SARS - The Contractual Implications

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The SARS alert, particularly in Asia and Canada, has led to extraordinary steps being taken by Governments to try to contain the spread of the virus. A number of countries are quarantining individuals who and/or buildings which could have come into contact with the virus.

Given the worldwide concern over its spread, it was only a matter of time before SARS posed problems to the shipping industry. Marine/Navigational Notices have been issued by several Port Authorities detailing SARS-specific reporting requirements and quarantine measures. (Click here for further details.) There is a potential threat that ports could be closed and there is a real threat that vessels which have called at ports in infected areas ("infected ports") particularly in Asia and Canada, could face quarantine periods at subsequent ports of call. This article considers the consequences of a vessel being quarantined following a call at an infected port and the effect of orders to call at an infected port. It is based on the NYPE 46 Time Charter, although similar principles will apply to fixtures on other forms.

1. OFF-HIRE

(A) If the vessel is quarantined as a result of calling at an "infected port", will it constitute an off-hire event?

Clause 15 of NYPE as unamended reads:

"In the event of loss of time from deficiency of men … or by any other cause preventing the full working of a vessel, the payment of hire shall cease for the time thereby lost …"

It is very likely that any period of detention because of quarantine will fall within the off-hire period. In the "LACONIAN CONFIDENCE", it was held that the reasonable intervention of authorities acting on their suspicion of a specified event could be sufficient to put the vessel off-hire. Given the Port Authorities in this situation would be intervening on the suspicion that the SARS virus was on board, it is likely the vessel could be off-hire.

It has been argued that the quarantine of the vessel, as a result of the possibility of a crew member having the SARS is a "deficiency of the crew". However in Royal/Greek Government v. Minister of Transport, (where there is a full crew but some are ill) this was held not to be a deficiency of the crew, since where the majority of the crew are healthy, the full working of the vessel is not prevented.

(B) "Whateveror"

It is common practice for Clause 15 to be amended by the additional word "whateveror". In the "APOLLO", detention of the vessel as a result of a suspicion that the crew was infected with typhus was held to be an off-hire event and it follows that any time lost as a result of the vessel being detained under suspicion of SARS will be off-hire.

(C) Compliance with Charterers' Orders

If it should be remembered, however, that where the quarantine is an inevitable result of the Charterers' orders then, following the "RUN", the quarantine will not be a fortuitous event but a "natural consequence of the way in which the Charterers chose to employ the vessel”. Even if the off-hire clause has been amended to include "whateveror", hire will remain payable to the Owners during the period of quarantine.

The off-hire clause is, therefore, likely to be only if the call leading to the quarantine arose on a previous fixture, not the fixture in question. If time is so deducted from hire there will be an argument available to Owners that the loss of time was a natural consequence of orders given by Charterers under the previous fixture and should be recovered as damages from them.

2. SAFE PORT

(A) Can Owners refuse to go to a port where there have been cases of SARS on the grounds that it is unsafe?

Although there are no cases on this, there is no reason why, in extremis, contagion cannot make any port unsafe. However, it is unlikely that Owners would be able to refuse to go to a port merely on the grounds that there have been cases of SARS in the territory. The Court would look at the factual safety of the port and is likely to consider statistical and medical evidence. Even with recent surveys indicating that the virus has a higher fatality rate than previously seemed (balanced with a suspected reduced virulence), there is a very low percentage of infection by population and it is unlikely that Hong Kong or any other port could be considered as an unsafe port. Indeed, it is quite likely that, for example, malaria is a greater risk in many ports than is SARS at present.

(B) Can Owners refuse to go to any port because of the risk of quarantine elsewhere?

It is again possible to argue this by analogy on extreme facts. This would first depend on the duration of any quarantine period. The quarantine would need to cause an "inordinate delay", i.e. a sufficiently long delay to be a frustrating event (see the "SUSSEX OAK"). Exactly how long the quarantine would need to be could only be assessed in relation to the particular Charterparty. The incubation period for the virus is 2-7 days (up to 10 in rare cases). It follows the quarantine period is unlikely to exceed 3-4 weeks and it is, therefore, difficult to see that this would be a sufficiently long period to frustrate any time charter.

Secondly, the risk of quarantine would have to be the likely result of a visit to any of the ports (i.e. very widespread).

(C) Having called at a port, could the Owners refuse to go to another port because of the quarantine?

An order to a port, which would foreseeably result in a delay to the vessel sufficient enough to frustrate the contract, is surely an order which cannot be given, whatever the reason for delay. This would not be a safe port issue. However, as stated above, given the incubation and likely quarantine periods, this is unlikely.

(D) Can the Owners claim damages from the Charterers in respect of crew personal injuries and/or loss of time?

If the situation in any port became sufficiently serious that it was, in fact, factually unsafe (which we consider to be unlikely at the present time) it is theoretically possible that any crew personal injury claims and medical expenses could be claimed from Charterers, together with any time lost if appropriate.

It is to be stressed that there is no case law in relation to the safe port issues raised above. The limited incubation and quarantine periods are likely to dispose of any potential safe port question at the outset but a definitive view could only be given on individual Charterparties (since the question
of frustration is of vital importance and that is not something that can be assessed on a general level. It would require a great deal of consideration and is only worthwhile if the factual circumstances of a particular case justify it.

This article is not intended to be a definitive statement of the law and with the virus showing no sign of abating at present, the legal situation may change in the coming weeks and months. If members are in any doubt whatsoever, they are encouraged to speak to their usual contact at the Club.

With thanks to Graham Harris and Anne Liversedge of Thomas Cooper & Stibbard for preparing this article.

1. [1997] 1 Lloyd's Rep. 139
2. [1948] 82 Lloyd's Rep. 196