

Maritime Bulletin – Infectious diseases and shipping contracts

With recent news events in mind, owners, charterers, shippers and cargo interests might well find themselves wondering what their rights and obligations are when it comes to viral infections in ports and amongst crew. There is currently little sign that the recent outbreak of coronavirus will have much, if any, widespread effect on shipping affairs. Some ports are requiring additional forms to be filled in by vessels on arrival with certain checks in place for crew members which may result in some delays in berthing as restrictions and quarantines are applied.

Whatever the broader implications, now seems as good a time as any to discuss how parties to shipping contracts might be impacted by viral outbreaks.

Specific clauses dealing with infectious diseases

Many charterparties include specific clauses dealing with the outbreak of illness or infectious diseases. A good example is clause 25 of the Supplytime 2017 form (“*BIMCO Infectious or Contagious Diseases Clause for Time Charter Parties*”). Such clauses will typically make provision for how time is to be allocated (i.e. whether the vessel is offhire), deal with whether charterers are obliged to nominate alternative ports, and address the question of owners are permitted to deviate. There may well also be specific provisions dealing with any additional regulatory compliance (and who bears the costs of this).

Fortunately, these types of clause are rarely needed, but their relative lack of use may well give rise to disputes as untested wording is debated.

Force majeure

Many modern shipping contracts will have clauses dealing with force majeure situations. Typically, such clauses will absolve both parties from liability in the event of non-performance due to force majeure. They may well also give a right to terminate in the event of prolonged force majeure.

Disputes about the application and effect of such clauses are common. Compliance with notice requirements is a particularly hot topic (clauses frequently require the affected party to give prompt notice on the occurrence of a force majeure event, and can prevent them from relying on the clause when they fail to do so). The force majeure event itself is usually defined, though in some less happily worded agreements the definition may be very generic indeed. Depending on severity and duration, an inability to perform because of port closures, restrictions or crew sickness on account of viral infections may well be caught by force majeure clauses.

Without an express clause, however, the prospect of the common law of frustration coming to rescue a party from liability for non-performance is very slim indeed. Absent very unusual circumstances, it seems most unlikely viral infections in a few specific ports will qualify.

Safe ports

As we all know from The Eastern City [1958] 2 Lloyd's Rep. 127, “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...”.

Perhaps not surprisingly, safe port disputes generally focus on the physical attributes of the port and the risk of damage to the vessel itself. But that need not be so. The view taken by Time Charters (2014) at paragraph 10.3 is that risks to the crew alone can be sufficient to render a port unsafe. If that view is right, then an infection of sufficient severity at a port could well end up rendering it unsafe, placing charterers in breach of their obligations by nominating it.

Offhire

Even without the benefit of express clause dealing with contagious diseases, sickness amongst crew may well give rise to an offhire event depending on effect, severity and duration. For instance, the standard NYPE offhire wording refers to “deficiency of men”, and the Supplytime 2017 contains similar wording. Many clauses will in any event refer more broadly to any other cause which prevents the full working of the vessel.

Deviation

As already touched on above, where a charterparty includes a specific clause dealing with infectious diseases, that may well include specific provision for when the vessel is and is not permitted to deviate.

Absent express wording, and where the Hague or Hague-Visby Rules are incorporated, owners may need to consider whether a defence of reasonable deviation is available to them under Art. IV.4 before they deviate on account of illness (“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”).

Port intervention

Increased inspections and procedures on account of infections will not only lead to delays, but may well also lead to detention of the vessel or other intervention from the port. In the recent decision of The Muammer Yagci [2018] EWHC 3873 (Comm) it was held that the words “government interferences” in the Sugar Charterparty 1999 form engaged where a voyage charter’s cargo was seized by the local authorities, causing delay to the vessel. The suggestion that this wording was confined only to some type of extraordinary or unusual event was rejected. Parties may well find that similar wording in their own contracts is now quite broadly interpreted, and be more than enough to include increased port scrutiny / quarantine procedures.

Please note that this paper does not provide legal advice. Whilst every care has been taken in the preparation of this document, we cannot accept any liability for any loss or damage, whether caused by negligence or otherwise, to any person using this document.