News 08 Apr, 2020

Coronavirus: A Guide For Members On Potential Legal Issues

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The World Health Organisation has declared the coronavirus outbreak a global emergency. Several legal issues for shipowners, operators and charterers may arise as a result of the outbreak and this article illustrates some of the most likely issues Members may face.

Duty of care towards to crew

Employers owe a duty of care towards their crew. The Club has set out some recommended precautions for minimising the spread of the disease which can be found in our News Item 24 January 2020.

Notice of Readiness

When the notice of readiness is given, the vessel must be physically ready but also legally ready. It is common to provide for the commencement of laytime “whether in free pratique or not”. In the majority of cases such matters are irrelevant to the giving of a notice of readiness And even where there is no such express provision, if those matters are reasonably believed to be “mere formalities” and routine, notice of readiness may be given without having obtained the necessary clearances. However, where there is a known, or even perhaps just a suspected infection problem, this “mere formalities” exception to the general principle of readiness will not apply, in which case owners should ensure that they have the necessary clearances before a valid Notice can be issued.

Deviation

A member of crew may become ill after visiting a port affected by the outbreak. A deviation for the purpose of saving life is permissible. Many standard charters will give the owner the right to deviate in such circumstances (Gencon 1994 clause 3 and NYPE 1946 clause 16). Unless the charter states otherwise, the vessel will not be off hire if the ship has to deviate in order to save the life of an infected crew member. Charterers will also not be able to claim for the additional bunkers used. Members may be able to make a claim against the Club for the net cost to the Member (over and above the expenses that would have been incurred but for the diversion or delay)

Safe Port

Under most standard charter party forms charterers are generally obliged to nominate a safe port. The owners must generally comply with the order to proceed to a port unless there is an unacceptable risk that the port is unsafe. The Master does not have to instantly obey charterers’ orders if in doubt about the prospective safety of the port. He will have reasonable time to make enquiries.

It is arguable whether a port could be said to be unsafe due to the coronavirus outbreak at a port. There do not appear to be any authorities on whether a port impacted by an epidemic can be considered unsafe.

In the case of a voyage charter party, where the port has already been nominated, the general view is that charterers have no general duty or right to re-nominate. If the charter (and the bill of lading) have a liberty clause (e.g. “so near thereto as she may safely get”), then the owner may discharge the cargo at some other port.

If the owners accept charterers’ orders in full knowledge of the unsafety of the port owners may have waived their right to refuse to obey charterers’ orders but this will not necessarily mean that owners have waived their rights to damages.

of fuel, insurance, wages, stores, provisions and port charges. Members may wish to refer to the Club's Claims Guide on "Guidance on the Submission of Diversion Expenses" below.

With regards to owners under a voyage charter, although the deviation would be permissible, owners would not be able to claim additional freight. Owners may want to add a clause providing for additional freight is the vessel is forced to deviate to safe the life of a crew who was infected as a result of visiting a port.

Under a bill of lading contract, a similar deviation would most likely be permissible if the Hague Visby Rules are incorporated (article IV rule 4).

For more information, please refer to our Claims Guide on deviation (Diversion expenses) below.

The vast majority of authorities relate to the safety of the port being determined by either its physical or political characteristics. It is suggested that risks to the crew can render a port unsafe even where there is no risk of damage to the ship.

Charterers have an obligation to nominate a safe port. Under time charter parties, if the port becomes unsafe after the first nomination, charterers then have an obligation to nominate another (safe) port. If the port becomes unsafe during the stay, charterers may order the ship to leave.

For more information, Members may wish to refer to our Defence Guide on safe ports and berths.

Off-Hire

If a large number of crew/officers are ill and prevent the full working of the ship, this may be considered as an off hire event (e.g. "deficiency of men" off-hire event in Clause 15 of the NYPE 46 Form ("deficiency…of officers or crew" in Clause 17 of NYPE 93). If the charter also includes the words "or any other cause" (in conjunction with "deficiency of men") or the words "any other cause whatsoever" it is arguable that quarantine measures taken due to the sickness of crew would be an off hire event (some charters, specifically refer to "quarantine restrictions" - Shelltime 4). However, charterers should bear in mind that if the contagion onboard the vessel is the natural result of compliance with the charterer's orders, this will not give rise to off-hire.

Bill of lading considerations

Whilst owners may be entitled to deviate to save life at sea or refuse to proceed to a port under the terms of the charter party, the carrier should also consider their position under the bill of lading. Carriers will still have an obligation to deliver the cargo under the bill of lading to the designated port with utmost due despatch and to take care of the cargo.

If the bill of lading terms do not permit to deviate (whether to save life at sea or discharge the cargo at a different port), the carrier may be liable towards cargo interests for damages resulting from deviation and or delay.

With regards to discharging the cargo at a different port, the carrier may be entitled to do so if the bill of lading incorporates a liberty clause (e.g. "so near thereto as she may safely get") or the BIMCO clauses for "infectious or contagious diseases" and the cargo can be safely delivered to the party entitled to take delivery at that alternative port.

If as a result of quarantine and/or deviation due to the epidemic, delivery of the cargo is delayed and deteriorates carriers may be able to rely on the exception of "restraint of princes" in Art. IV rule 2(g) of the Hague Visby Rules. Alternatively, the carrier maybe able to rely on the exception in Art. IV rule 2(h) "quarantine restrictions".

