

SOUNDINGS

EBOLA – charterparty considerations

Potential contractual issues

1. Can an owner refuse to go to an affected port?

A ship's crew may be reluctant to call at affected ports and a master may wish to avoid any risk to his crew by deviating to an unaffected port or waiting for a port to be clear of infection.

Under a time charter an owner is obliged to comply with a charterer's legitimate employment orders, but can refuse to do so where compliance with such orders exposes the ship to a safety risk. In most forms of charterparty, a charterer is under a duty only to order a ship to ports that are "safe". If a port becomes unsafe, an owner can require the charterer to nominate an alternative port.

However, it is unclear whether an Ebola outbreak might render a port legally "unsafe". This will be a question of fact within the well-known definition in the EASTERN CITY case:

"...a port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence,

being exposed to danger which cannot be avoided by good navigation and seamanship...".

The evidential burden for establishing "unsafety" is quite high. For instance, during the Indian plague period in 1994, a number of unsafe port claims failed because the courts took the view that the shipowners failed to establish that it was likely that the crew would have fallen ill. Given the uncertainty surrounding this relatively new disease and the fact that current World Health Organisation advice is that infection can be avoided if appropriate precautions are taken, it may be difficult to determine the "unsafety" of an infected port. This will depend on the facts and the risk status of the individual port, bearing in mind that the situation is constantly developing.

If an owner refuses to follow a charterer's orders without sufficient grounds, the charterer may be entitled to rescind the contract on the grounds of repudiation and/or claim damages, so an owner should carefully review its contractual position.

continued overleaf

A charterer may also be entitled to place a ship off hire, subject to the wording of the off hire clause. A crew's refusal to follow a charterer's orders might fall within the wording "any other cause preventing the full working of the vessel" (see the ATHENA), particularly if the word "whatsoever" has been included.

However, if an owner does follow a time charterer's orders to proceed to an unsafe port under protest and suffers loss as a result, it may be entitled to an indemnity from the charterer, depending on the terms of the contract. There may also be issues of public policy arising from a situation whereby an owner is contractually obliged to send its ship to an infected port at risk to the health of its crew.

Under a voyage charter, in the absence of any contractual provision giving liberty to deviate, an owner is obliged to proceed to the agreed port without unnecessary deviation or delay. There is, however, an exception where deviation is necessary for the safety of the ship or cargo.

In contrast to the position under a time charter, if a named port does become "unsafe", a voyage charterer may not be entitled to nominate an alternative port. The charter may qualify the destination with the words "or so near there unto as she may safely get", in which case the owner may be entitled to proceed to the nearest reasonable alternative port without breaching the charter and claim the costs of on-carriage of cargo to destination from the charterer. However, if there is no such provision, nor a force majeure clause dealing with the event, the ship may simply have to wait for the port to become safe.

This may give rise to a question as to whether such delay frustrates the charter. However, frustration is difficult to argue successfully under English law. The fact that contractual obligations become more onerous or expensive to perform is unlikely in itself to frustrate the contract. The "frustrating" event has to fundamentally change the performance obligations under the charterparty and render further performance impossible, illegal or radically different from that which was originally contemplated by the parties. This will depend on the terms of the charter and the length of any delay.

However, as discussed above, it is not certain that an Ebola infected port would be considered "unsafe" and an unjustified

deviation may give a charterer grounds to rescind the contract and/or to claim damages.

2. What if the port is closed?

Although at the time of writing there do not appear to be any port closures as a consequence of Ebola, if the situation escalates this may happen in due course. In a recent development the Nigerian port authorities are now denying access to Nigerian ports for ships coming from affected ports.

Under a time charter, if the nominated port is closed or restricted due to Ebola, then the charterer will have to decide whether the ship should wait off the port until it reopens or proceed to another port. The obligation to pay hire will probably continue either way, subject to any express provision dealing with this, because the ship will still be fully efficient in herself.

Under a voyage charter, as discussed above, in the absence of an express clause, it may not be possible for a voyage charterer to change the port that has been agreed in the charter; the wording of the charter may allow the ship to proceed to the nearest port or else there may be a question as to whether the contract becomes frustrated.

3. What if a crewmember becomes infected with Ebola?

If a crewmember becomes infected with Ebola the owner should normally ensure that the crewmember is immediately removed from the ship. As well as a deviation (if the illness is discovered at sea), this will involve costs such as repatriation and medical expenses.

Under a time charter an owner will, in the absence of an express clause, generally be responsible for costs related to the welfare of the crew. However, if the illness results from the charterer ordering the ship to an affected port, then the owner may be able to claim these costs from the charterer, depending on the terms of the charter and whether the owner is deemed to have agreed to go to the port in the knowledge that it was affected by Ebola and thereby accepted the risks of doing so.

Whether the charterer is entitled to place the ship off hire during any such deviation will depend on the terms of the charter. The Shelltime 4 charterparty, for example, provides for off hire if there is a loss of time for the purpose of obtaining

medical assistance for the crew. This situation would probably not fall within an unamended NYPE 1946 off hire clause (the “deficiency of men” exception is only applicable to a numerical deficiency), but the addition of the word “whatsoever” may well change this. However, an event which is the natural consequence of compliance with the charterer’s orders does not give rise to off hire and this may provide an owner with some defence, unless it is deemed to have accepted the risks of going to an affected port or the crew failed to take recommend precautions (e.g. by taking shore leave against the recommendation of the authority).

Under a voyage charter, an owner is generally entitled, if not expressly then by implication, to deviate for the safety of the crew. However, costs and time will be borne by the owner since the freight earned will remain the same.

