

UK P&I CLUB



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# LEGAL BRIEFING

*Sharing the Club's legal expertise and experience*

**Safe port  
and Ebola  
virus disease**

UK P&I CLUB  
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## Sharing expertise

This briefing is one of a continuing series which aims to share the legal expertise within the Club with our Members.

A significant proportion of the expertise in the Managers' offices around the world consists of lawyers who can advise Members on general P&I related legal, contractual and documentary issues.

These lawyers participate in a virtual team, writing on topical and relevant legal issues under the leadership of our Legal Director, Chao Wu.

If you have any enquiries regarding the issues covered in this briefing, please contact the team via Chao Wu (chao.wu@thomasmiller.com or +44 20 7204 2157) and we will be pleased to respond to your query. The team also welcomes suggestions from Members for P&I related legal topics and problems which would benefit from explanation by one of these briefings.

### Previous issues

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# Safe port and Ebola virus disease

Since the first confirmed outbreaks in Guinea in March 2014, the Ebola virus has continued to spread, with many recorded deaths and more cases being reported.

The disease has escalated at a tremendous rate, with the World Health Organisation recording more than 15,000 confirmed cases and over 5,500 deaths as at the end of November 2014, seven months later. The main affected regions are still Guinea, Sierra Leone and Liberia, though a small number of cases have been reported in other countries, spread by travel from an affected region.

The outbreak has raised concerns in the shipping industry, particularly in relation to the obligations and liabilities of owners and charterers under their contracts when trading in Ebola-affected areas. Most standard charterparties do not contain clauses specifically drafted to deal with the contractual issues arising in respect of Ebola-affected ports. Although some fever and epidemics clauses do exist, they have fallen out of common usage in recent years and where they are used there has been uncertainty as to whether and how they apply to the present situation. In the absence of applicable clauses, a key question amongst a number of issues that can arise is whether a particular port in an Ebola-affected area can be considered as an unsafe port such as to give a shipowner the ability to refuse his charterer's orders to proceed there.

Time and voyage charterparties usually provide that charterers will only nominate a safe port or berth within the agreed trading area. The majority of legal authorities on "safe port" relate to the ports' physical or political characteristics. There is less judicial guidance in relation to the risk of infection due to the outbreak of a serious disease. This legal briefing therefore aims to provide members with some analysis and guidance on safe port issues in the

context of the outbreak of Ebola virus disease and the resulting impact on their charter party obligations and liabilities. The issue of safe ports will be of particular relevance to members with charterer's P&I cover.

### Definition of "safe port"

The classic definition of a "safe port" was made by Sellers L.J. in *Leeds Shipping v. Société Française Bunge* ("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...". In *The Ocean Victory* [2014] 1 Lloyd's Rep. 59, a major recent decision on port safety, it was confirmed that this

remains the guiding definition of a safe port. The safety of an Ebola-affected port must, therefore, be considered in accordance with this definition.

### Black-listing at subsequent ports

Case law has confirmed that the danger to which the Eastern City definition refers could include physical and political unsafety. It seems arguable that a disease-ridden port might pose a physical threat to a ship. Leading practitioners suggest that "if a port or place is the subject of a fever epidemic which would result, were the vessel to call there, in her being blacklisted, detained or impounded at a subsequent port, then that port would be unsafe for it would render the vessel unseaworthy and would thus pose a physical threat" (Julian Cooke, Timothy Young QC and others, *Voyage Charters*, para 5.66).



Monrovia, Liberia: Shipowners are thinking twice before trading to affected areas



In the case of *Campia and Others v British India Steam Navigation Company Limited* [1915] 2 Lloyd's Rep 774, a voyage to a plague-affected port was held to have rendered a ship "unseaworthy" in the same way as damage caused by a physical danger. In this case, because the ship had come from a plague-contaminated port, fumigation was required at her next port. The Court found that this caused her to be not reasonably fit for the particular carriage and, therefore, unseaworthy. In this sense, a disease-ridden port might be regarded as possibly causing constructive physical

damage to ships calling there by rendering them unseaworthy. The damage is not in the physical transmission of disease but in the inevitable limitations to the ship's future physical performance due to her exposure to the risk of transmission.

