



# Covid-19 Insights

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## FORCE MAJEURE CLAUSES: THE IMPACT OF COVID-19 EMERGENCY ON CHARTERPARTIES

Force majeure clauses are one of the legal issues that promptly emerged as a consequence of the outbreak of the COVID-19 pandemic.

Such clauses identify the circumstances, not attributable to the parties, that make it impossible to perform the contractual obligations, and regulate their consequences.

Charter-parties are normally subject to English law.

Under English law (like in other common law jurisdictions), there are no general written rules that entitle the parties to rely on force majeure to suspend or terminate the contract. As a result, a party will be entitled to assert an event of force majeure only if there are specific provisions in the contract.

To activate a force majeure clause a party must, therefore, be able to prove that (i) a force majeure event as defined by the clause occurred and (ii) this event caused the (definitive or temporary) impossibility to perform the contractual obligation; moreover, if established

by the contract, the party must also comply with any notice requirements to the other party.

The effect of the occurrence of a force majeure event may be to suspend the rights and obligations of the parties releasing them from any liability or to give the right to terminate the contract.

Force majeure clauses often provide that the contract shall be suspended for the duration of the force majeure and, if this circumstance persists, the parties shall be entitled to terminate the contract.

Charter-parties may contain specific provisions governing these aspects; an example of a standard clause is included in the BIMCO Supplytime 2017 form (used to charter offshore support ships). Clause 35 of the SUPPLYTIME provides an example of force majeure with an "open" list, with a closing wording "any other similar cause beyond the reasonable control of either party". Clause 13 excludes that the ship is off-hire during force majeure period, but clause

34 allows the parties to terminate the contract if such an event lasts for more than 14 days.

The SUPPLYTIME form also includes the BIMCO clause "Infectious or Contagious Diseases" for time charter parties (clause 25). Under this clause, the owner can refuse to conduct the ship to a port where there is a risk of contagion or quarantine and the charterer may be obliged to issue alternative travel orders to avoid areas affected by an infectious and contagious disease; moreover, the charterer shall bear all costs and liability.

The BIMCO HEAVYCON Form is a standard contract for heavy and project cargo. Clause n. 7 "Quarantine" provides that any time lost due to quarantine formalities and / or health restrictions imposed or incurred at any stage of the voyage, including any loss of time in the loading port and / or the discharge port, shall be paid by the charterers at the demurrage rate as specified in clause 19. Charterers shall also pay all other expenses that may be incurred as a result of these activities.

As mentioned, BIMCO has developed an "Infectious or Contagious Diseases Clause" in two variants, respectively for time charter and voyage charter which is included in the text of some forms (such as the SUPPLYTIME) and can be added to any other forms. This clause was developed in response to any contagious disease and therefore the wording is drafted in general terms and without reference to specific conditions. The provisions are intended for application only in the most serious cases of illness or contagion (defined as "highly infectious or contagious disease that is seriously harmful to humans") and cannot be used improperly in the absence of these conditions. Given the potential ambiguity and the lack of clear meaning, the word "epidemics" has been avoided both in the heading of the clause (the provisions are called "clause on infectious or

contagious diseases") and in the definition of disease.

Akin for war or piracy risks, the owner and/or the master may refuse to let the ship carry out commercial operations in a region or a dangerous area based on their "reasonable judgment". If, however, this option is not exercised and the ship proceeds, the charterers shall be responsible for the resulting liabilities and any additional costs sustained for the preventive measures taken by the owner to protect the ship and the crew.

According to the time charter clause, the charterers' obligations are expressly formulated to also include post-contractual costs such as cleaning, quarantine or fumigation deriving from the previous voyage of the ship. Owners should make sure to obtain adequate financial guarantees when they agree to allow the ship to proceed to a risk area.

The voyage charter version expressly limits the application of the clause to situations that arise after the conclusion of the contract. This is because (unlike what happens in a time charter, in which the ship's itinerary is not set), the parties of a voyage charter should know the situation in the loading and unloading ports already during the negotiation of the contract and take due care. Instead, the events that occur after the conclusion of the contract can be more problematic to manage between the parties, therefore the clause establishes a mechanism to deal with these changed circumstances.

The owners are given the option, before loading, to terminate the contract or to refuse any performance that requires the entry or stay of the ship in an area considered infected; if the voyage charter contains the provision to carry out commercial operations in several ports within a certain range, the owners shall be entitled to terminate the contract only if the

charterers fail to nominate an alternative port within 48 hours of the owners' notice.



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