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Legal assessment of BIMCO’s infectious or contagious diseases (IOCD) clauses for voyage and time charter parties

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ABSTRACT

The impact of the Covid-19 pandemic on the shipping industry is still severe, ranging from vessels being denied entrance to ports to crews on board ships being trapped for many months. To counter and regulate those emerging issues, the shipping industry presently incorporated into the charter parties the BIMCO’s Disease Clause originated from the 2015 Ebola outbreak, the so-called BIMCO’s Infectious or Contagious Diseases (IOCD) Clauses. While proved successful during the Ebola outbreak, those Clauses were inadequate to regulate a global pandemic such as Covid-19 effectively. Specifically, the IOCD Clauses, while they successfully establish the concepts of ‘Disease’ and ‘Affected Area’, fail with the allocation of liability, especially when the crew on board is affected by Covid-19 and the ship needs to deviate from course to change the crew. In that instance, the shipowner, provided that he exercised due diligence in proactively avoiding the infection of his crew, is excluded from liability. In contrast, it is deemed that the liability between shipowner and charterer should be at least shared. For voyage charter parties BIMCO’s Infectious or Contagious Diseases Clause 2015, applied both to the Ebola and the Covid-19 outbreak, allocates the right of termination and the liability for deviations and excessive costs strictly to charterers. In contrast, for the time charter parties, BIMCO has imposed the ‘BIMCO Infectious or Contagious Diseases Clause for Time Charter Parties 2022’ amended presently. According to those regulations, the liability can and should be shared between charterers and ship owners. As a result, the shipowner is forced to exercise due diligence more effectively, especially when he is initially liable for the excessive costs.

1. Introduction

The outbreak of Covid-19 disease was not the first incident the shipping industry was called to encounter. Undoubtedly, the outbreak of a virulent disease always creates significant implications in shipping practice. The outcome of an emerging disease is usually the imposition of quarantine for vessels and crew on board in the affected area coupled with specific restrictions in nearby ports from the area of infection to counter the spread of the specific disease [1].

Those measures were effectively implemented during the spread of Severe Acute Respiratory Syndrome (SARS) and the Ebola virus, which caused similar concerns. Additionally, BIMCO developed generic clauses to be incorporated into voyage and time charter parties, being able to be applied to Ebola disease as well as to similar emerging deceases in the future, the so-called BIMCO’s Decease clause [2]. The reasoning for creating those sets of regulations was the proactive instalment of rules that can effectively counter an unpredictable and continuously emerging threat, namely the outbreak of diseases. Nevertheless, the main issue is that an infectious disease is unpredictable, depending not only on when or where it may occur but also on the severity that it will present [3,4].

The main characteristic of Covid-19 was not the timing or the eruption area. Instead, it was the severity of the disease and the rate of its spread. Specifically, the mortality ratio was terrifying during the first months of the Covid-19 outbreak. In addition, the spread of the virus could not be limited due to the ease of transmission and the extended timing for the symptoms required to manifest, thus making it impossible to locate and impose quarantines on the infected [5].

In addition to the imposition of quarantines coupled with specific restrictions, most shipping companies even avoided the transportation of goods from or to particular countries due to the unprecedented spread of the virus to limit the threat of crew infection and vessel quarantine for an extended period. Despite this, the crew infections became unavoidable, with many seamen being unfit for service, requiring self-isolation or immediate medical treatment. These crew infections, coupled with port closures and an overall freeze in the transportation of people and...
goods, created unprecedented delays [6,7].

2. General principles of BIMCO’s infectious or contagious diseases clause (IOCD)

The first issue to be addressed to enforce BIMCO’s Infectious or Contagious Diseases Clauses is the instalment of a threshold of a virus’s severity status for the clauses to be invoked. This threshold cannot be easily defined, but it should be set at a high severity status to avoid misuse from the shipowners and charterers [8].

