



Soundings

COVID-19 and unsafe ports

It has become apparent that the presence of COVID-19 on-board a ship poses a serious threat both to its crew and its ability to trade. Does this mean an infected port is unsafe and, if it does, what should owners and charterers do?

The spread of COVID-19 throughout the world has the potential to endanger ships and crew. Already, many owners and charterers have experienced costs and delays, as well as more personal anxieties, as a result of the potential for crews to become infected while in port. Given these costs and delays, questions have arisen as to whether ordering a ship to a COVID-19 infected port might constitute a breach of the charterer's safe port warranty.

COVID-19 and port safety

It is important to recognise at the outset that not all charterparties contain a safe port warranty (whether express or implied), and that some safe port warranties impose qualified duties requiring the exercise of due diligence to ensure safety. This article considers the position where a charterparty contains an absolute safe port warranty.

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The classic definition of a safe port remains that set out by Sellers L.J. in "The Eastern City" [1958] 2 Lloyd's Rep 127, 131 (recently re-confirmed in "The Ocean Victory" [2014] 1 Lloyd's Rep 59):

"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."

There is not thought to be any reported case deciding whether an outbreak of infectious disease can render a port unsafe. In the absence of such authority, textbooks have suggested two different types of danger to a ship which might lead to an infected port being unsafe.

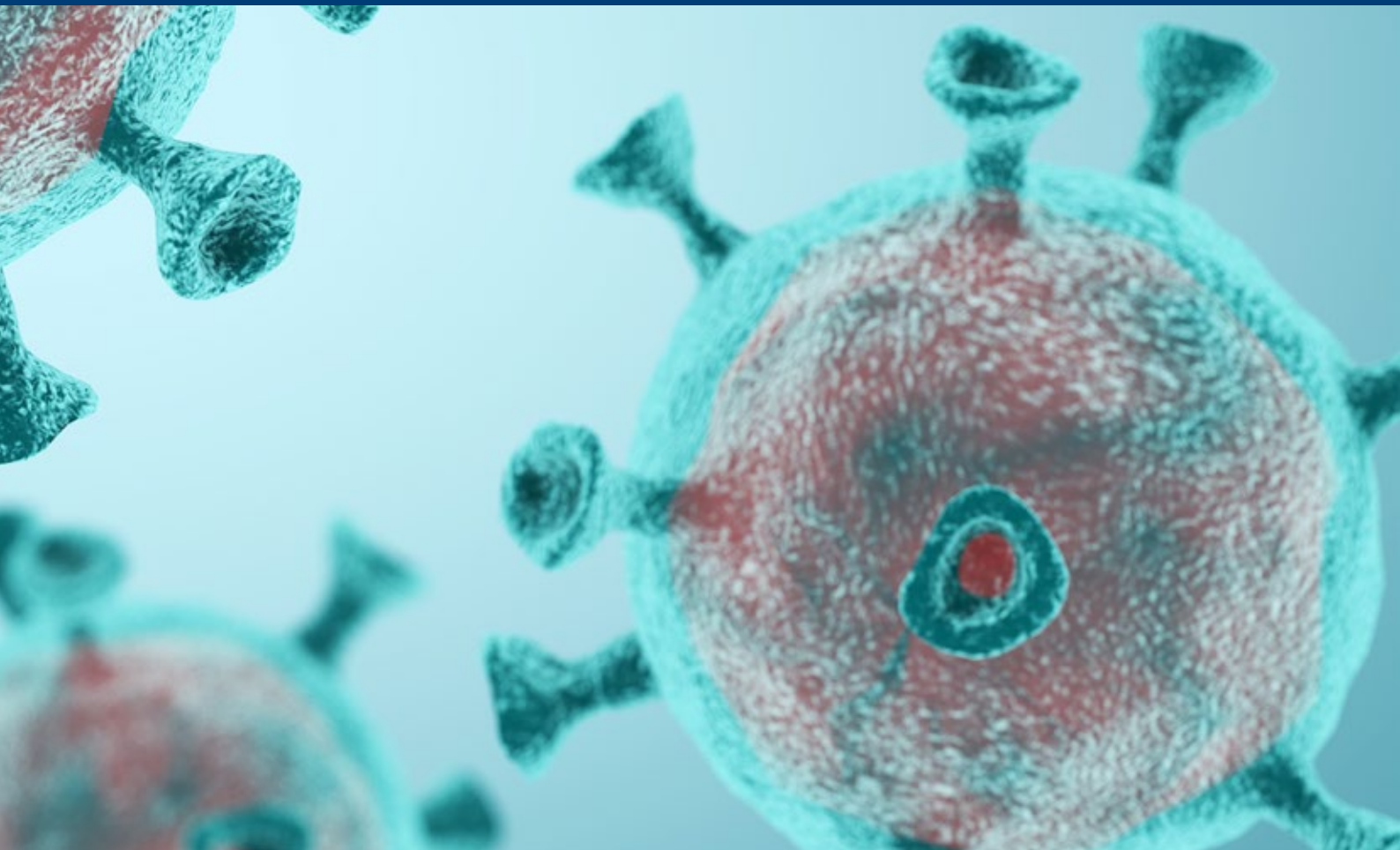
The first type is danger to the health of the ship's crew. One of the leading commentaries on the subject, suggests that the presence of a contagious disease in a port would raise a question as to whether precautions can and have been implemented by the port that can be relied upon to protect the crew from the threat of contagion. Where the precautions put in place by an infected port, if any, are not sufficiently protective it follows that the port in question might be unsafe. In this regard, parties would be well advised to check ports of call for compliance with [IMO Circular No. 4204](#). By this instrument, issued in response to the COVID-19 pandemic, the IMO has (among other things) set standards and provided guidance aimed at preventing the spread of COVID-19 between ship-board and shore-based personnel (see in particular Addendum 16 dated 6th

