

Circular From AMERICAN**Date: 10 April 2020****Infectious Diseases:****Charter Party and Other Contractual Considerations**

The outbreak of infectious diseases can have a significant impact upon international trade and travel worldwide. Measures taken in response to such outbreaks, when considered in the context of the specific charter party or bill of lading wordings and applicable laws, may result in the delay or detention of vessels and/or the incurring of expenses that naturally flow from such detentions or delays.

We have outlined a number of the legal issues that shipowners and operators may potentially face and trigger P&I covered incidents -- such as the illness of a crew member and an ensuing deviation, repatriation expenses, or quarantine expenses -- or FD&D covered disputes between owner and charterer regarding the allocation of risk and responsibility associated with infectious disease related delays or expenses.

The legal implications may vary from case to case depending on the particular facts and circumstances, as well as the underlying contractual terms. Guidance is also provided with respect to existing charter party clauses that either directly or indirectly address the expenses or delays caused by an infectious disease event, as well as recommended clauses which aim to provide more clarity for owners and charterers alike.

A. INFECTIOUS DISEASES RELATED ISSUES

Safe port issues: What makes an infected port “unsafe”?

The most common question facing a vessel owner is whether it is obligated to proceed to a port where there may be a risk of contracting an infectious disease. Under both English and U.S law, a port will be “unsafe” unless, during the relevant period of time, the particular ship can reach it, use it and return from it without being exposed to danger in the absence of some abnormal occurrence, which cannot be avoided by good navigation and seamanship. Whether or not a port is to be considered safe depends upon the relevant facts of each case. Safe port issues typically involve a threat of safety to the vessel or its cargo due to a feature or characteristic of that port. In the event of an infectious disease outbreak, the concept of safety may be extended to the crew, and it has been suggested that such health risks to those on board the vessel can render a port unsafe.

Under a time charter, the Master will be obligated to follow Charterers’ instructions to proceed to a particular port. Under a time charter party’s express/implied safe port warranty, Charterers will be obligated to order the vessel only to ports which are prospectively safe (that is, safe for the time when the vessel will be there). Charterers’ obligation to nominate a safe port applies at the time when the port is nominated.

However, if the port becomes unsafe after Charterers' nomination, Owners can ask for a change of, and Charterers are obligated to cancel, the original order and nominate a new, safe port.

The position is not as clear under voyage charters. Unless supported by a deviation clause in the voyage charter party, Owners' failure to proceed to a named port may constitute a breach of contract or repudiation, thereby entitling Charterers to claim damages. If the charter party is for one voyage only, deeming the port as unsafe may frustrate the contract (i.e. the charter can be terminated free of liabilities to either party) unless the voyage charter party includes transshipment or lightering clauses. In such cases, Owners will have to transship or lighten the cargo.

Whether a port is safe is a question of fact and is likely to depend on medical evidence such as the likelihood of the crew being exposed to an infectious disease and the fatality rate. Different ports and in a country or region may also be affected differently. This makes any safe port analysis somewhat subjective and open to interpretation when the governing charter party does not contain specific clauses addressing the risks, delays or liabilities associated with an infectious disease outbreak. Whether considering a voyage or time charter, each case will depend on its specific facts and charter party terms. In order to avoid risks and claims by Charterers for delay or damages, Owners are recommended to scrutinize charter party clauses and incorporate protective clauses where possible in new fixtures. In this regard, Owners should consider the issues addressed in Section B below and should contact the Managers for assistance.

Seaworthiness

Members should be aware that a vessel may become unfit to receive and carry the cargo if it is chartered after calling at an area affected by the infectious disease. For example, if a vessel is required to undergo compulsory fumigation as a result of calling at an infected area, this may cause cargo to rot if it is perishable. Similarly, if a vessel is delayed due to quarantine regulations which in turn cause damage to cargo, the vessel may be considered unseaworthy. The infectious disease may therefore inadvertently put Members in breach of their obligations to provide a vessel that is seaworthy.

Liability to cargo interests: Bill of lading considerations

While Owners may be entitled to refuse a Charterer's voyage order to call at a port that is unsafe, there are additional considerations when the vessel is already laden with cargo. Owners will still be obligated under the bills of lading to care for the cargo onboard the vessel and to deliver the cargo at the designated discharge port. Any departure from the contract of carriage may constitute a deviation which may prejudice the Member's P&I cover. If the charter party and/or bill of lading do not permit such a deviation or discharge of cargo at an alternative port under certain circumstances, Owners may ultimately be liable to the cargo receivers for certain damages and losses resulting from any associated deviation and/or delay.

Members must also be mindful that the local law of the discharge port listed in the contract of carriage may also apply. In such cases, Members should contact the Managers to assess the facts and circumstances of the situation to arrange for urgent and appropriate advice to best protect the Members' interests.