Undoubtedly, it is impossible to quantitatively assess the severity of an outbreak of disease to invoke the IOCD Clause. Nevertheless, there are two crucial definitions that can effectively enable us to evaluate the severity of a specific disease and consequently trigger the IOCD Clause. The first key point is the definition of “Disease” stipulated within the IOCD Clause. According to Subclause (a) of IOCD Clause, “Disease means a highly infectious or contagious disease that is seriously harmful to humans”. Therefore, to assess the infectious and contagiousness of a disease, BIMCO should rely on a public health emergency declaration from a public health authority, such as WHO. After the issuance of a health emergency, the IOCD Clauses should be automatically triggered, subject to the parties’ discretion [9,10].

The second key point is the definition of “Affected Area”, which should be evaluated separately in each case. According to subclause (a): “Affected area means any port or place where 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 Affected Areas do not only include the places where there is a threat of the infection of a vessel’s crew but additionally the ports well away from the contamination area, which may quarantine or restrict the vessel due to the vessel in a particular country’s call. Thus, a public health authority may order a port closure due to the threat of crew contamination or impose arrivals restrictions on vessels bound from specific countries. The “regionality” of a virus cannot be easily assessed; it is strictly subject to a case-by-case status [2,11].

The outbreak of Covid-19 was declared on 30 January 2020 as a Public Health Emergency of International Concern (PHEIC) by the World Health Organisation (WHO). Since the spread of the H1N1 pandemic in 2009, six PHEICs have emerged and were classified as such by WHO, with the inclusion of the outbreak of the Ebola disease in the region of West Africa in 2014. According to WHO, a PHEIC is “an extraordinary event which is determined to constitute a public health risk to other States through the international spread of disease and to potentially require a coordinated international response”. Thus it can easily be assumed that an IOCD Clause may be triggered during a sudden, unexpected and severe event that directly affects or threatens to affect public health well beyond the national borders of a State and requires an immediate and coordinated international response [12,13].

3. BIMCO’s infectious or contagious diseases clause to voyage and time charter parties

The IOCD Clauses were drafted to respond to any infectious disease, incorporating general terms and no specific conditions to be triggered. The main aim of the Clauses is to apply and regulate only the most severe cases of outbreaks. Thus a high threshold has been installed, dictating that the IOCD Clauses can take effect only when the two above-mentioned key points are invoked. It is evident that the utilisation of IOCD Clauses strictly relies on key points and criteria unrelated to business. As an outcome, the Clauses cannot be misused for commercial purposes [2,14].

In addition, for the IOCD Clauses to apply to only the most severe diseases, the term ‘epidemic’ has been methodically avoided both in the Clause heading and in the above-assessed definition of disease. Nevertheless, the term ‘epidemic’ includes even the most common diseases, which periodically affect specific regions; thus, the utilisation of the term will impose ambiguity during the invocation of the IOCD Clauses [15].

The IOCD Clauses have been modelled and structured based on the BIMCO War and Piracy Clauses, both in content and structure. Subject to any imposed limitations, the vessel owners have the option to refuse to operate in an endangered zone or region. Nevertheless, suppose the vessel owner waives this option and operates in the endangered area; in that case, charterers will be held responsible for any immediate or resulting liabilities and costs of imposing preventive measures by the owners aiming to the protection of the vessel and crew alike. In most cases, the degree of danger that an area may present is subjective. Therefore, the owners can either justify the refusal of orders to proceed to this area or waive this option and continue their course [16].

Under standard time charter party clauses, the charterer has established operational control of the ship, and his obligations are expressly stated, including any excessive costs, such as the cleaning of the vessel, the imposition of quarantine or any fumigation arising from the previous utilisation of the ship. As an outcome, the vessel owners, to protect their interests, should obtain the most strict financial guarantees when fixing the charter party or waiving the option of refusal to enter an endangered area [17].

On the other hand, under standard voyage charter party clauses, the application of such terms and consecutively of the IOCD Clauses is expressly limited to any incident arising after the charter party’s fixing. Due to the nature of a voyage charter party, a short-timed charter party, parties are deemed to be aware of any adverse event prior to or during the negotiation period and should have made specific arrangements. Therefore, for any emerging event after the fixture of the charter party, there may be clauses incorporated with special considerations and requirements, but only when the insurance company and the P&I Club have agreed to the imposition of such clauses [18].