May, 2020). If an infected port fails to adhere to the IMO's relevant guidance and standards there might be a good argument that it is unsafe on this ground.

The second type is danger to the ship's status. The authors of another leading text comment that "if a port or place is the subject of a fever epidemic which would result, were the ship to call there, in her being blacklisted, detained or impounded at a subsequent port, then that port would be unsafe". It is generally agreed that, if calling at an infected port might lead to a ship being quarantined (whether because of crew illness or simply the fact of having visited an infected port), that could in principle mean the infected port was unsafe. This reasoning could apply equally whether the ship is quarantined at the infected port or a subsequent port of call.

However, it is also suggested that the quarantine is likely to be too short to render the infected port unsafe. As an example of such a brief detainment, the authors of one of the leading texts cite the typical three week quarantine for visiting an Ebola-affected port during the 2014 outbreak. So far, quarantine durations have been similar for ships calling at COVID-19 affected ports. As long as this remains the case, owners may have difficulty asserting that infected ports are unsafe on this ground.

If an owner argues for unsafety on either ground, the charterer is likely to say that any COVID-19 infection in port is an abnormal occurrence, such that any danger to the ship caused by the infection does not constitute unsafety. As time goes on, however, and ports remain infected, the prospects of such an argument succeeding will diminish.



Given the above, it is evident that although a contagious disease can in principle render a port unsafe, in reality it may be difficult to prove such a claim. Nonetheless, parties should be alive to both possibilities set out above, given that the test for unsafety is fact sensitive, the factual environment is constantly changing and the authority in this area is limited, being derived from textbooks rather than decided cases.

Timing and knowledge

Consider a scenario where a port is nominated and throughout the loading operations neither the owner nor the charterer have any reason to suspect that the port is infected by COVID-19, but by the time the ship reaches the next port, three crew members are displaying symptoms and the ship is quarantined. While in quarantine at the second port, it emerges that in fact the first port was already infected by COVID-19 before it was nominated and the port authorities had failed to take any precautions to prevent the spread of COVID-19 such that it was unsafe. Is the charterer liable for breach of the safe port warranty?

