Neutral Citation Number: [2025] EWHC 193 (Admiralty)

Case No: AD-2024-000007

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
ADMIRALTY COURT

IN THE MATTER OF AN ARBITRATION CLAIM

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 30/01/2025

Before :

THE HONOURABLE MR JUSTICE HENSHAW

- -

Between:

BUNGE S.A.	**Claimant**
- and -	
PAN OCEAN CO., LTD.	**Defendant**
"SAGAR RATAN"	

- -
- -

Mark Stiggelbout (instructed by **Pennington Manches Cooper LLP**) for the **Claimant**
Gemma Morgan (instructed by **Preston Turnbull LLP**) for the **Defendant**

Hearing date: 2 December 2024
Draft judgment circulated to parties: 8 January 2024

- -

Approved Judgment

- -

Mr Justice Henshaw:

(A) INTRODUCTION

1. The claimant, Bunge S.A. ("***Owners***"), brings this appeal under section 69 of the Arbitration Act 1996, in respect of an arbitration award dated 17 January 2024 (the "***Award***") made in favour of the defendant, Pan Ocean Co Ltd ("***Charterers***") concerning the vessel "*Sagar Ratan*" (the "***Vessel***"). The arbitration was heard by an LMAA tribunal comprising Jonathan Elvey and Mark Hamsher (the "***Tribunal***").

2. In very brief outline, the arbitration concerned delay which arose when, on arrival in Bayuquan, China, members of the crew tested positive for COVID-19. Rather than leaving the Vessel stationary in quarantine, Owners decided to sail her to Ulsan, South Korea, in order to replace the crew. The Vessel then returned to Bayuquan and discharged her cargo. The Tribunal concluded that the Vessel was off hire during the

time this took, pursuant to Additional Clauses 38 and 50 of the charterparty (to which I refer later), and that Owners were not entitled to rely on Additional Clause 129. The latter clause incorporated, in amended form, the BIMCO Infectious or Contagious Diseases Clause for Time Charter Parties 2015 (the "***BIMCO Clause***"). The Tribunal concluded that the Vessel was not delayed due to visiting an "*Affected Area*" pursuant to Clause 129 but, rather, the delay was brought about solely by the positive tests of the crew members.

3. Permission to appeal was granted to Owners on 24 June 2024 by Mr Justice Butcher in respect of the following questions of law:

   i) [Additional Clause 129] On the true construction of the BIMCO Infectious or Contagious Diseases Clause for Time Charter Parties 2015, is a port or place an 'Affected Area' if it carries 'a risk of quarantine or other restrictions' or does that definition implicitly exclude situations where a) the crew had a Disease upon arrival there, and/or b) the risk was no greater upon arrival there than it was when the charterparty was concluded?

   ii) [Additional Clause 38] For the purposes of an off-hire clause, is there a 'detention' for 'quarantine' if the vessel can and does avoid quarantine by changing the crew at another port?

   iii) [Additional Clause 50] Is the vessel off-hire in respect of a period when it can and does comply with the service immediately required?

4. Owners' case can be summarised as follows:

   i) On a natural reading of the BIMCO Clause, the limb of the definition of Affected Area applying to a port or place which carries *"a risk of quarantine or other restrictions"* includes a port which imposes quarantine on a vessel because its crew tests positive for COVID-19.

   ii) Where a vessel visits an Affected Area and suffers delay (e.g. by being placed in quarantine), the vessel remains on-hire throughout the period of delay, regardless of whether the delay was as a result of visiting the Affected Area.

   iii) As to question 2, there is no "*detention"* for "*quarantine"* if the Vessel can sail to another port to change crew, since there is no sufficient geographical constraint on the vessel's movement. The Vessel was accordingly not off hire under Additional Clause 38.

   iv) As to question 3, the "*service immediately required*" in the present case was to sail to another port to change crew, as in fact occurred. The Vessel was therefore not off hire under Additional Clause 50 either.

5. Charterers' case may be summarised thus:

   i) The Tribunal correctly took the view that an Affected Area must be a port or place with a risk of quarantine or other restrictions beyond that which exists at any port to which the Vessel might go under the charterparty, and/or beyond that which existed at the port in question at the time the charterparty was entered into.

ii) The quarantine limb of the BIMCO clause applies to a port the visiting of which gives rise to a risk of infection or of subsequent quarantine at a later destination as a result of having visited it. Bayuquan was not such a place.

iii) To take the benefit of the BIMCO Clause, Owners must prove that the delay was caused by the Vessel's visit to the Affected Area. Owners have not challenged the Tribunal's finding that the legally effective cause of the delay was the crew's COVID-19 infections, not the visit to the (putative) Affected Area.

iv) As to question 2, the deviation from the contractual voyage to replace infected crew members did constitute a 'detention' which rendered the Vessel off-hire.

v) As to question 3, the deviation was also not what was 'immediately required' of the vessel, such that it was 'inefficient' and off-hire for the period of the delay. Moreover, Owners have not properly challenged the Tribunal's finding that when the Vessel sailed to another port to change crew, she was not performing the service immediately required of her by Charterers.

6. I have concluded that each of the questions should be determined against the Owners, and that the Tribunal made no error of law. A port is not an Affected Area merely by virtue of exposing a vessel to the risk of quarantine or other restrictions if the vessel has arrived carrying crew members infected by a serious contagious disease. Bayuquan was not an Affected Area and, even if it had been (for instance, because there was a risk of infection at Bayuquan itself), the delay was not caused by visiting an Affected Area but by the crew's infected state. Further, both off-hire clauses (Additional Clauses 38 and 50) were triggered and hence the Vessel was off-hire for the period during which it was delayed from discharging its cargo at Bayuquan by reason of the positive COVID-19 tests.

