

Topical legal issues in chartering

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Bird Flu, SARS and their effect on Charterparties

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Introduction

The Great Plague struck London in 1665 and caused the death of approximately 15% of the population of England. The Plague is believed to have started in the East and spread throughout Europe, including through rats bound for England on ships trading with the East. Shipping as an industry has changed immeasurably since the days of 17th century England. However, widespread illness and the surrounding issues such as the quarantine measures imposed at ports still have the potential to cause serious problems for all involved in the shipping industry.

Recently SARS (Severe Acute Respiratory Syndrome) and the deadly H5N1 strain of Avian or Bird Flu have caused concern for the shipping industry. SARS is a severe respiratory illness, which was initially reported in East and South East Asia. While Asia was the worst effected area, countries including Britain, Canada and America have all reported cases. The most recent outbreak peaked in 2003 and as at 10th May 2003 the World Health Organisation (WHO) reported that a total of 7296 probable cases of SARS had been diagnosed in 30 countries and there had been 526 deaths since 1st November 2002.

Bird Flu and specifically the deadly H5N1 strain of the flu virus originated in South East Asia several years ago. The current outbreak began in poultry in South Korea in mid December 2003 and has now been reported in birds in over 50 countries from as far a field as Japan,

Egypt and Nigeria to many European countries. Countries even as close to home as Scotland have been affected. Earlier this year a dead whooping swan was found at Cellardyke harbour and confirmed to have contracted the H5N1 strain. Luckily, no further cases have been found in the area and the Wild Bird Protection Zone in Scotland was lifted on 22nd April 2006.

The latest information on Bird Flu reported by the Department of Health¹ is that Spain reported a case in July 2006 and a 10 km protection zone was established. As of 24th August 2006, there have been 241 reported cases of the H5N1 infection in people in more than 10 countries including Thailand, Vietnam, Cambodia, Indonesia, China, Turkey, Iraq, Azerbaijan, Pakistan, Russia, Egypt and most recently Djibouti, 40 of these cases have been in the last 3 months. At that time 140 of these infections have been fatal. While there is no firm evidence that H5N1 has acquired the ability to pass easily from person to person, concern remains that the virus might develop this ability, or that it might mix with human flu viruses to create a new virus. It is this ability of Bird Flu to change and to mix that has given rise to the fear of a new human flu pandemic.

So what has been the impact of the SARS and Bird Flu outbreaks so far on the Shipping Industry and what effect would any future potential pandemic have on the Industry? In normal circumstances ports all over

¹ Department of Health website - www.dh.gov.uk - 6th September 2006

the world have existing pre-arrival procedures, which require infectious diseases to be reported. After the first SARS outbreak in 2003 the port authorities in Hong Kong and Singapore, in particular, issued marine and navigational notices dealing with SARS-specific reporting requirements and quarantine measures. These included isolation of suspected patients and requiring the ship's Master to have in place contingency plans and necessary kits to deal with any outbreaks. The reaction and knowledge of ship Owners and crew could prove crucial should the illness develop. At the height of the SARS outbreak, the Shipping Corporation of India (SCI) had started signing off crew members who wished to be relieved upon arrival at an Indian port if their ship's next sailing was to a SARS-infected country.²

The widespread nature of the current Bird Flu "epidemic" should not be underestimated. Those specifically involved in the poultry business and the transport of birds will obviously be most heavily affected. For example, when the French government announced the outbreak of Bird Flu in commercial poultry twenty countries, including Japan, Hong Kong and Canada, suspended imports of French poultry – ABC News 27.2.06 and this was not the only example of import bans. On 21st October 2005, the European Commission extended a ban on the import of pet birds and unprocessed feathers to most of Russia after another confirmed case of Bird Flu. Russia has been particularly badly hit due to the large number of migratory birds that stop there. On 2nd March

² Lloyds Fairplay (website) 30th April 2003

2006, the LA Times reported that during February 2006 alone H5N1 had killed nearly half a million domestic fowl in Southern Russia, despite efforts to control the outbreak by culling poultry. Wild bird hunting has also been banned to prevent hunters from killing migratory birds. In addition, China has already begun enforcing controls on travellers following the culling of 100,000 birds after an outbreak of H5N1 in Mongolia. Travellers face infrared body temperature checks and shoe sterilisation. It is highly probable that other countries will shortly follow suit if the outbreak continues.

