International Law Office

SHIPPING & TRANSPORT - SWITZERLAND

Time charters in inland river cruising and COVID-19: the situation under Swiss law

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16 September 2020 | Contributed by ThomannFischer

Introduction

The river cruise industry is without doubt one of the sectors that has been hit hardest by COVID-19 measures. On the one hand, the government measures as direct cause have meant that river cruises could not be carried out to the planned extent. On the other hand, indirect causes, such as the uncertainty among passengers and their reduced desire to travel, have contributed to the problem. And even if there were a demand, there would be no or very few flight connections available for most overseas passengers. So even if they wanted to, they could not travel to Europe to board their river cruises.

As a result, until recently the entire, and still the majority, of the European river cruise fleet has been decommissioned and hundreds of ships now lay at berth in ports in Germany, the Netherlands and Austria. From the shipowner's point of view, even a vessel decommissioned in this way incurs enormous costs. The pure operating costs (ie, without financing costs) can easily amount to between €30,000 and €50,000 per month. This fact alone shows that shipowners are urgently in need of income. Charterers and tour operators, on the other hand, have been confronted with the fact that cruises which they have sold to their customers (the passengers) and want to continue to sell cannot be carried out as intended and the question arises as to whether they will still have to pay the contractual charter rate despite the current situation.

This article provides an overview of the legal situation under Swiss law.

Legal assessment only one aspect to consider

Before going into legal details, it should be highlighted that the relationship between shipowners and tour operators is often a long-term business relationship and that both parties are dependent on each other to a certain extent, since without a tour operator, no cruises are sold and without a shipowner, no ships sail. In practice, therefore, it may often make more sense to find a commercial rather than a legal solution.

Tour operator contracts

This article focuses exclusively on so-called 'tour operator contracts', which are time charter contracts under which a shipowner or a shipping company (hereinafter both are referred to as 'shipping companies') provides a tour operator with a manned and operational ship (or part of such a ship).

However, the bareboat charter contract in which a shipowner provides the bare ship to a shipping company is not examined. Moreover, this article does not deal with ship management contracts under which the shipping company purchases nautical or catering services. Finally, the case in which the shipowner directly assumes the role of tour operator and directly concludes contracts with the passengers is also not the subject of this article (in this event, questions of package tour law would also have to be considered, which is not the case with tour operator contracts).

Suffice to say, the legal situation for these other contracts mentioned (eg, ship management contracts), differs significantly from the situation for tour operator contracts.

Tour operator contracts used in practice

The vast majority of shipping companies in inland navigation do not use standard contracts. Instead, most shipping companies rely on their internal house contracts. These time charter contracts are individually structured and cover the needs of the respective shipping company.

Although the use of pre-formulated standard contracts such as Baltic and International Maritime Council contracts can be seen occasionally in river cruise shipping, it remains the exception – at least for Swiss shipping companies. Of course, it is impossible to go into all of the conceivable regulations that occur in practice. Nevertheless, it should be highlighted that the legal framework available is essentially dispositive in nature and that the parties are therefore free to provide for tailor-made risk allocations in their contracts. The framework presented below will apply only if no deviating rules are agreed on.

Charter agreements in Swiss law

The charterparty is considered an innominate contract by the Federal Supreme Court (Federal Supreme Court decision (FSCD) 4A.201/2016 of 1 March 2017), which seems strange since the contract is certainly regulated for seagoing vessels in Article 94 *et seq* of the Federal Maritime Navigation Act (SSG) and, by virtue of the reference in Article 127 of the SSG, these provisions also apply in principle to international navigation of the Rhine.

By a charter contract, the shipping company undertakes to provide the charterer with the whole or part of a ship, including crew against payment of the charter rate. The charter contract is distinguished from the ship rental in that the shipping company retains nautical control of the ship and enables the charterer only to carry out transport on its own or a third party's account. The charterparty is distinguished from a freight contract by the fact that the shipping company assumes no obligation to transport goods or passengers, but only to provide the ship together with a crew (see FSCD 139 III 217, FSCD 115 II 108 and the Swiss Federal Court judgment 4A.201/2016 of 1 March 2017). This lack of an obligation to transport passengers has a significant impact on the legal situation (see below).

