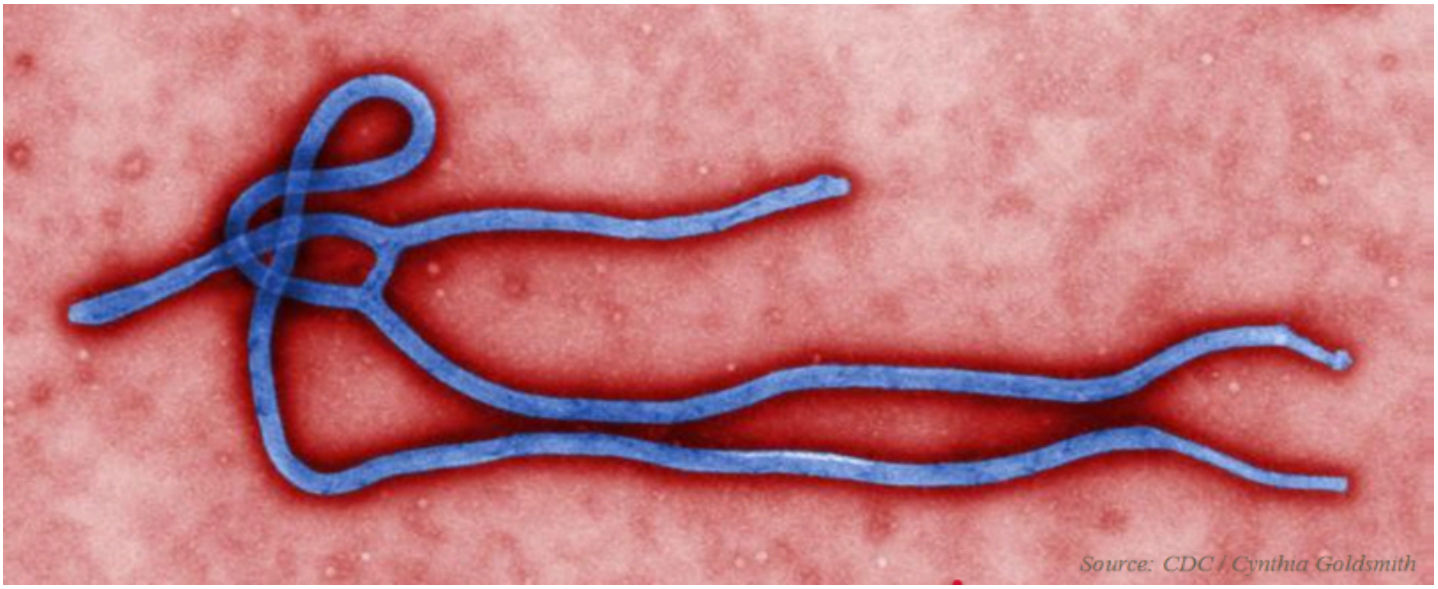

Charterparty clauses dealing with risks from Ebola and other diseases at ports of call

With the recent outbreak of Ebola in West Africa, there has been considerable interest by both owners and charterers to find clauses that specifically deal with the risks and uncertainties that arise when calling at ports with a risk of exposure to Ebola.

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There is no need for a charterparty to contain an Ebola clause, but a clearly laid out contractual scheme does give certainty to both parties.

The issue is too recent for there to be a standard clause in common use yet. There is no BIMCO Ebola clause, although some of their forms contain wording that could be used as a starting point for parties negotiating an Ebola clause.1

As there are many different Ebola clauses in circulation, the danger is that a poorly drafted clause does not reflect what the parties intended (it may well be a sign that the parties were unsure what they intended). This can lead to uncertainty and increase the risk of disputes rather than reducing it.

This Insight article identifies some of the issues that need to be considered by both owners and charterers when these clauses are being negotiated.

Which disease(s) will the clause apply to?The parties first need to decide if the clause will only apply to Ebola (or other particular named diseases), or whether it will cover a range of diseases not specifically identified in advance.