Greece has already demonstrated how it will deal with the virus at a port level: the impact of the case of the “MARY ANN”³ has so far been played down, but shows that crews aboard vessels may come into contact with infected migratory birds and are therefore at risk of contracting H5N1. The “MARY ANN” was en route to Piraeus when she was stopped near to the port so the crew could undergo medical checks. The alarm was raised after finding suspect dead and living migratory birds on board. Medics have advised that those working ‘in close proximity’⁴ to birds are at risk of catching the virus. Clearly this includes crew members. Advice given to those at risk is to wash their hands thoroughly after contact with infected birds.

In light of this, I will briefly examine the effect of quarantine measures taken in response to an outbreak of a highly infectious disease such as

³ Lloyds List Monday 17th October 2005

⁴ BBC News Health – no date given

SARS and Bird Flu on, firstly, the obligations of Owners and Charterers under time and voyage charterparties; and, secondly, the liability of Owners to third party cargo claimants.

Part A - The effect of the law relating to the quarantine of vessels on the obligations of Owners and Charterers

(a) The position under time charters

(i) *New York Produce Exchange Form 1946 / Shelltime 4*

In examining the relevant provisions of these charterparties (which are very similar), the following factual scenario will be envisaged:

EXAMPLE

A vessel arrives in New Orleans, USA from Turkey to discharge a cargo with two suspected cases of Bird Flu among its crew. The performance of the vessel is in no way hindered by this illness, in that the vessel can still efficiently discharge its cargo. On arrival in New Orleans, the port authorities quarantine the vessel. The Charterers seek to argue that hire is not payable in respect of the quarantine period.

Consider: -

- **the Charterer's primary obligation is to pay hire continuously throughout the charter period.**

- Clause 4 of the NYPE 1946 Form states - *“4. That the Charterers shall pay for the use and hire of the said vessel at the rate of..... to the Owners (unless lost)”*.
- Clause 8 of the Shelltime 4 Form states - *“8.Charterers shall pay for the use and hire of the vessel at the rate of From the time and date of her delivery.....until the time and date of her redeliveryto Owners.”*
- **the off-hire clauses**
- Clause 15 of NYPE 1946 Form states - *“15. That in the event of the loss of time from deficiency of men or stores.....or by any other causes preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost;”*
- Clause 21 of the Shelltime 4 Form states - *“21.(a) On each and every occasion that there is loss of time (whether by way of interruption in the vessel’s service or from reduction in the vessel’s performance or in any other matter)(i) due to deficiency of personnel.....or any other similar causes preventing the efficient working of the vessel;.....the vessel shall be off hire from the commencement of such loss of time until she is again ready and in an efficient state to resume her service from a position not less favourable to Charterers than that at which such loss of time commenced;”*

Where there is no numerical deficiency, but a large number of the crew are ill, it is doubtful that there would be a “*deficiency of men/personnel*”, and even if illness among crew members could constitute a “*deficiency of men/personnel*”, this deficiency would still have to prevent the “*full/efficient*” working of the vessel.

In the above example, this would not be the case, as the vessel is still able to continue working despite the Bird Flu cases on board. If it can be established, as a matter of fact, that the vessel is still able to work efficiently, then the Charterers may face difficulties in establishing that the vessel is off-hire pursuant to Clause 15/21.

