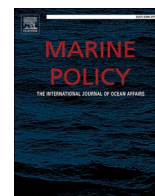




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Full length article

Implication of COVID-19 outbreak on ship survey and certification

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ABSTRACT

The COVID-19 pandemic is having a significant implication on shipping industry causing disruption to smooth operation of ships. In particular, it has been difficult to arrange ship surveys due to a restriction on surveyors' travel to reach ports for the surveys. However, to keep ships to continue operating, all ships must be surveyed and have relevant certificates renewed in a timely manner. In response, Classification Societies and flag Administrations have come up with temporary measure by granting 3-month extension of ship surveys. The rationale for granting extension up to 3 months can be found in Class rules and IMO instruments in force majeure clauses and extension clauses respectively. However, the real test is just beginning for further extension beyond 3 months as the COVID-19 pandemic seems to prolong globally, and there is no legal ground for this further extension in both Class rules and IMO instruments. Thus, granting such extension beyond 3 months of statutory maximum would leave uncertainty about the legal exposure of all parties involved in case a ship were victimized during the extension period. To ease the legal uncertainty, this paper suggests that the force majeure clause in Class rules should be amended to cover the COVID-19 pandemic. It is also suggested that IMO should embark the discussion to amend the extension clause, to cover the possibility of not being able to find a port in which a ship can be surveyed within 3 months in the wake of world-wide pandemic like the COVID-19 outbreak.

1. Introduction

The COVID-19 pandemic is having a significant impact on the global shipping industry causing disruption of global supply chains. In particular, it has been difficult to arrange surveys and audits required under national and international regulations due to limited availability of surveyors and a restriction on their travel to reach ports for the surveys. For example, in some cases surveys could not be conducted because surveyors have been denied access to ports. However, to keep the maritime industry to continue functioning without disruption, all ships must be surveyed by officers of the flag States or their recognized organizations (ROs) so that relevant statutory certificates can be issued and/or renewed after confirming that the ships are designed, constructed, maintained and managed in compliance with the requirements of International Maritime Organization (IMO) conventions, codes and other instruments as well as Class rules [1].

In response to these urgent needs of the ship surveys, some Classification Societies have come up with a solution by granting 3-month extension of the surveys in compliance with their own rules and regulations. The main rationale behind this extension of class surveys is the

existence of force majeure clauses in the Class rules. Likewise, many flag States have announced their policy by granting 3-month extension for ships which are prevented from arranging the relevant surveys and audits required for compliance with the relevant statutory instruments due to the ongoing COVID-19 outbreak. The flag Administrations' stance is based on the existing provisions in most IMO instruments regarding the extension of the period of validity of certificates. However, the extension provisions contain some conditions and time limitation. In case a statutory certificate expires when a ship is not in a port where it can be surveyed, the flag Administration may extend the period of validity of the certificates for the purpose of allowing the ship to complete its voyage to a port in which it can be surveyed, but no longer than 3 months.

Nevertheless, if the pandemic continues and thus restricts surveyors from travelling, it is necessary to find additional commonly supported ways forward. Now as the COVID-19 pandemic had been lingering more than 3 months, it was inevitable for maritime regulatory bodies to come up with a measure on whether to permit certificate extensions beyond the 3 months. This further measure of permitting departure from statutory requirement has not been tested in maritime history, which thus

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leaves some critical questions unanswered as to the legal exposure of all parties involved.

In an effort to answer some of these questions, in this study the legality of extension of surveys is analyzed in terms of Class rules and IMO instruments by examining the force majeure clauses in the relevant documents. Furthermore, the comparative gap analysis is performed with collated policies announced by various maritime regulatory bodies such as flag States, port States and Classification Societies as well as IMO and International Association of Classification Societies (IACS), and then a regulatory analysis on COVID-19 outbreak is conducted. Lastly, legal implications of the COVID-19 pandemic on ship survey and certification are examined and presented accordingly.

2. Extension of survey under force majeure clause

2.1. Classification Societies approach to Class survey and certificate

From the early stage of the COVID-19 outbreak, Classification Societies acknowledged that shipowners were finding it difficult to arrange ship surveys. In response, the Classification Societies have developed their own policies on how to conduct the surveys, and consequently issue or endorse the Class certificates under those circumstances. Basically, they resorted to two solutions: 1) to conduct a remote survey scheme rather than physically attending on board a ship; 2) if the temporary solution of 1) is not feasible, to allow extension of the validity of a Class certificate when the situation is considered as a force majeure.

