

Quarantine and the Ebola Outbreak – Practical Considerations for Charterparties involving shipments from affected Ports

It is not the purpose of this article to set out the nature of the Ebola crisis as such which has been well documented in the press. Similarly the remedial measures and precautions which prudent shipping operators should undertake have been set out clearly in the various media, including P&I Club websites.

The effect in terms of quarantine restrictions and port closures is similarly well covered. It is important that operators refer to these abundant sources of relevant information in order to keep up with the changing position. It might also be the case that the reports, regulations and restrictions, together with the position taken by supra-national bodies such as the World Health Organisation (“WHO”) and the International Maritime Organisation (“IMO”) will help to shape the factual background which can be a material consideration in analysing relevant contractual provisions.

Responses to the crisis such as the following could well have bearing on the performance of charterparties and contracts of carriage:

- The Singapore Port Authority’s circular stipulating that vessels arriving which have been in a “plague infected area within 60 days” are to wait at the quarantine anchorage for clearance.
- China’s reported increasing vigilance as far as quarantine is concerned for vessels sailing from Ebola infected countries.
- Port closures: a number of ports, particularly those close to the Ebola affected countries (including Mauritania, Gabon, the Ivory Coast and Cameroon) were closed to vessels sailing from Ebola infected ports, although some restrictions have started to ease again.

Set against this the stance of the WHO and IMO so far has been that trade and transport to and from Ebola affected countries should continue.

Legal context

As with any other crisis (e.g. piracy, wars in the Gulf) the particular problems, no matter how distressing, do not displace established principles or the terms upon which parties have contracted – a fact neatly summarised by the owners’ Counsel in a case concerning liability to pay hire following seizure by pirates “*The Saldanha*” [2011] (Lloyd’s Rep 287)..

‘There is no relevant concept of fairness other than the contractual balance struck...construed in accordance with well known orthodoxy’

Delicate questions will arise about the safety – for legal purposes – of the Ebola affected ports which in turn feed into important questions about whether an owner is obliged to sail to them. The answers to such questions will be elusive: the underlying principles are complex and controversial, in the absence of clear authority on the issue, and, even if the legal principle was clear, the application of the facts to such a question is a matter of speculation particularly where the contracting of Ebola at a relevant port is not being reported.

Arguably of more practical context are the consequences of a call at a port in a country where there are reported cases of Ebola, and it is those questions which this article will largely concern itself.

Scenario

The scenario principally considered is that a vessel has sailed to a port in a country which has suffered an outbreak of Ebola. The vessel then sails to a port in another country where the vessel will have to wait for an extended period, or might even be prevented from entering the port because:

- (a) there is an enhanced quarantine regime to deal with vessels which have previously called at Ebola ports; and/or
- (b) because there is a suspicion of Ebola having been contracted by one or more of the crew members (which may or not prove to be the case).

Time charters

If the vessel is ordered to sail to a port in an Ebola affected area, it is possible that one or both of the owners and crew will refuse to sail to the port.

In such a case, the owners might be exposed to a claim for a repudiatory breach of the charterparty. The owners' right to refuse the order might well turn on the question as to whether the port in question is an unsafe port or not and that question is a complex one beyond the scope of this article.

Assume now that there is a delay due to an initial refusal, but the crew or owners relent: in the "off-hire" context, if time is lost due to the refusal of the crew to sail to the nominated port, then this would amount to "default" of men. The reason why the NYPE clause 15 is adjusted so that the "default" is added to "deficiency" within the NYPE clause 15 is to cover such refusal. A similar position arises under clause 21(a)(ii) under the Shelltime 4 (2003 revision) whereunder loss of time due to "refusal to sail" is an off-hire event.

Moving on to consider the scenario described to above, what is the position where the vessel has been delayed due to enhanced quarantine? As many recent articles have noted, the issue has been considered in at least one reported case – "*The Apollo* [1978] 1 Lloyd's Rep 200".

Care is needed when considering "The Apollo" – while this is clearly an authority on the effects of quarantine delays following crew illness, it is equally important to recognise that the term "*whatsoever*" was inserted into the off-hire clause.

The case concerned the consequences of two crew members having contracted typhus. The vessel discharged at Naples where the two affected crew members disembarked. The vessel was then ordered to load cargo at Buchanan, Liberia. When the vessel arrived a Buchanan, a full inspection of the vessel took place and specimens of the vessel's drinking water were taken for testing and the granting of free pratique (as to which see below) was delayed.

The owners claimed that the vessel remained on-hire for the time effectively lost; the charterers maintained that they had the right to rely on the off-hire clause. Subject to adjustments for time which would have been lost anyway, the charterers succeeded in applying the off-hire clause.

It is clear from the report that the wide scope of the off-hire clause which included the word "whatsoever" was a material factor. Many off-hire clauses on the NYPE clause 15 do not have "whatsoever" added so it does not follow that time lost due to quarantine will necessarily be an off-hire event.

What can be taken from "The Apollo" is:

- Delays caused by enhanced quarantine can satisfy the requirement of the preventing of the full working of the vessel (one of the issues in dispute in the case); and
- in such circumstances, any delay in obtaining free pratique will not be a delay due to a "mere formality" (a material consideration also in the ability to serve a notice of readiness).

Thus, for an NYPE clause 15, the word “whatsoever” would have to be added to make the delays due to quarantine clearly an off-hire event.

In “The Apollo”, arguments to the effect that the time lost was lost in any event as a natural result of charterers’ orders and/or was somehow the charterers’ responsibility (accepted grounds for dis-applying an off-hire clause) were not advanced.

It is submitted that in such circumstances, if the off-hire clause did apply, such arguments would not be bound to succeed on owners’ part, although they might be explored.