In response to the current Ebola outbreak, a large number of countries have imposed special measures or restrictions on ships coming from Ebola-affected areas. Such measures include banning ships from entering the port (such as Cameroon and Zhanjiang port in China), banning pilots from boarding

the ship (as in Argentina) and conducting compulsory quarantine and inspections (for example, Brazil, France, China). So in the context of the current outbreak, there seems to be an argument that an Ebola-affected port may pose a physical threat to the ship by making her subject to inevitable consequences at following ports. However, such an argument has not yet been considered by the Courts and it would be risky for a shipowner to expose itself to a potential claim for wrongfully refusing to obey its charterer's orders based on an untested argument.

### Threat to the health of the crew

Another obvious basis for arguing that an Ebola-affected port is unsafe is the risk to the health of the crew. The disease has now spread from inland villages to the major port cities in the affected countries, though as yet there are few, if any, known cases of crew actually becoming infected through visiting a port in an affected area.

The test for proving that a port is rendered unsafe by a particular danger is a high one and a claimant will need to show that the danger is a characteristic of the port. The mere fact that there is a foreseeable risk at the port does not necessarily mean that the port is unsafe. In *The Saga Cob* [1992] 2 Lloyd's Rep. 545, although it was ruled that a guerilla attack at the port of Massawa was foreseeable, on the basis that there had been no attack since the last incident three months ago, which itself had been isolated and abnormal, the Court of Appeal held that the risk of such an attack was not a normal characteristic of the port. It was held that a port would be regarded as safe unless the risk was sufficient for a reasonable shipowner or master to decline to send or sail his ship there.

It follows that an Ebola-affected area is unlikely to be considered legally unsafe by reason of a threat to the health of the crew unless the crew is exposed to a real danger of contracting the infectious disease. The World Health Organisation (WHO) has advised that infection by Ebola can be avoided if appropriate precautions are taken, for example, by

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wearing appropriate protective equipment and limiting occasions for local people to board ships and come into contact with crewmembers. The International Maritime Organisation (IMO) has also issued guidance and information on protective measures for ships visiting ports in countries affected by the Ebola virus disease. As mentioned, there have, as yet, been no reported occurrences of transmission of the disease onboard a visiting ship (though there have been suspected cases).

Therefore, in this light and unless the facts change (for example, if there is an actual case of transmission to a ship's crew), charterers may legitimately contend that the nominated port is a safe port even though it is in an Ebola-affected area so long as sufficient precautionary measures are in place in that port.

It follows that where the port in an affected area is found not to have a proper disease prevention systems or safety management systems (for example, where a port is found in violation of International Health Regulation 2005), a shipowner will have a stronger argument that the port is unsafe. A port that has potentially dangerous features can allay any allegations of unsafety by having in place adequate systems for protecting and alerting shipowners. This is demonstrated by the decision in *"The Marinicki"* [2003] 2 Lloyd's Rep. 655, in which the ship was damaged by an obstruction in a dredged approach channel and the port was held to be unsafe because it lacked a proper system for monitoring the safety of the channel and reporting hazards accordingly. A prudent charterer therefore needs to pay close attention to the health management systems in place at any nominated port in an Ebola-affected area and ensure compliance with the recommended safety measures.

That said, it would appear that all of the three major Ebola-affected countries have imposed special measures on ships entering their ports. In Guinea, among other restrictions, health checks are to be carried out on all persons and there

## What is Ebola?

Despite the increasing prevalence of Ebola in the three West African high risk countries (Guinea, Sierra Leone and Liberia), Ebola remains a rare disease with a low risk of transmission from one person to another, if the necessary precautions are taken.

Ebola Virus Disease (EVD) is named after the Ebola River in the Democratic Republic of Congo where the disease was first identified in 1976. If contracted, Ebola is a severe and often fatal illness, with a death rate in humans of up to 90%. Presently, there is no vaccine for Ebola and no specific treatment for the disease exists, only treatment for the associated symptoms. It is believed that the disease originates in fruit bats and can infect most primates. As a result, outbreaks often start in remote jungle areas of West Africa and in their local communities, rather than urban centres.