As for the latter solution, for instance, when DNV GL announced their advice to the shipping industry under the title of 'Response to the Coronavirus outbreak', they claimed that "DNV GL will generally accept the coronavirus situation as an exceptional circumstance in terms of granting postponement of surveys, applying a force majeure clause." [2]. Similarly, Lloyd's Register (LR) also issued their policy claiming that LR has 'force majeure' provisions applicable when survey works cannot be undertaken. LR further clarified that they would consider a force majeure situation: 1) when surveyors cannot attend a vessel due to travel or quarantine restrictions preventing the surveyor attending; 2) in cases where the shipowner cannot mobilize superintendents, essential technicians/service teams and any specialized equipment nor have essential spares delivered. Under the above circumstances, they noted that the current COVID-19 situation would be accepted as the justification for postponement of Class surveys for up to 3 months beyond the due date in accordance with LR Class rules [3]. Similarly, other Classification Societies such as American Bureau of Shipping (ABS), Bureau Veritas (BV), Indian Register of Shipping (IRS), etc. have also issued similar guidance for shipowners on how to apply for extension of certificates or, if possible, remote surveys.

2.2. 'Force majeure' clauses in Class Rules

Most Classification Societies have the 'force majeure' clauses and the definition of 'force majeure' in their respective Class rules. For example, LR's Rules and Regulations for the Classification of Ships states;

"3.11 Force majeure

3.11.1 If due to circumstances reasonably beyond the Owner's or LR's control, as defined below, the ship is not in a port when surveys become overdue the Classification Committee may allow the ship to sail, in class, directly to an agreed discharge port and then, if necessary, in ballast to an agreed repair facility at which the survey can be completed. In this context, 'Force Majeure' means damage to the ship, unforeseen inability of Surveyors to attend the ship due to governmental restrictions on right of access or movement of personnel, unforeseen delays in port or inability to discharge cargo due to unusually lengthy periods of severe weather, strikes, civil strife, acts of war or other force majeure." [4].

DNV GL [5] has also very similar 'force majeure' clause and with the exactly the same definition of the force majeure as the LR rule.

Even, non-European Classification Societies, for example, Korean Register (KR) has a very similar 'force majeure' clause in English version of its Rules as LR and DNV GL [6]. By comparing across rules of LR, DNV GL and KR, it was found that the definition of the force majeure was identical. This is probably because IACS has their own procedure, i.e. the Procedure for Suspension and Reinstatement or Withdrawal of Class in Case of Surveys, Conditions of Class or Recommendations Going Overdue (PR1C) which, among others, contains the definition of 'force majeure' as follows:

"'Force Majeure' means damage to the ship; unforeseen inability of the Society to attend the vessel due to the governmental restrictions on right of access or movement of personnel; unforeseeable delays in port or inability to discharge cargo due to unusually lengthy periods of severe weather, strikes or civil strife; acts of war; or other force majeure." [7].

It is evident that the clause stipulated in this procedure of IACS have been incorporated to the class rules of its all member Societies.

In terms of the force majeure situation considered for the COVID-19 outbreak, it is believed that the most convincing excusable clause is the 'unforeseen inability of the Society to attend the vessel due to the governmental restrictions on right of access or movement of personnel'. Over the past few months there have been various governmental restrictions on surveyor travelling to reach a port of survey such as lockdown and quarantine. Under this circumstances it is understandable for Classification Societies to resort to this 'unforeseen inability' situation to trigger the force majeure clause and thus to grant the extension of Class surveys.

It is important to recognize the fact that the extension granted by 'force majeure' clause in Class rule is on condition that the ship proceeds directly to an agreed port where the survey can be completed. However, most Classification Societies have been granting a general extension for 3 months in response to the COVID-19 pandemic. Reflecting these practices among its members, IACS recently amended PR1C in April 2020 as the 'Addendum Rev.0 to PR1C Rev.5' which sets out a common procedure among its members for granting 3-month extension for ship survey [8]. This common practice among major Classification Societies has also triggered a wide spread of 3-month extension of statutory certificates by a number of flag States, which will be further analyzed in the next chapter of the paper.