For such reasons, two separate sets of IOCD Clauses have been imposed, one for time charter parties and one for voyage charter parties. Both Clauses were drafted during the Ebola outbreak of 2014–2015, containing generic terms on purpose to be used for similar infectious diseases in the future. Accordingly, the BIMCO’s Infectious or Contagious Diseases Clause for Voyage Charter Parties 2015 has been applied both to the Ebola and the Covid-19 outbreak. In contrast, for the time charter parties, BIMCO has imposed the ‘BIMCO Infectious or Contagious Diseases Clause for Time Charter Parties 2022’ amended on 23–6–2022 [19,20].

3.1. IOCD clauses on voyage charter parties

The outbreak of infectious diseases is not uncommon in the shipping industry. Such event in shipping is considered ‘periodical’, and it often includes the imposition of quarantines to vessels and crew alike in the area of the outbreak as well as the instalment of specific restrictions, possibly for an extended period, in remote ports from the affected area to proactively counter the spread of disease [21].

The emergence of the Covid-19 virus is only the latest outbreak of a long chain of contagious diseases that affected and caused a severe impact on the operation of the shipping industry. Initially, the Severe Acute Respiratory Syndrome (SARS) and in 2015, the Ebola virus disrupted shipping operations and caused significant concerns. Those incidents and the presence of the Covid-19 virus have established the principle that a virus outbreak is unpredictable, unavoidable and periodical. That is why BIMCO has elected to draft specific, comprehensive, clearly worded and generic clauses for voyage and time charter parties that can be applied to all virulent diseases that may emerge at any time in the future [2,4].

As stated, BIMCO’s voyage charter party version of clauses significantly differs from the time charter party version. Subject to the provisions of each separate contract and the nature of a voyage, the relevant clauses can be imposed only before or during the fixture of a contract. Any arising post-fixture incidents can only be handled by triggering the
BIMCO’s Infectious or Contagious Diseases Clause for Voyage Charter Parties 2015 [19].

Subject to the said legislation, the word ‘disease’ (Subclause a) refers to ‘any infectious or contagious disease that is seriously harmful to humans’, whereas the ‘affected area’ is ‘any port or place where 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’. Therefore, the IOCD clause for Voyage Charter Parties can only be triggered when the definitions of ‘Disease’ and ‘Affected Area’ are combined. Subject to this, the Covid-19 virus falls within this subclause’s aim and scope. Regarding the term ‘Affected Area’, it should be said that the Clause can be triggered only if the risk of exposure to the virus or the threat of quarantine emerges after the fixture of the charter party. The term ‘Affected Area’ may refer to a port or place where the ship is present while the risk of crew infection is high, or the vessel and crew may be led to the imposition of quarantine or other restrictions. Therefore, to fulfil the requirements of this subclause and characterise a region as an ‘Affected Area’, only one of the risks mentioned above is sufficient [22].

In addition, the definition of ‘Affected Area’ does not strictly refer to regions declared as such by the WHO but to places where the risk of exposure to a disease is high. Thus, characterising a port as safe is not dictated only by Organisations or Authorities; it is not arbitrable by the owners-charterers agreements and negotiations; it is an issue of facts, sound judgement and circumstances. Thus, even if WHO characterised the Covid-19 outbreak as a global scale pandemic, the term ‘Affected Area’ does not lose its aim and scope, being principally subject to the circumstances and the facts of each case [10].

Regarding the risk to the crew being exposed to Covid-19, it is previously stated that the risk should be high. By this, it can be concluded that a risk of exposure is insufficient to deem a port as an ‘Affected Area’; the risk should be high compared to other cases. Thus, even during the expansion of a global-scale pandemic, the specific circumstances of a port or place should be assessed initially before this area is characterised as safe or unsafe. Regarding the risk of quarantine, as stated in the definition of the term ‘Affected Area’, it should be noted that it refers to all ports and places where quarantines or restrictions have been applied. Therefore, consecutively the term ‘Affected Area’ includes the ports where the risk of contamination is evident and any other ports where special regulations have been imposed as a counter or a proactive measure to the spread of the pandemic [19,23].