The latter part of Clause 15 includes the terms “*any other cause preventing the proper working of the vessel*”, as compared to Clause 21 in the Shelltime 4 Form “*any other similar cause...*”. This indicates that the Shelltime 4 Form is more restrictive in this respect, however, it would probably not provide any additional remedy to the Charterers.⁵ There do not appear to be any direct authorities stating that quarantine measures do constitute “*any other cause*” for these purposes. Indeed, as can be seen below, quarantine is referred to in other parts of the charterparty and not, notably, in Clause 15. Thus any such arguments advanced by the Charterers may well fail. However, in the “AQUACHARM”, Griffiths

⁵ Note *Andre et Cie SA v Orient Shipping (Rotterdam) BV (The Laconian Confidence)* [1997] 1 Lloyd’s Rep 139, which held that “preventing the full working of the vessel” did not require the vessel to be inefficient, as a vessel could be prevented from working by legal as well as physical means.

LJ stated that, “No responsible person would use a ship suspected of carrying typhus”.⁶

It has been held that that the use of the word “*whatsoever*” added after “*any other cause*” can bring the actions of the authorities in such a scenario within Clause 15/21. In the “APOLLO”⁷ the words “*whatsoever*” were included in Clause 15 of an NYPE 1946 time charter of a vessel carrying two crew suspected of typhus. Free pratique was only granted after the vessel was inspected and no communicable disease was found onboard. The Court held that the actions of the port authority in refusing initially to grant free pratique was an off hire event within the meaning of Clause 15. Indeed it has also been suggested that even if the word “*whatsoever*” has not been included, a vessel that has been quarantined because of a suspected communicable disease onboard may still be considered not to be working fully within the meaning of Clause 15.⁸ Thus, if the crew members were suffering from SARS, a highly communicable disease, the vessel may be off-hired. Especially if the vessel is unable to follow the Charterers’ orders.

- **The “exceptions” clauses**
- A Charterer may seek instead to claim that they are entitled to deduct or not to pay hire by virtue of the “*exceptions clauses*”

⁶ [1982] 1 Lloyd’s Rep, at page 11

⁷ [1978] 1 Lloyd’s Rep 200

⁸ See the obiter judgement of Rix J in The “LACONIAN CONFIDENCE” (at page 151 column 2) and referring to the comment by Griffiths LJ in the “AQUACHARM”

contained in the second sentence of Clause 16 and Clause 27 on the Shelltime 4 Form.

- Clause 16 of NYPE 1946 Form states “16. (...) *The.....restraint of Princes, Rulers and People.....always mutually excepted.*”⁹.
- Clause 27 of Shelltime 4 Form states “(a)...*neither the vessel, her master or Owners, nor Charterers, shall, unless otherwise in this charter expressly provided, be liable for any loss or damage or delay or failure in performance hereunder arising or resulting from.....quarantine restrictions.....or restraint of princes, rulers and people.*”

Quarantine regulations can be an example of a “*restraint of Princes, Rulers and People*”.

Clause 16 primarily refers to vessels that have been lost (see first sentence). It has been held that the second sentence of Clause 16 is not exclusive to the first sentence of Clause 16. The words “*always mutually excepted*” mean that the exceptions in the clause are equally available to both Owners and Charterers.

In the “*OLIVA*”¹⁰, however, it was held that where a party seeks to rely on the occurrence of an event listed in this exceptions clause, such as a restraint of princes, he must prove that the event prevented him from discharging his obligations.

In the case of Bird Flu or SARS, even if a “*restraint of princes*” situation arises in the event of quarantine, the Charterer would still physically be able to pay hire. Therefore the Charterer cannot rely on the “*restraint of princes*” exception and will still be obliged to pay hire during the quarantine.

