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Rethinking Bareboat Charter Agreements in the Wake of the Covid-19 Pandemic

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1. Introduction

Covid-19 represents a global crisis whose effects go beyond the field of public health, and affect many others parts of our daily lives. It goes without saying that the pandemic has heavily impacted all domestic economies due to a necessary slowdown of business activities driven by lock down measures, social distancing and uncertainty. The deteriorating financial situation of companies and individuals, alongside the domino effect produced on commercial relationships, puts companies on the verge of breaching their contractual obligations that had been undertaken pre-pandemic.

Mutual understanding, collaborative conversations, contract renegotiation, good faith and equitable solutions, should be regarded as valid mechanisms to weather the Covid-19 storm and guarantee business continuity. Conversely, omitting to appraise in perspective these extraordinary times and neglecting the validity of ad hoc mechanisms, constitutes a strict application of the law that will probably power litigation.

Bareboat charter agreements executed within the global shipping industry, are not exempted from the complexities and challenges mentioned above. These types of agreements use boilerplate language extracted from the model provided by the Baltic and International Maritime Council (BIMCO), the world's largest organisation for shipowners, charterers, shipbrokers and agents.

In this article, we aim to produce an introductory analysis into these type of agreements in the wake of the pandemic, and the challenges that they face given their global nature and participants. As part of our analysis, we will review the topic of contractual obligations from a common law and civil law standpoint, and the impact on contractual fulfilment and enforcement. This work will allow us to rethink the role and efficiency of bareboat charter agreements in light of the lessons learned from Covid-19.

2. What is a bareboat charter agreement? Do the parties to this agreement freely negotiate and determine its terms?

Simply put, a bareboat charter agreement is a lease agreement whereby the charterer obtains from the owner the possession and full control of a ship along with the legal and financial responsibility for it, against which the charterer pays a fee and undertakes other responsibilities including all operating expenses, fuel, crew, maintenance, repairs, insurance, etc.

So the parties to the bareboat charter agreement are – as explained above- the owner and the charterer. By definition, this would fall into the category of a business-to-business agreement. If this agreement is entered between parties with equal bargaining power, they

would freely negotiate and determine its value after careful consideration and assessment from professional counsel. Said agreement would be binding and parties will be empowered to legally enforce its provisions.

That said, within the global shipping industry, and in particular with the bareboat chartered agreement, parties do not freely negotiate its terms and provisions. Rather, these agreements are standard form and given to the parties in boilerplate language by a very influential organization, the Baltic and International Maritime Council (BIMCO). To understand how BIMCO dictates international agreements that are binding on private parties, attention must be paid to the role played by BIMCO in the global shipping industry.

BIMCO is the world's largest direct-membership organisation for shipowners, charterers, shipbrokers and agents. In total, around 60% of the world's merchant fleet are BIMCO members, measured by tonnage (weight of the unloaded ships). With around 1900 member companies across 120 countries – from the largest shipowners in the world to small local port agents and law firms, BIMCO represents a wide range of maritime companies and organisations. Per BIMCO´s website, its aim is "*to produce flexible commercial agreements that are fair to both parties*" and that are "*tailored to specific trades and activities*" and "*recognised around the world and widely used*"[1].

3. What are the main terms of bareboat charter agreement?

BIMCO regularly updates the industry's go-to standard contracts for bareboat chartering, which are widely known as BARECON. The latest edition of this contract is BARECON 2017 and alternatively BARECON 2001 is also available.

In practice, the parties to the agreement leverage the standard contract from BIMCO and fill out the sections provided in the first few pages of the contract. These blank sections are filled out to personalize the agreement by way of laying down: the name of the parties, vessel´s name, call sign and flag, port and time of delivery, cancelling date, place of redelivery, trading limits, chartered period and costs of hire, place of payment, mortgages over the vessel, insurance coverage, grace periods (if applicable), applicable law, etc.

Later on, the standard contract provides the legal terms that should be read in conjunction with the commercial specifications laid down in the sections that had previously been filled out. The legal terms establish the parties´ rights and obligations in regards to the delivery and cancelling of the vessel, applicable trading restrictions, right of inspection, inventory of the vessel on delivery and redelivery, maintenance and operation, payment mechanisms, mortgages and insurance on the vessel, indemnification clauses, war risks, dispute resolution and legal notices, covenants and termination events, among others. It is worth noting that these contracts do not contain any stipulation in regards to *force majeure* or hardship.

It is regular practice in the industry that BARECON be governed and construed under English law and that any dispute arising from it be referred to arbitration in England and Wales.

4. An introductory analysis into the binding nature of these types of contracts from a common law and civil law perspective

In summary, as a result of entering into bareboat charter agreements, the parties subject themselves to rules and obligations laid down in the common law legal system. That said, these agreement do not always involve parties from jurisdictions where the common-law system prevails. While owners are usually based in common law jurisdictions and feel at ease with this legal system to govern its rights and obligations, this is not true for charterers.

[1] Please refer to BIMCO´s website: https://www.bimco.org/about-us-and-our-members.

In fact, charterers are normally based in jurisdictions where continental law is applied, also known as civil law.