3. Extension of Statutory surveys under IMO instruments

3.1. Extension clauses in IMO instruments

The relevant IMO conventions and mandatory codes have not been worded in such a way like Class rules. There are no such clauses with the specific terms of 'force majeure' in mandatory IMO instruments regarding the extension of Statutory surveys. Instead, some of IMO mandatory instruments contain extension clauses in different expressions suggesting with the possibility of extension of the validity of Statutory certificates. The extension provisions contain some conditions and time limitation. In case a certificate expires when a ship is not in a port where it can be surveyed, the flag Administration may extend the period of validity of a certificate for the purpose of allowing the ship to complete its voyage to a port in which it can be surveyed, but not for a period more than 3 months. For example, the regulation 14(e) of Chapter 1 of SOLAS 1988 Protocol states:

"(e) If a ship at the time when a certificate expires is not in a port in which it is to be surveyed, the Administration may extend the period of validity of the certificate but this extension shall be granted only for the purpose of allowing the ship to complete its voyage to the port in which it is to be surveyed, and then only in cases where it appears

proper and reasonable to do so. No certificate shall be extended for a period longer than three months, and a ship to which an extension is granted shall not, on its arrival in the port in which it is to be surveyed, be entitled by virtue of such extension to leave that port without having a new Certificate.”

Almost identical regulations can be found in other IMO conventions and codes, in such places like Regulation 8.5 of the International Convention for the Prevention of Pollution from Ships (MARPOL) Annex I, Regulation 12.5 of MARPOL Annex II, Regulation 8.5 of MARPOL Annex IV, Article 19 of the International Load Line Convention (ICLL), Regulation E-5.5 of the Ballast Water Management Convention (BWMS) and 19.3.5 of the International Ship and Port Facility Security (ISPS) Code. Whereas, the International Bulk Chemical Code (IBC Code) and the International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk (IGC Code) have somewhat different but a simpler version of extension requirements. Regulation 1.5.6.5 of the IBC Code and 1.4.6 of the IGC Code stipulating:

“If a ship, at the time when a Certificate expires, is not in a port in which it is to be surveyed, the Administration may extend the period of validity of the Certificate but this extension shall be granted only for the purpose of allowing the ship to complete its voyage to the port in which it is to be surveyed, and then only in cases where it appears proper and reasonable to do so.”

It is important to recognize that the extension is only valid until a ship arrives in a port in which it is to be surveyed. Although a flag State may extend the period of validity of relevant certificates for up to 3 months, there is no such a concept as a blanket extension for 3 months in any IMO instruments. This restrictive condition is not perfectly fit to situations like the COVID-19 pandemic which are currently preventing ships from taking their surveys in a timely manner. It also has not been easy for shipowners to find a port at which the survey can be carried out as many countries have established a series of travel restrictions. In this very extraordinary circumstance with the worldwide pandemic, maritime regulatory bodies have been challenged for coming up with a pragmatic approach.

3.2. Limitation of IMO's approach

In response to the impacts on the shipping industry resulting from the COVID-19 outbreak, on 19 February 2020, the IMO Secretariat issued the Circular Letter No.4204/Add.1 addressing to all its Member States. The Circular Letter provides encouragement for flexibility from IMO Member States. Furthermore, on 27 March 2020 IMO Secretariat issued Circular Letter No. 4204/Add.6 reiterating the need for the States to keep the flow of commerce by sea without disruption. This Circular Letter urged a practical and pragmatic approach to issues like survey and certification of ships.

The reality, however, is that the IMO Secretariat can only encourage flag and port States to enhance their co-operation and urge them to employ a pragmatic approach, and cannot issue a general exemption from the mandatory provisions of the relevant statutory conventions even in the current unprecedented situation [9]. That is because the enforcement of IMO conventions depends upon the individual governments of Member States enforcing the provisions of IMO conventions as far as their own ships are concerned [11]. The IMO conventions are not actually laws, rather they are internationally agreed ‘templates’ with which Member States use as a base for enacting their maritime legislation through their national law. Therefore, the final and definite decision for extension of surveys due to the COVID-19 disruption falls on the hands of individual flag Administrations.