Subclause (b) dictates that a vessel is ‘not obliged to proceed to or continue to or remain at any place which, in the reasonable judgement of the Master/Owners, becomes an Affected Area after the date of the Charter Party’. In subclause (c), in conjunction with subclause (b), it is stated that (i) the owner may elect to inform the charterer of the cancellation of the contract of carriage at any time before the commencement of the loading or may elect to refuse to enter or remain to an affected area. (ii) in case of the commencement of loading, the owner may elect to notify the charterer that the vessels will depart with or absent of any cargo on-board. This election is subject to the charter party in effect. For example, suppose the charter party states that cargo loading or discharging can occur within a specific region where many ports exist. In that case, the owner should request the charterer nominate an alternative safe port within the specific area. In that case, the ship owner may terminate the contract or leave the loading port before the contract commences if the charterer fails to nominate an alternative safe port forty-eight hours after the receipt of notice from the charterer. In case of cargo has been partially loaded, the vessel may complete the loading process to any other port or ports, subject to the charterer’s-shipowner’s discretion [16, 19].

Thus, in case of the invocation of the IOCD Clause from the vessel owner and the termination of the voyage charter party before the commencement of loading, the Clause ‘liberates’ both parties from the contract, absent of any claims or liabilities vis-à-vis. However, if the loading port was characterised as an ‘Affected Area’ before the fixture of the charter party, the owners would not be able to terminate the contract, and the charterers would establish a claim against the owners for any contractual breach. On the other hand, if the port of loading is deemed as an ‘Affected Area’ after the fixture of the charter party, the owners would be entitled to terminate the contract, and the charterers would establish no claim against the owners [9,24].

Subclause (d), in accordance with subclause (b), states that prior to or after the arrival at the port of discharge, should this port is deemed as an affected area, the owner may elect to request the charterer to nominate another safe port inside the range of the Charter Party. As before, after the receipt of notice from the owner, if the charterer fails to make a nomination of an alternative safe port within forty-eight hours, the owner may elect to discharge the cargo or any cargo remaining on-board in case of uncomplete discharging to a safe port of their election abiding the terms and clauses of the contract of carriage. In case of discharging the cargo at any port other than the port of loading or any port outside the stated area in the charter party, the owners will be entitled to claim from the charterers any exceeding expenses of such a discharge and receive the total amount of payment, as if the cargo had been carried to the discharging port. Subject to the previous case, if the vessel is relocated for more than one hundred miles, the ship owner can claim an additional freight in the same percentage of the agreed freight, installing a maritime lien on the cargo for all additional expenses and freight [10,19].

Subject to subclause (e), the owner cannot be forced to sign, and the charterer shall not allow or impose the signing of any shipping documents that can evidence a contract of carriage for any affected area. According to subclause (f), notwithstanding Sub-clauses (b) to (e), the vessel may avoid or exit an affected region and: i) the owner should inform the charter of such a decision. In case the owner’s selection of avoidance of an area should not be regarded as a waiver of any rights under the signed charter party. ii) the owner’s election may be an outcome of proactive or reactive measures recommended or enforced by the World Health Organisation to counter the spread of an emerging disease. iii) any exceeding costs, freight or liabilities arising out of the entering, exiting or withdrawing from an affected area, including but not limited to screening, cleaning, fumigating and/or quarantining the vessel and its crew, should be claimed from the charterer and any loss of time should be regarded as laytime or counted as demurrage [18,19].

According to subclause (g), the vessel should be free to implement any orders or recommendations given by competent authorities, flag states, classifications societies, P&I Clubs or International Organisations regarding the commencement of a voyage, the ship routing, the ports of loading and discharging and any other issues relevant to an affected area. Finally, subclause (h) installs this Clause as ‘a rider clause’ to any charter party, dictating that if an act or an avoidance of action is in compliance with this Clause, any deviation from the original charter party will not be considered as such, but as due fulfilment of it. Thus, in any case of a conflict between the provisions of this Clause and any express or implied obligation of a charter party, the Clause should always prevail, but only to the extent of the conflict and not any further [19,25].

Lastly, subject to subclause (i), the charterer should indemnify the owner for any exceeding claims from the vessel operating under the provisions of subclauses (b) to (h), which are implemented under any shipping documents used to evidence a contract of carriage and subject to subclause (j) this Clause should be incorporated into any shipping documentation as evidence of a contract of carriage, issued under the charter party in effect [26].

