



Are we all in the same boat? Crew changes in the time of pandemic

At our recent webinars dealing with the difficult and timely issue of crew changes during the COVID-19 pandemic, our presenters discussed the issue from the standpoint of seafarer wellbeing as well as the contractual challenges between owners and charterers faced with deviations for crew rotation. In this article we follow up on some of the questions put to them during the seminar.

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Introduction

The COVID-19 pandemic has disrupted even the most routine ship operations. One of the biggest challenges facing the shipping community right now is crew change. The national, regional, or local restrictions imposed to reduce the spread of the virus have made it extremely difficult to rotate crew within their normal contract periods. Prolonged service aboard the vessel has increased seafarer stress and fatigue giving rise to concerns for their safety, as well as the safe operation of the ships they crew and the safe and efficient carriage of cargoes. Crew changes in the Covid-19 environment often require the ship to deviate and this can cause a host of problems which cause commercial tensions and disputes between owners and charterers as they try to continue their business. In our recent webinars, our authors drew upon Gard's experience over the recent months to focus on the legal and practical issues that owners and charterers face when dealing with crew changes in this difficult and uncertain environment. [You can view a recording of the one-hour webinar here](#).

A number of important and relevant questions were posed by the attendees during and after the webinars, touching upon regulatory, contractual, and insurance issues. In this Insight, we take the opportunity to respond to the questions raised.

Regulatory and port state control

Question : The IMO has called for key worker status for seafarers. Where are we with this proposal?

Answer: The UN Global Compact (UNGC) published a set of recommendations and guidelines back in May 2020. These guidelines were to assist port states around the world to recognise seafarers as “key workers”. Since the proposal we have seen port states take a cautious approach to adopting the protocols given that their own national interest is at stake if there are any outbreaks due to crew change. Several port states have softened their stance and implemented the protocols and we have seen positive developments if we compare the current situation with how it was in the first few months of the pandemic. The rate of adoption is slow as there are several logistical issues in the implementation of the key worker status which require cooperation with various stakeholders including the airlines, health authorities, environmental agencies and national governments. This is going to be a drawn-out process before conditions normalise and we in Gard are supporting our Members and clients through our correspondent network in liaising with the port authorities around the world.

Question : What is the risk that port state authorities in a port of call will detain a vessel for failure to repatriate crew that have exceeded their contract period?

Answer : This risk is very real and we have seen several detentions around the world because of crew members being on board for an extended period of time. The problem is that vessel detention in these ports does not mean that the port states would allow crew change in their jurisdiction which leads to further complication regarding crew change.

Potential claims between owners and charterers

Question : What sort of questions should charterers be asking from owners before

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fixing a vessel? Likewise, what sort of extra information should owners give charterers to make them aware that crew change will be needed while the vessel is on charter?

Answer : Charterers should expressly ask if the owners are planning or expect to change crew at some point during the charter period, and if so, roughly when and where. With longer term charterers, it will be difficult for owners to be precise, but for shorter periods, such as single trip time-charters and voyage charters, an owner should be able to state fairly clearly what their plans are. If a crew change will require deviation, charterers should consider whether this is the right fixture for them given their commercial concerns.

Owners should be cautious about agreeing to clauses that prohibit crew changes altogether, simply because circumstances may change on board that are beyond the owners' control. Also bear in mind that any representations by owners about the need for planned crew changes should be limited to what they can actually warrant.

The main takeaway is that from both owner's and charterer's perspectives exchanging information about planned or possible crew changes allows the parties to find out if their requirements are aligned before entering into a binding fixture.

Question : Many ports require vessels to give at least 14 days' notice for a crew change but the next voyage is often not known until the last minute. What can owners do? Could charterers share the burden by advising the voyage details earlier? Can charterers who notify late be required to share the off-hire and costs?

Answer : Some port states accept shorter notice. Our recommendation would be for the owners to check the ports within the current trading area where crew change is permissible and share their crew change plan with their charterers as soon as possible.

From the charterers side, it would assist owners for charterers to notify of voyage plans as soon as possible but there is no obligation under usual charter terms for charterers to share costs or maintain the vessel on hire during waiting periods. Again, cooperation and communication are key to minimizing costs for all parties.

Question : We are a time charterer, what happens if the owners deviate on a ballast voyage to change crew before arrival at the load port and our sub-charter has a cancellation provision for late arrival at the load port? Any advice what we can do in such a situation?

Answer : If the deviation means the vessel will not arrive by the sub-charterers' cancelling date, then you will need to look at the following points:

- (i) Do the owners have a right to deviate anyway?
- (ii) Do the owners have any alternatives that you might be able to persuade them to accept?
- (iii) Would the sub-charterers agree to extend the cancelling date?

Open communication in both directions is the most likely way to find a solution that works for all interests.