3.3. Flag States responses

In response to the call from IMO Secretariat and demand from

shipping industry, many flag Administrations have issued their own guidance related to the current COVID-19 situation. In general, there have been two different approaches under the current frame of IMO instruments permitting the extension of certificates.

Bearing in mind that IMO instruments do not provide a basis for the blanket extension for 3 months, some flag Administrations have taken a cautious approach by literally interpreting the context of IMO instruments. For instance, UK announced its Maritime and Coastguard Agency (MCA) policy through its Marine Information Note as follows:

“It is the MCA Policy that should neither the MCA nor a RO be able to attend the vessel to complete a survey, leading to the endorsement or renewal of a relevant certificate then the issuing authority may issue a short-term certificate on the basis of a declaration from the Master. The short-term certificate issued should be valid for not more than 3 months from the date of expiration of the current certificate. On expiration of the short-term certificate, or earlier if circumstances permit, a survey to the same standard as that previously required must be completed.” [12].

This approach sets a time limit as ‘not more than 3 months’ and puts a condition of ‘if circumstances permits the previously required survey must be completed’. Furthermore, the extension can be permitted on a case-by-case basis rather than a blanket extension for all UK registered vessels. Some flag States took a similar cautious stance, namely, Cyprus, Egypt, Finland, Greece, Iceland, Liberia, Malaysia, Marshal Islands, Oman, Panama, Saudi Arabia, Singapore, Republic of Korea and USA.

On the contrary, some other flag Administrations have taken somewhat proactive approaches which could have been controversial if it were before the outbreak of the COVID-19. The wordings in IMO instruments “No certificate shall be extended for a period longer than three months” was stretched in full length by giving maximum time period for 3 months. The blanket extension for 3 months was granted not requiring further case-by-case approval from the flag Administration. Norway, for instance, through its Instructions to Class, instructed:

“The Norwegian Maritime Authority (NMA) has decided that certificates which expire before 12 June 2020 will be granted a 3-month extension without further approval from the NMA” [13].

A number of flag States announced a similar policy for granting such a general extension, namely, Bangladesh, Curacao, Estonia, Germany, Ireland, Kuwait, Lithuania, Netherlands, Saudi Arabia and Switzerland.

Even more radical approach can be found in Swedish policy as they granted 6-month extension, saying:

“The Swedish government has decided that all ships’ statutory certificates that expire on or after the 1st of April and before 1st of September 2020 will remain valid for 6 months from the date of expiry of the certificate without a specific decision or approval from the Swedish Transport Agency or the RO. The expired certificate is valid along with this notice. There is no need to approach the Swedish Transport Agency to take advantage of this extension.” [14].

The rationale behind granting 3-month extension is based on the force majeure situation. Most of flag Administrations with such general extension claimed that they consider the current COVID-19 outbreak as a force majeure situation. For example, Irish Maritime Administration (IMA) declared through its Marine Notice No. 15 of 2020 that it considers the COVID-19 outbreak to be a force majeure situation [15]. Identical or very similar declarations have been announced by Bangladesh, Netherlands, Norway and Sweden. Even some of those flag States with a cautious approach in granting extension up to 3 months declared the COVID-19 outbreak as a force majeure situation, namely, Algeria, Bahamas, Belgium, Marshal Islands, Turkey and Republic of Korea.

In summary, in terms of flag States approach, most of flag States seem to take very flexible interpretation on the provision of IMO

instruments taking into account this unprecedented situation the whole world is facing. Some States claimed the COVID-19 outbreak to be a force majeure situation, while others have been reluctant to mention such a heavy legal terminology. Nevertheless, there are two different approaches: 1) some States granting a general extension for 3 months to all flag ships; 2) others taking more cautious approach on a case-by-case basis for extension up to 3 months strictly abiding by clauses in IMO instruments.

3.4. Port State Control (PSC) regimes reaction

Once an extension of a certificate is granted by a flag State, it is also important that the extended certificate should be accepted by a port State. Otherwise the ship could be subject to control measures like deficiency or even detention. In the past in IMO circle, there has been one such precedence encouraging port States to take a flexible approach to flag states' decision. In 2007, when the shipping industry faced with a challenge in implementing the provision of corrosion prevention of seawater ballast tanks in oil tankers and bulk carriers, IMO approved a unified interpretation on the term "unforeseen delay in the delivery of ships" through MSC.1/Circ.1247 [10]. It was agreed that where the delivery has been subject to delay beyond the specific date due to unforeseen circumstances beyond the control of a shipbuilder or ship-owner, it may be accepted by an Administration as a ship delivered before the date of delivery specified in the relevant regulation. The treatment of such a ship should be considered by a flag State on a case-by-case basis taking into account the particular circumstances. In addition, it should be noted that ships accepted by flag States should also be accepted as such by port States.

