COVID-19, THE RUNNING OF LAYTIME AND TIME OFF-HIRE

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(1) Introduction

1. In response to the new Coronavirus ("**COVID-19**"), ports around the world are imposing quarantine restrictions on vessels arriving from COVID-19-affected States.[1] Delays (and the consequences of delays) will, inevitably, have a critical impact on the shipping industry. This note outlines three areas in which COVID-19 may have effects: the commencement of laytime, the interaction between *force majeure* and laytime, and time off-hire.

(2) Readiness to Load and Discharge

Free pratique

2. Free pratique is "*something of a term of art*",[2] but refers to a grant of permission at port authorities upon their satisfaction as to the health of the vessel. As a matter of common law, the absence of pratique will not prevent a notice of readiness ("**NOR**") from being given provided that the medical condition of the crew is such that pratique can be obtained without subsequent delays where this is considered to be a formality (*Shipping Developments Corporation v V/O Sojuzneftexport (The "Delian Export")* [1972] 1 QB 103). However, in *The "Delian Export"* Lord Denning MR said, *obiter* at p.124:

> I can understand that if a ship is known to be infected by a disease such as to prevent her getting her pratique she would not be ready to load or discharge. But if she has apparently a clean bill of health, such that there is no reason to fear

[1] See, by way of example: https://www.seatrade-maritime.com/ports-logistics/india-imposes-14-day-quarantine-vessels-covid-19-affected-countries; and https://www.seatrade-maritime.com/opinions-analysis/australia-slams-door-cargo-ships-desperately-needed-goods-risk.
[2] *AET Inc Ltd v Arcadia Petroleum Ltd (The "Eagle Valencia")* [2010] 2 Lloyd's Rep 257, [3].

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> delay, then even though she has not been given her pratique, she is entitled to give notice of readiness, and lay time will begin to run.

3. In the absence of express clauses stating otherwise, it is unlikely that vessels travelling from an area known to be affected by the COVID-19 pandemic will be able to treat free pratique as a mere formality.

4. Charterparties sometimes provide that NORs are valid when tendered WIFPON (whether in free pratique or not). However, such clauses are predicated on the basis that obtaining free pratique is likely to be a mere formality (*Summerskill on Laytime*, 6th edn. 2013, §5-13). Some arbitrators have suggested that provisions of this kind cannot be relied upon where a delay to granting free pratique is foreseeable. In London Arbitration 11/00 (2000) 545 LMLN 3, the charterparty provided that NOR could be tendered WIFPON. NOR was tendered on arrival, but the grant of free pratique was delayed by 13 days after it was discovered that four crew members did not have valid vaccination certificates for yellow fever. The Tribunal held that *The Delian Spirit* was not relevant because the obtaining of free pratique was not a "*pure formality*". The inclusion of the words WIFPON did not mean that the parties were to be taken to have contracted out of the usual requirement that the vessel was in fact ready to load at the time that NOR was tendered.

5. As a result, the mere inclusion of a WIFPON provision may not absolve the owners of the obligation to have the vessel actually ready in the usual way, but only allow valid NOR to be tendered pending the grant of free pratique where it is a formality. As a result, the authors of *Laytime and Demurrage* go so far as to say that the words WIFPON are "*probably surplusage*" where there is no impediment to free pratique being granted (at §§3.197, 3.200).

6. However, printed forms will differ in the weight put on the free pratique requirement and therefore will be subject to varying interpretations (see e.g. *Odfjell Seachem A/S v Continentale des Petroles et d'Investissements (The "Bow Cedar")* [2005] 1 Lloyd's Rep 275 on the BPVoy4 form).

Quarantine

7. Where a quarantine restriction is placed on a vessel, she cannot be considered ready to load or discharge because the result of the restriction is that the work is prevented. Thus laytime will not

begin to run (*White v Winchester* (1886) 13 Rettie 524 (a decision of the Scottish Court of Session); *The "Austin Friars"* (1894) 10 TLR 633). In *The "Austin Friars"*, loading was not permitted until the doctor had visited the vessel and pronounced her free from infection. The ship was not considered ready to load until such time as the vessel was pronounced free from infection – the decision in *White v Winchester* was approved.

8. This exception arises because loading and unloading the cargo during a period of quarantine is illegal by the law of place where unloading is to be performed (*Scrutton*, §15-036 (note 129).