Issues of laytime and demurrage may also arise if the ship is in port at the time the illness is discovered and is delayed as a result. If, on arriving at a port, a crewmember is infected it is doubtful whether a valid NOR could be tendered as the relevant health formalities could not be completed. Laytime/demurrage will not run until a valid NOR can be tendered.

4. What if a ship is quarantined by reason of being at or having visited an Ebola affected port?

A ship that has visited an affected port may be required to be quarantined for a period or undertake cleaning, either at that port or subsequent ports. Fines may also be imposed.

A time charter may set out some guidance as to which party should be responsible for such costs. The NYPE 1946 charterparty, for instance, provides: “Fumigations ordered because of illness of crew to be for Owner’s account. All other fumigations ordered because of cargoes carried or ports visited while vessel is employed under this charter to be for Charterer’s account...”.

As to liability for time incurred during detention, this may fall within the off hire clause depending on the wording (see the APOLLO, in which the actions of the authorities in detaining the ship due to a suspected outbreak of typhus fell within the wording of the off-hire clause when the word “whatsoever” was added after “any other cause”).

However, a charterer may not be able to put the ship off hire or recover costs from an owner if the quarantining or cleaning is seen as a natural result of the charterer’s orders. An owner would be well advised to take all recommended preventative precautions to avoid an argument that it has broken the chain of causation. Notably, the Shelltime 4 charterparty provides specifically that the ship will be off hire “due to any delay in quarantine arising from the master, officers or crew having had communication with the shore at an infected area without the written consent or instructions of Charterers...”.

Voyage charters often contain specific “quarantine” or “free pratique” clauses. Where a ship is placed under quarantine, it will not be considered ready for the purposes of commencing laytime and the owner will therefore receive no demurrage or damages in respect of the delay. However, some charters may contain clauses dealing with this, for example Clause 17 (a) of the Asbatankvoy charter provides for delay due to quarantine to detract from charterer’s laytime if charterers give orders to proceed to a port that is already quarantined, whereas if the port is declared quarantined while the ship is en route, it will not.

Similarly, where free pratique is not given due to the ship being infected or simply arriving from an infected area, laytime will not commence unless there is an express clause dealing with this. For example, it is common to provide that laytime is to commence “whether in free pratique or not” (“WIFPON”).

5. Drafting considerations

Where Members are currently negotiating contracts that involve ports that are or may become affected by Ebola, careful consideration should be given to incorporating terms dealing with the potential situations that are likely to arise. The uncertainty surrounding Ebola and the potential implications make it difficult to anticipate all potential problems. However, in general, parties should consider providing for time and costs in relation to the following:

- fumigation;
- quarantining;
- cleaning operations;
- preventative measures;
- medical treatment, including deviation to disembark an infected crew member; and
- fines;

Any clause should be considered in the context of the particular situation and the particular charterparty.

Delays may normally be dealt with by ensuring that the ship remains on hire or time to count if delays are caused.

Provisions should also be made allowing for alternative loading/discharge ports in the event that the named port becomes affected (this should be defined to include situations where the port has not been closed but still poses a risk).

Charterparty clauses

The following clause has been drafted to cover the eventualities that may arise as a result of the recent Ebola outbreak. The clause can be used in a time or voyage charter. However please note that it may not cover all eventualities and may not suit every circumstance. Any clause should be considered in the context of the particular situation and the particular charterparty.

Ebola clause

- a) The Vessel shall not be obliged to proceed to or continue to or through or remain at any port, place, area or country (hereinafter "Affected Area") which may expose the Vessel and crew or other persons on board the Vessel to danger from highly infectious diseases, including Ebola, as determined and notified by the World Health Organization to be harmful to human health.
- b) If in accordance with sub-clause (a) the Owners decide that the Vessel shall not proceed or continue to or through or remain in an Affected Area they must immediately inform the Charterers. The Charterers shall be obliged and entitled, notwithstanding any other terms of this charter, to issue alternative voyage orders and shall indemnify the Owners for any time or expense incurred by Owners, including claims from holders of the Bills of Lading, as a consequence of waiting for and/or performance of such orders. Any time lost as a result of waiting for or complying with such orders shall be for Charterers' account.
- c) If notwithstanding their liberty to refuse to do so, Owners agree to proceed to or continue to or through or remain at any Affected Area, Owners shall not be deemed to have waived any of their existing rights under this charterparty.

- d) 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 ordered to an Affected Area.
- e) Any delays and additional costs and expenses whatsoever arising out of the Vessel visiting an Affected Area, including but not limited to screening, cleaning, fumigating and/or quarantining the Vessel and its crew for such diseases either in the Affected Area or at subsequent ports of call and including the obtaining of medical treatment for any infected crew, and any time lost as a result of complying with the same shall be for the Charterers' account.
- f) If in compliance with this Clause anything is done or not done, such shall not be deemed a deviation, 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 the Charter Party, this Clause shall prevail to the extent of such conflict, but no further.

In addition, there are a number of BIMCO clauses that may be appropriate for use in charterparties being negotiated in the present circumstances, for example clause 14(A) of the BALTIME 1939 (as revised 2001) Clause 25 of the SUPPLYTIME 2005 and Clause 46 of the BIMCHEMVOY 2008.

Conclusion

A key point to take away is that a port may not be legally "unsafe" simply because it is affected with Ebola. If an owner refuses to take its ship to affected ports, it may risk exposure to claims. In practical terms, the most important step an owner can take is to advise its crew of appropriate precautions and ensure that they are strictly implemented.

If difficult decisions have to be made, it is important that full and accurate information is obtained and recorded for use in potential future litigation.

If Members have any questions please contact your local Managers' office.

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