Charter agreements and COVID-19

As mentioned above, the contractual obligation of shipping companies under a time charter agreement is not to transport passengers, but rather consists of providing a ship including crew. During the COVID-19 pandemic, shipping companies have continued to offer this contractual performance: the ships are not laid up because the shipping company does not offer its contractual performance (ie, ship and crew), but rather because the tour operator is unable to bring its passengers on board. From a legal point of view, the shipping company therefore continuously offers its services, but they are not called on by the charterer.

At first sight, it can therefore be assumed that COVID-19 has no influence on the shipping company's performance, which continues to provide a vessel with crew. Whether the cruise takes place is not an issue relating to the shipping company's contractual performance, but is rather to be regarded as a risk purely of the charterer that organises the cruise for its own account or for the account of a third party.

This finding is of course not really comforting for the charterer. However, whether there are legal remedies that give the charterer a better position is discussed below. In this context, it is striking that the concept of *force majeure*, which is almost reflexively called on in these times, is not a concept firmly established as such in Swiss law. The issue must therefore be addressed on the basis of the instruments made available under Swiss law, which will be briefly described below.

Impossibility to perform (Article 119 of the CO)

In the context of COVID-19, reference is often made to Article 119 of the Code of Obligations (CO), which deals with the subsequent impossibility of contractual performance. Article 119(1) states that "[i]f performance has become impossible due to circumstances for which the debtor is not responsible, the claim shall be deemed to have expired".

This provision offers the tour operator no protection: the provision presupposes (from the tour operator's point of view) that its performance under the contract has become impossible. However, its contractual obligation is not the provision of passengers (this is not a contractual obligation), but simply the payment of the charter rate. Even if the tour operator cannot bring passengers onto the ship, this does not change the fact that paying the charter rate and thus fulfilling its contractual obligation has in no way become impossible.

Article 119 of the CO thus offers the tour operator no protection and, in particular, provides no option to not pay the charter rate. The highly controversial question of whether Article 119 of the CO applies at all if an impossibility is only temporary can therefore be left open.

Plea of non-performance of the contract (Article 82 of the CO)

Can a tour operator take the position that it does not owe the charter rate because the shipowner cannot offer its contractual service? Article 82 of the CO states the following in this respect:

> *In the case of a bilateral contract, anyone who wishes to require the other to perform must either have already performed or offer to perform, unless the content or nature of the contract means that he will not have to perform until later.*

This provision would allow the tour operator to refuse payment only if the shipping company could be accused of not fulfilling the contract. As already mentioned, the shipping company's contractual performance consists in the provision of a vessel with crew. It continues to offer this performance.

Article 82 of the CO therefore offers the tour operator no protection.

Clausula rebus sic stantibus

The so-called '*clausula rebus sic stantibus*' is often mentioned in connection with COVID-19.

The *clausula rebus sic stantibus* is not about the refusal or cancellation of an individual performance under a contract, but about the adjustment of an entire contract if, due to a change in circumstances, the performance of the contract as concluded is no longer deemed reasonable, at least for one party. In addition to this change of circumstances, it is a condition that this change was not predictable and results in a serious disruption of the contractual balance. The issue of predictability in particular can be problematic in the present context.

The Swiss courts apply the *clausula rebus sic stantibus* cautiously (Huguenin, Obligationenrecht, Zürich 2016, Rz 327) and consider it as an absolute "emergency valve". Cases in which the *clausula rebus sic stantibus* has been applied by the courts are rare and accordingly, it is difficult to make generally applicable statements in this regard. From court practice, it seems clear that a mere deterioration in a debtor's economic situation is not sufficient in itself. Rather, the balance between performance and consideration must be so disturbed as a result of an extraordinary change in circumstances that the distribution of risks as provided for in the contract is no longer acceptable to one party and the adherence of the other party to its claims would appear abusive (FSCD 100 II 345; FSCD 122 II 97).

In an earlier ruling, the Federal Supreme Court had applied the *clausula rebus sic stantibus* when, during a politically unstable period, material costs had risen suddenly by 60% (FSCD 50 II 165) or when raw material prices had risen by 300% due to a war (FSCD 47 II 399). On the other hand, normal inflation rates and economic fluctuations were considered foreseeable and thus not a case of the *clausula rebus sic stantibus* (FSCD 101 II 21). The Federal Supreme Court also considered the consequences of the 2007 and 2008 financial crisis to be foreseeable (FSCD 138 V 366) and did thus not apply the *clausula rebus sic stantibus*.