If a port is closed due to an outbreak of infectious disease, an alternative port will be required, but the legal

consequences depend on the terms of the underlying charter party and bills of lading. Cargo may be discharged at a location which seems reasonable to all parties. This will depend upon whether the bill of lading incorporates the terms of a charter party or permits discharge at a substitute port in certain circumstances. However, where a port of discharge is named, delivery at an alternative port may constitute a deviation, and hence a breach under the bill of lading. Also, depending on the charter party, Owners may arrange transshipment, lightering or alternative transportation to the place of the intended discharge. In that case, Owners may have to pay a claim for such an operation. Members should therefore review prospective terms of the bills of lading and the charter party in advance of performance to minimize the risks posed by an outbreak of an infectious disease that afflicts a port or region.

If it becomes necessary to deviate, say, to avoid confiscation or to repatriate crew members who have fallen ill, Members may also seek to rely on Article IV Rule 4 of the Hague or Hague-Visby Rules which provides that *“any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of these rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom”*. The deviation should not be greater than that reasonably necessary in the circumstances and is at the Owners’ expense.

Indemnity from Charterers

Both English and U.S. law generally allow vessel Owners to seek indemnity from their time charterers (in some cases voyage charterers too) for loss or damage incurred as a result of complying with Charterers’ orders, provided the Owners did not agree to bear that particular risk. If a time chartered vessel is ordered to call at an infectious disease afflicted port, and as a direct result of complying with Charterers’ orders (having not accepted the risk), Owners may incur expenses arising from quarantine and disinfection. In such instances, Owners can seek indemnity from Charterers for those expenses.

Delay/off-hire

The Managers have already seen situations arise where a vessel has encountered delays due to the response by local authorities to the threat of the infectious disease. Each day, more countries are promulgating new protocols to address these threats. For instance, in the U.S., a vessel that has called at an infectious disease affected country within its last five voyages will be subjected to stricter scrutiny by the Coast Guard and other authorities. The existence of stowaways or crew afflicted by fever and other disease related symptoms will also prompt delays. In such circumstances, *free pratique* may not be granted to the vessel, and possibly, the vessel may ultimately be denied entry, quarantined or turned away.

Delays can also just as easily be encountered on the front end of a voyage when a vessel calls at a load port where preventative measures implemented by the local authorities indirectly cause port congestion or longer periods of loading or discharge.

Liability for such delays will be determined based on the relevant terms of the applicable charter party, and its provisions should address such situations and provide clarity for both the vessel owner and charterer as to what would be considered an off-hire event for lay time in an infectious disease context. Members should consider incorporating contractual wording, as addressed below in Section B. Owners may try to shift the

liability to the Charterers by proving a causal link between a last port of call under Charterers' order and the denied entry to a port.

Demurrage

Whether lay time will continue to run and demurrage to accrue under a voyage charter will depend on:

- (i) the type of the voyage charter (i.e. whether it is a port or berth charter) and thus where a valid notice of readiness can be tendered;
- (ii) whether the vessel is required to be in *free pratique* or not; and
- (iii) whether delays caused due to presence of an infectious disease may some way fall within lay time exceptions.

Each voyage charter party must be reviewed individually to ascertain demurrage issues. Some charters contain express quarantine clauses. For example, the Asbatankvoy Charter expressly excludes Charterers from liability caused by delay resulting from quarantine declared after Charterers have given Owners orders, meaning that Owners will not be entitled to demurrage in respect of such delay.

In other charters, the issue of *free pratique* may arise if the wording requires the vessel to be in *free pratique* before lay time can commence. Owners will then not be able to tender a notice of readiness until *free pratique* is obtained. As a result, Owners will be bound to bear the costs of obtaining for the Vessel a *free pratique* if the vessel has called at an infected area, or if certain crew members are suspected of infection, so that the notice of readiness can validly be tendered.

Employment of crew

Members employing crew have a duty of care to them under their employment contracts. As with any health risk, awareness is the first and most important step toward prevention. Members are strongly advised to ensure that industry and international guidelines to prevent the spread of an infectious disease are communicated to its officers and crew to reduce any risk of contracting or spreading the infectious disease. Members are referred to the Club's prior Circulars and Member Alerts attaching guidance from the U.S. Centers for Disease Control and Prevention (CDC) and the World Health Organization (WHO) concerning infectious diseases. Members are also urged to review their existing International Ship and Port Security (ISPS) Code procedures, as well as any procedures concerning shore leave and crew changes/substitution when visiting any infectious disease afflicted regions.

Stevedores and stowaways

As with crew changes and shore leave policies, Members must strictly implement their ship security plans and fully comply with their ISPS obligations.