3.2. IOCD clauses on time charterparties

The COVID-19 pandemic prompted the revision of the BIMCO IOCD Clause for Time Charter Parties. The Clause is not intended as a “COVID-19 clause” - it is designed to be applied to future epidemics and pandemics. The BIMCO IOCD Clause 2022 is appropriate for outbreaks of
diseases on a pandemic scale-like COVID-19, and outbreaks at a regional level, such as the Ebola virus epidemic in West Africa in 2014–2016. The knowledge from the COVID-19 pandemic is that although mortality rates from the virus were relatively low per head of population, the social impact on the movement of people was significant. What is unknown is whether future pandemics will be similar or if they will be more life-threatening, like the Ebola virus [4,20].

The Clause is therefore drafted on the premise that not every disease will be life-threatening, and the risk of crew infection can, in many cases, be avoided by taking measures to protect the crew and prevent the spread of the disease. Accordingly, it is based on three key principles: (i) the owners’ actions and measures to protect the crew’s welfare, (ii) the allocation of any liability from any delays, and (iii) the owners’ right to refuse the charterers’ orders [20,27].

According to an ordinary time charter party, the Clause assumes that the charterers have control over the ship and determine the ports of loading and discharging, with the owners under the obligation to follow the orders. Thus, for a trip time charter party, the liabilities and responsibilities could be amended by the parties recognising that the owners will know the ports the ship will call [17].

The Clause adopts a balanced approach to risk allocation, focusing on ensuring the contract continues. The reason for this is to help avoid potentially costly disputes and further supply-chain disruptions. There is also a focus on preventative measures appropriate to the contracting parties’ interests.

Thus, subject to BIMCO’s Infectious or Contagious Diseases Clause for Time Charter Parties 2022, subclause (a) dictates that for the purposes of this Clause, “Disease” means ‘a highly infectious or contagious disease that may cause serious illness to humans’. Preventive Measures means all reasonable, applicable and available measures to prevent exposure to the vessel, its crew or other persons on board to a Disease. “Risk of Exposure” means ‘a risk of exposure to a Disease which arises or substantially increases at a port or places nominated by the Charterers which in the Owners’ reasonable judgement cannot be avoided by Owners/Master taking Preventative Measures, whether such risk of exposure existed at the time of entering into the Charter Party or occurred after that’. Finally, “Exposure Risk Notice” means ‘a written notice from the Owners to the Charterers of a Disease’ [15,20].

Subclause (a) sets out the definitions of terms used throughout the Clause. “Disease” – This is one of the core definitions used in the Clause. It does not provide a more detailed definition of the terms used, such as “serious illness”. This is because the Clause is also designed to be used for unknown future diseases. Defining specific symptoms or risks would be too limiting. The standard rules of interpretation apply, and each situation should be assessed on a case-by-case basis [9,10].

“Preventive Measures” – “Measures” are meant to be equipment such as Personal Protective Equipment (PPE) but also the master’s/owners’ right to reject access on board to people who might infect the crew. The scope of the owners’ obligation is limited under this definition to “reasonable, applicable and available”. This means that nothing extraordinary can be required from the owners. The reference to “available” means that the measures, in this case especially PPE, can be provided to the ship. In the COVID-19 context, for example, the owners are not obliged to provide specific masks if they cannot be delivered or are sold out [28,29].

“Risk of Exposure” – This definition informs the Exposure Risk Notice and is used in the context of owners’ right to refuse to call a port under subclause (b). It is important to note that the reference to risks emphasises that if the risk pre-existed the charter party, then a significant increase in that risk triggers the Clause. The owners must assess whether the exposure risk can be avoided by taking Preventive Measures. This assessment should be made in their “reasonable judgment” [30].

According to English law, there are two main elements to consider and evaluate if a party has performed ‘reasonably’. Initially, every decision or action of a contracted party should be made ‘in good faith’, and it should be objectively reasonable. According to The Triton Lark [2011], Judge Teare suggested that to regard and state that an action has been made “in reasonable judgement”, no express clause needs to be incorporated into the charter party to classify an action as reasonable. The owner initially performs a judgement. The judgement should be first executed ‘in good faith’, or it will be regarded as a tool to obtain economic benefits or avoid liability. Then the judgement should be made objectively and with reason. To this end, an owner will exercise due diligence, utilising all accessible information and making all possible enquiries to reach a judgement in good faith [31].

