

Ebola Virus – P&I contractual issues

As a follow-up to our [Bulletin 985](#) giving practical advice in relation to the recent Ebola outbreak in West Africa, this bulletin is intended to provide guidance in relation to some of the contractual issues that may be anticipated in a P&I context.

The situation is developing rapidly so advice may change over time. Each case will depend on its specific facts and the nature of the applicable charterparty.

Potential contractual issues

1. Can an owner refuse to go to an affected port?

A ship's crew may be reluctant to call at affected ports and a master may wish to avoid any risk to his crew by deviating to an unaffected port or waiting for a port to be free of infection. There will be a question as to whether or not an owner is entitled to do so under the terms of the relevant charterparty (which will require detailed, contract-specific consideration which is beyond the scope of this P&I article; additional comments are made within the [UK Defence Club's article](#) on contractual matters relating to Ebola), for example by invoking a "safe port" warranty. If an owner does deviate, unless the charterers are also the cargo owners, he must also consider his potential exposure to third party cargo interests under the bill of lading.

If a bill of lading names a specific port, an owner will have contractual obligations to a third party receiver to deliver/load a cargo there and failure to do so may leave the owner liable for a potential deviation claim or a claim for transshipment expenses under any bill of lading relating to the voyage, unless it can rely on a clause giving liberty to discharge at a different port, or an exception allowed by the Hague or Hague-Visby Rules.

It may be that the bill of lading contains a "safe port" warranty that corresponds to that contained in the relevant charterparty, either because there is an express term to this effect or by incorporation of the terms of the charterparty. However, it is questionable whether the current Ebola outbreak will render any affected ports unsafe given that current World Health Organisation advice is that infection can be avoided if appropriate precautions are taken. The evidential burden for establishing "unsafety" is quite high and shipowners would probably have to establish that there is a "likely" risk of infection.

The contract may contain a "liberty" clause, allowing deviation in certain circumstances. The contract of carriage should be considered carefully as a whole, including the terms of any relevant charterparty that may be incorporated into the bill of lading.

Members should be aware that P&I cover may be prejudiced if the ship deviates and the position should be confirmed with the owner's P&I Club before proceeding with any

deviation, even if it may appear to be justified and the diversion port must be viewed as being a reasonable alternative.

2. What if the master is instructed to avoid an infected port?

Depending on the terms of the relevant charterparty, a charterer may be able to order the ship to an alternative discharge port, to avoid potential liabilities for which the charterer may be required to indemnify the owner. If the charterer is not the bill of lading holder, this may pose problems for the owner who will have an obligation to deliver the cargo to the destination named in the bill of lading, as discussed above. In such circumstances, the owner would be advised to require an indemnity from the charterer in respect of the consequences of such a deviation in compliance with the charterer's orders. We recommend that in such a case Members discuss the position with the Club.

3. What if access to a port is restricted due to Ebola?

At the time of writing, we are not aware of any port closures due to Ebola, but this may happen if the situation escalates. We are aware that the Nigerian port authorities are denying access to Nigerian ports for ships coming from affected ports. In such cases where the ship is physically unable to go to the agreed port, the same problems arise in respect of the owner's obligations to a third party under a bill of lading to deliver at the agreed place. In the absence of an express provision authorising deviation or delivery to an alternative port, the contract may become frustrated, depending on how long the port is likely to be closed/restricted.

If the Hague or Hague-Visby Rules are incorporated into the bill of lading, the owner may be able to rely on the "strikes, lock-outs or stoppages" exception to avoid liability for deviating to a different port, though this will depend on the terms of the contract and the factual circumstances. It is recommended that Members seek Club advice as to how to proceed in such circumstances.

4. What if a crewmember becomes infected with Ebola?

If a crewmember becomes infected with Ebola the owner should normally ensure that the crewmember is immediately removed from the ship. As well as a deviation (if the illness is discovered at sea), this will involve costs such as repatriation and medical expenses.

Deviation for the purpose of saving life is justifiable and therefore permissible without exposing the owner to a claim under the bill of lading. Where the Hague Visby Rules are incorporated, Owners may be able to rely on the "reasonable deviation" exception as a defence to any potential claim.

The additional time required for such a deviation will be borne by the owner since the freight earned will remain the same. However, additional medical, repatriation and other expenses incurred as a result of the illness may be covered by the owner's P & I insurance, subject to the terms of the ship's entry.

However, it is possible to foresee complications in terms of finding a port that is willing to accept an infected crewmember for medical treatment and the ship should then be subject to quarantine requirements, which are discussed below. In the event of a suspected Ebola outbreak on board a ship, Members are advised to consult their Club for advice.

Problems will also arise if a ship is found to be carrying stowaways from an infected area who may potentially be infected themselves. This is likely to cause difficulties in terms of finding a country that will accept such stowaways and Club assistance should be sought in such cases.

5. What if a ship is quarantined by reason of being at or having visited an Ebola affected port?

A ship that has visited an infected port or carried an infected crewmember may be required to be quarantined for a period or undertake cleaning, either at that port or subsequent ports.

If the Hague Visby Rules apply, the owner may also be able to rely on the “quarantine” or “restraint of princes” exception as a defence to any cargo claim for delay or deterioration of cargo as a result of quarantining, either at an affected port or a subsequent port.

An owner may also rely on these exceptions as a defence to deviating in order to avoid the ship being detained. However, this will probably only apply if the quarantine restriction is actually in existence at the time it is relied on, i.e. there is a real risk. In fact, if quarantine restrictions are known by the owner to be in place, yet the ship nevertheless proceeds there and is detained, the owner may be unable to rely on the “quarantine” or “restraint of princes” exceptions.

Deviation is generally justifiable in order to avoid capture or confiscation so this may also apply to allow a shipowner to deviate if he reasonably believes that there is a risk of quarantine or detention at an intended port.

Additional expenses incurred as a consequence of an outbreak of infectious disease on the ship (including quarantine and disinfection expenses as well as net loss arising from additional fuel, insurance, wages, stores, provisions and port charges) should be covered by the ship’s P&I Club. The Club may also cover fines that may be incurred as a result of a ship visiting an Ebola infected port.

6. Drafting considerations

Where parties are currently negotiating contracts that involve ports that are or may become affected by Ebola, careful consideration should be given to incorporating appropriate terms into contracts of carriage. Please refer to the [UK Defence Club bulletin](#) for more details and suggested clauses.

7. Will Club cover be affected?

Members should bear in mind that while certain losses that may arise as a result of the Ebola outbreak will fall within the scope of normal P&I cover, some, such as loss of profit, hire or loss of a commercial fixture, are excluded risks.

Potential losses which may be covered by P&I insurance, subject to the terms of the ship’s entry include:

- liability for illness or death of crew or passengers;
- costs of repatriating or substituting crew;
- ship deviation costs;
- quarantine and disinfection costs;
- additional running costs while under quarantine;
- fines; or

- delay or contamination related cargo claims;

Members who are involved in trade to affected areas and who have any doubt as to whether a particular loss is covered should take further advice from the Association.

Conclusion

Members considering deviating to avoid an Ebola infected port should be careful to consider their contractual obligations under the relevant bill of lading as well as any applicable charterparties.

In practical terms, the most important step owners can take is to advise the crew of appropriate precautions and ensure that they are strictly implemented. If difficult decisions have to be made, it is important that full and accurate information is obtained and recorded for use in potential future litigation.

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