In the same spirit, IMO Secretary-General, via the Circular Letter No.4204/Add.6, urged a practical and pragmatic approach to issues of survey and certification from maritime regulators. In particular, PSC authorities are once again encouraged to show a pragmatic approach with regard to the control measures such as issuing deficiencies or detaining ships for expired certificates due to the current COVID-19 pandemic.

In response to the IMO Circular Letter, some PSC regimes expressed their acceptance of extensions which have been granted by some flag States for ships facing difficulties in maintaining the validity of certificates. For example, on 12 March 2020, The Memorandum of Understanding on Port State Control in the Asia-Pacific Region (Tokyo MOU) issued guidance on how they intend to deal with the impact of the COVID-19 stating:

"the Tokyo MOU have agreed to adopt guidance for dealing with the circumstances in a pragmatic and harmonized approach. The guidance is based on the general principle that requests/issues would be considered on a case-by-case basis by the relevant port State Authority. For consideration of the request by the port State Authority, operators/companies concerned should provide a plan or process containing equivalent solutions to address the COVID-19 situation and letters of dispensation or exemption by the flag State or Recognized Organization (RO), under which the period of grace for delaying surveys, inspections or audits should be no more than 3 months, in accordance with the relevant regulations of conventions." [16].

Following this, the Indian Ocean Memorandum of Understanding on Port State Control (Indian Ocean MOU) issued its press release on 20 March 2020 which is almost identical to what has been communicated by the Tokyo MOU. Similarly, the Paris Memorandum of Understanding on Port State Control (Paris MOU) also published its press release on 26 March 2020 stating that:

"As a general principle, a pragmatic approach is suggested to be taken on a case-by-case basis for periods up to maximum 3 months. In such cases it is expected that there is active involvement of the flag

State, and, if appropriate, the RO. This would include evidence that the ship has a plan that covers how the ship will be brought back in compliance with the requirements." [17].

Similar to what has been communicated by Tokyo MOU, Indian Ocean MOU and Paris MOU, the United States Coast Guard (USCG) through their Marine Safety Information announced its policy stating that no deficiencies or detention of ships will be issued for expired certificates until 1 October 2020. With regard to extension of validity of certificates, USCG requires ROs to request extensions on a case-by-case basis on behalf of ship owners or operators. USCG further reiterated that any extension request of a statutory survey should generally not be more than 90 days [18].

In summary, it is clear that all PSC regimes have been taking a flexible and pragmatic approach, however, their relaxations are based on the extension of certificates from either flag Administrations or their ROs. In addition, they all put the time limit up to 3 months which is in line with the extension clauses stipulated in IMO instruments.

4. Extension beyond 3 months

4.1. Flag States as the decision makers

The real test for the maritime regulatory regime has yet to come. Ongoing and prolonged COVID-19 pandemic have already cast to maritime regulatory bodies a very tricky question that is 'what happens to those certificates which have reached the expiry date of their already extended 3 months, if it is still impossible to conduct surveys due to the COVID-19 pandemic?' This is an unprecedented challenge that maritime regulators have never faced before. The maritime industry is now looking into a possibility of further extension which, in effect, means extending the survey window beyond the 3-month period set out in IMO instruments, e.g., SOLAS Regulation I/14 (e).

Such extension beyond 3 months is not covered in the relevant conventions as there is no basis to allow more than 3 months extension of statutory certificates in any IMO instruments. Under this situation, it becomes the responsibility of flag States to decide the extension of statutory certificates. More specifically, it is the responsibility of flag States to issue clear statutory instructions to ship owners and ROs. In this regard, some flag States such as Belgium, Denmark, Kiribati Liberia, Marshall Islands, Norway and Panama have already provided initial instructions on possible ways forward in cases where further extensions of statutory surveys are necessary. However, most of these initial instructions announced before the end of May 2020 lacked details on the criteria and the procedures to be followed.

