not only the terms of the charterparty but also the specific factual scenario. It is beyond the scope of this Circular to provide comprehensive advice on the individual printed forms, however, the above are some of the clauses to look out for.

### **6) Is this a force majeure event?**

Force majeure is not a standalone concept under English law, the relevant contract must contain a force majeure clause.

To rely on force majeure, the party seeking to invoke the clause has to show (1) that there has been a force majeure event. Whilst some force majeure



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clauses may specifically include “epidemics”, “disease” etc. the current situation may be caught by “act of god” or alternatively, a catch all type provision for matters outside the parties’ control; and (2) that performance of the contract has been prevented, delayed or hindered by reason of the force majeure event i.e. there must be causation. It is important to check the terms of any force majeure clause as they commonly impose requirements such as service of notice and supporting documentation.

Generally, a force majeure clause will protect the parties from liability in the event of delays to or prevention of performance as a result of force majeure. However, the specific remedy will be set out in the clause and these do vary. Before declaring force majeure (or indeed on receipt of a force majeure notice), it is important to carefully consider whether factually the situation falls within the clause, what the notification requirements are and what the available remedy is. A failure to properly follow the terms of the clause can either prove fatal to the claim or alternatively, if the wrong remedy is exercised, amount to breach of contract.

### 7) Frustration

A contract is frustrated if performance becomes impossible or the nature of the contractual obligations are radically altered. It will not, however, assist where performance simply becomes more onerous or expensive. When it comes to delay, it has to be excessive. Note also that you can only claim frustration if the consequences of the event have not been regulated elsewhere in the contract.

As with force majeure, whether or not a contract has been frustrated has to be assessed on the specific facts, however, the threshold for proving frustration is high and it is unlikely that the immediate effects of COVID-19 would be sufficient to frustrate a charterparty.



BY VICKI TARBET

### 8) COVID-19 clauses

We have seen a wide range of “COVID-19” clauses circulating in recent weeks. Some are good for owners (like the Bimco and Intertanko clauses) while others offer virtually no protection.

If members are considering using the BIMCO clauses, we would recommend amending the “affected area” language in sub-clauses (a) and (b) such that they read as follows:

“Affected Area” means any port or place where, **in the reasonable judgement of the Master or Owners**, 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.

“(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~~ **is an Affected Area after the date of, whether or not such place was an Affected Area at the time of entering into this Charter Party or became so thereafter.**”

When members are considering including any of these clauses there are a few key issues that they should consider as outlined below:

- Has the Clause been incorporated into, not only all the charterparties in the chain, but also the bills of lading?
- What is the “affected area” and how broad or narrow is the definition? On the one hand, if the “affected area” is given a wide definition then owners can also ensure that any delays or additional costs incurred as a result of the Covid-19 pandemic are for charterers’ account. On the other hand, if the definition is quite wide (e.g. a port in a country with at least one reported case of the COVID-19) it may soon be that all countries are “affected areas” thereby severely limiting the scope of trading under the charterparty.

#### *Under Time Charters*

- Owner’s warranties: can owners really guarantee that they will not call at an affected port to bunker, obtain supplies, or change crew? As the breadth and impact of the COVID-19 expands, in the near future it will be virtually impossible to refuse to call at ports affected by the virus. Owners should accordingly attempt to avoid giving these warranties or in the alternative, consider how narrow the definition of “affected area” is.

#### *Under Voyage Charters*

We have developed a COVID-19 clause that we have shared with some of our members already. It was

drafted on the basis that many members were finding it difficult to get institutional clauses accepted and therefore needed a shorter, more concise clause.

**COVID-19 CLAUSE:**

*“Affected Area” means any port or place where, in the reasonable judgment of the master or owners, 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 vessel shall not be obliged to proceed to or continue to or remain at any place which is an Affected Area, whether or not such place was an Affected Area at the time of entering into this charter party or became so thereafter. Any delay due to COVID-19 related measures, including vessel quarantine at any of charterer’s nominated ports, to be for charterer’s account. Same also to apply where valid nor has not been tendered due to delay in obtaining free pratique. Should charterers nominated port be closed due to COVID-19 or COVID-19 related causes, all cost and time waiting to be for charterer’s account.*

*Any additional costs, expenses or liabilities whatsoever arising out of or in connection with 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 and time spent waiting for the same, shall be for the charterers’ account and any time lost shall count as laytime or time on demurrage.*

*Any delays and additional costs and expenses incurred at any load or discharge port(s) under this charter arising out of the vessel having visited or called at an Affected Area prior to the commencement of this charter shall be solely for owner’s account and any time lost shall not count towards laytime/time on demurrage. Owners warrant that the vessel has not called at any port or ports in an Affected Area in the 14 days prior to the commencement of this charter.*

*The terms of this clause shall override any conflicting provisions in the charter party.*

NB! The inclusion of the highlighted paragraph in the COVID-19 Clause must take into account the nature of the vessel’s trade. This is especially so in light of the increasing

number of Affected Areas and the imposition of a 14 day quarantine in many ports.