(B) BACKGROUND

(1) The Charterparty

7. The Vessel was chartered by Owners to Charterers by a fixture recap and amended NYPE form dated 17 February 2022 (the '**Charterparty**') for one time charter trip from the Philippines via Australia to China with a cargo of alumina in bulk. Owners were disponent owners who had chartered the Vessel from its registered owners (the '**Head Owners**') under a time charter dated 8 October 2021.

8. The three key terms of the Charterparty for present purposes were Additional Clause 38, Additional Clause 50 and Additional Clause 129 (which is a version of the BIMCO Clause with various deletions). They are set out below. In Clause 129 I have shown the deletions from the standard BIMCO Clause by strikethrough.

> "**Clause 38 – Quarantine / Radio Pratique**
>
> (38) Normal quarantine time and expenses for the Vessel's entering port shall be for Charterers' account, but any time of detention and expenses for quarantine due to pestilence, illness

and etc. of Master, officers and crew shall be for Owners' account.

[…]"

"**Clause 50 – Deviation / Put Back**

In the event of loss of time either in port or at sea, deviation from the course of the voyage or putting back whilst on voyage, by reason of … sickness or accident to the Master, officers, crew … the hire shall be suspended from the time of the Vessel's inefficiency in port or at sea until the time when the Vessel is again efficient in the same position or equidistance position to the destination.

All directly related expenses incurred including bunkers consumed during such period of suspension shall be for Owners' account. Under this clauses neither Owners not Charterers to be allowed to be benefited at the expense of the other party."

"Clause 129 - BIMCO Infectious or Contagious Diseases Clause for Time Charter Parties 2015

BIMCO Infectious or Contagious Diseases Clause for Time Charter Parties 2015 only sub-Clause b to g deleted

(a) For the purposes of this Clause, the words:

"Disease" means a highly infectious or contagious disease that is seriously harmful to humans.

"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.~~

~~(b) The Vessel shall not be obliged to proceed to or continue to or remain at any place which, in the reasonable judgement of the Master/Owners, is an Affected Area.~~

~~(c) If the Owners decide in accordance with Sub-clause (b) that the Vessel shall not proceed or continue to an Affected Area they shall immediately notify the Charterers.~~

~~(d) If the Vessel is at any place which the Master in his reasonable judgement considers to have become an Affected~~

~~Area, the Vessel may leave immediately, with or without cargo on board, after notifying the Charterers.~~

~~(e) In the event of Sub-clause (c) or (d) the Charterers shall be obliged, notwithstanding any other terms of this Charter Party, to issue alternative voyage orders. If the Charterers do not issue such alternative voyage orders within forty-eight (48) hours of receipt of the Owners' notification, the Owners may discharge any cargo already on board at any port or place. The Vessel shall remain on hire throughout and the Charterers shall be responsible for all additional costs, expenses and liabilities incurred in connection with such orders/delivery of cargo.~~

~~(f) In any event, the Owners shall not be obliged to load cargo or to sign, and the Charterers shall not allow or authorise the issue on the Owners' behalf of, bills of lading, waybills or other documents evidencing contracts of carriage for any Affected Area.~~

~~(g) The Charterers shall indemnify the Owners for any costs, expenses or liabilities incurred by the Owners, including claims from holders of bills of lading, as a consequence of the Vessel waiting for and/or complying with the alternative voyage orders.~~

(h) If, notwithstanding Sub-clauses (b) to (f), the Vessel does proceed to or continue to or remain at an Affected Area:

(i) The Owners shall notify the Charterers of their decision but the Owners shall not be deemed to have waived any of their rights under this Charter Party.

(ii) The Owners shall endeavour to take such reasonable measures in relation to the Disease as may from time to time be recommended by the World Health Organisation.

(iii) Any additional costs, expenses or liabilities whatsoever arising out of the Vessel visiting or having visited an Affected Area, including but not limited to screening, cleaning, fumigating and/or quarantining the Vessel and its crew, shall be for the Charterers' account and the Vessel shall remain on hire throughout.

(i) The Vessel shall have liberty to comply with all orders, directions, recommendations or advice of competent authorities and/or the Flag State of the Vessel in respect of arrival, routes, ports of call, destinations, discharge of cargo, delivery or in any other respect whatsoever relating to issues arising as a result of the Vessel being or having been ordered to an Affected Area.

> (j) If in compliance with this Clause anything is done or not done, such shall not be deemed a deviation, nor shall it be or give rise to an off-hire event, but shall be considered as due fulfilment of this Charter Party. In the event of a conflict between the provisions of this Clause and any implied or express provision of this Charter Party, this Clause shall prevail to the extent of such conflict, but no further.

9. It is common ground that the deletion of the final few words from Clause 129(a) ("*imposed in connection with the disease"*) was a clerical mistake. For the purposes of interpreting the clause, I ignore the inadvertent deletion.

10. The intentional deletions may be a tacit recognition of the effect of the COVID-19 pandemic. They mean that the Master can no longer exercise a discretion to refuse to visit a nominated port where there is a risk of infection or quarantine (which at the height of the pandemic could have applied to almost any port in the world); but the allocation of financial risk arising from visiting an Affected Area is retained.

(2) Factual background

11. A full factual background is set out in Award §§ [1] to [23]. I set out a brief summary below.

12. On 28 February 2022 the Vessel was delivered to Charterers at Cebu, the Philippines. It was ordered by Charterers to Gladstone, Australia to load cargo. On 11 March 2022, at Gladstone, the Vessel began loading and seven crew members were changed. On 15 March 2022 the Vessel sailed for Bayuquan.

13. On 30 March 2022 the Vessel arrived in Bayuquan, tendered NOR, and berthed. The crew were tested for COVID-19. On 31 March 2022 the Master was informed that five crew members had tested positive for COVID-19. On 2 April 2022 those five crew members were tested again. Four tested positive again and one (the Master) tested negative.