9. In theory, it is of course possible for the parties to provide in their charter that the owner takes the risk of delays resulting from quarantine. Given that COVID-19 delays are likely to be with us for the foreseeable future, it will be interesting to see whether parties in the industry take steps to move, or at least share, the burden of quarantine-related waiting time.

(3) Force Majeure and the running of laytime

10. By contrast to 'free pratique', '*force majeure*' is not a term of art; whether a *force majeure* clause is triggered depends on its construction on the usual principles (*Tandrin Aviation Holdings v Aero Toy Store LLC* [2010] 2 Lloyd's Rep. 668 at [43], *per* Hamblen J). The Court will not imply a *force majeure* clause into a contract in the absence of one.

11. It should also be noted that for a *force majeure* clause to apply, it will in all likelihood have to be triggered during laytime. A *force majeure* clause will not usually operate once the vessel is on demurrage absent a clear indication in the language of the clause. Thus, in *Islamic Republic of Iran Shipping lines v Ierax Shipping Co. of Panama (The 'Forum Craftsman')* [1991] 1 Lloyd's Rep. 81, Hobhouse J considered the following clause: "*any other force majeure causes including Government interferences, occurring beyond the control of the shippers or consignees, which may prevent or delay the . . . discharging of the vessel always excepted*". Hobhouse J held that this clause did not apply once the Vessel was on demurrage. He stated at pp.87-88:

> In relation to the obligation to discharge (or load) within a limited time, any clause which qualifies the obligation to discharge potentially raises a question of causation. Whilst laytime is still running any excepted peril can operate directly

> so as to excuse the obligation to discharge or load at that time; but, after the laytime has been exhausted and the charterer has not completed discharge within the laytime, the subsequent occurrence of an excepted peril, say a strike, has a different causative relevance. If the charterer had performed his obligation in time, the excepted peril later occurring would have had no causal relevance at all; it only has relevance because of the charterers' earlier breach. […] the clause has to demonstrate a clear intention that the exception should apply even when the vessel is on demurrage whether or not the operation of the peril arises from the earlier breach by the charterer of his obligation to discharge within the laydays. For a clause to have such a clear intention requires language that leaves one in no doubt that that is what the parties intended. Clause 28 falls short of demonstrating such an intention.

12. The same view is put forward in *Scrutton*, §15-013, where it stated that: "*Even if such a clause is capable of applying to the obligations concerning the time for loading and discharging cargo, it will not normally be held to apply once the vessel is on demurrage*", following the adage 'once on demurrage, always on demurrage'.

(4) Time off-hire – deficiency of men and any other cause

13. It is not only in the context of voyage charters that delays are likely to give rise to issues. It is unclear whether a standard 'deficiency of men' provision in an off-hire clause in a time charter is sufficient to cover the position where the crew is unwell. In *Royal Greek Government v Minister of Transport (The 'Ilissos')* [1949] 1 KB 7, Sellers J considered *obiter* that the inability of officers to work through sickness would constitute deficiency of men, and that "*it would make no difference if the incapacitated members of the crew were on the ship or in hospital on shore*" (at p.12). However, Bucknill LJ in the Court of Appeal ([1949] 1 KB 525, p.529) was "*not sure*" that he agreed, but did not have to decide the point.

14. This can be contrasted with the position in American jurisprudence where a ship will go off-hire due to crew incapacity (Wilford et al, *Time Charters*, 6th edn, §§25A.10 *et seq*). Thus, some standard forms will explicitly provide for the Vessel to be off-hire when owners are obtaining medical advice or treatment (e.g. the Shelltime 4 form).

15. Off-hire clauses often end with catch-all provisions such as "*any other cause*" or "*any other cause whatsoever*".[3] Whether such provisions cover ill health will depend on whether the full working of the Vessel has been prevented within the terms of the charterparty and on the facts of each particular case.

16. Even without evidence of actual crew member ill-health, there have already been disputes about whether the catch-all can be used to place a vessel off-hire where a vessel is not permitted to berth due to mandatory 14-day coronavirus quarantine periods at particular ports.

17. To the extent that quarantine restrictions cause loss or damage to owners, they may also be able to rely upon the implied indemnity for loss resulting from compliance with charterers' orders, on commonly found exclusions for losses caused by 'acts of God' or 'restraint of princes', or on Article IV(2)(h) (the *"Quarantine restrictions"* exemption) of the Hague(-Visby) Rules where these are incorporated by a Clause Paramount.

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[3] The purpose of the 'whatsoever' being to disapply the application of the *ejusdem generis* rule.