The advantage of a specific list is that there can be no dispute as to the clause's potential application. The downside is that there is also a chance that new diseases are identified that are as serious, or even more so, than those the parties had in mind when drafting the clause (such as SARS or H1N1/swine flu).

If the clause is to cover a range of unnamed diseases, then it needs a clear mechanism to identify which are relevant for the clause. A common approach that we have seen is for the clause to refer to diseases that have a particular degree of seriousness as determined by a specific health body – say the World Health Organisation (WHO), or the Centers for Disease Control and Prevention. The difficulty is that these organisations issue many updates and warnings about different diseases, but they will rarely use the particular form of words contained in the clause, which then makes it difficult to know if and when the clause applies. It is also very unlikely that the WHO would ever answer a direct question whether a particular disease was "extremely harmful to human health" or a "highly infectious disease".

If there is to be a reference to a public health body it would be best to set a specific criteria which can be measured objectively – for example if the disease is the subject of a WHO declared Public Health Emergency of International Concern (PHEIC). The parties must understand the criteria being used to make sure it reflects the degree of seriousness that they intend – the recent Ebola outbreak is only the third PHEIC declared by the WHO since 2005. If the parties want the clause to apply to a wider class of diseases then different criteria would be needed.

A middle route may be to list all the diseases that the parties consider the clause should apply to, and then add a catch-all "*or any other disease or illness with a similar degree of seriousness to humans*".

In general, an owner would want to expand the list of diseases as wide as possible to maximise protection, and a charterer would want to restrict it, to minimise the potential impact on trading.

How to identify if the clause applies at a particular port?The next issue is: how much risk of exposure to a disease does there need to be for the clause to apply? For example, does the disease need to be prevalent within the port, or are confirmed cases in the region or country enough? What if the port of call is in a country that has had no reported cases of the disease, but it is located near to the border of another country that has had a significant outbreak? How long ago does the last confirmed case need to have been?

In some clauses that we have seen this test is also deferred to an authority – for example the clause applies to a place where the WHO has declared an outbreak. Yet again, the problem here

is that the WHO may never issue a clear declaration one way or the other.

A more popular approach is to say that the clause applies where there is a particular level of risk of exposure to the relevant disease. The parties need to then decide what level of risk is needed. Several BIMCO clauses work in this way – for example, the BIMCO Conwartime definition of War Risks applies to certain acts "*which, in the reasonable judgement of the Master and/or the Owners, may be dangerous or may become dangerous to the Vessel, cargo, crew or other persons on board*". This requires a judgment to be made on the level of risk.

However, the parties need to consider carefully what degree of risk will trigger the clause, and then make sure that the words used reflect their intention. The options range from low risk (perhaps "*a possibility of the disease being present at the port*") to high ("*the port is actually seriously affected*").

If a dispute arises, the clause will be analysed closely to identify what the parties intended. For example, if the parties say the risk of exposure must be "likely" then this could include an event that is more likely than not to happen, but also an event which has a less than even chance of happening.2 Bear in mind that a disease with a 50 per cent chance of exposure would be a very extreme case indeed, and that on current information a vessel calling at a West African port would have a much less than 50 per cent risk of exposure to Ebola.

We have also seen a few clauses that are triggered where the local authorities implement Ebola related "measures". The problem is that it may well be unclear if a particular "measure" falls within the clause - say if it has been adopted in response to Ebola outbreak in another country, and in some cases there may be no public explanation at all for a particular measure, or the stated explanation may be suspected to be only part of the story.

In general, owners will want the clause to be drafted where it will apply even if the risk is at the lower end of the scale, and charterers will want it to apply only when the risk is high.

The consequences of calling at an affected portThe final important area of consideration is what happens if the Ebola clause applies. The primary aim will be to allow owners to refuse to call at the port and to request alternative instructions, in a similar way to a War or Piracy Clause.

