



ASSESSING THE IMPACT OF THE COVID-19 PANDEMIC ON PORT OPERATIONS AND CHARTERPARTIES IN NIGERIA

APRIL 30, 2020

PREFACE

Following various reports regarding the impact of the coronavirus (“**COVID-19**”) pandemic on the shipping industry, the International Maritime Organization (“**IMO**”) issued a circular¹ urging flag state authorities, port state authorities and control regimes, companies and shipmasters to co-operate in order to ensure that, where appropriate, passengers can embark and disembark, cargo operations can occur, ships can enter and depart shipyards for repair and survey, stores and supplies can be loaded, certificates can be issued and crews can be exchanged, with minimal disruptions. However, the implementation of various restrictions imposed by national and sub-sovereign authorities affecting docking and berthing of ships, as well as other regulatory measures around the world, are making it challenging for stakeholders in the shipping industry to fulfill their contractual obligations.

This briefing note highlights some of the impact of the COVID-19 pandemic on shipping and port operations in Nigeria. Also, we discuss some relevant issues that may arise under charterparties and measures that may be implemented in order to mitigate or address same.

REGULATIONS WHICH DIRECTLY IMPACT PORT OPERATIONS

President Muhammadu Buhari issued a directive² to the port authorities in Nigeria stipulating that only cargo vessels which have been at sea for more than fourteen (14) days should be allowed to dock in Nigerian ports, after their crew have been tested and confirmed disease-free by Port Health Authorities. However, vessels transporting oil and gas were exempted from this ban in view of minimal human contact involved in their operations.

Further, in issuing the COVID-19 Regulations 2020 (which restricted movement in Lagos, Ogun and the Federal Capital Territory, Abuja), the President confirmed that seaports in Lagos will remain operational, subject to the earlier directive regarding cargo vessels.³ Also, in order to cushion the effects of the COVID-19 pandemic on businesses and as part of general measures in furtherance of the Ease of Doing Business

1. COVID-19 – Implementation and enforcement of relevant IMO instruments Circular Letter No. 4204/Add.1

2. The President confirmed this directive by a tweet on March 26, 2020.

3. The Nigerian Maritime Administration and Safety Agency (“**NIMASA**”) had also directed that only international marine vessels which had planned and informed of their call to a Nigerian port not later than February 1, 2020 would be allowed to call on such port, while international marine vessels who had a travel history of visiting any of the COVID-19 affected countries shall not be permitted to enter any Nigerian port from March 30, 2020 to April 12, 2020. We expect that further directives will be issued in the coming weeks.



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initiative of the Federal Government of Nigeria (“FGN”), the Nigerian Ports Authority (“NPA”) directed all terminal operators to suspend all demurrage charges for storage of consignment.⁴

It is therefore clear, from the foregoing, that the efforts of the FGN have been geared towards keeping port operations running while observing the necessary safety precautions to mitigate the effects of the COVID-19 pandemic.

CERTAIN RELEVANT ISSUES FOR SHIPOWNERS, OPERATORS AND CHARTERERS

Various legal issues have arisen from the outbreak of the COVID-19 pandemic and its impact on the operations of international marine vessels which call at Nigerian ports, as well as marine vessels which operate within and offshore Nigerian waters. We shall examine some of these issues and possible measures to address them.

Port Health and Safety

Notwithstanding that the World Health Organization (“WHO”) upgraded the outbreak of COVID-19 to the status of a pandemic, it is expected that relevant provisions in charterparties regarding “Epidemics” will address some contractual rights and obligations in relation to the COVID-19 pandemic.⁵ A preliminary issue to consider will be whether the outbreak of the pandemic in a country renders the ports in that



country, or vessels which commence voyages from (or transit through) such countries unsafe. This will appear to be the approach taken by Nigerian Maritime Administration and Safety Agency (“NIMASA”) which, by its COVID-19 Marine Notice (“NIMASA Healthcare Marine Notice”), prohibited international marine vessels or any member of its crew and/or passenger who had a travel history of visiting any of the COVID-19 affected countries from entering any Nigerian port.⁶ This is a rather stringent approach⁷ (which may only have been suitable for the initial stage of the COVID-19 outbreak) and may no longer be realistic or achievable considering that over 200 countries, including Nigeria, have now been affected by the pandemic. Indeed, this goes against the directives of the IMO, which enjoins port authorities to ensure continuous access of ships to ports, and now further seeks for seafarers to be designated as essential workers.