It should also be noted that a party could only rely on this exception where it has not been negligent.

ii) Shelltime 4: differences from NYPE 1946

Shelltime 4, (unlike NYPE 46) specifically refers to “*quarantine restrictions.*”

Clause 21(a) states that “*On each and every occasion that there is loss of time (whether by way of interruption in the vessel’s service, or from reduction in the vessel’s performance, or in any other manner).....(iv) due to any delay in quarantine arising from the master, officers or crew having had communication with the shore at any infected area without the written consent or instructions of Charterers or their Agentsthen.....the vessel shall be off-hire from the commencement of such loss of time until she is again ready and in an efficient state to resume her service.....*”

This differs from NYPE 46 in that it provides that where there is a “*delay*” in quarantine because of “*communication*” the Owner’s agents

⁹ The wording of this clause is reproduced in identical fashion in the NYPE 93 Form (as Clauses 20 and 21). NB The second sentence in Clause 16 is of general application and is not restricted to cases where the ship is lost (The “OLIVA” [1972] 1 Lloyd’s Rep 458, quoted in “Time Charters”, 4th edition, Wilford, LLP, 1995).

have had with the shore in an affected area, and if the Charterers did not provide written consent to this “*communication*”, the vessel is to be off-hire for the period of the delay. In other words, the Charterers will be compensated (through not having to pay hire in respect of such period) for the delay caused by the actions of the Owner’s agents, where the Charterers have not provided written consent to the same.

Owners under the Shelltime 4 charter are therefore advised to take account of this provision when deciding, for example, whether crew are to be allowed shore leave in a SARS or Bird Flu infected area. If the Charterers have not consented to this, and the vessel is subsequently detained because of this, the Owners may well find the vessel is off-hire.

There does not appear to be any substantial judicial authority on the interpretation of these provisions.

(b) **The position under voyage charters**

The position under voyage charters differs in that, whether or not there is a specific “*quarantine*” clause, there is, in a number of voyage charters, a “*free pratique*” clause. I shall look first at quarantine, before looking at the effect of a “*free pratique*” provision.

(i) *Quarantine*

¹⁰ [1972] 1 Lloyds Rep 458

Where a ship is placed under quarantine, it will not be considered ready because the quarantine will prevent loading and discharge and the Charterers will not have unrestricted access to it. For example, where a vessel was subjected to quarantine restrictions, although having arrived at the port, it was held¹¹ not to have been at the Charterer's disposal¹².

Clause 17 (a) of the Asbatankvoy charter expressly provides for the possibility of quarantine:

"17. (a) QUARANTINE Should the Charterer send the vessel to any port or place where a quarantine exists, any delay thereby caused to the Vessel shall count as used laytime; but should the quarantine not be declared until the vessel is on passage to such port, the Charterer shall not be liable for any resulting delay."

This clause distinguishes between orders given to Owners to proceed to quarantine ports, depending on the time when the state of quarantine is declared.

¹¹ See the Scottish case of *John and James White v The Steamship Winchester Co* [1886] 23 SLR 342, in which the Winchester arrived to load a cargo, her previous port of call having been Port Said. Quarantine restrictions were therefore placed on her, preventing access to the ship.

¹² *"The vessel would be an arrived ship in name only, but not in reality, so far as regarded the Charterer, whose duty and obligation - the loading or unloading - should begin on arrival. The Charterer might be quite ready to unload, or ready with a cargo waiting to load the vessel, but the disqualification of the ship would prevent this, and indeed, would lead to the ship being sent away from the place of loading or discharge. She would thus never be at the disposal of the Charterer so as to enable him to fulfil his obligation."* Per Lord Shand

- If the Charterers order the vessel to a port that is already quarantined when the order is given, the “*delay thereby caused*” will count as laytime.
- If the state of quarantine at a port is declared while the vessel is en route to it, it will not, and the Owner will receive no demurrage or damages in respect of the delay.

EXAMPLE

A vessel is under voyage charter on the Asbatankvoy form, from Hong Kong¹³ to Los Angeles. As of the date of departure, the port authorities in Los Angeles have not issued quarantine notices in respect of vessels arriving from Hong Kong. While on passage in the Pacific, however, such a notice is issued. The vessel is therefore quarantined on its arrival in Los Angeles.

Result: The Charterer’s laytime does not begin to run until after the vessel clears quarantine, and the Owner is not entitled to damages or demurrage in respect of the period of the quarantine.