It is important to remember the risks may only be identified when cargo is already loaded and bills of lading issued naming the port with the outbreak as the place of discharge. Owners would therefore want to ensure that any rights they have under the charterparty to refuse to call at the "risky" port are also included in the bill of lading, and that anything done under the Ebola clause shall not amount to a deviation from the contract of carriage. This would normally be by an express agreement on the part of charterers to do so, or an indemnity to owners against the consequences of enforcement of the Ebola clause. This point is particularly important because unless agreed otherwise, sailing to a new discharge port could amount to a deviation from the contractual voyage, which may in turn prejudice P&I cover.3

In either case, the clause is likely to identify who is to be responsible for the extra time and costs incurred as a result – whether in terms of hire, demurrage or an adjustment to freight.

Some clauses for voyage charters state that laytime or demurrage shall apply at a reduced rate during any delays caused by Ebola. In such clauses it is probably the charterer that has the interest in expanding the range of triggers for the clause, although this will depend on what else the clause covers.

Other points that could be included in an Ebola clauseA range of other points are included in Ebola clauses that we have seen. Some contain warranties (i.e. promises) by the owner that the vessel has not called at an affected port within a particular period prior to delivery. As long as this is accurate and it only refers to the conditions at the ports at the time of the call then it should be acceptable.

Some clauses have placed an express obligation on owners to satisfy themselves that shore workers attending on board are not affected by the disease. With some diseases that may be relatively easy to identify, but it will not always be easy to do this, so if the potentially applicable list of diseases is long, then an owner needs to be careful about agreeing this.

The parties would probably want the clause to apply not only to ports of call, but also other water ways or places through which the vessel may pass. If so, this should be expressly stated.

The consequences of calling at an Ebola risk port are unpredictable - different authorities around the world may take very different approaches to vessels that have called at such ports, perhaps requiring extended quarantine periods, or withholding services, or even blacklisting them. These problems may continue even after the charterparty has come to an end and owners should note that there may be no P&I cover for costs and expenses incurred where quarantine is expected.4 An owner would therefore ideally want the clause to expressly cover a situation where the vessel is allowed to call at an affected port and consequences later arise at an unaffected port.

Finally, and importantly, the clause will need to be adapted to whether the charterparty is a time charter or a voyage charter – they are unlikely to be interchangeable. For example, with a time charter it may be agreed the vessel may remain on hire if the vessel discharges at a different port, whereas under a voyage charter this may take effect as an adjustment to the freight payable.

Negotiations between owners and charterersGard recognises that in general an owner would want to expand an Ebola clause to maximise its application, and a charterer would correspondingly want to keep its terms narrow to minimise the effect on trading.

The final balance will of course depend on the parties' negotiating positions, but the aim should be to ensure clarity and certainty, not only to reduce issues between owners and charterers, but also potentially with cargo interests if the clause is incorporated into bills of lading. To achieve clarity, the parties really need to first identify what they want the clause to do, and that requires an open and measured discussion.

In summary:

- Make sure you know what diseases the clause is to apply to. If it is an open-ended list, can the relevant disease be identified objectively?
- Identify what degree of risk of exposure there needs to be for the clause to apply, and make sure the wording reflects this.
- Make sure that you understand each part of the clause – it may contain unexpected items that substantially affect other charterparty clauses.

Finally, it should be noted that this is not a complete list of the issues, and we recommend that queries are directed to your normal point of contact at Gard.

Please see our spotlight for further information on the Ebola outbreak.

Questions or comments concerning this Gard Insight article can be e-mailed to the Gard Editorial Team.

Footnotes1 See, for example, Clause 14(A) of BALTIME 1939 (Revised 2001), Clause 25 of SUPPLYTIME 2005, and Clause 46 of BIMCHEMVOY 2008.2 The Heron II [1969] 1 AC 350.3 See Gard Rule 34.1.xi.4 Under Rule 48, Gard will cover certain costs and expenses incurred in connection with quarantine orders or disinfection, but not "where the Ship has been ordered to a port where the Member knew or should have anticipated that she would be quarantined."