14. Head Owners and Owners arranged to replace the four COVID-infected crew members in Ulsan, South Korea and sailed there accordingly. On 7 April 2022 the four infected crew members disembarked. On 8 April 2022 the Vessel sailed back to Bayuquan. On 10 April 2022 the Vessel re-tendered NOR and discharge was completed on 25 April 2022. At 00:36 GMT on 26 April 2022 the Vessel was redelivered to Owners.

15. Charterers deducted hire and expenses in respect of a period from 07:50 LT on 31 March 2022 (the time of the first positive tests at Bayuquan) to 18:30 LT on 14 April 2022. I refer to this period as the "***Period of Delay***".

16. Owners claimed for the total hire withheld by Charterers for the Period of Delay and for an indemnity for any claim advanced by Head Owners for the costs of replacing the four COVID-infected crew members at Ulsan. Charterers denied Owners' claims and claimed they were entitled to make the deductions because of the time lost and additional expenses. Both parties argued that, regardless of the Tribunal's findings,

they were entitled to recover a small balance (USD $2,518.94) from the other. Both parties also claimed interest and costs.

17. The Tribunal concluded that the Bayuquan positive test results must be taken at face value (contrary to Owners' contention that they were inaccurate) (Award [16] to [17]). At the same time, there was insufficient evidence to conclude that the positive tests resulted from failure by the Owners to take all reasonable steps to detect and avoid the spread of COVID (Award [26]). It was not possible to determine whether they resulted from the crew change at Gladstone or whether one or more crew members were already infected when the vessel was delivered into Charterers' service on 28 February (*ibid*.). As a result, the Tribunal thought, it was not possible to determine whether there was a breach of lines 21 and 22 of the charterparty (state of vessel and crew on delivery); and it seemed to the Tribunal that the obligation in clause 1 to *"keep the vessel in a thoroughly efficient state in hull, machinery and equipment ..."* would not readily apply to the vessel's crew (Award [35]).

18. Further, the Tribunal considered that Clause 15, the basic off hire clause, which had been amended to require that the loss of time be *"due to vessel's fault"*, probably did not apply. It was not necessary to reach a firm conclusion on that point because the Tribunal was satisfied that Additional Clauses 38 and 50 applied (Award [36]). The Tribunal rejected Charterers' submission that Additional Clause 131 (BIMCO COVID-19 Crew Change Clause) applied, on the basis that it was a clause invokable by Owners if they had to deviate from the port to which the vessel had been ordered in order to allow crew changes to take place (Award [27]).

19. The Tribunal found that the decision to sail to Ulsan to replace the infected crew members provided certainty and could not be criticised as unreasonable (Award [18] – [23]).

(C) QUESTION 1 – THE BIMCO CLAUSE

20. Owners seek to rely on Clause 129(h)(iii) to establish that the Vessel was on-hire throughout the Period of Delay:

> "(h) If, notwithstanding Sub-clauses (b) to (f), the Vessel does proceed to or continue to or remain at an Affected Area:
>
> …
>
> (iii) Any additional costs, expenses or liabilities whatsoever arising out of the Vessel visiting or having visited an Affected Area, including but not limited to screening, cleaning, fumigating and/or quarantining the Vessel and its crew, shall be for the Charterers' account and the Vessel shall remain on hire throughout."

Owners submit that they need to prove only that Bayuquan was an Affected Area. Bayuquan was an Affected Area because it carried "*a risk of quarantine or other restrictions*" in connection with COVID-19. Therefore, the Vessel was on-hire for the whole duration of the Period of Delay.

21. Charterers submit that Clause 129(h)(iii) imposes a three-stage test for Owners to be able to claim hire: (a) Bayuquan must have been an Affected Area, (b) the Vessel must have incurred additional expense or delay and (c) visiting an Affected Area must have caused the additional expense or delay. Question 1 in its express terms goes only to the first stage of this test. However, since the definition of Affected Area and the question of whether a visit to such an Area causes additional delay or expense, are intertwined, and since Owners do not accept the Tribunal's approach to the question of causation, I consider the clause as a whole.

(1) Principles of construction

22. Three general principles of contractual interpretation are of particular relevance in this case. The first is that, where agreements are sophisticated, complex, and have been negotiated and prepared with the assistance of skilled professionals, they may be interpreted principally by close textual analysis (*Wood v Capita Insurance Services* [2017] UKSC 24 at [17]). The BIMCO Clause is a sophisticated agreement prepared by skilled professionals which merits close textual analysis.

23. The second is that the relevant words of a contract must be assessed '*in their documentary, factual and commercial context*', in the light of (*inter alia*) '*...the facts and circumstances known or assumed by the parties at the time that the document was executed*' (*Arnold v Britten* [2015] UKSC 36 at [15]). For the Charterparty, such facts and circumstances will include, but not be restricted to, the fact that the Vessel was to sail from Australia to a port in China, the ongoing COVID-19 pandemic, and the existing COVID regulations in Australia and China.

24. The third is that a contract must be read as a whole, reading each clause in light of and consistently with every other clause, and with the overall purpose of the contract (objectively ascertained). Clause 129 of the Charterparty must be read, so far as is possible, consistently with Clauses 38 and 50. The parties had differing views as to how this should be achieved:

    i) Charterers submitted that Clauses 38 and 50 accorded with the '*entirely familiar*' distinction '*between those matters which lie upon the owners' side of responsibility, essentially the vessel and crew... and those matters relating to the charterers' employment of the vessel and crew*' (*The Doric Pride* [2006] Lloyd's Rep. 175 at [33]). Where the costs of a vessel being refused entry to a port must be allocated, the question which must be asked is '*where does the real problem lie: with the crew's status or with the trading of the Vessel to the particular port?*' This standard division of risk must be borne in mind when reading Clause 129.

    ii) Charterers also submitted that the overall purpose of the contract was to convey cargo from Australia to a port in China. Owners could be taken implicitly to have accepted the risk of sailing to China and Clause 129 must be read accordingly.

    iii) Owners in contrast relied on Steyn J.'s warning in *The Fjordaas* [1988] 2 All E.R. 714 (at p.720c) that '*it would be wrong to approach*' a clause '*with a predisposition in favour of a restrictive interpretation*' based on '*the traditional allocation of risk as between owners and charters*'. To rely on this

> '*traditional allocation*' was to beg the question as to whose responsibility was the Period of Delay, which was not a question required by the words of Clause 129.