(ii) “Free pratique”

“*Pratique*” is a permission granted by the port medical authorities to a vessel, on its arrival from a foreign port, for her crew to go ashore and visitors to come onboard. If a ship is not given “*free pratique*”, either because of serious infectious diseases being

¹³ In this, and the following examples, it shall be assumed, for illustrative purposes only, that Hong Kong is a SARS-affected port. Other ports mentioned will be assumed to be SARS-free, unless otherwise stated.

onboard or because the vessel has arrived from an infected zone, it is likely to have quarantine restrictions imposed on her.¹⁴

Sometimes it is expressly provided that laytime is to commence “*whether in free pratique or not*”¹⁵ (“WIFPON”). Where this is the case, the granting of free pratique will be irrelevant to the question of the Notice of Readiness.

The parties may expressly require free pratique to be obtained before the tendering of a Notice of Readiness. Where this is the case, any such requirement must be clearly expressed.

EXAMPLE

A Charterer is seeking to charter a vessel from Sydney to Auckland. The vessel will arrive in Sydney from Hong Kong (assuming that it is permitted to leave Hong Kong by the port authorities there). The Charterer fears that upon arrival in Sydney it will be refused free pratique and quarantined. Therefore to prevent the Master giving a NOR as soon as the vessel arrives (causing laytime to start to run) and before free pratique is granted, the Charterer may insist on the insertion into the charterparty of a clause expressly requiring free pratique to be obtained before a NOR can be given.

¹⁴ At most ports there is a quarantine anchorage to which the vessel may be sent, generally in a more isolated part of the port. A ship in quarantine signifies this fact by flying a yellow flag (flag Q in the international alphabet of shipping flags).

¹⁵ See, for example, Gencon Form 1976, Clause 6: “*Laytime.....(c) commencement of laytime (loading and discharging)If the loading/discharging berth is not available on the Vessel’s arrival at or off the port of loading/discharging, the Vessel shall be entitled to give notice of readiness within ordinary office hours on arrival there, whether in free pratique or not, whether customs cleared or not. Laytime or time on demurrage shall then count as if she were in berth and in all respects ready for loading/discharging....*”

It is suggested that attempts by Charterers to insert such clauses may become more common if the danger from the viruses such as SARS or Bird Flu continues.

(c) “Safe ports”

In many forms of charterparty a Charterer is under a duty only to order the vessel to ports that are “safe”.¹⁶ The question of “*safe ports*” is an additional topic within itself, which we intend to touch on only in as far as it affects the subject matter of this talk.¹⁷ The question is whether a port infected with SARS or Bird Flu or situated in a SARS or Bird Flu infected region can be considered a “*safe*” port so that if a Charterer orders a vessel to such a port, it will be in breach of its obligations under the charterparty.

There do not appear to be any authorities on the question of whether a disease-ridden port can be an “*unsafe port*”. The vast majority of the authorities on this question relate to the safety of a port being determined by either its physical¹⁸ or political¹⁹ characteristics. Whether a port can be considered unsafe because it is infected with SARS or Bird

¹⁶ Lines 27 to 35 of the NYPE 1946 provides: “[Vessel.....to be employed] between safe port and/or ports.....as the Charterers or their agents shall direct....”

¹⁷ This topic was dealt with in detail in a recent client briefing by this firm on the effect of war on shipping contracts

¹⁸ e.g. dangerous weather conditions at certain times of the year, as in the “EASTERN CITY” [1958] 2 Lloyd’s Rep 127.

¹⁹ For example, *Ogden v Graham* [1861] 1 B & S 773: where a ship was liable to confiscation by Chilean government on entering a given port, that port was unsafe.