Certain charterparties impose an obligation on the charterer of an international marine vessel to use due diligence to ensure that the vessel is only employed

⁴ This directive was for an initial period of fourteen (14) days but was further extended for another fourteen (14) days till the last week in April 2020.

⁵ Please refer to our previous briefing note on relevant provisions in the Supplytime on Epidemics/ Fever <https://banwo-ighodalo.com/grey-matter/assessing-the-impact-of-the-covid-19-pandemic-on-the-operations-of-marine-vessels-in-the-nigerian-oil-and-gas-industry>

⁶ This directive was for an initial period of March 30, 2020 to April 12, 2020.

⁷ The approach may only have been suitable for the initial stage of the COVID-19 outbreak.



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in safe ports. In the context of COVID-19, the above “due diligence” obligation merely requires the charterers to display “reasonable care”. Thus this duty will be discharged if “a reasonably careful charterer” would, on the facts known, have concluded that a port was prospectively safe. Vessels which are designated to call at Nigerian ports, and are not prohibited from berthing further to the aforementioned regulatory restrictions, will generally be required to comply with and adhere to all applicable health and safety regulations⁸ as required by most charterparties.⁹ Therefore, in the light of the above health and safety measures, it is unlikely that any party can successfully contend that Nigerian ports are unsafe, simply on the basis of the outbreak of COVID-19, without more.

Crew Health



Shipowners have a responsibility to ensure that crew members are (and remain) in good health while on board a vessel. The Merchant Shipping Act 2007

(“MSA”)¹⁰ provides that:

“where a master, seaman or cadet belonging to a Nigerian ship...suffers from any illness, not being an illness due to his own willful act or default or to his own misbehavior, the expenses of: (a) providing the necessary surgical and medical advice and attendance and medicine; and (b) the maintenance of the master, seaman or cadet until he is cured, or he dies or is returned to his proper return port and of his conveyance to the port; and (c) in the case of death, his burial, shall be defrayed by the owner of the ship without any deduction on that account from the wages of the master, seaman or cadet.”¹¹

Some safety measures specifically put in place for crew men in relation to the COVID-19 pandemic, as stipulated in the NIMASA Healthcare Marine Notice, include:

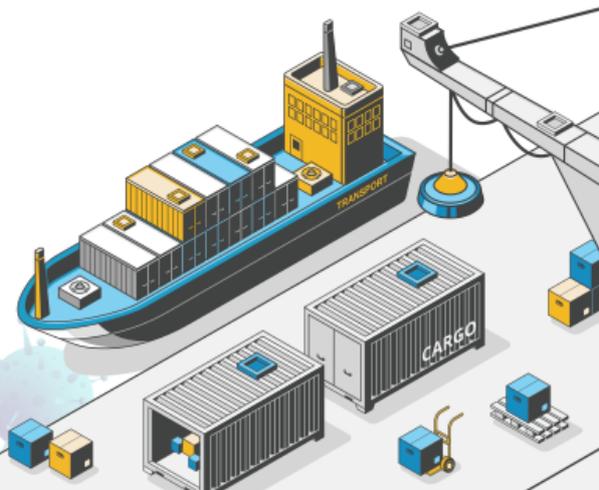
- I. Ship masters should prevent sick crew men from boarding their vessel;
- II. Port Health Officers (“PHO”) shall carry out thermal screening of all crew members on board the vessel and until clearance is given by the PHO, no crew shall be allowed ashore;
- III. Where any crew member shows symptoms of COVID-19, disembarking of such crew shall not

⁸ This will include international, national and local regulations pertaining to health and safety.

⁹ This is addressed in the Supplytime 2005 & 2015.

¹⁰ Section 183(1) of the MSA.

¹¹ It is important to note that the obligation placed on shipowners in this regard extends to a situation where a crew member, on account of any illness is temporarily removed from his ship for the purpose of preventing an infection or otherwise for the convenience of the ship and subsequently returns to duty. In this regard, Section 183(3) of the MSA provides that the expenses of removal and of providing the necessary advice and medicine and of his maintenance while away from the ship, shall be defrayed by the owner of the ship without any deduction on that account from the wages of the master, seaman or cadet.



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be permitted. Rather the crew shall be quarantined and samples shall be collected for testing; and

- IV. Health and hygiene measures should be circulated and the mental health of crew members must be well monitored.