25. I now turn to the issues raised by the interpretation of Clause 129.

(2) Was Bayuquan an 'Affected Area'?

26. Permission to appeal was granted pursuant to Owners' submission that the BIMCO Clause was a widely-used standard clause in charterparties, such that clarification of its terms would be of public importance. However, the BIMCO Clause was incorporated into the Charterparty with considerable deletions as Clause 129. Owners submit that the meaning of 'Affected Area' is identical with or without the deletions, but (as pointed out by Charterers) some of their arguments stray close to relying on the deletions as points in favour of their preferred meaning. Ultimately, however, I am inclined to agree with Owners that 'Affected Area' should be interpreted in the same way in both circumstances, for reasons I indicate out in paragraph 38 below.

(a) The Tribunal's findings

27. The Tribunal found that COVID-19 was a qualifying "Disease" for the purposes of Clause 129 (Award [29]). Its core findings on the effect of Clause 129 in the present case are at Award [30] and [31]:

> "30. The evidence indicated that the vessel and her crew were not at risk of exposure to Covid and/or at risk of being subject to quarantine or other restrictions if the four crew members had not re-tested positive. There was nothing to suggest that in the absence of positive tests, the vessel would have been subject to delays other than normal operational ones that might have been caused by a shortage of available berths or discharging facilities. The quarantine that was triggered by the positive tests was no different to a quarantine or withholding of free pratique that would have been imposed at any port in the world if a member of the crew were found to have any infectious disease that port authorities consider sufficiently dangerous to require quarantining. The quarantining of the Vessel was not brought about by the Vessel being in an '*affected area*' as defined by Clause 129 of the Charterparty; it was brought about solely by the positive tests first of five and subsequently of four crew members.
>
> 31. There was a further reason why, if one considered additional clause 129 in the context of the whole charterparty, it did not apply. As was validly pointed out on behalf of the Charterers, the charterparty was for a time charter trip from a port in Australia to a port in China. Although the Charterers had the right to nominate the specific load port and the specific discharge port in, respectively, Australia and China, the charterparty was concluded against the background of the existing Covid regulations in both those countries. There was

> no suggestion that the regulations at Bayuquan were any different to those prevailing at any other port in China. Objectively, it was extremely unlikely that the parties could have intended that all the other off-hire provisions in the charterparty and any other conflicting provisions in the charterparty should be overridden by additional clause 129 if the anti-Covid regime in Bayuquan was exactly the same as at the date of the conclusion of the charterparty and was the one applied at all Chinese ports. It would have required very clear, express wording to override all the other provisions of the charterparty when the conditions encountered in China were those apparently in existence at the time of the conclusion of the charterparty and prevailing throughout the agreed country within which the port of discharge would be located."

(b) The two limbs of the definition of Affected Area

28. Under the BIMCO Clause there are two (disjunctive) limbs to the definition of an Affected Area. An Affected Area can be a port or place where there is a risk of exposure to the Vessel, crew or other persons on board:

    i) to the disease ("***Limb 1***"); and/or

    ii) to a risk of quarantine or other restrictions being imposed in connection with the disease ("***Limb 2***").

29. The focus in the present case is on Limb 2. I note that both parties, and commentary about the BIMCO Clause, appear to treat Limb 2 as applying to "*a port or place where there is a risk of quarantine or other restrictions being imposed*…". However, syntactically, Limb 2 would appear to apply to "*a port or place where there is a risk of exposure … to a risk of quarantine or other restrictions being imposed…*". Nonetheless, I do not consider that that point affects the outcome.

(c) To which port is Limb 2 directed?

30. One of Charterers' submissions is that Limb 2 refers to a port or place which is affected by a Disease and so gives rise to a risk that the vessel may subsequently be subject to quarantine or other restrictions by reason of having called there. By way of illustration, Charterers postulate a voyage from a West African port, where there is a risk of exposure to a qualifying Disease, to Rotterdam, where there is a risk of quarantine as a result of having visited the West African port. Charterers suggest that the West African port will be the Affected Area, even though the delay for quarantine occurs in Rotterdam.

31. I consider there to be two difficulties with this approach. The first is that the word *"where"* in the language *"any port or place <u>where</u> there is a risk of exposure to the Vessel, crew or other persons … to a risk of quarantine or other restrictions being imposed …"* in my view most naturally has a geographical meaning and points to the place where the quarantine or other restriction is liable to be imposed: i.e. Rotterdam in the example. I would accept that it is possible to read Limb 2 as referring to the West African port, on the basis that that is a port "*where*" there is a risk of subsequent

exposure to quarantine risk at a port subsequently visited (e.g. Rotterdam). In addition, the same result might be achieved by giving *"where"* the non-geographical meaning of 'in circumstances where', which again is compatible with Limb 2 referring to the West African port. However, neither of these latter approaches is in my view as natural as the first interpretation, which points to Rotterdam as being the 'Affected Area'.

32. The second problem is that a port that is affected by a Disease, and so gives rise to a risk that the vessel may subsequently be subject to quarantine or other restrictions by reason of having called there, will almost inevitably fall within Limb 1 already because it will be a "*port or place where there is a risk of exposure to the Vessel, crew or other persons on board to the Disease*". The Charterers' proposed interpretation would thus make Limb 2 redundant or virtually redundant.

33. The Charterers submitted that this interpretation of Limb 2 was supported by a passage in *Carver on Charterparties* (3rd ed.). However, for the reasons I give in section (C)(2)(f) below, I consider that the passage in question in fact supports a different view of Limb 2 which is consistent with the Tribunal's approach.