## NOTE – OFF-HIRE ISSUES UNDER VARIOUS CHARTERPARTIES

The below comments examine whether a vessel may be off-hire if the vessel is delayed due to (i) free pratique not being granted, or (ii) quarantine in the subsequent port after having called an affected port.

The focus here is on existing contracts, rather than post-outbreak charterparties which will typically seek to regulate the issue.

We will address three time charterparties below:

### Shelltime 4:

The general off-hire provision is found in clause 21. Hire shall be suspended if there is a loss of time “due to deficiency of personnel (...) or any other similar cause preventing the full working of the vessel”. As a starting point note the need for loss of time to have been caused by the off-hire event, absent which there can be no off-hire. Where delay is suffered by a concurrent cause there is typically no off-hire.

A further requirement is that the vessel is prevented from working. A ship is not prevented from working merely

because she cannot perform the next operation that the charterers contemplate, or were expecting, her to undertake. The relevant question is whether she is prevented from carrying out the service immediately required by charterers. As held in one case: “The question is not what the charterers hoped or expected their orders would be, but what service they actually required.” As a consequence, it is necessary to assess precisely what order the charterers have given to the vessel. If the order is to go to port X and start loading, and the vessel is prevented from berthing due to inability to obtain free pratique or is restricted by a quarantine, it may well be considered to be prevented from working in the meaning of clause 21. Insofar as that order requires the vessel on arrival to comply with local regulations, but there is nothing physically wrong with the vessel or crew, the delay is merely incidental to carrying out the orders given such that charterers will struggle to place the vessel off-hire. Similarly, if the order is to go to port X and wait for berth, owners may say that they are in compliance with this order, even when awaiting free pratique or a quarantine. This is also an example of there being no loss of time despite the possible existence of an



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off-hire event.

Deficiency of personnel is understood to mean numerical deficiency. If crew members fall ill and are unable to work, it may be argued that there is “deficiency of personnel”. Assuming no crew member is ill and the crew is in adequate numbers, it will be virtually impossible for charterers to argue that there is deficiency of personnel. The clause, however, does expand the list of possible off-hire events, by adding “any other similar cause preventing the full working of the vessel”. Due to the use of “similar cause”, it is clear that the sweep-up alternative shall be read in light of the list of off-hire events in clause 21 (a). As a consequence, only events of a similar nature will be covered by the more general sweep-up language. When examining the preceding events, the view is that they refer to the efficiency and condition of the ship and her crew, which is quite different from waiting for free pratique and quarantine, which are both a result of the commercial trading of the vessel – provided that the delay in obtaining free pratique or quarantine is a direct result of the vessel’s previous port call(s) and not due to suspicion of, or actual illness of, the crew. Thus it will be fairly difficult for charterers to place the vessel off-hire pursuant to the general off-hire clause.

It is also worth noting that clause 21 (a) (iv) contains regulation of a related situation – namely delay due to quarantine as a result of the master or crew having had communication with an infected area without consent or instruction from charterers. In such event, the vessel will be off-hire for the time lost. This sub-clause supports the idea that time waiting for free pratique or in quarantine is on-hire (as per the above). Charterers bear the delay risk, including time waiting to berth, as well as waiting for free pratique or in quarantine. Only events where the delay in quarantine is caused by the master/crew’s action shifts the risk, which in turn arguably required the particular regulation in clause 21 (a) (iv). **It is worth noting that in relation to crew change, clause 21 (a) (iv) may cause a problem for owners if the incoming crew is being quarantined upon arrival in the country where the crew change is to take place and the vessel as a consequence is delayed. There is a possibility that this situation will result in off-hire for the time lost as the incoming crew is unlikely to have had communication with the affected area as part of**

**charterers’ instructions or with their consent.**

Even if a vessel is off-hire for time waiting for free pratique or in quarantine, owners may have defences available. There is generally an implied indemnity available to owners for the consequences of following charterers’ orders, unless the relevant risk is one that the owner can be considered to have assumed. An assumed risk is one that is generally known at the date of the charter. Thus even if it was known that the particular port was affected when the vessel was sent there, the consequence (problems with obtaining free pratique or quarantine) may be considered to be a direct result of charterers’ order to send the vessel to the port nevertheless, for which the Charterers will be responsible. If the vessel faces quarantine in the next port after calling the affected port, and the next port is the first port under a new charterparty, the argument may not be available if the virus was a known issue at the date of that charterparty. In the case of new fixtures where the vessel has been in an affected port/will go to an affected port before being delivered into a new charter, we strongly recommend insertion of wording regulating the possibility of delay and quarantine.

