



THE EBOLA VIRUS: CHARTERPARTY AND OTHER CONTRACTUAL CONSIDERATIONS

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The current outbreak of the Ebola virus in West Africa has raised serious health concerns worldwide and it had a significant impact on shipping and international trade. Many countries have implemented various restrictions and protocols for vessels that intend to call at West African ports or which have recently called at West African ports in an effort to stem the outbreak of the Ebola virus. These measures, 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.

In this section, we have outlined for our Membership some of the legal issues that the shipping industry may potentially face as a result of the current Ebola virus outbreak. These issues can potentially 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 Ebola virus 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 Ebola virus related issues, as well as a proposed Ebola virus clause tailored to provide more clarity for owners and charterers alike.

A. EBOLA VIRUS RELATED ISSUES

Safe port Issues: Is an Ebola 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 the Ebola virus. 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 context of the Ebola virus, 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 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 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 lighter the cargo.

Safe port issues are further clouded by the fact that at this time, there is insufficient case law or other authority on the issue of whether a port can be considered unsafe due to an Ebola virus outbreak at a nominated port. Moreover, each port in West Africa has been affected differently by the Ebola virus. 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 the Ebola virus.



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 charterparty 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.

Liability to Cargo Interests: Bill of Lading Considerations

While Owners may be entitled to refuse Charterers' 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 and in such situations, 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 the Ebola virus, 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 bills of lading incorporate the terms of a charterparty 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 bills of lading. Also, depending on the charterparty, 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 discharge 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 Ebola virus related issues.

Indemnity from Charterers

Both English and U.S. law generally vessel Owners to seek indemnity from its 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 Ebola 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 Ebola virus. 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 Ebola 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 Ebola virus symptoms will also prompt delays. In such circumstances, 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 the Ebola virus context. 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 laytime 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 the Ebola virus may some way fall within lay time exceptions.

Each voyage charter party must be reviewed individually to ascertain demurrage issues.

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 the Ebola virus are communicated to its officers and crew to reduce the risk of contracting or spreading the virus. Members are referred to our prior Circulars and Member Alerts attaching guidance from the U.S. Center for Disease Control and Prevention (CDC) and the World Health Organization (WHO) concerning the Ebola virus. Members are also urged to review their existing ISPS procedures, as well as any procedures concerning shore leave and crew changes/substitution when visiting West Africa or any other areas of concern regarding the Ebola virus.

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 traditionally shipped to most West African ports are break bulk, such as bagged rice or bagged sugar. As such, 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.

Additionally, West African ports are also a popular embarkation point for many stowaways, and unfortunately the health crisis in the region may increase the risk of certain individuals to flee the area and unlawfully board foreign vessels calling at such ports. Accordingly, Members should be aware of their ISPS requirements and ensure that all unauthorized personnel are prevented from boarding the vessel throughout its port call.

B. CHARTER PARTY CLAUSES FOR THE EBOLA VIRUS

Because the Ebola virus has been prevalent at certain ports in West Africa, 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. As mentioned previously, the effects of the Ebola virus have been felt not only in West Africa, but also in many countries worldwide which have implemented their own respective protocols to address the outbreak of the Ebola virus. It is therefore recommended -- even if a vessel is not calling at a West African port -- Members should include a provision in its future charter parties to address any likely disputes that may arise due to the Ebola virus and the precautions taken worldwide to stem spread of the disease.

There are a number of wordings contained in existing form charter parties that may be used in future charter parties to deal with Ebola 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 a detailed discussion on these particular standard wordings and the Ebola Virus Disease, in its guidance entitled [Ebola Virus Disease: Shipping contractual guidance from the Baltic and International Marine Council \(BIMCO\)](#).

More specialized clauses regarding the Ebola virus 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 2.11);
- Fumigation / Disinfection of the vessel (P&I Class I, Rule 2.11);
- Preventive measures;
- Life salvage and/or medical treatment (P&I Class I, Rule 2.1.B);
- Diversion to land an infected crew member (P&I Class I, Rule 2.12);
- Repatriation and substitute expenses (P&I Class I, Rule 2.2); and
- Fines or penalties (P&I Class I, Rule 2.9).

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 Ebola virus related delays or detentions take place. Other specialized wordings are recommended to provide for alternative loading or discharging ports in the event that the designated port becomes affected by the Ebola virus or closed altogether.

While neither BIMCO nor INTERTANKO have yet developed an Ebola clause wording, the Managers recommend the use of the following clause as set forth in [Appendix 1](#)¹. A second wording of an Ebola clause seen in a recent fixture can be found in [Appendix 2](#).

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

Conclusion

The Ebola virus situation is still developing and constantly changing. As a result, the international community and maritime authorities worldwide have struggled to keep pace and continue to enact protocols to counter the threat of the virus. In addition to the constantly evolving regulatory landscape, shipping contracts have evolved as well. Three months ago, charter parties were likely silent with respect to Ebola virus considerations while today's agreements most likely include specific clauses to allocate the risks and expenses associated with the virus.