(d) The increased risk argument

34. Charterers also submit that where a port has been specified as a destination in the charterparty, in order for it to be an Affected Area, the '*risk of quarantine or other restrictions*' there must have increased from the date of the conclusion of the charterparty. This approach is compatible with a passage in Award [31]:

> … Objectively, it was extremely unlikely that the parties could have intended that all the other off-hire provisions in the charterparty and any other conflicting provisions in the charterparty should be overridden by clause 129 if the anti-Covid regime in Bayuquan was exactly the same as at the date of the conclusion of the charterparty and was the one applied at all Chinese ports. It would have required very clear, express wording to override all the other provisions of the charterparty when the conditions encountered in China were those apparently in existence at the time of the conclusion of the charterparty and prevailing throughout the agreed country within which the port of discharge would be located.

35. Charterers refer to a series of war risks cases, where it was held inconsistent with an express agreement to sail to or through a particular area, for a Master subsequently to rely on a war risks clause to refuse to sail to or through that particular area. In *The Polar* [2024] UKSC 2, Lord Hamblen JSC reviewed these authorities, including *The Product Star (No 2)* [1993] 1 Lloyd's Rep. 397 and *The Paiwan Wisdom* [2012] 2 Lloyd's Rep. 416. *The Polar* case concerned whether cargo interests were liable in general average to owners for the ransom paid to Somali pirates who seized a vessel in the Gulf of Aden. The cargo interests argued (*inter alia*) that the voyage charter contained a complete code/insurance fund, such that the owners could not sue the cargo interests. In addressing that argument, which was rejected, the Supreme Court had to consider whether the owners would have been entitled to refuse to sail across

the Gulf of Aden. Lord Hamblen JSC concluded that they would not have been so entitled:

> "In the present case the shipowner, in the context of well-known piracy risks, has agreed to pass through the Gulf of Aden on the terms set out in the Gulf of Aden clause. It would similarly be inconsistent with that express agreement to construe clause 39 in such a way as to permit the shipowner to refuse to transit the Gulf of Aden on account of such piracy risks." ([65])

36. By analogy, Charterers in the present case argue that Owners had agreed to sail from Australia to any port in China, and had accordingly accepted the COVID-19 testing and quarantine procedures present at all Chinese ports when the Charterparty was concluded. Owners could not subsequently claim that Charterers bore the risk of visiting a Chinese port.

37. Owners counter that there is no such inconsistency here, because in the amended version of the BIMCO Clause incorporated at Clause 129, the Owners have no right to refuse to go to the Charterers' named port in China. They refer to *The Archimidis* [2008] 1 Lloyd's Rep. 597, where there was held to be no inconsistency between a safe port warranty and a named load port, such that the owners of the vessel were not liable for vessel not in fact being able to load the contractual quantity of cargo safely at the port in question.

38. I am inclined to agree. Clause 129 does not permit Owners to refuse to visit a port named as a destination in the Charterparty, even if it is an Affected Area. It might be objected that (a) that result would not follow in the unamended version of the BIMCO clause on which Clause 129 is based and (b) the definition of Affected Area should be construed in the same way regardless of the deletions made to the BIMCO clause in Clause 129. However, the answer to that objection may well be that, under the full version of the clause, one would 'read down' the right to refuse to visit the port (i.e. the right in subclause (b) of the unamended clause), rather than reading down the definition of Affected Area. That would seem a more logical approach, given that the definition of Affected Area is evidently intended to be based on factual matters relating to the Disease and the resulting risks. (I acknowledge that, as Charterers point out, the Court of Appeal in *The Product Star (No 2)* addressed the position where the contractual destination might otherwise be regarded as dangerous by, in effect, reading down the concept of 'dangerousness'. However, it does not follow that that would necessarily be the appropriate response in the context of the present clause.) In addition, to construe 'Affected Area' in a way that depended on showing an increase in risk since the inception of the charterparty would make its application more complex and uncertain.

(e) Owners' interpretation of Limb 2

39. Conversely, I consider Owners' approach to Limb 2 to be problematic. The language *"any port or place <u>where</u> there is a risk of exposure to the Vessel, crew or other persons ... to a risk of quarantine or other restrictions being imposed ..."* is most naturally directed at a characteristic of the port or place itself, such as the policies or other measures it has introduced in response to the Disease in general, rather than to a

risk arising because a particular vessel happens to arrive with an infected crew (a possibility which, I note, Clause 129 does not mention). Moreover, the Owners' approach would, as the Tribunal in substance pointed out at Award § [30], mean that if a crew member in fact had a Disease, then any port in the world that regarded the Disease as sufficiently dangerous to require quarantining would then be an Affected Area. Since "*Disease*" is defined to mean a disease that is highly infectious or contagious and seriously harmful to humans, it would follow that, given such a crew infection, virtually any port in the world would be likely to be an Affected Area. The problem would arise in relation not only to COVID-19 but also to other Diseases within the definition, such as Ebola.

40. I do not consider it to be an answer to those points that, according to Owners' submission, China's COVID testing policies were stricter than those in other countries at the time. First, there is no factual basis for that view in the Award. Secondly, and in any event, even in a country that did not routinely require COVID tests on arrival, the presence of a crew member infected with a Disease would still create a "*risk*" of quarantine or other restrictions. For example, the infection may be or become symptomatic and have to be disclosed as part of the pratique process, or it might be observed or become known to port authority staff. As a result, it remains the case that Owners' approach would be liable to render all or most ports Affected Areas regardless of testing regimes.

(f) The correct interpretation of Limb 2

41. In my view, Limb 2 applies where the risk of quarantine or other restrictions is one of general application arising from the Disease. One example is the type of blanket requirement referred to in Charterers' submissions to the Tribunal recorded in Award [29]:

> "The Charterers argued that there was no generalised *"risk of quarantine or other restrictions being imposed"* in Bayuquan similar to a blanket requirement that all vessels be required to quarantine for 14 days regardless of test results which had been im.