Other standard forms have more complex off-hire schemes than the NYPE and deal with quarantine.

Examples include:

- Sheltime 4 (2003 edition) clause 21(a)(iv), where an off-hire event arises “due to any delay in quarantine arising from the master, officers or crew having had communication with the shore at any infected area without the written consent or instructions of Charterers...”; and
- Supplytime 2005 clause 13(a)(ii) where delays caused by “quarantine or risk of quarantine unless caused by the Master, Officers or Crew having communication with the shore at any infected area not in connection with the employment of the Vessel without the consent or the instructions of the Charterers”.

It can be seen from these two examples that the specific wording has to be carefully considered – note that the “not in connection with the employment” condition of the Supplytime clause does not apply to the Shelltime clause. It is perhaps worth also reflecting on the practical steps that might be taken to avoid loss of revenue under such terms: in such cases payment for the quarantine might be secured simply by obtaining the charterers’ consent to contact with the shore.

Voyage charters

Before a vessel is in a position to earn extra revenue at a port it must be able to serve a Notice of Readiness ‘NOR’. Generally, the vessel will have to be in such a position that work is not prevented and cargo can be loaded. This might not be the case where there are quarantine restrictions. Official permission is generally required to show that the ship is without infectious disease and the crew is allowed to make physical contact with the shore. This permission is usually called ‘free pratique’.

Free Pratique will be required unless the charterparty provides otherwise or unless its obtaining is a mere formality. As “The Apollo” case shows, the obtaining of free pratique after the contracting of an illness like Ebola (and its submitted position will be the same for being exposed to serious risks of contracting Ebola) is unlikely to be deemed to be a mere formality.

Thus a delay in obtaining free pratique due to enhanced quarantine is likely to preclude the service of a valid NOR. The position will be otherwise if the contract provides for example terms such as ‘whether in free pratique or not’ (‘WIFPON’).

Further, as with some form of time charters (see above) delays due to quarantine are anticipated in a number of the standard forms.

A good example is Asbatankvoy, Clause 17(a), under which the delay caused by quarantine should count as used laytime unless the quarantine is declared whilst the vessel is on its passage to the port, in which case the charterer shall not be liable.

BP VOY 4 adopts a similar scheme.

Thus the degree of notoriety of the relevant quarantine is a material factor – if the quarantine requirement arises only after sailing, for example from the load port, then the owners will bear the relevant risk; otherwise the charterers’ run the risk of quarantine delays. In practical terms it might well be that the likelihood of potential quarantine delays is now sufficiently notorious, but the parties might sensibly make this clear.

Part of the industry's response is to circulate the adjustments to clauses or new clauses. So far there is no BIMCO recommended clause, but this is something that BIMCO intends to address soon. Thus a number of potential clauses have been suggested in the meantime, some of which are comprehensive and others merely adjust the above scheme in voyage charter quarantine clauses.

These latter adjustments are less radical and probably do less to disturb the balance of the contract, dealing essentially with the aspect of prior knowledge of the quarantine and stating that any delays caused by the vessel having called at or traded to an Ebola affected country should count as laytime or demurrage – a reasonable outcome given it is the charterers' trade which has caused the delay.

Questions arise as to what might happen in the event of an extended delay where the vessel has not been able to serve a NOR and will therefore be detained in owners' time. This might seem unfair. There are cases in which an owner might argue that it is proper for it to be paid for this additional time given that it has not been able to put itself within the lay time/demurrage regime.

However, additional remuneration can in some circumstances be payable where the time spent is a consequence of compliance with the charterers' request or entering into an implied contract to provide additional service (see, for example "The Saronikos" [1986] 2 Lloyd's Rep. 277). It is very unlikely that Courts or arbitrators would see quarantine detentions in this way, particularly where, as we have seen, delays due to quarantine are anticipated by the charterparty.

Extended quarantine delays are unlikely to give rise to the doctrine of frustration: the delays will probably not be long enough and, as above, in many cases the situation is anticipated by the charterparty.

However, a more fundamental problem might arise where it is practically impossible to discharge at the chosen discharge port. In such cases it is quite likely that a bill of lading and/or charterparty will provide for the vessel to sail 'so near thereto [the discharge port] as she can safely get'. It might then be open, after waiting for a reasonable period of time, for an owner to sail to an alternative place of discharge. That said, if there is finite period of quarantine, the reasonableness of such a course might well be challenged.

Delay claims based on unseaworthiness seem far-fetched – it is conceivable that it might be argued that any failure to adopt protective measures leading to, say, crew members contracting the disease, might amount to unseaworthiness (along the lines of similar arguments about the failure to institute BMP in the piracy context). Hague and Hague Visby Rules exemptions would be available: under Article IV, Rule 2, sub rule (g) "the arrest of restraint of Princes" and (h) "quarantine restrictions". Of course due diligence would have to be exercised for a carrier to rely on the exceptions if the vessel were found to be unseaworthy.

As already stated, there are already in circulation a number of alternative clauses which have been drafted with a view to clarifying the position in cases where Ebola might affect the performance of the contract and in some cases seek also to re- allocate the relevant risk.

Some of these clauses are comprehensive, others just focus on a specific issue: for example, the anticipation of quarantine (as above) or off-hire. This attention to the terms of the relevant contract rightly underscores the submission in the "Saldanha" quoted above.

In simple terms, it is the words that matter.

David Pitlarge,
Partner
Marine, Trade and Energy
HILL DICKINSON LLP

Tel : +44 (0) 207 280 9251
Mob: + 44 (0) 7792 736663
Email: david.pitlarge@hilldickinson.com