The intersection between the parties involved and the applicable legal system is key for the mutual understanding and collaboration of the parties in long lasting commercial relationships. This is particularly true when it comes to determining the binding nature of a contract in times of extraordinary and unforeseen events such as Covid-19.

For instance, the English legal system does not lay down statutory provisions in regards to force majeure, unforeseen circumstances or hardship. So, to ensure that parties understand that the effects of a contract should be limited in certain occasions (*i.e.* global pandemic, wars, political riots, etc.), the parties will need to agree and negotiate in regards to their extent and expressly set them out within their contract. Otherwise, the parties will need to abide by and enforce the literal terms of their agreement regardless of any circumstance within or without their scope of control.

In this respect, it is worth recalling the English case-law set in re "*Paradine v. Jane (1647)"*[2] setting the principle of absolute liability for contractual debts (*"pacta sunt servanda*"), as well as the extraordinary circumstances that would allow to limit such principle in case of impossibility of performance (*Taylor v Caldwell (1863*)[3] and frustration of purpose (*Krell v Henry (1903*)[4].

That said, from a continental or civil law system perspective, the first point in common that we see is the express recognition of liberty (or freedom) of contract and the binding nature of contracts.

For instance, the Argentine Civil and Commercial Code (CCCN) provides that the parties involved in a contract (be it verbal or written) are free to establish in good faith (art. 9, 961 CCCN) and acting with care and foresight (art. 729 CCCN), the terms and scope to which they intend to give their obligations, within the limits imposed by law, public order, morality and good customs, otherwise it will be null and void of legal effects (art. 1014 CCCN). As such, the contract will be mandatory and binding for the parties (art. 4, 959, CCCN) unless it is conventionally modified or terminated, or any legally established exception is verified, in which case the judge may modify the contractual terms.

The main difference, however, can be said to be that - unlike common law systems - civil law jurisdictions contain express provisions contemplating *force majeure* and hardship. Next, we will deploy some lines to briefly analyse said statutory provisions in the wake of covid-19.

4.1. Would the Covid-19 pandemic trigger the allegation of force majeure or hardship clauses?

It is public knowledge that the coronavirus COVID-19 raises countless public health concerns globally. The World Health Organization (WHO) declared on 11 March 2020 its global pandemic character, and along with it, governments around the world began to adopt drastic measures to face the crisis in their respective countries.

The effects of this global health crisis are manifold and to date are difficult to determine exactly. From an economic perspective, there are those who argue that the pandemic will lead to a global economic recession, which inevitably would negatively impact national public accounts and business ventures worldwide.

In this context, it would be at least plausible that in the short or medium-term companies would present serious difficulties in fulfilling their contractual obligations, or that their

[2] EWHC KB J5.
[3] EWHC QB J1.
[4] 2 KB 740.

attempt to fulfill them would leave them in an undesirable or extremely fragile financial situation.

This brings us back again to the discussion around the statutory provisions of *force majeure* and hardship in civil law jurisdictions.

In France, for example, *force majeure* is enshrined under article 1218 of the French Civil Code which provides that "*There is* force majeure *in matters relating to a contract when an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of conclusion of the contract and the effects of which cannot be avoided by appropriate measures, prevents performance of the obligation by the debtor. If the impediment is temporary, performance of the obligation shall be suspended unless the resulting delay justifies termination of the contract. If the impediment is permanent, the contract is terminated by operation of law and the parties are discharged from their obligations under the conditions set out in articles 1351 and 1351-1.*"

Article 1351 of the French Civil Code provides that "*Impossibility of performance shall release the debtor to the extent that it is due to force majeure and is definitive, unless the debtor has agreed to perform or has been given prior notice of default."* And article 1351-1 lays down that *"Where the impossibility of performance results from the loss of the thing due, the debtor who has been put in default shall nevertheless be discharged if he proves that the loss would have occurred in the same way if the obligation had been performed. He shall however be bound to assign to his creditor the rights and actions attached to the thing."*

Hardship provisions can be found in Article 1195 of the French Civil Code, that allows that a party to a contract entered into on or after October 1, 2016 may ask its co-contractor to renegotiate the contract if a change of circumstances, unforeseeable at the time of the conclusion of the contract, renders its performance excessively onerous and if that party did not agree to bear the risks of such a change of circumstances. There is no requirement that a contract include any specific wording for the parties to be able to claim hardship under this article.

In **Argentina**, parties affected by extraordinary circumstances could aim to limit the binding nature of the contract by alleging, namely:

(i) that a fortuitous event or force majeure has occurred, understanding this as the event that it could not have been foreseen or that, having been foreseen, it could not have been avoided (art 1730 CCCN), which (in principle and subject to conditions) would extinguish its contractual obligation, without liability (art. 955 CCCN);
(ii) that the purpose of the contract has been frustrated due to an extraordinary alteration of the circumstances existing at the time of its conclusion (art. 1090 CCCN), which enables it to terminate the contract (Frustration of Contract or Change of circumstances under common law);
(iii) that the provision at their expense became excessively onerous due to an extraordinary alteration of the circumstances existing at the time of its conclusion, which allows him to complete or partially terminate the contract, or request its modification (art. 1091 CCCN) (doctrine of *imprévision* under French law).