42. More broadly, it applies where there is a risk of quarantine or other restrictions by reason of having previously visited a port affected by the Disease. That view is supported by the discussion in *Carver on Charterparties* at §§ 4-485 ff:

> "4-485 Key to the operation of the 2015 Clauses is the concept of an "affected area", which is defined in both clauses as meaning "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". An affected area, therefore, may be a place where there is a risk of exposure to the disease or a place where the vessel may be subject to quarantine or other restrictions by virtue of having previously visited such a place. The term "disease" is in turn defined as "a highly infectious or contagious disease that is seriously harmful to humans".

> 4-486 This definition of "affected area" contains two elements. First, a port or place to be visited by the vessel must be affected by a qualifying disease. This must be a disease that is not merely harmful to humans but "seriously harmful". Moreover, it must be not only infectious but "highly infectious". The threshold in terms of transmissibility and severity of illness is high. Examples of qualifying diseases include Ebola and Covid-19. Secondly, visiting the port or place must generate a "risk", either of exposure to the disease or of quarantine or other restrictions. The degree of likelihood required by the concept of "risk" receives no elaboration but notably there is no requirement for a high risk or serious risk. It suffices, it is suggested, that there is a genuine, appreciable danger without any requirement for any heightened level of threat. Whether that danger exists in a port or place that is experiencing an outbreak of a qualifying disease depends on the measures in place to protect visiting vessels. Also devoid of elaboration are the references to quarantine and other restrictions, beyond the disease being the reason for their imposition. There is, for example, no requirement that the possible quarantine need be of any minimum duration. Equally, there is no requirement that the quarantine or other restriction be imposed within any particular time of leaving the affected area or within any degree of geographical proximity to that area; the only limit is that the reason for the quarantine or other restriction is the prior exposure to the qualifying disease."
>
> (footnotes omitted, though the last sentence cites the Explanatory Note quoted below; my emphasis)

In my view the underlined passages indicate that the editors of Carver consider that Limb 2 at least typically applies where a risk of quarantine or other restrictions arises at a port (e.g. Rotterdam in Charterers' example) by reason of it having previously visited a port affected by the Disease (e.g. the West African port in Charterers' example).

43. That view also gains some support from the Explanatory Notes to the BIMCO Clause, which include this paragraph:

> "The second part of the definition of "Affected Area" refers to any port or place where quarantine or other restrictions are imposed. This could mean the same port where a risk of infection exists, or another port where restrictions may be imposed on a ship as a result of it previously trading to a port where there was an infection risk." (my emphasis)

albeit it is fair to note that (i) the words *"could mean"* might be regarded as non-exhaustive and (ii) it is not clear on the evidence whether the above paragraph was promulgated in 2015 when the BIMCO clause was issued, or added only later. (Other parts of the Explanatory Notes refer to COVID-19 and so must date from later.)

44. In my view, that approach to Limb 2, which is consistent with the Award § [30], is to be preferred. It is consistent with the language of the definition, as noted earlier, and avoids the overly wide effect of Owners' approach. In addition, it strikes a fair balance between the parties that is consistent with the general rule of thumb that delays arising from problems with the vessel and crew are for owners' account, because it means the vessel will not be off hire under Clause 129 by reason of problems that would not have arisen but for the provision of an infected crew.

45. In the present case, therefore, Bayuquan was not an Affected Area. The quarantine imposed depended entirely on the actual infected status of the crew, and did not arise from any policy of quarantining incoming vessels in general or vessels who had visited particular countries. It resulted essentially from a characteristic of the Vessel/crew rather than a characteristic of the place to which Charterers ordered the Vessel to proceed.

(3) Causation under the BIMCO Clause

46. The question of causation is moot given my conclusion above that Bayuquan was not an Affected Area, but for completeness I briefly consider here the question whether Subclause (h)(iii) requires that the visit to the Affected Area cause the delay or additional expense, and if so, whether the visit to Bayuquan could have satisfied that causation requirement.

(a) Does BIMCO Clause (h)(iii) contain a causation requirement?

47. The Tribunal probably made an implicit finding that a causal link between the visit to the Affected Area and the Period of Delay was necessary for Clause 129(h)(iii) to apply. At Award [30] the Tribunal stated that "*the quarantining of the vessel was not brought about by the vessel being in an 'affected area' as defined by clause 129 of the charterparty*".

48. Owners contended that no causation is required, on the wording of Clause 129(h)(iii), for the vessel to remain on hire. They submit that the words underlined below:

> "(iii) Any additional costs, expenses or liabilities whatsoever arising out of the Vessel visiting or having visited an Affected Area, including but not limited to screening, cleaning, fumigating and/or quarantining the Vessel and its crew, shall be for the Charterers' account and the Vessel shall remain on hire throughout."

are freestanding and not governed by the preceding phrase "*arising out of …*". Thus, they say, if the vessel proceeds to, continues to, or remains at an Affected Area, it remains on hire for the entire period in which it is so engaged, regardless of whether what would otherwise be an off hire event resulted from having visited the Affected Area. If Bayuquan was an Affected Area, then the Vessel was on hire for the Period of Delay whether or not it resulted from having visited an Affected Area.

49. I do not accept that submission. The core purpose of the Clause is to protect Owners where, as a result of Charterers' decision to visit an Affected Area, a delay or other cost arises. It is not to provide a blanket protection for Owners for a delay

encountered on a visit to an Affected Area howsoever incurred and regardless of all other provisions in the Charterparty. Further, as a matter of language, the words '*the Vessel shall remain on hire throughout*' are connected by the conjunctive particle '*and*' to the preceding words before, which provide that additional costs, expenses and liabilities are for Charterers' account only where they arise out of *"the Vessel visiting or having visited an Affected Area*".

50. For these reasons, I consider that BIMCO Clause (h)(iii) contain a causation requirement, including the portion providing for the vessel to remain on hire throughout.