For the IOCD Clauses, this means that the owners cannot simply reject calling at a port just because there appears to be an outbreak. Instead, they must make necessary enquiries on (1) whether there is an outbreak of a “Disease” at the port and gauge the severity of the outbreak, (2) whether the crew is in danger from infection and (3) whether Preventive Measures would protect the crew. This can be done by obtaining information from local authorities, agents or the media [32].

In subclause (b), it is stated that the owner shall take Preventative Measures in relation to the vessel throughout the currency of the charter party. Suppose costs for such Preventative Measures during the currency of a charter party exceed a certain amount. In that case, the owner will be liable for all costs, and when the specified amount is reached, the charterer will be liable for the excess costs. Subclause (b) Preventive Measures is an essential feature of the IOCD Clause and requires the owners to take steps to protect the ship. If the owners do not take protective actions, they are not entitled to give notice to the charterers to trigger the Clause. This Clause reflects the commercial practice of responsible owners who equip their ships with protective material to prevent crew infection. There is no corresponding obligation on the charterers because, in practice, they would not be directly involved and often have no control over stevedores in the ports because they are appointed by shippers or receivers. The obligation to take Preventive Measures includes the owners’ and masters’ right to refuse access to the ship. This is because experience has shown that the crew’s main risk comes from the ship’s crew on board [16,20].

The subclause does not address the consequences of a breach and owners’ non-compliance with this obligation. This means that in case of a breach, the principles of the governing law of the charter party will apply to the situation. To ensure that the owners’ obligation is not too extensive and to provide balance, the parties should agree on a threshold for the owners’ responsibilities in situations where the appropriate protective equipment is costly. In practice, the owners bear the costs up to the stated amount, and thereafter the charterers bear the costs. The parties must fill in an agreed amount; otherwise, the owners will be solely responsible for the costs [17].

According to subclause (c), if in connection with a Disease, the vessel is quarantined, refused admission at any port or otherwise delayed, the vessel shall remain on hire during such time. Therefore, the Charterers shall be liable for any direct losses, damages and/or expenses incurred by the Owners during the currency of the Charter Party. However, suppose any such quarantine, refused admission or delays are caused by the Owners’ acts or omissions or arise due to the vessel’s activity prior to the Charter Party. In that case, the vessel shall be off-hire for any time lost, and the Owners shall be liable for any direct losses, damages and/or expenses incurred by the Charterers. Subclause (c) Delays – This Subclause reflects the nature of the time charter party where the charterers have control over the ship and will therefore be liable for delays. Because of this, there can be situations where the charterers are liable without being in breach of the Clause or charter party [17,20].

The owners are responsible for delays in situations where they have caused or when the ship is delayed due to a prior “activity”. This is meant to include previous employment but also events like dry-docking. The vessel will be off-hire for the net time lost. The reference to “direct” losses means that the party would be responsible for reasonable and foreseeable damages [33].

Subclause (d) states that the vessel shall not be obliged to proceed to,
continue to or remain at a place where in the Owners’ reasonable judgement, there is a high risk from a Disease to the crew or other persons on board the vessel which cannot be prevented by taking Preventative Measures. Where the Owners decide not to proceed to, continue to or remain at a place as above and provided they have given the Charterers an Exposure Risk Notice: (i) the owners shall request new voyage orders from the Charterers, which the Charterers shall, subject to their redelivery obligations and any other terms of the Charter Party, issue within a reasonable time, (ii) pending such instructions, the vessel shall have the right to proceed to the nearest safe waiting place, (iii) the vessel shall remain on hire during such period and the Charterers shall indemnify the Owners for any costs, expenses or liabilities incurred by the Owners in relation to claims from holders of bills of lading as a consequence of the vessel waiting for and/or complying with the alternative voyage orders [20,30].