Cargoes are loaded/discharged by local stevedores who come on board the vessel. The Master has little control over what local labor is used for these purposes, and often times, the stevedores are hired by Charterers under the terms of the subject charter party. In this regard, Members are urged, first, to revisit and reconsider their ship's security plan to address these issues and, second, to have their respective Ship

Security Officers zealously enforce all aspects of the revised ship's security plan.

Members should be aware of their ISPS requirements and ensure that all unauthorized personnel are prevented from boarding the vessel throughout its port call.

Force majeure

Members' inability to perform their charter party obligations due to the outbreak of an infectious disease may constitute a force majeure event (i.e. circumstances that are not within a party's reasonable control) under the terms of the charter party. Members should note that under the laws of the U.S. and the U.K., there is no general understanding of force majeure and it will only have the meaning given to it by the relevant contract. Also, Members should bear in mind that the consequences of any force majeure event should also be set out in the relevant contract.

Therefore, whether Members' obligations are suspended as a result of the outbreak of an infectious disease will depend on the wording of the charter party. If the specific event, or one very like it, is not mentioned within the force majeure provision, it cannot be a force majeure event and Members' obligations will remain in force.

It is very important, therefore, when considering whether to declare force majeure or what to do with a force majeure notice in relation to an infectious disease, that the specific requirements of the charter party are adhered to.

In considering whether or not the infectious disease constitutes a force majeure event, careful consideration should be given to the cause of the delay or interruption in performance. For instance, the clause may not include the term "epidemics" or "infectious diseases". However, the prevention of performance may arise because a governmental body has prevented performance (i.e. a declaration of port closure by a central government). This will turn on the wording of the relevant force majeure or exceptions clause.

B. CHARTER PARTY CLAUSES FOR INFECTIOUS DISEASES

Because an infectious disease may be prevalent in certain ports in a given region, it is tempting to simply recommend that Members avoid the region altogether. Such advice may be impractical for certain Members either from a commercial or legal standpoint.

Many non-afflicted countries worldwide may have implemented their own respective protocols to address the outbreak of an infectious disease may be felt beyond the borders of afflicted regions -- Members should include a provision in future charter parties to address any likely disputes that may arise due to an infectious disease outbreak and the precautions taken worldwide to stem spread of the disease.

There are several wordings contained in existing form charter parties that may be used in future charter parties to deal with infectious disease related issues. These clauses include:

- Clause 14(A) of the BALTIME 1939 form C/P (as revised 2001);
- Clause 25 of the SUPPLYTIME form C/P; and
- Clause 46 of the BIMCHEMVOY form charter party.

BIMCO has prepared [infectious or contagious diseases clauses for both time and voyage charter parties](#). The Managers recommend that Members incorporate such clauses, as applicable, as standard wording in time and voyage charter parties in order to provide contractual certainty and assurance to Members in the event of the outbreak of an infectious or contagious disease.

More specialized clauses regarding an infectious disease outbreak should consider terms and provisions to deal with the likely situations which may be encountered. These considerations would include provisions addressing the allocation of risk and responsibility for time and costs associated with the following:

- Quarantining (P&I Class I, Rule 2, Section 11);
- Fumigation/Disinfection of the vessel (P&I Class I, Rule 2, Section 11);
- Preventive measures;
- Life salvage and/or medical treatment (P&I Class I, Rule 2, Section 1(B));
- Diversion to land an infected crew member (P&I Class I, Rule 2, Section 12);
- Repatriation and substitute expenses (P&I Class I, Rule 2, Section 2); and
- Fines or penalties (P&I Class I, Rule 2, Section 9).

A clause tailored to an Owner's needs would ensure that the vessel remain on hire, or under voyage charters, for time to count, if infectious disease related delays or detentions take place.

Other specialized wordings are recommended to provide for alternative loading or discharging ports if the designated port becomes affected by an infectious disease or closed altogether.

The use of an appropriate infectious disease clause endeavors to provide clarity and predictability to future fixtures being performed both in and away from maritime areas most affected by an infectious disease. And while the clause will likely reduce the likelihood of disputes between Owners and Charterers, it is also recommended that an infectious disease clause be incorporated in any bill of lading issued in connection with the underlying charter party to similarly minimize potential disputes with cargo interests.

Good housekeeping

The international community and maritime authorities worldwide have struggled to keep pace and continue to enact protocols to counter the threat of infectious diseases. In addition to the constantly evolving regulatory landscape, shipping contracts have evolved as well.

Because each case will depend on its facts, it is recommended that Members consult with the Managers to not only coordinate their efforts, obtain advice and take appropriate measures to best protect their respective interests, but also to stay abreast of all new and significant developments regarding the outbreaks of any major infectious diseases. The Managers are eager to work with the membership in this regard and we are hopeful that such cooperation will promote awareness of infectious disease issues. We recommend that

Members refer to our infectious disease updates [at our website](#) for any updates as they may arise.

Source of Information: The American P&I Club

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