(b) Causation in the present case

51. On the definition of Affected Area which I have adopted here, the Period of Delay did not arise out of the visit to an Affected Area, even if Bayuquan were an Affected Area (for example, as a place carrying a risk of Disease within Limb 1). The Vessel was not delayed as result of Bayuquan being an Affected Area. It was delayed, as the Tribunal found, only because five of its crew members tested positive for COVID-19 on 30 March 2022 and four tested positive again on 2 April 2022.

(4) Conclusion on Question 1

52. I therefore conclude that no error of law is established as regards Clause 129. On the Tribunal's factual findings, Bayuquan was not an Affected Area and the Period of Delay did not result from the Vessel having visited an Affected Area. More generally, a port is an Affected Area within Limb 2 if, in connection with a Disease, it imposes or may impose quarantine or other restrictions on incoming vessels in general or particular categories of vessel (in particular, vessels who have previously visited specified destinations); but is not an Affected Area purely on the basis that there is a risk of quarantine or other restrictions being imposed in the event that an incoming vessel has one or more crew members infected with the Disease.

(D) QUESTION 2 – DETENTION FOR QUARANTINE

53. I turn to Question 2. The question whether there is "*a detention for quarantine if the vessel can and does avoid quarantine by changing the crew at another port*" relates to Clause 38, which provides that "*any time of detention and expenses for quarantine due to pestilence, illness and etc. of Master, officers and crew shall be for Owners' account*".

54. I have considered, as a preliminary matter, whether the words "*for quarantine*" qualify the word "*detention*" or only qualify the word "*expenses*". If the latter were correct, then Clause 38 could be triggered by a "*detention… due to pestilence, illness etc. of Master, officers and crew*". However, given that there is already, in Clause 50, a general off-hire clause triggered by "*loss of time*" for a variety of reasons, I consider the preferable view to be that Clause 38 is a quarantine-specific off hire clause.

(1) The Tribunal's findings

55. In Award [50] the Tribunal found that:

> "The situation was covered by additional clauses 38 and 50 so that the hire and additional expenses incurred by the Charterers were to be for the Owners' account."

(2) Applicable principles

56. Clause 38, like Clause 50, is an off hire clause. The "*cardinal rule*" for interpreting off-hire clauses (per *The Berge Sund* [1993] 2 Lloyd's Rep. 453, 459 rhc quoting Bucknill LJ in *The Ann Stathatos* (1948) Lloyd's Rep. 196) is that "*the charterer will pay hire for the use of the ship unless he can bring himself within the exceptions*". The burden is on Charterers to establish that Clause 38 (or Clause 50) operates so as to relieve them of liability for hire in the Period of Delay.

57. The word 'detention' has been given a broad meaning in charterparties. In *The Jalagouri* [2000] 1 Lloyd's Rep. 515, the Court of Appeal approved Kerr J's definition of detention in *The Mareva A/S* [1977] 1 Lloyd's Rep. 36 as a "*physical or geographical constraint upon the vessel's movements in relation to her service under the charter*". In *The Jalagouri*, a ship was prevented from discharging damaged cargo by a port authority and ordered off berth until an agreement had been reached about storage of the damaged cargo. There was held to have been a 'detention' of the ship. In *The Doric Pride* [2005] 2 Lloyd's Rep. 470 (in a finding not challenged on appeal), Michael Crane QC held similarly that "*if there is some physical or geographical constraint on a vessel's movement which prevents her from proceeding on the course directed by charterers, the fact that she is not prevented from proceeding elsewhere does not negate "detention"*".

(3) Application

58. Owners contended that although there may have been a detention, there was no quarantine. There were alternatives open to the Vessel instead of undergoing a 14-day quarantine, as evidenced by the Vessel's actual course of action in sailing to Ulsan to change crew. Since Clause 38 provides that it is the "*time of detention… for quarantine*" which is for Owners' account, where there is no actual quarantine Clause 38 is not triggered and Charterers remain liable for the Vessel's hire. Owners contended that at the very least the term "*detention… for quarantine*" involves sufficient uncertainty that the off-hire clause had not been clearly triggered, so that the vessel was not off hire (applying the '*cardinal rule*' mentioned above).

59. Charterers contended that there was clearly a detention, following Kerr J's reasoning in *The Mareva A/S*. Since the detention was clearly due to crew illness, Clause 38 has been triggered. Charterers pointed out that it would lead to unwelcome commercial results if the application of Clause 38 hinged on how "*for quarantine*" affected the definition of detention. For instance, an owner could avoid triggering Clause 38, even where quarantine would otherwise be imposed, by sailing away from the relevant port and anchoring until a quarantine would no longer be necessary. That, Charterers submitted, would be odd given that Clause 38 is intended to give effect to the "*entirely familiar distinction*" mentioned in *The Doric Pride* between what are owners' and charterers' responsibilities.

60. Owners' argument appears to depend on a narrow definition of "*detention for quarantine*" as remaining in place, near the port which the vessel is attempting to enter, in isolation from all other vessels people and places. I do not agree with that approach. The case law indicates that whether a restraint is a "*detention*" is to be determined having regard to whether it impedes the core venture of the charterparty, not by whether it prevents movement in any direction. A quarantine, at minimum, is a restriction on contact or movement imposed in order to avoid the spread of disease. I see no reason why a quarantine, for the purposes of an off-hire clause such as Clause 38, should not be interpreted as covering a restriction imposed in order to avoid infection (whether to or from the vessel) which prevents the vessel from entering the port, particularly where entering that port is part of the core venture of the charterparty. Clause 38, of course, makes the further provision that for the vessel to be off-hire, the "*detention… for quarantine*" must be due to the illness of the vessel's crew.