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 Ebola virus front. The Managers are eager to work with the Membership in this regard and we are hopeful that such cooperation will promote awareness of Ebola virus issues, and will contribute towards the larger worldwide effort to combat the spread of this deadly virus.

¹ The Association would like to thank Cristan Evans, Haris Zografakis and Michael Bundock of Messrs. Stephenson Harwood for their assistance with the drafting of the Ebola clause at [Appendix 1](#).

Appendix 1: Ebola Clause (Version 1)

- 1.1 In this clause "Affected Place" means any port, place, area, region or country in which, in the reasonable judgment of the Master and/or the Owners, the Vessel or crew or other persons on board may be at risk by reason of the Ebola virus.
- 1.2 The Vessel shall not be obliged to proceed to or continue to or through or remain at any Affected Place, and Owners shall not be obliged to load cargo or to sign bills of lading for any Affected Place.
- 1.3 If Owners decide in their sole discretion that the Vessel shall not proceed or continue to or through or remain at an Affected Place they shall immediately notify Charterers. Charterers shall be obliged and entitled, notwithstanding any other terms of this Charterparty, to issue alternative voyage orders ("the Alternative Orders") within 48 hours of receipt of such notice.
- 1.4 Charterers shall indemnify Owners for any costs, expenses or liabilities incurred by Owners, including claims from holders of bills of lading, as a consequence of the Vessel waiting for and/or complying with the Alternative Orders. The Vessel shall not be off-hire if any time is lost as a result of waiting for or complying with the Alternative Orders.
- 1.5 If, notwithstanding their liberty to refuse to do so, Owners agree to proceed to or continue to or through or remain at an Affected Place:
 - 1.5.1 Owners shall not be deemed to have waived any of their existing rights under this charter party.
 - 1.5.2 In the event of any time being lost as a result of the Vessel proceeding to or continuing to or through or remaining at an Affected Area, the Vessel shall remain on hire.
 - 1.5.3 Owners shall undertake the following measures: [list additional hygiene and security measures to be taken to prevent infection, stowaways etc.]. Upon taking such measures, Owners shall be deemed to have taken all reasonable steps to avoid infection by any severe fever or epidemic (including the Ebola virus).
- 1.6 The Vessel shall have liberty to comply with all orders, directions, recommendations or advice of competent authorities and/or the Flag State of the Vessel in respect of arrival, routes, ports of call, destinations, discharge of cargo,

delivery or in any other respect whatsoever relating to issues arising as a result of the Vessel being ordered to an Affected Place.

- 1.7 Any additional costs, expenses or liabilities whatsoever arising out of the Vessel visiting or having visited an Affected Place, including but not limited to screening, cleaning, fumigating and/or quarantining the Vessel and its crew, and the obtaining of medical treatment for any infected crew, shall be for Charterers' account.
- 1.8 If in compliance with this Clause anything is done or not done, such shall not be deemed a deviation, nor shall it be or give rise to an off-hire event, but shall be considered as due fulfilment of this Charterparty. In the event of a conflict between the provisions of this Clause and any implied or express provision of this Charterparty, this Clause shall prevail to the extent of such conflict, but no further.
- 1.9 If, after the currency of this Charterparty, the vessel suffers delays and/or costs and/or expenses and/or liabilities due to the vessel having called at an Affected Place during the currency of this Charterparty, Charterers shall indemnify Owners for any delays, and/or additional costs, expenses and liabilities arising.

Appendix 2: Ebola Clause (Version 2)

1. If the Charterers order the vessel to any port or place (“the affected area”) at which the incidence of Ebola disease (“Ebola”) has been reported and if in the reasonable opinion of Master or Owners there would be an actual risk of a crew member or other person on board contracting Ebola if the vessel were to proceed to the affected area, the Owners will be at liberty by prompt written notice to the Charterers to decline such orders and request alternative voyage orders.
2. If in compliance with Charterers’ orders the vessel is en-route to or has arrived at an affected area and since the initial voyage orders the incidence of Ebola at the affected area has materially increased and, in the reasonable opinion of the master of Owner there would be an actual risk of a crew member or other person on board contracting Ebola if the vessel were to proceed to, or as the case may be, remain at the affected area, the Owners by written notice to the Charters may decline to proceed further to the affected area, or if the vessel has arrived at the affected area, but always before tendering Notice of readiness, may direct the vessel to leave the affected area, and request alternative voyage orders. Charters shall compensate Owners for all time lost at the demurrage rate and for actual additional expense incurred by Owners by reason of a change in voyage orders under this paragraph number 2.
3. Any delays and additional expense incurred at other ports or places called at under this charter by reason of the vessel having called at an affected area under his charter (including delays for quarantine and screening for Ebola) shall be compensated by Charterers, delay at the demurrage rate and expenses at cost. In the event that laytime has commenced such time shall count as laytime, and if on demurrage shall be payable at the demurrage rate.



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