### How is it transmitted?

Ebola is introduced into the human population through close contact with the blood, secretions, organs or other bodily fluids of any infected person or animal. Anyone with broken or damaged skin will be more at risk and they should ensure that these areas of their body are well protected when entering high risk areas. Whilst precautions should be taken at all times when the risk of Ebola is present, the disease is not an airborne virus passed from person to person simply by proximity.

### What are the symptoms?

Symptoms of Ebola include: sudden onset of fever, intense weakness, muscle pain, headache and sore throat. This is followed by vomiting, diarrhoea, rash, impaired kidney and liver function, and in some cases, both internal and external bleeding.

### Incubation period

The incubation period, or the interval from infection to the onset of symptoms, is from 2 to 21 days. Patients become contagious once they begin to show symptoms, and are not contagious during the incubation period.





is to be no disembarkation of non-Guinea stowaways. In Liberia, it is mandatory for any persons entering port areas to wear protective masks and gloves and to carry hand sanitizer. In Sierra Leone, although Freetown port is functioning normally and the local authorities have not introduced any special clearances for ships entering the port, a travel ban outside the hours of 9am to 5pm is currently in place and around 1.5 million people have been quarantined in 14 districts in the country. Relevant information and updates can be found on the UK Club's Ebola webpage.

## Delays at Ebola-affected ports

Delays are likely to occur at Ebola-affected ports, as well as at subsequent ports as discussed above. However, delays

caused by dangers or obstructions in a port will only render the port unsafe where the period of delay would be regarded as frustrating the charterparty *Unitramp v. Garnac Grain "The Hermine"* [1979] 1 Lloyd's Rep. 212. Frustration is difficult to argue successfully under English law. The "frustrating" event has to fundamentally change the performance obligations under the charterparty and render further performance impossible, illegal or radically different from that which was originally contemplated by the parties. This will depend partly on the length of the delay compared with the length of the charter period. We have not yet seen delays due to Ebola that are likely to be sufficient to frustrate a charter and, therefore, render a port unsafe for that reason alone. However, the provisions of the charterparty in relation to off-hire and quarantine

measures may provide an answer to Ebola-related delays. For more details on this, please refer to the UK Defence "Soundings" on contractual matters relating to Ebola.

## Charterers' obligations

Charterers have a primary obligation to nominate a port that is, at the time of nomination, prospectively safe for the ship to reach, use and leave at the relevant time. This primary obligation will not be breached if the port becomes affected by Ebola after the time of the order or the prevention measures at the affected port cannot be maintained due to an unexpected and abnormal event occurring after the order has been given.

The charterer has a secondary obligation to cancel the original order and to issue

new orders to another port which is prospectively safe at that time.

It should be noted that the charterer's primary obligation is an "absolute" obligation whereas the charterer's secondary obligation is a "due diligence" obligation. The primary obligation is "absolute" in the sense that it requires the charterer to nominate a port which is in fact prospectively safe and not merely a port which the charterer believes to be prospectively safe. This position may be altered by charterparty provisions such as clause 4(c) of Shelltime 4, which provides that "Charterers shall use due diligence to ensure that the ship is only employed between and at safe places...". By virtue of such a clause, the charterer's primary obligation is relaxed to the standard of due diligence. The charterer will be in breach of the "due diligence" obligation only if it fails to take reasonable care to establish that the port is safe. When considering nominating a port in an Ebola-affected area, charterers are advised to make diligent enquiries in relation to the port, and only persist in the order if it can be reasonably concluded that the apparent degree of danger of the virus does not amount to unsafety, considering the factors discussed above in terms of precautions in place and history of transmission at the port.

Under a voyage charter, the situation will be different in that a voyage charterer may not have the same scope as a time charterer in relation to the employment of the ship. In the case where a single loading or discharging port named in the voyage charterparty becomes affected by Ebola, a voyage charterer may not be able to order that ship to proceed to an alternative port unless the charterparty specifically provides liberty to do so. As a result, the charterparty may be frustrated because the owner is not obliged to enter the port, whilst the charterer does not have a right to re-nominate a safe port. A commercial resolution under such circumstances would be for the parties to agree an alternative loading or discharging port by way of variation of the charterparty.