On these assumed facts, the answer is likely to be “yes”. Assuming the charterer is subject to an absolute safe port obligation under the charterparty (rather than one of due diligence only) the only question is whether, at the time the first port was nominated, it was prospectively safe for the ship on its arrival. If it was prospectively unsafe, viewed objectively and with all the evidence available in hindsight, the charterer is strictly liable for the consequences. The fact that the charterer did not know, and had no way of knowing, that the first port was unsafe at the relevant time makes no difference.

The answer may be different where the safe port obligation is one of mere due diligence. Accordingly, where ‘latent unsafety’ like this is at issue it will be important to scrutinise the particular terms of the safe port obligation in the charter.

Implications of orders to potentially infected ports

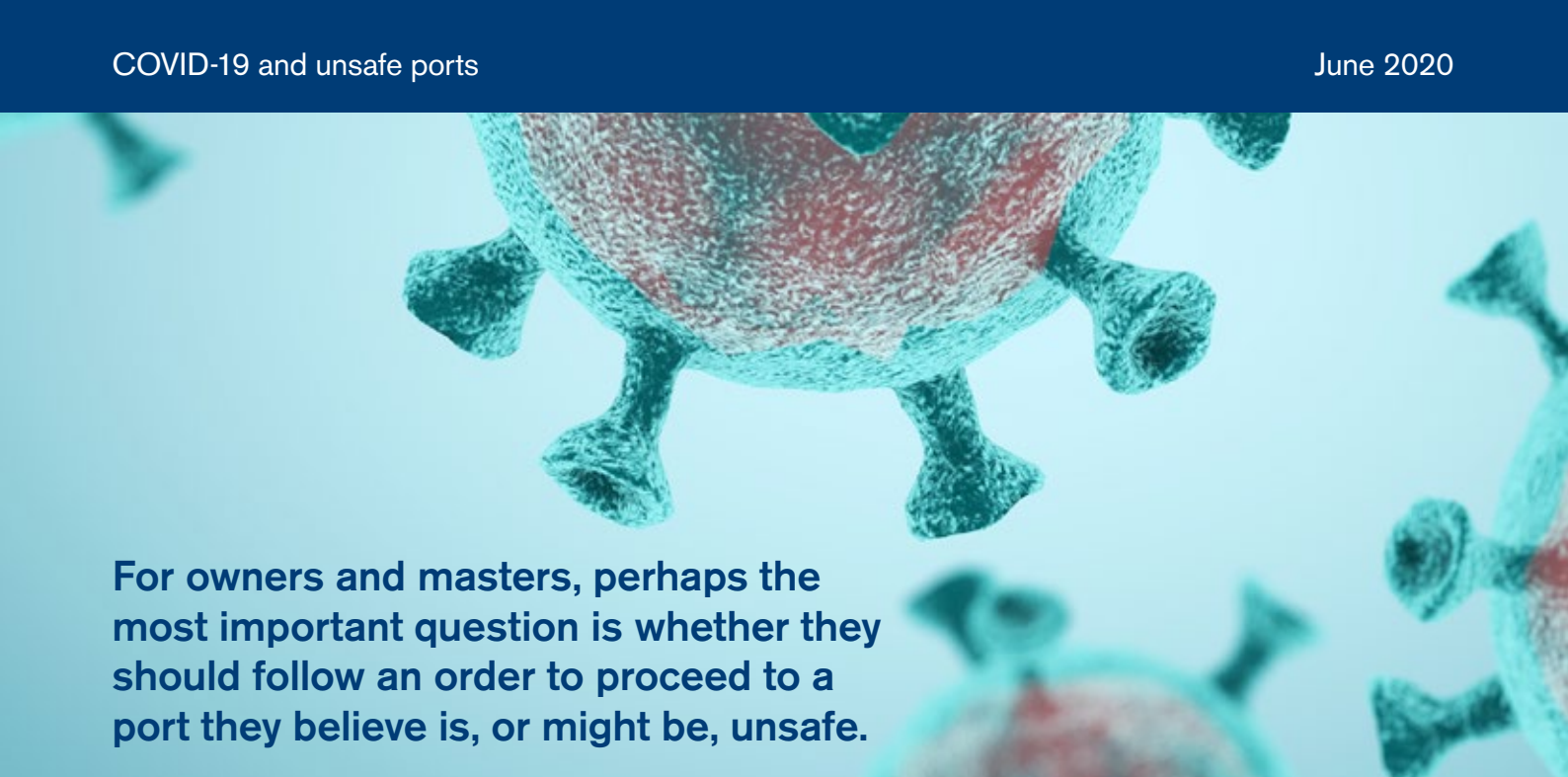
The question of whether a port is safe or unsafe is only the starting point of understanding the parties’ rights and obligations. In the remainder of this article, we will consider two important practical points regarding the implications of potential COVID-19 related unsafety for making and obeying orders under charterparties.