Frustration, exception and force majeure clauses (whether in voyage charters or shipyard contracts)

Frustration occurs when without default of either party, the performance of a contract is rendered impossible or changes the party's principal purpose for entering into the contract so as to render it “radically different”. Whilst a frustrating event would inevitably cause financial loss of a party if the charter was continued, financial loss does not in itself cause the charter to be frustrated. Under English law it is difficult it is to prove a contract is frustrated: the delay or disruption has to be so radical that “ *performance is really in effect that of a different contract*“ (*Tatem v Gamboa* (1938)). The fact that it has become more onerous or more expensive for one party than he thought is not sufficient to bring about a frustration. It must be more than merely more onerous or more expensive. It must be positively unjust to hold the parties bound. As matters stand now, it is thought that the virus is some way from having that kind of impact.

The outbreak of the virus could leave to substantial delays due to quarantine for example. A charter may be frustrated if the performance of the charter is sufficiently delayed. The main factor is whether the interruption will be (or likely to be) substantial in relation to the remainder of the charter period. The length and effect of the interruption must be assessed at the time that the cause of the delay operates and without the benefit of hindsight. If at the outset of an event, the delay appears likely to be of short duration, the contract will be frustrated when it subsequently appears that the delay will be inordinately lengthy.

The virus may not necessarily render the charter frustrated depending on the terms of the charter. The coronavirus

With regards to whether this disease would be a force majeure event, this would greatly depend on the wording of the clause. In effect, force majeure is a civil law concept which does not exist at common law. There is no implied term of force majeure under English law. Because force majeure is not a common law concept, parties will try to recreate it contractually and set out in advance a list of events where force majeure can be invoked. Force majeure clauses will be construed against the party claiming the benefit under the contract and will be strictly construed. Any ambiguous clause will offer no protection. Essentially whether a party will be entitled to rely on force majeure will ultimately depend on the wording of the contract in question. The fact that the Chinese government for example is offering force majeure certificates to local companies unable to fulfil their contractual obligations due to the coronavirus outbreak, will not be relevant (unless it is an event listed in the said clause).

Broadly speaking a force majeure clause will be interpreted like any exception clauses in a voyage charter. Unlike the doctrine of frustration where the contract will come automatically to an end, the effects of force majeure will depend on the wording of the clause. The clause may for example suspend the contractual obligations until the event ceases or give the parties an option to cancel the contract. A lot of force majeure clauses are drafted as an exceptions clause (as opposed to a frustration clause where causation does not have to be proven). This will be a matter of construction. The distinction is important as, in order to rely on an exceptions clause, the party relying on the clause has to show that, but for the event, performance would

A party relying on force majeure must show that there were no reasonable measures that it could have taken to avoid or mitigate the circumstances or its consequences and must use reasonable means to overcome the hindrance, whether or not this causes a loss on the party relying on the force majeure clause.

With regards to ship building contracts, delays caused by “plague”, “epidemics” and/or “quarantine” are often expressly stated to be force majeure events which constitute “permissible delays” under the contract, thereby permitting postponement of the contractual delivery date. Parties should however be aware of strict provisions and deadlines for the yard to declare force majeure and for the buyer to challenge the force majeure notice. Failure to carefully consider the terms of the force majeure clause may lead to respective parties’ loss of rights. However, as with permissible delays generally, even where the contractual delivery date has been postponed due to permissible delays, the buyer will usually still be entitled to cancel the newbuild contract if the delay extends beyond the “drop dead” date specified in the newbuild contract.

may frustrate a voyage charter whilst it may not have any effect on a time charter with a wider trading limit. In effect, if the charter permits the ship to trade between other places then the charter will not be frustrated even though the charterer may find it hard to find an employment for the ship.

have occurred, i.e. causation (Classic Maritime Inc v Limbungan [2019]}. If the force majeure clause is drafted as a frustration clause, then the relying party can invoke the clause without needing to show it could have otherwise performed its side of the bargain.

Implied indemnity

Owners may also have an implied indemnity if they can show that the loss arose out of a risk which they had not agreed to bear. The scope of the indemnity is however narrow as owners will have to show that the risk was one which was not reasonably foreseeable. It is arguable whether there is even any implied indemnity when there is a specific protective clause relating to the present outbreak.

BIMCO clause

BIMCO has previously issued specific clauses for infectious or contagious diseases for both voyage and time charter parties. Pursuant to these clauses owners may refuse to trade to an area or zone of danger. If, nevertheless, that option is waived and the vessel proceeds, charterers will be responsible for resulting liabilities and any additional costs of preventative measures taken by owners to protect the vessel and crew. It is important to note that whether an area presents the degree of danger justifying a refusal to proceed is a subjective decision to be taken by owners in the light of available evidence and information.

Under the time charter party clause, and recognising charterers' commercial control over the vessel, charterers' obligations are expressly stated to include post contractual costs such as cleaning, quarantine or fumigation arising from the vessel's previous trading pattern.

In this respect and in order to secure their interests, owners will need to consider the most effective means of obtaining appropriate financial guarantees either at the time of fixing or when agreeing to allow the vessel to proceed to an area considered to be at risk.

The voyage charter version expressly limits application of the clause to situations arising after the date of the charter party. This is because parties should know about events that arise prior to or during negotiations and make appropriate arrangements accordingly. Events arising post-fixture may be more problematic and so the clause sets out a regime to address such changed circumstances. Any delay due to the outbreak will count as laytime and/or demurrage. With regards to additional freight relating to a deviation due to the outbreak, Members may want to have a bespoke clause as to how the additional freight would be calculated.

The provisions in the clauses might result in contractual or geographic deviation. Accordingly, when considering incorporating the clause, owners and charterers should consult the Managers to ensure that inclusion will be compatible with their cover and also to discuss any special considerations or requirements that might be applied.

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