Subclause (d) Right to reject orders – The owners have the right to refuse employment orders. They require charterers to issue alternative voyage orders provided the conditions have been met to trigger the Clause. To avoid the risk of prejudicing P&I cover, owners and charterers should contact their P&I clubs before any contractual deviation takes place – especially if bills of lading have already been issued. This subclause focuses on the risk to the crew when calling a port [34].

The owners’ assessment of whether there is a high risk of Disease to the crew is in their “reasonable judgement”. This reference is often deleted because people believe it is a carte blanche for owners to refuse an order. However, deleting the reference would make it unclear who must make the assessment. The term might appear uncertain, but there is abundant legal guidance on its meaning and how any decision would be examined in arbitration and by the courts. The burden of proof is on the owners to establish that there is no high risk. The owners cannot easily reject the orders leaving it to the charterers to prove there is no risk to the crew [31].

To properly assess the Clause, it is essential to note that there is a distinction between (a) the likelihood/chances of contracting a Disease and (b) the severity of the Disease. For example, the chances of catching the disease are high for the common cold, but the severity is low. This Clause is not intended to cater for common cold-type situations; therefore, it needs to refer not (or not just) to a high Risk of Exposure but to the severity of the Disease itself [8].

Subclause (d)(iii) includes the charterers’ indemnity for costs, expenses or liabilities incurred by the Owners in relation to claims from holders of bills of lading due to the vessel waiting for and/or complying with alternative voyage orders. It is essential for charterers to check with their P&I Club that this indemnity is covered by their P&I insurance before agreeing to the Clause with owners [34].

According to subclause (e), when acting in accordance with any of the provisions of this Clause, anything is done or not done, such shall not be deemed a deviation but shall be considered due fulfillment of the Charter Party. Subclause (e) incorporation provision – It is common in many standard BIMCO clauses to include words of incorporation to ensure that the provision is carried through any chain of charter parties and into bills of lading. For the consequences of non-compliance with it, see subclause (d) above [11,16].

Finally, in subclause (f), it is stated that the Charterers shall procure that the provisions of this Clause are incorporated into all sub-charters, bills of lading, waybills or other documents evidencing contracts of carriage that are issued in relation to the Charter Party [20].

4. Discussing the issues of crew changes and deviation in IOC\Cl clauses

Due to the Covid-19 pandemic, the shipping industry is now facing many problems before the isolation (lockdown) did not exist in routine operations. One of these most significant problems that arose was, and is, the change of crews. The restrictions imposed to prevent the spread of the virus have created difficulties in changing the crew. As a result, shipowners are often forced to deviate from the planned voyage to disembark the crew and embark on the replacements. This problem, while it concerns the safety of the crew and the ship, is at the same time a field of claims between shipowners and charterers [35,36].

Undeniably, changing crews are usually a problem for shipowners, and the time lost falls within their responsibilities. However, measures can be taken to avoid this. Such actions can be: (i) for short voyages, they should make sure that the crew change takes place before the start of the journey; (ii) for longer voyages, where a crew change proves necessary, shipowners should try to agree with the charterers to introduce a clause in the charter agreement allowing the ship to deviate from changing crew; (iii) the inclusion of a paramount clause in the charter agreement can also be helpful in cases where the deviation is considered reasonable; (iv) if the deviation has not been agreed at the charter, the owners should try to obtain the consent from the charterers and consignees before the deviation is carried out [37,38].

Some charter agreements contained clauses which give the right to the owners to deviate from the planned course with the aim of changing crews. An example is the above assessed BIMCO clauses on crew changes, which give owners the freedom to deviate for the purpose of changing crew, as long as covid-19 restrictions prevent the crew change at the ports to which the ship is to approach within the scheduled voyage. Consequently, a deviation that falls entirely within the wording of the Clause will not constitute a breach of the terms of the charter agreement, and the cost of the discrepancy is shared between the parties. However, most of the clauses provided for in the present charter agreements in the way they are worded allow only the deviation to provide assistance to ships in distress and save life and property at sea. In this case, a unilateral decision to derogate constitutes a violation of the terms of the charter agreement [39].