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Question : Do you recommend the [BIMCO COVID-19 Crew Change Clause](#) ?

Answer : The clause is for time charterparties and essentially provides express liberty to deviate for crew changes if COVID-19 restrictions prevent crew changes at ports or places where the vessel has been ordered. The liberty to deviate only applies where owners are prevented by travel or other COVID-19 related restrictions from making a crew change at the ports to which the charterers order the ship within the expected duration of the calls. The use of the word “prevent” sets a high threshold for invoking the clause. The fact that a crew change at the ports or places ordered by charterers may be more expensive or less convenient than elsewhere does not give owners the right to invoke the clause.

The clause has two alternatives – the vessel remains on hire but at 50% rate with sharing of the cost of bunkers or, alternatively the vessel is off-hire and bunkers are for owner’s account. The parties are to choose one of the alternatives. The clause requires charterers to include the liberty to deviate in sub-charters and bills of lading evidencing contracts of carriage issued pursuant to the charter party.

For owners – we would recommend the clause because it grants an express liberty that is often not found in charterparties, and avoids the need to fall back on more complex arguments, such as the permissibility of the deviation under the Hague/Hague-Visby Rules (if applicable).

For time charterers – the benefit of the clause is that it provides certainty so in our view, it is better than ad hoc clauses, which are often drafted without thorough consideration of the relevant legal issues. That said, it may be difficult to include the clause in sub-fixtures, particularly if they are voyage charters (more on this in the next question). We also appreciate that for charterparties with shorter durations, charterers might feel such a clause imposes too much of a burden on them. As always, we encourage the parties to enter into open and frank dialogue on this issue – if owners can be open about the need for crew changes then it should be possible to mitigate this issue in other ways.

Question : Isn’t the BIMCO COVID-19 crew change clause difficult to pass down the chain in voyage charterer parties or bills of lading (as actually required by the clause)?

Answer : In theory there is no difficulty in incorporating sub-clause (a) into voyage charters or bills of lading (there is no obligation to incorporate the other parts of the clause), however in practice we accept that it may not be so easy, particularly as the potential risk of additional costs will need to be priced into the freight rate under the sub-voyage charters. It is of course a matter of negotiation.

Question : Have you come across instances where charterers have requested a letter of indemnity (LOI) from owners before consenting to a deviation for crew changes?

Answer : We have not seen this. It is unclear what the LOI would cover, and if the deviation were a breach of the charterparty, it would probably be better to simply allow the claims to play out under that contract. Of course, if the LOI was a negotiated settlement of the wrongful deviation claim then the parties can agree to it.

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Question : Port authorities and terminal operators are failing in their risk management by not facilitating crew changes. Are premiums likely to increase considering risks are almost certainly higher?

Answer : We are concerned with increased risks due to crew fatigue, but so far have not seen an increase in incident frequency compared to previous years. Claims data takes longer to mature and the full picture will be known later next year. We have seen some high severity claims in Gard and the other International Group clubs which may or may not be related to the crew change crisis.

Question : Does Gard cover deviation cost to rotate crew due to fatigue as sue and labour of crew illness claims?

Answer : Gard does cover deviation costs to obtain treatment for crew who are ill with COVID-19. That would include the *extra costs of fuel, insurance, wages, stores, provisions, and port charges attributable to a diversion* provided they were incurred *solely* for the purpose of getting medical treatment.

If a vessel must divert to secure treatment for a crewmember on board suspected to be suffering from COVID-19, cover of the *deviation costs* will depend on the specific facts and circumstances of each case, provided the *extra* costs were incurred *solely* for the purpose of getting medical treatment.

So, cover for deviation costs depend on actual illness and would not be covered as sue and labour of potential illness. Cover guidance can be found in [Gard's COVID-19 FAQ](#)

A few concluding remarks

COVID-19 has and will continue to affect all of us in different ways, but we are all in the “same boat”. Seafarers need safe employment onboard ships for their livelihood, owners need to be able to operate safe ships to fix employment for them and charterers need their cargoes to be carried safely and to arrive on time in order to be able to continue to provide that employment. It is not necessarily an easy balance to strike, but we must continue to support seafarers as key workers and continue to work together to rotate crew for their health, the safety of the seas and for the continuation of trade. To obtain more information and recommendation on COVID-19 and shipping, we recommend our [web publication](#) which is regularly updated.

For Gard there has been a silver lining to this dark pandemic cloud in that we have been able to collaborate digitally on a global basis. Our webinars reached over 300 members, clients and contacts in all corners of the shipping world and was produced with participation from Gard personnel in Singapore, Hong Kong, Tokyo, Arendal, Oslo, London and New York. We thank all of those who took the time to attend our webinar and those within our organization who supported us in producing the sessions.

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