Shipowners are therefore enjoined to ensure the health, safety and welfare of their crew men in order to prevent liabilities in this regard.

Seaworthiness of Vessels



This is a fundamental requirement for all sea-going vessels and the MSA provides that even where this is not an express term in the charterparty, there is an implied obligation on Shipowners and Agents to ensure the seaworthiness of vessels.¹² In the Nigerian case of *Narumal & Sons v Niger Benue Transport*,¹³ it was held that the appropriate time to determine the seaworthiness of a vessel is at the time

of departure. It must be highlighted that seaworthiness does not only apply to the hull, machinery and proper workings of the vessel. Failure to comply with safety requirements which endangers the cargo laden on board a vessel has been held to make the vessel unseaworthy. In the English case of *Ciampa v British India Steam Navigation Co. Ltd.*¹⁴, it was held that a vessel, which had to be fumigated because it called at a contaminated port, before arriving at its intended destination, rendered that vessel unseaworthy due to the damage done to the cargo. Following the outbreak of COVID-19, Shipowners and operators need to be mindful of relevant health and safety requirements, which can render vessels unseaworthy, where such requirements are not complied with. Indeed, it is likely that the position that seaworthiness should be determined only at the time of departure will be tested due to various daily safety measures which Shipowners and operators are now required to comply with during this period.¹⁵

Delivery & Redelivery

A time charter party commences with the “delivery” of the vessel to the control of the Charterer and comes to an end with the “redelivery” of the vessel to the Owner’s control. Thus, the “Delivery and Redelivery” clause is important in determining when the obligation

¹². Section 280 of the MSA.

¹³. NSC Volume 3, Page 531.

¹⁴. [1915] 2 K.B. 774

¹⁵. Indeed, the MSA has extended the obligation to keep a vessel seaworthy to periods during the course of a voyage. Please refer to Section 280, MSA 2007.



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to pay hire will arise and end. In this regard, pertinent questions to be asked by parties to a time charter party include: what will be the impact of COVID-19 on late delivery and re-delivery of vessels? Will late delivery be a basis for the charterer to cancel the charter and bring it to an end? Can the shipowner or charterer rely on force majeure in a case of late delivery or redelivery respectively?

It is important to note that the answers to the above questions will be dependent on the circumstances of each particular case. The BIMCO Time Charter Party 2005¹⁶ (“**Supplytime 2005**”) enables the charterer to cancel a charter if the vessel is not delivered by midnight local time on the cancelling date. In order to avoid the above situation, Shipowners who are unable to deliver the vessel due to COVID-19 related reasons, may give a notice in writing to the Charterers prior to the delivery date and state the date by which they intend to deliver the vessel.

Most charter party agreements provide for charterers liability for late delivery. For example, under the BIMCO Standard Bareboat Charter 2001¹⁷ (“**BARECON 2001**”), Charterers generally “warrant not to permit the Vessel to commence a voyage which cannot reasonably be expected to be completed in time to allow redelivery of the Vessel within the charter period”. Notwithstanding the above, a Charterer who fails to redeliver within the charter

period “shall pay the daily equivalent to the rate of hire plus 10 per cent or to the market rate, whichever is higher, for the number of days by which the charter period is exceeded.”

Thus, a party who seeks to rely on force majeure as the basis for late delivery or redelivery must ensure that it gives the required notice informing the other party of the force majeure event without delay.

Suspension of Hire (Off-Hire Clauses)

An off-hire clause relieves the Charterer from paying hire in circumstances where use of the ship is compromised and without any need to prove breach of charter by the owner. As an example, under the Supplytime 2005¹⁸, the vessel is placed off-hire, if the vessel is prevented from working as a result of “deficiency of crew”, albeit with a few exceptions. However, the vessel remains on-hire where the vessel is prevented from working due to quarantine, except where caused by the crew having had communication with the shore at any infected area without the written consent or instructions of the Charterers. Thus, marine vessel owners who are required to quarantine crew men on board due to any COVID-19 related matters may still be able to claim hire for the period of the quarantine.

¹⁶. Clause 2 of the Supplytime 2005.

¹⁷. Clause 15 of the BARECON 2001.

¹⁸. Clause 13 of the Supplytime 2005.