In order to ease the gray area, Classification Societies of IACS developed a set of guiding principles to assist flag States in determining the approach to the certificate extensions beyond 3 months. Subsequently, on 2 June 2020, IMO has incorporated the IACS document into their advice which was issued as the Circular Letter No 4204/Add.19/Rev.1.

The guiding principles suggest a step-based approach for flag States to make informed decision that can result in an evidence-based assessment of the extension of a certificate. For each extension, flag States need to consider following six steps:

Step 1: Whether all the options for completing the survey and renewal of certificates have been exhausted.

Step 2: Whether alternative evidence can be considered in order to establish the condition of the ship instead of completing the survey.

Step 3: Whether the requirements of the IMO instruments and Class rules can be met in the interim.

Step 4: How long any alternative to survey and certification can be considered valid before revalidation is required.

Step 5: Consider alternative evidence for assessing compliance.

Step 6: Concluding with an overall documented evidence.

The Circular Letter sets out two principles: 1) the extension of the

validity of certificates beyond the statutory maximum should only be considered in extraordinary circumstances; 2) the issuance of short-term certificates or other measures should be limited to specific situations caused by the COVID-19 pandemic thus relevant decisions should be made on a case-by-case basis. It is important to note that IMO emphasized the principle of a case-by-case basis extension rather than a general extension when it comes to the extension beyond the statutory maximum.

4.2. Recommendation by Classification Societies to flag States

It is a long-standing principle that flag States are ultimately responsible for ensuring compliance with the provisions of various maritime treaties. Based on this principle, IACS made it clear that the role of ROs is limited to providing technical and implementation advice to flag States when IACS submitted the 'Guiding principles' which were eventually reproduced as the Annex to the Circular Letter No.4204/Add.19/Rev.1. In the Annex of the Circular Letter, IACS highlighted the importance of the checks and balances between flag States and Classification Societies. The main concept of IACS is that Classification Societies provide the technical appraisal/recommendation, and then flag States utilize RO's recommendation for their informed decision-making. This concept is a stark reminder of ROs' limited role acting on behalf of flag States as far as statutory certification is concerned.

4.3. Flag States responses

Taking into account the IMO Circular Letter No 4204/Add.19 on 2 June 2020, a few flag Administrations have issued their instructions providing their own ways forward with regards to the extension beyond 3 months. One of the very first responses came out from Netherlands on 17 June 2020 under the title of 'Corona virus (COVID-19) Contingency Plan and Guidelines Revision 2'. It noted that extending the validity of a statutory ship certificate beyond 3 months is an extraordinary measure which is not covered in the relevant conventions, thus careful consideration should be given to any request by a shipowner on a case-by-case basis. The key point of the suggested procedure is that firstly a shipowner should submit a well-founded request to a RO rather than a Flag Administration, and, if it is satisfactory, the RO should recommend the flag Administration for a final decision. In this regard, the Netherlands' policy is well aligned with the Circular Letter and, more specifically, abiding by what is suggested in the annexed Guiding Principles following the step-based approach. The policy also sticks to the checks and balances between flag States and Classification Societies in a way Classification Societies provide technical appraisal/recommendation to flag States, and then the flag States utilize it for their final decision-making [19]. Similar policies have also been announced by Germany, Marshall Islands, United Kingdom and Oman.

On the other hand, Norway took a somewhat different approach by producing its Instruction to Class on 29 July 2020. To a certain extent, Norway took a similar stance with Netherlands, requiring ROs to follow the steps set out in the Annex to the IMO Circular Letter No.4204/Add.19 in dealing with the application. However, the decision for granting for a further delay of the survey window is in the hands of ROs who will issue a dispensation on the behalf of the flag Administration. The main difference from Netherlands is that the process taken by Norway does not require the flag State's final decision, rather the flag Administration gives a general authorization to its ROs to follow the guiding principle of the Circular Letter, and to make final decision on behalf of the flag State. In this process, ROs would make their own decision based on their technical appraisal and professional judgment, which means that the decision made by the RO is considered to be that of the flag State because the flag State has delegated the authority of issuing dispensation to its RO through the formal instruction [20]. A number of other flag States are expected to follow the Norway model.