In Chile force majeure or unforeseen event has been defined as "*the unforeseen event that it is not possible to resist, such as a shipwreck, an earthquake, the arrest of enemies, acts of authority exercised by a public official, etc".* (art. 45, Chilean Civil Code).

In **Brazil,** art. 393 of the Civil Code lays down that "*The debtor is not liable for damages resulting from unforeseeable circumstances or force majeure, if expressly not responsible for them. The act of God or force majeure occurs in the necessary fact, the effects of which it was not possible to prevent or impede".*

In **Uruguay**, art. 1342 of the Civil Code sets out that "*The debtor is sentenced to compensation for damages, whether due to failure to comply with the obligation or delay in execution even if there is no bad faith on your part, provided that it does not justify that the breach comes from a strange cause that is not attributable to him*".

4.2. Could an evident extraordinary and unforeseen circumstance such as the Covid-19 pandemic be alleged within bareboat charter agreements to limit the binding nature of the contract?

To analyse this question, we must first carefully consider the relevant facts of the case, the terms of the agreement and the applicable law and jurisdiction. As mentioned before, bareboat charter agreements involve owners and charterers of vessels who are familiarised with common law and civil law systems, respectively. In addition, normally said agreements do not contemplate *force majeure* or hardship clauses and are governed by common law legal systems. Simply put and preliminarily speaking, charterers affected by extraordinary events such as a global pandemic would have no alternative but to fulfil all their obligations as per the literal terms agreed.

In other words, it appears that the legal infrastructure of these types of contracts expects all the effort to be made by the affected party, and the owners have no incentives to collaborate or renegotiate the terms of the agreement. This could certainly put charterers in situations of extreme vulnerability after their efforts to fulfil the absolute terms of the agreement, following the guidelines laid down in "*Paradine v. Jane (1647)*". If the charterers end up being unable to fulfil their own obligations, the harmful legal and commercial consequences for bareboat chartering operating worldwide would be evident.

Given this scenario, it seems advisable that an equitable solution be sought, either from a contractual perspective and/or regulatory initiative arising from the UK statutory law. Despite the fact that bareboat charter agreements fall under the category of business to business contracts, it is clear that there is no equal bargaining power between owners and charterers. Therefore, regulatory initiatives aiming to equal the balance (such as those protecting consumers against limitation of liability, under the Unfair Contract Terms Act of 1977 – UCTA and Misrepresentation Act of 1967) could be a convenient channel to explore.

That said, the legal strategy of those who allege the limitation of the effects of a given contract, will depend on the specific case at hand. As discussed, it will be important to examine what the contract that binds the parties says. It will always be very convenient if the contract defines as accurately as possible the situation of fortuitous event / *force majeure* or extraordinary event (for example, epidemic, endemic or contagion), given the lack of statutory provision in the common law system.

Another element to bear in mind is the one of contractual interpretation. As mentioned before, express provisions of *force majeure* or hardship will be absolutely essential in jurisdictions such as the United States and the United Kingdom, where it is plausible that the courts will not be prone to imply any contractual circumstance in pursuit of a fairness or equitable solution. The courts will adopt a strict approach to seek a definition of "*fortuitous event or extraordinary event*" within the contract and whether there are specific examples of such situations. Based on this, it will be analysed whether the facts of the case fall within the definition and the exhaustive examples established in the contract.

Conversely, under continental or civil law systems, statutory law defines the fortuitous case / *force majeure*, and in light of this the judges could decide based on an analysis of the facts of the case, the surrounding circumstances (which are public and well-known to everyone), and all other evidentiary material provided by the parties. These elements will be key provided that the contract lacks any stipulation on *force majeure*.

The causation between the contractual breach and the event of *force majeure* will play a preponderant role. Thus, an attempt will be made to determine whether the breach of contract is purely and exclusively due to *force majeure* (and not attributable to other reasons), and that the termination of the contract being attempted is the only possible solution (that is, that there is no alternative way to fulfill their obligations).

It could also be the case that the obligations can be fulfilled, but at a price substantially higher than previously thought, which makes it financially unfeasible. This situation fits within the doctrine of frustration of purpose (or change of circumstances) or hardship.

5. Conclusion

Bareboat charter agreements present challenges from a global legal perspective, due to the fact that they have been drafted in adherence to legal standards set in common law jurisdictions, but whose legal effects have an impact on chartered parties who are original from civil law jurisdictions.

This dichotomy of dual legal systems that confluxes in the global shipping industry could certainly put the fulfilment of obligations in tension when unexpected and extraordinary circumstances arise, such as the covid-19 pandemic.

Prima facie, the matter boils down to the enforcement of an agreement whose terms absolutely disregard the weight of unforeseen circumstances. Therefore, equitable contractual solutions or statutory initiatives should be sought to balance the inequality in bargaining power.

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Natonal Shipping is a company dedicated to the integral transportation of hydrocarbons, with an experience of more than 20 years.

The company complies with an important part of the supply of products from the Argentine Republic and carries out international transports.

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