It is also worth noting that the exceptions clause, clause 27, expressly regulates liability for quarantine restrictions – neither party shall be “liable for any loss or damage or delay or failure in performance hereunder arising or resulting from (...) quarantine restrictions.” This clause will be an available defence against a claim for damages for alleged breach of contract, but does not affect the off-hire.

### **BPTIME 3**

In BPTIME 3 the general off-hire regulation is in clause 19. The wording of the clause is to a certain extent similar to Shelltime 4, but differs on a potentially important point. Even though the specified off-hire events are to a large extent the same as in Shelltime 4, the list of off-hire events in clause 19.1.4 contains general sweep-up language “any other cause preventing the full working of the Vessel”, while the corresponding clause in Shelltime 4 refers to “any other similar cause.” The question is whether the generality of the wording of BPTIME 3 clause 19.1.4 will make the clause more extensive than the corresponding wording in Shelltime 4. In legal theory and case law the phrase “any other cause” has been held

to mean ‘any other cause of the same type as those previously mentioned’. This is an application of the *eiusdem generis* rule, a rule of construction to the effect that a sweep-up provision at the end of a list must be taken to refer to the same kind of things as those specifically mentioned. In *The Laconian Confidence* [1997] 1 Lloyd’s Rep. 139, Rix, J., said at page 150: “In my judgment it is well established that [the words ‘any other cause’], in the absence of ‘whatsoever’, should be construed either *eiusdem generis* or at any rate in some limited way reflecting the general context of the charter and clause.”

In order to apply the above rule, it is necessary to identify the common features of the named causes. This is not obvious. However, it seems that there is commonality relating to the condition of the ship or her crew. In *The Laconian Confidence* [1997] 1 Lloyd’s Rep. 139 said, at page 150, Rix, J., said: “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 page 382) that it is for the owners to provide an efficient ship and crew.” The reference in clause 19.1.3 to clause 9.6.5 as a separate off-hire event may cause some problems in this matter, when assessing the meaning of clause 19.1.4. Clause 9.6.5 refers to an obligation for owners to have all documents required to trade within the trading limits. If the reason for the vessel being prevented from obtaining free pratique or held in quarantine is caused by failure to provide required documents, there is a possibility that clause 19.1.4 may be applicable, even if the documents needed do not fall within the scope of clause 9.6.5.

If the vessel despite the above is placed off-hire, the same defence as presented above for *Shelltime 4* will be available to owners (implied indemnity for complying with charterers’ orders).

### **ExxonMobil Time 2012**

Clause 11 regulates the charterers’ right to place the vessel off-hire. The list of off-hire events is relatively similar to what is found in *Shelltime 4* and *BPTime 3*, but does not contain a sweep-up provision of the kind found in the other two charterparties. In addition, the issue of quarantine is expressly regulated

in clause 11 (a) line 835, where it is stated that time spent in quarantine shall be for charterers’ account. As a consequence, the vessel will not go off-hire unless the quarantine is caused by the Master or crew having communications with the shore at an infected port subject to charterers having given the Master adequate written notice of the infection risk.

The clause does not regulate free pratique expressly. Clause 11 (a) (i) refers to “detention or other interference by authorities”, which charterers could potentially argue will cover the refusal to grant free pratique. However, when read in light of item (i) as a whole, it is unlikely that such an argument would succeed, both because the “other interference has to be read in light of the preceding events (capture, seizure and arrest)” and also because item (i) relates to the condition of the vessel as such, while items regarding the crew are regulated in item (ii).

It is worth noting that if any of the crew members fall ill due to the virus and this is what causes delay, the charterers may pursuant to clause 11 (a) (ii) place the vessel off-hire.







## NOTE - NOR/LAYTIME REGIMES

The first step to trigger laytime is the service of a valid NOR. Free pratique is a requirement of readiness, however, under common law, obtaining free pratique has been treated by the courts, in the absence of any express clauses, as a mere formality. Thus, NOR can be tendered despite the Vessel having not yet obtained free pratique. In present times, with COVID-19 and increased health screening for vessels and crew, this is may no longer be the case.

Even if NOR can be tendered before free pratique is obtained, in the event free pratique is ultimately refused or there are reasonable grounds for believing it will be refused, it is unlikely this would bring forward the commencement of time, (see para. 3.197 of Schofield, Laytime & Demurrage).