It is the owners who are responsible for the management of the ship, its safety, and the safety of the crew and cargo. Therefore, in cases where the charterer does not give the right to the owner to deviate from the agreed journey, a deviation normally constitutes a breach of the terms of the charter agreement and charterers will be able to claim compensation for the damages suffered as a result of the delay [40].

As part of the time charter, the ship will usually be put off-hire for the entire deviation, and the owners will be responsible for the costs incurred during the deviation, such as fuel and port charges. For voyage charters, the discrepancy will normally constitute a violation of the obligation to perform the trip with a “due dispatch” or “utmost dispatch” [18].

In addition, the deviation can also interrupt the measurement of laytime and demurrage. As a result, shipowners are at risk of significant losses, for example, in cases where the ship is placed in mandatory quarantine after the crew change or by accepting claims due to late delivery by cargo consignees [16].

Suppose the charter agreement contains a paramount clause. In that case, the Hague/Visby rules will be incorporated into the charter agreement, according to which a “reasonable deviation” is allowed, and will not lead to a breach of the charter agreement. What constitutes a “reasonable deviation” is not further described in the Rules and must be assessed on a case-by-case basis. The need to prove that the deviation for the change of crew is reasonable and in most cases is a matter for the shipowner. However, it is important to stress that if it is not proved that the deviation is within the framework of common sense, the consequences can be severe. In addition to being responsible for the delay suffered by charterers, shipowners may also lose the right to limit their liability for cargo claims [41].

5. Conclusion

The outbreak of Covid-19, while unprecedented for the global populace, was simply another crisis-to-be-handled for the shipping industry. The Covid-19 virus was another disease after the incidents of SARS and the Ebola outbreak. For the shipping industry, the outbreaks
have been proved an unpredictable and also a periodical issue. Therefore, when they emerge, they should be countered effectively to minimise the overall impact on the market. To this end, BIMCO has created the Infectious or Contagious Diseases (IOCD) Clauses, specific clauses for countering diseases but at the same time generic to include all possible emerging diseases. Nevertheless, the issue with the diseases is that they differ considerably in severity, ease of transmission, and the methods required to counter them.

In the case of the outbreak of Covid-19, the existing clauses from the Ebola outbreak proved efficient in establishing the concepts of ‘Disease’ and ‘Affected Area’, effectively helping the contractual parties nominate a safe port and counter the spread of diseases. However, despite this initial success, they failed to fairly allocate the liability when the ship needed to execute or avoid some actions to protect the crew welfare, such as crew changes due to infections, deviations, or vessel’s relocation for loading and discharging, quarantines etc. Therefore, subject to the provisions, the ship owner is excluded from liability when effectively exercising due diligence to counter the virus.

This became evident with BIMCO’s Infectious or Contagious Diseases Clause for Voyage Charter Parties of 2015, where the right of termination and the liability for deviations and excessive costs were allocated strictly to charterers. In contrast, according to the newly amended BIMCO’s Infectious or Contagious Diseases Clause for Time Charter Parties 2022, the liability can and should be shared between charterers and ship owners. As a result, the shipowner can be deemed liable for the excessive costs up to a specific amount, thus making him more prone to exercise care while executing a Charter Party. In practice, the newly amended regulations minimise the ‘windows of liability’ that the vessel owners had with the previous legislation, making them more diligent in evoking the IOCD Clauses. This is beneficial for shipping practice, while the burden for utilising measures to counter the Covid-19 virus is fairly and equally allocated to both parties, increasing diligence during a voyage and making contractual discontinuation less likely to emerge.

Lastly, regarding the issues of crew changes and deviation from the ordinary course, the application of some processes can be considered for the risk of those incidents to be further minimised. Initially, for short voyages, the crew change should be scheduled to be executed before the commencement of the journey. As for longer voyages, where crew changes will prove mandatory, there should be an agreement between ship owners and charterers in introducing a clause in the charter party, allowing the vessel to deviate from the execution of crew change. Consecutively, when the deviation from the course is deemed reasonable, including a paramount clause in the chartering agreement would be impactful. Finally, in case the parties have not included any clause regarding deviation from the course, the owners should promptly obtain consent from the charterers and consignees before the deviation is executed.

**Data availability statement**

Data were used publicly available except for specific regulations, extracted from BIMCO Database.

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