Whether the COVID-19 crisis will one day be considered a reason for invoking the *clausula rebus sic stantibus* must therefore remain open for the time being. The doctrine shows no clear tendencies so far.(1) In an arbitration ruling published in mp 2020, p 152, the application of the *clausula rebus sic stantibus* was described as "conceivable", but the question was ultimately left open.

In the field of tour operator contracts, special attention must be paid to the requirement of predictability. Tour operator contracts usually contain a clause which excludes the shipping company's liability if certain circumstances arise. In addition to terrorist acts, political unrest or wars, the outbreak of pandemics is regularly explicitly mentioned. This suggests that the parties were aware of the possibility of a pandemic breaking out and placed it on the same level as, for example, a war. Taking this into consideration, it seems at least doubtful whether a tour operator could successfully claim that a pandemic such as COVID-19 and its extent was unforeseeable.

Swiss Maritime Navigation Act

Article 89 of the SSG provides a separate regulation for temporary impossibility in charter contracts. Unfortunately, there is no literature or case law on this provision and the Federal Council's memorial does not specifically elaborate on this provision. Thus, only the wording of the provision itself remains as a source.

The title of the article is "Impossibility of Performance". As stated above, there is no case of impossibility. Although charterers are unable to provide passengers and may therefore not start a cruise as originally planned, their contractual performance (ie, the payment of the charter rate) is not 'impossible' by any means. Thus, the basic requirement of the provision is already lacking and the provision therefore cannot be applied.

After using the term 'impossibility' in its title, the article then no longer refers to 'impossibility', but only to a 'temporary obstruction'. At first glance, a 'temporary obstruction' does not seem to be the same as a 'temporary impossibility'. However, the same idea can be applied here as well: the payment of the charter rate (and thus

the contractual performance of the charterer) is not obstructed by the COVID-19 crisis or the measures adopted in the context of the crisis.

At least the wording of Article 89 of the SSG thus also suggests that tour operators cannot deduce anything in their favour from this provision. Further, it must also be left open whether the provision applies to charter contracts for passenger ships at all, since the provision refers to the "unloading of the goods", which is quite obviously tailored to charter contracts for cargo ships. However, this question must be left open here.

Comment

The legal framework is not favourable to tour operators: their performance under a contract (ie, the payment of the charter rate) has not become impossible due to the COVID-19-related measures and shipping companies continue to offer their contractual performance (ie, ship and crew).

In this situation, tour operators cannot invoke either Article 119 of the CO or Article 82 of the CO. The only possibility is to appeal to the *clausula rebus sic stantibus*, which is rarely and only cautiously applied by the Federal Supreme Court. The application of the *clausula rebus sic stantibus* presupposes, among other things, that an event was unforeseeable. Given the fact that the contracts commonly used in the industry explicitly refer to the possibility of a serious epidemic, it remains highly doubtful whether a tour operator can actually claim that such an epidemic was unforeseeable.

After all, all the legal remedies described above are dispositive (ie, the parties are free to deviate from the framework described). Before jumping to the conclusions laid out above, it is therefore necessary to examine whether the parties have agreed otherwise.

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Endnotes

(1) Issue left open: Del Fabro, Auswirkungen des "Shutdown" / "Lockdown" auf Arbeitsvertragen von Sportlinnen und Sportlern, CaS 2020, 234; Müller, Die Behandlung von Vertragsverhältnissen und von Vereinsmitgliedschaften im "Shutdown"/"Lockdown", CaS 2020, 2014; to be examined on a case-by-case basis: Klett/Müller, Die Auswirkungen von COVID-19 im Reiserecht, in: COVID-19, Basel 2020, S 199; rather favourable: Lachat/Brutschin: SJ 2020, Le bail aux temps du Coronavirus, S 111; Häfeli/Galli/Vischer, Anpassung privarechtlicher Verträge infolge COVID-19, in: COVID-19, Basel 2020, S 26 ff; rather critical: Pedruzzi, Die Auswirkungen der Notmaßnahmen in der Coronakrise auf Geschäftsmietverträge, MRA 1/20, p 3; application only to contracts concluded before 31 December 2019: Enz, Jusletter /Mor, Risk allocation in contracts and the COVID-19 situation: Part 1; Jusletter 18 May 2020).