Supervening infection

Consider circumstances in which a time charterer orders a ship to a port, but while the ship is on its way there, the charterer forms the view (perhaps due to a news report) that the port has become unsafe by reason of COVID-19 infection. What should the charterer do?

In time charters, the safe port obligation is typically divided into a primary and a secondary obligation. The primary obligation is to order the ship to a port which is prospectively safe at the time the order is made. However, there is a secondary obligation to cancel that order if the port becomes prospectively unsafe after the first order is given.

Accordingly, if a time charterer forms the view that the next ordered port of call has become unsafe by reason of COVID-19 contagion, it would be well advised to immediately cancel the order to proceed to that port. Indeed, even if the ship has already arrived in port, if



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she can avoid the danger by leaving then the charterer will come under an obligation to order such a departure, whether the ship has completed cargo operations or not (see “The Evia (No 2)” [1982] 2 Lloyd’s Rep 307). Accordingly, time charterers should continue to monitor carefully any COVID-19 developments in port after an order to proceed to that port is made.

By contrast, in voyage charters it is thought that the charterer has no right or obligation to nominate a new port in the event of supervening unsafety. Rather, in the event of supervening unsafety, the parties may agree to vary the charter to provide for a new port to replace the unsafe one that has been nominated. If the parties cannot agree, the charter may be frustrated. However, the common language “...or so near thereto as she may safely get...” often has the effect of preventing frustration in these circumstances.

Obeying an order to proceed to an affected port

For owners and masters, perhaps the most important question is whether they should follow an order to proceed to a port they believe is, or might be, unsafe.

Before an owner makes this decision, it can take some comfort from the fact that the master’s obligation on receipt of an order from a charterer is one of reasonable conduct, not instant obedience (see “The Houda” [1994] 2 Lloyd’s Rep 541). A reasonable delay to consider whether to obey an order is not a refusal to obey an order.

What is a reasonable delay will always be a fact sensitive enquiry, but, particularly where questions of a danger to the crew’s health arise, it will be hoped that tribunals will have some sympathy with an owner’s desire to investigate the safety of a port to which its ship is ordered. The desire to investigate, though, must be balanced against the risk

that, if the port is safe, the owner’s delay may amount to a (possibly) repudiatory refusal to obey the charterer’s legitimate orders which may result in a claim for damages.

In any event, by accepting an order to proceed to an unsafe port an owner does not necessarily forego its right to compensation for the charterer’s breach of a safe port warranty. In determining whether the owner has lost this right (whether through variation, estoppel or waiver) the court will carefully and objectively scrutinise the owner’s communications with the charterer for an unequivocal representation that the owner is foregoing its right to damages, (see “The Chemical Venture” [1993] 1 Lloyd’s Rep 508). Therefore, if the owner does decide to comply with an order to proceed to a COVID-19 infected port, it would be prudent to reserve expressly its right to claim damages if the port is unsafe.

For completeness it is important to mention that, even if an owner’s right to claim damages caused by the order to the unsafe port is reserved, that damages claim will be subject to the owner acting reasonably in mitigation in the usual way.

Concluding remarks

Whilst it is clear that there is scope to argue that a port infected by COVID-19 is unsafe, it is widely accepted that the threshold for unsafe port claims is a high one and the burden will be on the owner to prove there was a sufficient level of unsafety which could not have been overcome by the exercise of reasonable precautions on the part of the ship. Factors such as timing and knowledge will also be relevant and each case will need to be considered on its own facts.

If Members have any questions about the issues covered in this article, they are invited to contact the Managers in the usual way.

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