61. On that basis, a detention for quarantine was imposed on the Vessel at Bayuquan. The Vessel's subsequent action in sailing to another port to replace crew does not alter the fact that a quarantine procedure had prevented its entry into Bayuquan, and would continue to do so until the Vessel's crew were not infected by COVID-19. Accordingly, I consider that the Tribunal was correct to conclude Clause 38 was triggered by a '*detention… for quarantine*' due to the illness of the crew, and that the Vessel was therefore off hire for the Period of Delay. More generally, there can still be 'detention' for 'quarantine' if a vessel has to spend time sitting in quarantine, or travelling/waiting for a crew change in lieu of quarantine, before it is permitted to enter or berth at a port.

(E) QUESTION 3 – SERVICE IMMEDIATELY REQUIRED

62. Question 3 relates to Clause 50 of the Charterparty:-

> "**Clause 50 – Deviation / Put Back**
>
> In the event of loss of time either in port or at sea, deviation from the course of the voyage or putting back whilst on voyage, by reason of … sickness or accident to the Master, officers, crew … the hire shall be suspended from the time of the Vessel's inefficiency in port or at sea until the time when the Vessel is again efficient in the same position or equidistance position to the destination.
>
> All directly related expenses incurred including bunkers consumed during such period of suspension shall be for Owners' account. Under this clauses neither Owners not Charterers to be allowed to be benefited at the expense of the other party."

63. In its literal terms, Question 3 *("Is the vessel off-hire in respect of a period when it can and does comply with the service immediately required")* asks a question of law to which the answer is well-established, and in fact common ground between Owners and Charterers: a vessel is 'inefficient' for the purposes of an off hire clause where it cannot perform the service immediately required of it.

64. The real debate between the parties, it appears to me, is whether, after the crew members had tested positive for COVID-19, the Vessel was capable of performing the service immediately required of her. That is probably best viewed as a mixed question of law (construction) and fact.

65. Owners assert that the Vessel was so capable, and in fact did perform the service immediately required, in sailing to change crew at Ulsan and subsequently returning to Bayuquan. They further contend that the Tribunal implicitly found that the crew change at Ulsan was the service immediately required.

66. Charterers contend that the Vessel did not perform the service immediately required, and that the Tribunal did not implicitly find that it did.

(1) The Tribunal's findings

67. The Tribunal made no explicit finding on Question 3, literally construed, which is understandable given that the correct answer ('no') is and was an uncontested proposition of law; and that is the basis on which the Tribunal proceeded.

68. The Tribunal made the following findings relevant to whether the Vessel performed the service immediately required of her:

> "The vessel was ordered to Gladstone, Australia to load the charterparty cargo of alumina in bulk to be carried to Bayuquan, China." [Award [7]]
>
> "… Particularly given the ambiguous explanations as to the options available to the Owners and in particular the absence of any certainty that discharge would definitely be permitted after a 14 day quarantine period, the decision to sail to Ulsan and replace the crew members who had tested positive provided certainty and we concluded that it could not be criticised as an unreasonable decision." [Award [23]]
>
> "… We were satisfied that the situation was covered by additional clauses 38 and 50 so that the hire and the additional expenses incurred by the Charterers were to be for the Owners' account." [Award [38]]

(2) Did the Vessel perform the service immediately required during the relevant period?

69. Owners' contention that the Tribunal implicitly found that the Vessel performed the service immediately required during the Period of Delay is in my view wrong. In *Sharp v Viterra* [2024] UKSC 14 Lord Hamblen held that a tribunal should be regarded as having made an implied finding of fact where that implied finding "*inevitably follows*" from the tribunal's express findings. That is not the case here. To the contrary, the Tribunal's finding that Clause 50 was triggered clearly indicates a finding that the Vessel did not perform the service immediately required. The finding that the Vessel's action in changing crew '*could not be criticised as an unreasonable*

decision' does not imply the contrary. There is no necessary inconsistency between (a) a reasonable decision having been taken in response to the circumstances that arose and (b) those circumstances, and the effect of the decision taken, being that the Vessel was not performing the service immediately required. In simple terms, the service required was discharge at Bayuquan, not a detour to South Korea in order to replace an infected crew, however reasonable that course may have been given the course of events.

70. Owners rely on *The Berge Sund*, where it was held that an unexpected and extraordinary cleaning exercise was nonetheless the service immediately required. By analogy, Owners argue that an unexpected and extraordinary crew change, which was a reasonable course of action in order to enable the Vessel to comply with Charterers' orders (discharging cargo at Bayuquan), was the service immediately required.

71. However, Staughton LJ in *The Berge Sund* reasoned that the cleaning exercise could be the service immediately required because "*cleaning is in the ordinary way an activity required by a time charterer*". Where an activity is not "*in the ordinary way*", such as where a vessel suffered an engine breakdown and experienced delay while the owners undertook repairs, then the vessel "*would clearly not be performing the service required, and would be off-hire*" (p.461 rhc). That is the case despite the fact that the engine must be repaired in order for the owners to continue carrying out charterers' orders. In my judgment the Chinese port authorities' refusal to grant berth on the grounds of crew illness is clearly analogous to Staughton LJ's example of the engine breakdown, not to the cleaning exercise. Crew illness which results in quarantine restrictions is not "*in the ordinary way*" of a charterparty so as to mean the vessel remains on hire.

72. Accordingly, the Vessel was not providing the service immediately required, and was off hire, during the Period of Delay pursuant to Clause 50, whether or not it was also off hire pursuant to Clause 38.

73. For completeness, I record that Owners submitted that, since they tendered their Notice of Readiness at 18:48 on the 10 April, Charterers were wrong to deduct hire until 18:30 on the 14 April and the Tribunal was wrong to conclude that the Vessel was off hire to the latter date. However, as I think Owners were disposed to accept, that is not a freestanding question of law in circumstances where I have concluded that the Tribunal did not err in law on the matters for which permission was given.

(F) CONCLUSIONS

74. For the reasons given above, I conclude that the Tribunal did not err in law and the appeal must therefore be dismissed. I am most grateful to both counsel for their clear, cogent and persuasive submissions.