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Crewing Arrangements

Shipowners / Manning Agents who employ foreign crew men on board Nigerian-flagged vessels will also likely be impacted by the COVID-19 pandemic. In this regard, movement in and out of Nigeria using commercial flights has, unless specifically exempted, effectively been stopped by virtue of governmental directives suspending movement of all passenger aircraft. Thus, foreign crew men who were due to arrive in Nigeria through any commercial flights will most likely be unable to do so, while those who are designated to travel out of Nigeria based on rotation cycles will also be constrained to stay back in Nigeria. In the unlikely event that such seafarers are able to travel to Nigeria through international vessels, they will likely be required to be quarantined for the mandatory two weeks period, after passing the initial tests. Further, the current restriction of movement in various parts of the country¹⁹ will hamper transportation to offshore locations. Thus, Shipowners / Manning Agents who have no contingency plans for replacement of foreign crew men may have a severe disruption in their operations.

However, considering the recent stance of NIMASA

restricting the grant of waivers for foreign crew men and the insistence on Nigerian ship-owners engaging local seafarers as much as possible, it is expected that only a few Nigerian flagged vessels will be adversely affected by the recent developments.

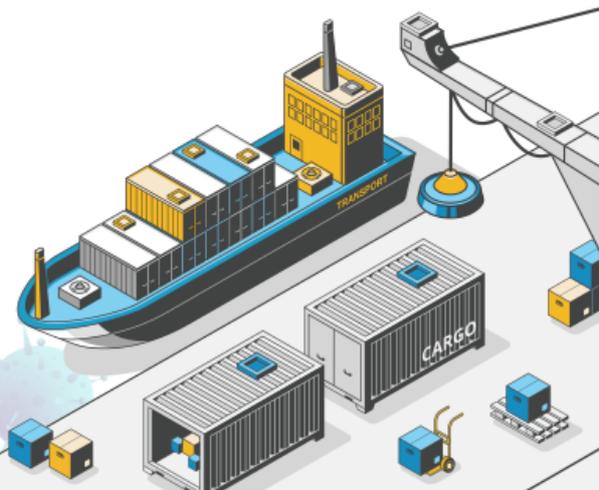
Insurance Compensation

The attendant risks in the maritime industry have been reshaped by the COVID-19, which has in turn raised questions about shipowners' insurance coverage and how it may be triggered. Some pertinent questions in this regard include: Are pandemics typically covered by insurance policies taken out by marine vessel operators? Can a Shipowner seek compensation for losses resulting directly or indirectly from COVID-19? While the answers to these questions may vary for each operator, the usual insurance policies for vessels often cover hull, machinery and war risks. Additional cover by Protection and Indemnity Clubs are mostly in respect of third party contractual liabilities, collision, environmental and pollution risks.²⁰ These policies will rarely cover losses incurred by marine vessel operators as a result of the COVID-19 pandemic, except an operator specifically procured an insurance policy covering business interruption and/or loss of earnings.²¹

¹⁹. While the COVID-19 Regulations 2020 specifically restricted movement in Lagos, Ogun and the Federal Capital Territory, Abuja, a number of other States in the Nigerian Federation also imposed measures restricting movement within their territories.

²⁰. Similarly, the insurance policies generally referenced in the Supplytime 2005 are marine hull insurance, protection and liability (marine liability insurance); general third-party liability insurance, workmen's compensation and employer's liability insurance for employees; and comprehensive general automobile liability insurance.

²¹. It is instructive to state that financial losses arising from business interruptions are typically covered by business interruption insurance policies ("BI Policy"). A BI Policy would often cover loss of profit due to reduction in turnover arising from an interruption of or interference with business operations. "Interruption", in this instance, generally refers to break in commercial activities whereby an insured party is either unable to operate or is forced to continue to operate under reduced or differing circumstances which would have a direct effect on the turnover of the business. The scope of a BI Policy may cover a company's gross profit, wages/ salaries, contractual commitments, repayment obligations, amongst others and would typically provide for a maximum indemnity period for such coverage. However, a BI Policy will usually not cover short duration business interruptions; and, instead, it will prescribe a waiting period (typically sixty (60) days) during which the indemnity will not be triggered.



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CONCLUSION

The impact of the COVID-19 pandemic on the shipping industry continues to evolve on an almost daily basis. It is therefore important for various parties in the shipping industry to continue to obtain sound legal advice as they navigate this seemingly uncharted territory and the various challenges arising from the pandemic.

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