

Crew Employment and the COVID Curveball

Introduction

At the start of the COVID-19 pandemic we highlighted a number of considerations for owners, charterers and captains as the scale of the pandemic started to reveal itself.

Back then the word “furlough” didn’t mean a lot to most people in the UK, the idea of working from home for the next four months seemed inconceivable, and the phrase “social distancing” had hardly debuted in our vocabulary.

Over the last four months we have worked as closely with our clients as ever, as they encountered situations not seen in living memory which have tested them, and their contracts, in equal measure.

There has been no one-size-fits-all approach during this time, and in this article we consider crew-related issues which we have seen over the last four months and look at the issues yacht managers have faced, how they have dealt with them, and how well their seafarer employment agreements (SEAs) have held up during this time.

Challenges presented during the COVID-19 pandemic

As the impact of COVID-19 on the movement of people, and yachts, became clearer, so too did the realisation that the use of yachts by owners and charterers alike would be severely impacted for a significant period of time.

With the prospect of limited or no use of their yachts for much of 2020, the temptation for many owners was to reduce their overheads by reducing the size of their crews until the pandemic was over.

Whilst this approach is understandable, it was not without several issues, not least whether it was even worthwhile in the first place. Many SEAs provide for unilateral termination upon service of 30 days’ written notice by the Owner and in the context of the pandemic, this was only worth considering if you know you don’t need your crew for several months – and at the time, nobody knew how long their yachts would be out of action. If the disruption only lasted a few weeks owners risked dismissing a large proportion of their staff, only to have to re-hire them a couple of weeks later.

Our approach throughout the pandemic has been to encourage our clients to find ways of supporting their staff by keeping them employed rather than taking the easy option of letting them all go and we are pleased to confirm that all of our clients embraced this approach.

In our view, the benefits of keeping a good crew together and showing your support

though a difficult time for everyone far outweigh the more tangible saving on wages and living expenses.

That said, we did see isolated examples of crew members failing to reciprocate their employer's faith which we will come onto later.

Just as the pandemic has shown us all the strengths and weaknesses of life as we knew it before, so it has also shone a light on the various contracts that are in use across the superyacht sector, be that a build contract, sale and purchase agreement, or SEA.

We found that, while SEAs are generally well drafted for the world we knew, many were not as well prepared for the unknown of a pandemic like we have seen which, overnight, left yachts stranded all over the world, with crew members due to come on and off duty but without flights to get them home.

The last few months has been an unprecedented opportunity to really look at SEAs in a new light and consider their strengths and weaknesses.

When working out what best to do with crew members we had to consider not only the wishes of the owner and the individual crew members, but also the regulatory and contractual environment in which they work.

We have already considered the owners' perspective, but what about crew members? As you would expect, the response was very varied, many being young and fit were not too concerned about the virus themselves, but would be worried about bringing it home with them when they went off duty – particularly relevant to those working in Italy at the time of the outbreak in Europe.

Many appreciated that they worked in about as safe an environment as there was at the time of the outbreak – a yacht is a highly controlled environment and it is possible, in extreme circumstances, to isolate an entire crew onboard for extended periods of time.

Finally, there were those who simply wanted to go home. And those were the most difficult cases because peoples' responses to the outbreak were so subjective and with limited knowledge at the start about how the virus worked, it left owners and yacht managers alike in a very difficult position.

At the end of the day, the employer is obliged to take reasonable precautions to prevent the spread of infectious disease onboard.

It was this obligation which gave many owners, and their yacht managers, the biggest headache – whose advice do you follow? What are reasonable measures? Who decides whether the measures you have taken are reasonable? What happens if you've done everything you think you had to do to protect your crew and COVID-19 still makes its way onto the yacht? Can you force a crew member to remain onboard if in your view you have taken reasonable measures to protect them from COVID-19?

The managers we work with were very proactive in ensuring ample hand sanitation stations, masks, and thermometers were available for anyone working on the yachts, with increased cleaning schedules implemented to ensure the most commonly touched surfaces were cleaned regularly.

We are pleased to confirm that to date, no instances of COVID-19 have been identified on any of the yachts we work with.

Nonetheless, in most cases, the decision was taken to send as many crew members as possible home so that they could remain within their family groups until the worst of the pandemic had passed – no mean feat considering that we were dealing with individuals from every corner of the globe at a time where flights were scarce.

When looking to operate a yacht short-handed, the first thing to consider is whether it is authorised by your Flag state. We found Flag state authorities to be particularly receptive during this time, and short-handing yachts in appropriate circumstances did not prove to be problematic.

The next thing to work out is on what basis are those crew members at home? Some will still be on annual leave, others would need to be placed on some other form of leave permissible under their SEA – garden leave, unpaid leave, sick leave even?

Then there are questions of who is responsible for the living costs of those crew members if they would otherwise be on duty but for the pandemic?

In our experience, the most sensible option for most crew members was to place them on garden leave until it became clear just how things would pan out. This option is available under most SEAs, but clearly never designed as a means of placing the majority of your employees off duty for a prolonged period of time.

Of course, much like with the measures introduced in the UK to combat COVID-19, the question is how to unwind those measures. How do you decide when to bring crew back onboard? Can individuals refuse to return to duty? Who decides that it is safe to return to duty? In what circumstances can a crew member be dismissed for refusing to return to duty?

Obviously there are too many variables to go into here, but these are the sorts of problems we worked through with our clients to ensure the balance was struck between looking after the health and wellbeing of their crew, protecting each Owner's interests and ensuring disingenuous individuals did not take advantage of the Owner's goodwill in keeping them employed throughout the pandemic.

We have seen isolated examples of crew members refusing, without reasonable grounds, to return to duty and the position in these instances must be unequivocal – refusal to accept a reasonable order of the Master is grounds (subject to SEA) for dismissal and owners should not be afraid to take such action where appropriate. Every crew needs individuals who can be relied upon and willing to work hard for the cause – disruptive individuals have never had a place onboard and the silver lining of the disruption caused this year might be that those negative influences stand out more than ever before.

Concluding remarks

Clearly, we are not out of the woods yet. Whilst many cruising areas have opened their doors to the yacht fleet (led by Croatia as early as 4 May 2020), the pandemic continues to intensify across the Americas and Asia. Then there is the prospect of a "second spike" across Europe which we might expect to hit across the winter months causing another wave of disruption.

Whether you are an owner, yacht manager, captain, crew manager or other service provider, at Bargate Murray we have significant experience in all facets of yacht ownership and management and are available to assist you through this period and into, hopefully, a more "normal" future.



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