## Consequence of breach

If a charterer orders the ship to a prospectively unsafe port the charterer will be in breach of either express (e.g. clause 8

## Keeping safe

To minimise the risk of contracting Ebola when in a high risk area, the following steps are recommended to seafarers:

1. Good personal hygiene at all times with regular hand washing.
2. Avoid shaking hands with local authorities, agents and stevedores, etc. in the affected areas.
3. A bucket or wash station containing chlorine, water and powdered soap should be placed at the gangway for all persons boarding the ship to wash and disinfect their hands. Similar wash stations should be placed in other prominent locations on the ship.
4. No direct bodily contact should be made with local individuals, whether they are suspected to be infected or not.
5. All crew should be monitored for whether they are displaying any symptoms of Ebola, and if any are observed, this should be immediately reported to the Master, local authorities and the UK P&I Club.
6. Where possible, contact should be avoided with any severely ill people and seafarers should not handle items that may have come in contact with an infected person's blood or body fluids.
7. Avoid funeral or burial rituals that require handling the body of someone who has died from Ebola.
8. Avoid contact with animals or with raw meat.
9. Avoid hospitals where Ebola patients are being treated. Embassies or the local Club Correspondent may be able to provide advice on facilities that are suitable for the seafarer's needs.
10. Medical attention should be sought if any crew members develop fever, headache, achiness, sore throat, diarrhoea, vomiting, stomach pain, rash, or red eyes.



# CONCLUSION

of NYPE 93 and clause 4 of the Shelltime 4) or implied terms of the charterparty as to port safety. The shipowner may be entitled to damages if the master reasonably obeys the charterer's instruction and loss or damage is incurred as a result of the unsafety of the port.

However, if a shipowner refuses to follow its charterer's orders without sufficient grounds, the charterer may be entitled to rescind the contract on the grounds of repudiation and/or claim damages. Under a time charter, a charterer may also be entitled to place a ship off hire, subject to the wording of the off hire clause (see the UK Defence Club article for more detail on this point).

## Conclusion

Whether or not an Ebola-affected port is safe will depend on issues of both fact and law. Some general conclusions that may be drawn are as follows:

1. A port located in an area where there is an outbreak of Ebola is not necessarily a legally unsafe port.
2. Factors such as the availability of protective equipment, the implementation of preventative measures, the severity and spread of the disease at the particular port, and any previous occurrences of transmission of the disease to visiting crew will need to be considered when assessing the safety of any particular Ebola-affected port.
3. The fact that visiting an Ebola-affected port will inevitably expose a ship to quarantine or other such measures at a subsequent port may give a basis to argue that the Ebola-affected port is unsafe, but this is an untested argument.

4. In the absence of clear and direct legal authority, the answer to the question whether a disease-ridden port is a safe port remains unclear. In such circumstances, a shipowner that wrongfully resists a charterer's order on the basis of an unsafe port argument risks exposing itself to potentially costly claims and so any such decision needs to be considered very carefully.

5. However, if the charterer's orders are followed and severe consequences are suffered as a result, then a shipowner may be in a stronger position to claim an indemnity from the charterer for having followed their orders, so long as the shipowner exercised its own safety precautions and did nothing to break the chain of causation to the loss.

When negotiating new fixtures likely to involve ports in West Africa, Members should be alive to the issues. Shipowners may, where possible,

consider excluding Ebola-affected ports from the trading area or, alternatively, seek to incorporate bespoke terms dealing with the potential liabilities that are likely to arise if the ship visits a port that is affected by Ebola. Charterers may seek to persuade shipowners to accept nominations to affected areas by agreeing to accept certain liabilities. A suggested clause has been issued by the UK Defence Club and can be found at [www.ukdefence.com](http://www.ukdefence.com). The UK P&I Club is also working together with BIMCO produce a new BIMCO "fever and epidemics" clause, which will be published in due course. In practical terms, members should ensure that the recommended precautions are followed when visiting such areas and maintain an awareness of the likely consequences for the ship at subsequent ports. Further information and recommendations can be found on the UK Club's website. ■



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