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Ebola virus:**Charter and bill of lading issues arising from the outbreak****Applicability: Shipowners and Charterers****The situation**

Following the outbreak of the Ebola virus, the shipping world is facing a significant challenge with potentially dramatic implications for Shipowners involved in trade to and from Western Africa. The legal implications may vary from case to case depending on the underlying contract, and more specific advice should be sought. Owners may find likely anticipated scenarios and the implications under English law as below.

Possible scenarios and implications**Scenario 1: The vessel refuses to enter a port that is allegedly Ebola infected either due to the owners or the crew**

Here the principle of safety of ports may apply. A port will probably not be safe if it exposes the crew to an imminent risk of contraction of the Ebola virus that cannot be avoided by taking appropriate measures. This is rather a question of facts than of law and medical advice should be sought. For this first scenario we will imply that the port is indeed unsafe.

- 1 Under a time charter, a port can be unsafe at the time the order was given (rendering the order invalid and owners have grounds for the refusal), or become subsequently unsafe, i.e. after charterers have given the initially valid order to proceed to a port which only thereafter became affected by the virus. In the latter case owners can refuse the subsequently invalid order and charterers will have to give fresh and safe port-orders. Please note that frustration of a time charter will probably not be arguable as charterers can give new orders.
- 2 Under a voyage charter, the position would be different. The charter may be found to have been frustrated, i.e. it can be terminated free of liabilities to any party. Here, the unsafety of the port will affect the contract "at the core", as most voyage charters are for one voyage only. It should be remembered, however, there is no concept of "Force Majeure" in English statutory law and the doctrine of frustration is interpreted strictly.

However, whether the contract might be frustrated depends on the terms of the voyage charter or the bill of lading, as there might be transshipment or lightering clauses included. If this is indeed the case owners will have to tranship or lighter the cargo even though this will cause additional costs and/ or loss of time.

Further, the ban on entry or unsafety has to be permanent. The prospects of whether a ban may be eventually lifted have to be looked at from a reasonable perspective at the time of the incident. A mere delay is not enough.

Finally, if all the above requirements are fulfilled then the voyage charter or the bill of lading might be frustrated.

The consequences of the contract being frustrated depend greatly on whether the vessel was already laden with cargo.

Under a voyage charter and given that the vessel is not loaded, the situation is simply that the contract is terminated without any liabilities for any party to the contract terminated no liabilities.

In laden condition there is a question arises as to whether freight was earned at the time of the termination. This will depend on the terms of the charter party.

Further, if in a laden condition the question remains what will happen to the cargo on board once the contract is terminated. Under a bill of lading, the owners have the duty to care for the cargo and, once frustrated, to discharge the cargo at a location which seems reasonable to all parties. It is worth mentioning that owners may have a claim for reasonable pay for such discharge operation.

Scenario 2: The vessel refuses to enter a port because either the crew or the owners fear that following charterers' order would result in an imminent risk of contraction of the virus

This is a question of (medical/ expert) facts rather than law.

If the port can indeed be considered safe then owners will be in breach of charterers' valid order and consequently the vessel will be off-hire and liable for damages that charterers may have for this delay.

It may also lead to a possible repudiatory breach by owners and liabilities under bills of lading.

Scenario 3: The vessel is prevented from entering port A due to her previously calling port B which authorities in port A allege is Ebola infected

- 1 Under a time charter the answer here probably is that if calling port A is prevented due to calling port B and calling port B was charterers order under the same charter party then there is presumably no liability for delay on the owners and the vessel remains on-hire. Charterers may need to give fresh alternative orders, or accept the time of any possible quarantine.
- 2 Under a voyage charter or under a bill of lading the situation may again be so that the contract is frustrated with above consequences.

In the given scenario it might be worth mentioning that the application of defences under the Hague Visby

Rules might be prejudiced (cf. Article IV rule 2 (g) and (h): “Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from (g) arrest or restraint of princes [...] (h) [due to] quarantine restrictions”).

This might be the case when owners / charterers knew about the quarantine restrictions in port A already at the time when they were calling at port B, and still agreed / ordered the vessel to go to Port A.

Scenario 4: The vessel cannot enter a port due to an infected/ suspected crew on-board, or due to potentially infected stowaways on-board

Under the abovementioned scenarios, however depending on charter party clauses, the vessel may potentially be off-hire and owners responsible for any delay / losses.

Nevertheless, owners may try and argue that there is a causational link between a last port of call under charterers order and the denied entry to a port.

Demurrage issues

Any legal issue related to demurrage will depend on the type of the charter, i.e. whether it was a port or a berth charter and consequently where a valid notice of readiness can be tendered and whether the vessel is required to be in free pratique or not. There may be laytime exceptions applicable, and whether the delay was caused due to the unsafety.

Cargo liabilities

Owners may face the issues of delay or deviation under the bill of lading. If the relevant bill of lading does not seem to be frustrated then owners may be liable for costs related to transshipment, lightering or alternative transportation to place of the intended discharge. Further, owners might be liable towards the receiver for delay-losses (this represents the difference between the market value at the day of intended discharge and the market value of the day of actual arrival) and potentially for resale profits.

Recommendations

All parties are strongly recommended to inform the Association of all potential issues relating to the outbreak of the Ebola virus. Further, to follow closely on developments and to take all preventive measures recommended therein.

Finally, in order to avoid risks and expenses incurred in the future we suggest that operating charter party clauses are scrutinized and protective clauses are incorporated where possible in new fixtures.

Source of Information: Andrew Liu & Co., Ltd www.andrewliu.com.hk

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