In all instances, if there is a delay obtaining free pratique it is recommended that owners re-tender NOR on a without prejudice basis, as soon as free pratique is granted, while also ensuring that any required letters of protest are issued.

### Dry Charter Forms

#### 1. AMWELSH 93

The relevant provisions can be

found in Clauses 6 and 7.

Under Clause 6(a) where the berth is available on arrival, NOR is to be tendered on arrival in berth. If the berth is not available on arrival, NOR can be tendered from a layby berth or anchorage. Clause 6(b) extends this further to allow tender of NOR at the usual anchorage outside port limits, if the vessel is prevented from entering port (amongst other reasons) on the order of charterers or “*any competent official body or authority*” whether customs cleared or in free pratique or not. This would therefore potentially cover the scenario of a vessel being ordered to wait outside port during a quarantine period. Note, however, that if the vessel is subsequently found not to be ready in all respects, time lost from discovery thereof is excluded from laytime or demurrage.

There are no express exceptions to laytime or demurrage in the printed form that would apply to delays relating to COVID-19 and/or quarantine.

#### 2. GENCON 94

The relevant provisions can be found in Clauses 6 and 7.

Under Clause 6(c) NOR can be tendered at or off port if the berth is not available on arrival, whether in free pratique or customs cleared. However, if the



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factor preventing berthing is not congestion, but the vessel is prevented from berthing due to quarantine or other delays related to COVID-19, Owners may find themselves in a situation where they are unable to get into a position to be able to tender valid NOR. Assuming NOR could be tendered, if the vessel is subsequently found not to be ready, all time lost after discovery thereof until the vessel is in fact ready shall not count as laytime.

There are no express exceptions to laytime or demurrage in the printed form that would apply to delays relating to COVID-19 and/or quarantine.

### **Wet Charter Forms**

#### **1. Asbatankvoy**

With the usual combination of Clauses 6 and 9, NOR can be tendered at the customary anchorage and time will count, where the berth is not reachable on arrival. This is not simply limited to congestion or physical matters and should extend to situations where a vessel is prevented from proceeding to berth on arrival as a result of quarantine or other protective measures.

There are no express exceptions to laytime or demurrage in the printed form that would apply to delays relating to COVID-19 and/or quarantine.

#### **2. BPVOY 4**

The relevant provisions can be found in Clauses 6 and 18.

NOR can be tendered under Clause 6 on arrival at port. However, it will not be effective to start time running unless free pratique is obtained within 6 hours, see Clause 6.3.3. If free pratique is not granted within that timeframe and the delay is not attributable to owners, the Master is required to issue a Letter of Protest, failing which time will only start to count towards laytime or demurrage when free pratique is granted.

There are no express exceptions to laytime or demurrage in Clause 18 that would apply to delays relating to COVID-19 and/or quarantine.

#### **3. BPVOY 5**

The relevant provisions can be found in Clauses 10 to 12.

As with BPVOY 4, if free pratique has not been

obtained within 6 hours of tender of NOR, the Master is required to issue a Letter of Protest. The NOR then becomes effective for the purpose of counting time (laytime or demurrage) on the earlier of the issue of the Letter of Protest or the granting of free pratique. Note this Clause also requires the Vessel to re-tender NOR immediately on obtaining free pratique, failing which all time from the granting of free pratique to the earlier of such re-tender of NOR or commencement of cargo operations will not count as laytime or demurrage.

Clause 11.4 provides for half rate demurrage for delays arising from "act of god". Depending on the facts, Charterers may be able to bring themselves within this, however the Clause that neither the cause of the delay or the resulting delay could have reasonably been prevented by either party.

#### **4. ExxonMobil VOY2012**

The relevant provisions can be found in Clauses 11, 13 and 14.

Under Clause 11, NOR can be tendered on arrival at the customary anchorage or waiting place. There is no express requirement for the vessel to have obtained free pratique to tender NOR, thus the common law position applies.

Clause 14(c)(vi) excludes from laytime and demurrage time spent/lost due to the requirements of (amongst others) port authorities, or Health Authorities. Clause 14(c)(vii) provides a further exception for time spent/lost by reason of the action or inaction of the same entities.

In addition, there is the Quarantine Clause at Clause 23 which excludes from laytime and demurrage time lost due to quarantine, unless the quarantine was in force at the time the port/place was nominated by charterers.

#### **5. Shellvoy 5**

Under Clause 13(1)(a), if the Vessel does not proceed immediately to berth, NOR can be tendered at the usual waiting place or where she has been ordered to wait, as long as the berth is accessible. Accessible in this context means the Vessel is not prevented from proceeding by bad weather, ice, tide, tugs, port traffic requirements or awaiting daylight.