It is arguable to confirm which approach, i.e. Netherlands model or

Norway one, would be better in terms of effectiveness of measures for the prolonged COVID-19 situation. One thing that has become clearer is that flag States' heavy dependence on Classification Societies in dealing with emergency situation. With either Netherlands model or Norway model, the decision of Classification Societies will have a critical impact on the decision of flag States in granting extension beyond 3 months.

4.4. Delegation of Flag State responsibilities to Classification Societies

One obvious evidence of flag State's dependence on Classification Societies can be found in an IMO approved document in 2005. IMO has issued the MSC-MEPC.5/Circ.1 containing recommended conditions for extending the period of validity of a certificate, which includes eight considerations. Among others, it was agreed that the extension period of the relevant statutory certificates should not exceed the period of validity of the Class certificate which may be issued to document compliance with the structural, mechanical and electrical requirements of the recognized classification society [21].

This tradition can be traced back to the maritime history. From mid-eighteenth century, the maritime industry has grown to depend heavily on Classification Societies which initially were formed at the request of hull underwriters as a means of obtaining an independent evaluation of the seaworthiness of the hull and machinery of vessels [22]. As national laws evolved for safety of ships from the mid-nineteenth century, flag States began to carry out statutory surveys to verify the condition of the remainder of the ship and its equipment, particularly safety and navigational equipment. The survey of hull and machinery from Classification Societies were increasingly accepted by flag States as verification of the standard of these components of the ship thus duplication of surveys was avoided [23].

The Class rules as standards for the ship design and construction have been codified by the amendment to the SOLAS Convention in July 1998 newly introducing SOLAS Chapter II-1, Reg. 3-1, which states:

"In addition to the requirements contained elsewhere in the present regulations, ships shall be designed, constructed and maintained in compliance with the structural, mechanical and electrical requirements of a classification society which is recognized by the Administration in accordance with the provisions of regulation XI-1/1, or with applicable national standards of the Administration which provide an equivalent level of safety."

This codification has reinforced the vital role that Classification Societies have played in international shipping. It was formally confirmed that statutory certifications are dependent on classification work and are inextricably interlinked to each other. Based on this principle, the period of extension of certain statutory certificates depends on the period of extension of class certificates. Therefore, when flag States consider an extension beyond statutory maximum due to COVID-19 disruption, the final decisions of flag States are conditioned by the decision of their RO for the validity of Class certificates. Consequently, the decision of the Classification Societies has become critical in the wake of COVID-19 outbreak.

5. Suggestions going forward

5.1. Re-definition of force majeure clauses in Class rules

As observed in the previous chapter 4, before Classification Societies make a recommendation to flag States for the extension beyond 3 months, it is necessary for them to establish a case for the extension of Class certificate in the first place. For this decision it is inevitable for them to refer to the force majeure clauses in the respective Class rule. Once they consider that there is a reasonable case for force majeure due to the COVID-19 in terms of Class certification, then they can recommend the flag Administration concerned for the extension of statutory

survey windows. Effectively, the final decision of flag States is based on the force majeure clauses in Class rules. Thus, it can be concluded that the force majeure clauses in Class rules is the very first starting point for any possible extension of statutory certificates granted by flag States.

However, the scenarios covered under the force majeure clause in the current Class rules only include severe weather, strikes or civil strife or acts of war. There is no specific scenario to cover a pandemic like the COVID-19. Clauses that are silent on pandemics, epidemics, or other viral outbreaks are likely to be insufficient for a force majeure defense in the court in case a ship were victimized during the extension period. In the current era of globalization as people travel a great deal on businesses and tourism, this COVID-19 pandemic is not likely to be the last as foreseen by many experts in the current period of accelerated globalization and urbanization based on previous experiences in disasters of pandemics such as Black death, Smallpox and Spanish flu. An outbreak of a similar viral disease can cause a global shipping disruption. For maritime regulatory bodies to better prepare when this comes around the next time, it is suggested that the force majeure clause in Class rules should be amended to cover such a scenario like the current COVID-19 pandemic. Based on the clauses, a declaration by World Health Organization (WHO) as a 'pandemic' would trigger a force majeure clause that expressly accounts for 'pandemics'. Furthermore, in order to maximize the effect of such moves by individual classification society and expedite the global application of such change, it is also suggested that IACS amend the definition of 'force majeure' clause in the PR1C as follows:

“Force Majeure” means damage to the ship; unforeseen inability of the Society to attend the vessel due to the governmental restrictions on right of access or movement of personnel; unforeseeable delays in port or inability to discharge cargo due to unusually lengthy periods of severe weather, strikes or civil strife; acts of war; **pandemic**; or other force majeure.”