There is no express requirement for the Vessel to have obtained free pratique to tender NOR, thus the

common law position applies.

See also, Clause 23 for the Quarantine Clause, which provides an express exception to laytime and demurrage for time lost due to quarantine, unless the quarantine was in force at the time the affected port was nominated by charterers.

### **6. Shellvoy 6**

Clause 13(1)(a) has been amended (to the disadvantage of owners) to require Customs clearance and free pratique to be obtained within 6 hours of tender of NOR. If not, the NOR is invalid and a new NOR can only be tendered once both these requirements have been satisfied, at which time, laytime and/or demurrage starts to count. This places the risk of obtaining free pratique on owners and it is quite possible that in the current circumstances vessels will have difficulty obtaining timely clearances.

Note, however, there is also a Quarantine Clause at Clause 23 which provides that time lost will not count against laytime or demurrage unless the quarantine was in force at the time the affected port was nominated. Whilst there is no authority as to how Clause 13(a) and Clause 23 interact, the logical way to read these two clauses together is that if charterers nominate a quarantine affected port, any time lost as a result will count against laytime or demurrage even where the vessel has been unable to obtain free pratique or otherwise been unable to get into a position to tender valid NOR.





## NOTE – QUARANTINE DELAYS UNDER VOYAGE CHARTERPARTIES

Where the printed form includes a Quarantine Clause, the general concept across these is similar, namely, time counts where delay is caused by quarantine if the quarantine is in place when the vessel is sent/ordered there or the port nominated. If the quarantine is imposed after orders/nomination, the delay falls on owners. These clauses deal only with delay and do not give owners a right to refuse to go to a quarantined port.

If Hague-Visby Rules are incorporated into the Charterparty, Art.IV Rule 2(h) excludes liability for loss or damage arising out of quarantine.

### Dry Charter Forms

#### 1. AMWELSH 93



BY VICKI TARBET

The printed form does not include a quarantine clause. Accordingly, delays will be dealt with by way of the usual laytime regime.

#### 2. GENCON 94

The printed form does not include a quarantine clause.

Accordingly, delays will be dealt with by way of the usual laytime regime.

### Wet Charter Forms

#### 3. ASBATANKVOY

Cl. 17(a) *“Should the charterer send the Vessel to any port or place where a quarantine exists, any delay thereby caused to the Vessel shall count as used laytime; but should the quarantine not be declared until the Vessel is on passage to such port, the Charterer shall not be liable for any resulting delay”*

Commentary in Voyage Charters para.67.2 opines that the language *“should the charterer send”* suggests an active order is required and this would not apply where the port is simply named in the charterparty.

#### 4. BPVOY - BPVOY 4 & 5

Clauses 29 and 32 respectively *“If Charterers require the Vessel to proceed to any port which, at the time when the Vessel is ordered to that port, there is a quarantine then time spent or lost whilst the Vessel is detained due to such quarantine shall count as laytime or, if the Vessel is on demurrage as demurrage. However, if*

*quarantine is subsequently declared whilst the Vessel is on passage to such port Charterers shall not be liable for any delay caused by such quarantine.”*

Note that under clause 6.3 if the Vessel cannot berth on arrival NOR can be tendered at customary anchorage. However, if free pratique is not granted within 6 hours owners must issue a letter of protest otherwise time will not start to count.

Note also the general right charterers have under Clause 22/Clause 21 to provide revised voyage orders.

### **5. ExxonMobil VOY2012**

Clause 23 *“Time lost at any port or place due to quarantine shall not count as laytime or, if the Vessel is on demurrage, as time on demurrage, unless such quarantine was in force at the time when such port or place was nominated by Charterer”*

There is also an exception to laytime and demurrage under Clause 14(c) for time lost by reason of action/inaction of (amongst others) the Health Authorities. Charterers may therefore be protected from delay as a result of COVID-19 when there is no formal quarantine in place.

Note also, the general right charterers have under Clause 9(b) to nominate new ports or places.

### **6. Shellvoy 5 & 6**

Clause 23 *“Time lost due to quarantine shall not count against laytime or for demurrage unless such quarantine was in force at the time when the affected port was nominated by Charterers.”*

Charterers can give revised orders under Clause 26 at their expense.

Clause 32(1) provides a general exception to liability for loss, damage or delay except as otherwise provided for in the charterparty, arising or resulting from quarantine restrictions. Cargo claims are excluded from this.

Note the position on tender of NOR in the absence of free pratique differs significantly between Shellvoy 5 and 6. See the note on NOR/Laytime for more details.