5.2. Amendment to the extension clauses in IMO instruments

It is worthwhile to note that the IMO Secretary-General only used the words “in extraordinary circumstances” in the preamble of the Circular Letter No.4204/Add.19. Whereas IACS used the words “exceptional circumstances and/or force majeure” in the ‘Guiding principles’ which were eventually reproduced as the Annex to the Circular Letter No.4204/Add.19/Rev.1. Such a discrepancy may be driven by the fact that IMO instruments have no ‘force majeure’ clause but Class rules have one as examined in this paper.

Instead of the force majeure in Class rules, some of IMO mandatory instruments contain the extension clauses. However, the extension provisions of IMO instruments contain some conditions and time limitation. In case a statutory certificate expires when a ship is not in a port where it can be surveyed, the flag Administration may extend the period of validity of the certificates for the purpose of allowing the ship to complete its voyage to a port in which it can be surveyed, but no longer than 3 months. If literally interpreted, this provision could not resolve a pandemic like the COVID-19. Firstly, the disruption is worldwide, thus it is not easy for shipowners to find a port in which their ships can be surveyed. Moreover, maximum period of 3 months would not be sufficient if a pandemic prolongs such a long period like beyond 3 months. Under this situation, many flag States have been making hard decisions without any proper legal ground in international maritime treaties.

In order to ease this legal uncertainty and in preparation of a similar occurrence of a pandemic, the authors suggest that IMO should embark the discussion to amend the extension clause, e.g., the regulation 14(e) of Chapter 1 of SOLAS 1988 Protocol. The outcome of the discussion should cover the possibility of not being able to find a port in which a ship can be surveyed within 3 months in the wake of a world-wide pandemic like the COVID-19 outbreak.

6. Conclusions

Since the COVID-19 outbreak in global scale, it is having a significant implication on the shipping industry. The supply chain in which ships are playing their roles have been disrupted by the difficulties in carrying out survey in due. To keep the maritime industry to continue functioning, all ships must be surveyed by flag States and/or Classification Societies so that relevant certificates can be issued in a timely manner.

In response to these urgent needs of ship surveys, most Classification Societies and flag Administrations have come up with a temporary measure by granting 3-month extension of the surveys. This paper has reviewed the legality of such grants in Class rules and IMO instruments. The regulatory analysis in this study shows that whilst there are only some degrees of legal ground for triggering force majeure in Class rule sets, unfortunately there are no such expressed legal ground for triggering force majeure in any IMO instruments. Nevertheless, a number of flag States have already granted the extension of the validity for 3 months on the basis of their consideration of the COVID-19 pandemic as a force majeure situation.

Now as the COVID-19 pandemic have been lingering more than 3 months, regulatory bodies are challenged to come up with a further measure to permit extensions beyond the period of 3 months. Literally speaking there is no legal ground for this further extension neither in Class rules nor IMO instruments. Given the extraordinary circumstances with the COVID-19 pandemic, both Classification Societies and flag Administrations are exerting their discretion in granting such extension beyond 3-month statutory maximum. In the long run, this discretion would leave some uncertainty about the legal exposure of all parties involved, if a ship was victimized during the extension period.

The COVID-19 pandemic is unlikely to be the last as foreseen by many experts in the current period of accelerated globalization and urbanization based on previous experiences in disasters of pandemics such as Black death, Smallpox and Spanish flu. An outbreak of a similar viral disease could disrupt a global shipping in anytime. To address these legal uncertainties in the future, it is suggested that the force majeure clause in Class rules should be amended to cover such a scenario like the COVID-19 pandemic. It is further suggested that IMO should embark the discussion to amend the extension clause, e.g., the regulation 14(e) of Chapter 1 of SOLAS 1988 Protocol. The outcome of the discussion should cover the possibility of not being able to find a port in which a ship can be surveyed within 3 months in the wake of a world-wide pandemic like COVID-19 outbreak.

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