Flu or is in a SARS or Bird Flu infected region is a question of fact within the definition in the “EASTERN CITY”.²⁰

It is settled law that a Charterers’ warranty of safety is only prospective, i.e. that the port is safe at the time the Charterers give their order (assuming that it can be argued that having SARS or Bird Flu makes a port, as a question of fact, unsafe, as mentioned above). Where a port which is prospectively safe at the time when the voyage order is given later becomes unsafe (either during the voyage to it or after the ship’s arrival there) the “EVIA”²¹ is authority for the proposition that, at least in relation to time charters²², the Charterer would be under a secondary obligation to nominate an alternative safe port. Where the vessel is already at the port, this obligation is subject to the proviso that the vessel can avoid the danger by leaving the port. If it cannot, this secondary obligation does not arise.

EXAMPLE

A time Charterer orders a vessel from Auckland to the UK. At this time the UK is free of SARS and Bird Flu. However, en route to the UK, numerous cases of Bird Flu develop there. The Charterer nevertheless maintains its order.

The Charterer has fulfilled its primary obligation in that the UK was prospectively safe when the order was given. It is unclear whether (after the Bird Flu cases arise)

²⁰ Discussed in client briefing by this firm

²¹ *Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes (The “EVIA”)* (No. 2) [1981] 2 Lloyd’s Rep 613

²² As it is stated in “Voyage Charters”, supra, “*The position in a voyage charter is unclear*” (at p. 109).

the Charterer will be subjected to a secondary obligation to order the vessel elsewhere, and will be in breach of its “safe port” obligation if the vessel continues to the UK. This will depend on whether UK ports have become “unsafe ports”.

It is important to remember that in their early stages of development much remains unclear about the nature of viruses such as SARS and Bird Flu virus. Questions such as how infectious it is, exactly how it is transmitted, its mortality rate, etc can often only be established with time. In my view, this uncertainty will make it very difficult to determine the “unsafety” of a port in a SARS or Bird Flu infected country.

Part B - The effect of the law relating to the quarantine of vessels on the liability of the Owner to third parties under the Hague / Hague Visby Rules

Where a voyage Charterer is not responsible for time lost as a result of quarantine restrictions, an Owner will not receive any demurrage or damages for detention in respect of the delay.

If the Hague or Hague Visby Rules apply²³ the Owner’s own liability to third parties for deterioration of the cargo or late delivery, as a result of

²³ For example, clause 27(c) of the Shelltime 4 Form provides for the application of these Rules to cargo claims against Owners:

“Clause 27(a) shall not apply to or affect any liability of Owners or the vessel or any other relevant person in respect of:

(.....)

(ii) any claim (whether brought by Charterers or any other person) arising out of any loss of or damage to or in connection with cargo. All such claims shall be subject to the Hague-Visby Rules or the Hague Rules, as the case may be (emphasis added), which ought pursuant to Clause 38 hereof to have been incorporated in the relevant bill of lading (whether or not such Rules were so incorporated) or, if no such bill of lading is issued, to the Hague-Visby Rules.”

the delay, may be excluded by Art. IV rule 2(h) of whichever set of the Rules applies.²⁴

Art. IV rule 2(h) provides:

“Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from –

(....)

(g) Arrest or restraint of princes, rulers or people.....;

(h) Quarantine restrictions;

(.....)”

As described above in relation to time charters, quarantine restrictions can be an example of “*restraint of princes*”. Indeed, many of the cases on “*restraint of princes*” concern quarantine restrictions²⁵. The authorities relating to the “*restraint of princes*” exception will therefore be relevant in determining whether the Owner of a quarantined vessel can escape liability under the Hague/Hague Visby Rules.

²⁴ The wording of Article IV rule 2 (h) is identical in both the Hague Rules and the Hague Visby Rules.

²⁵ As it is pointed out in “Voyage Charters”, 2nd edition, LLP, 2001, at p. 976:

“ *(h) Quarantine restrictions*’

Many of the cases on “restraint of princes” concern quarantine restrictions. Where the exception of “restraint of princes” applies, there is no extra need to rely on the present more limited exception. It is difficult to think of any cases where a “quarantine restriction” will protect a shipOwner where a “restraint of princes” would not..... It is submitted that it would not have had any effect on the result in.....Ciampa v British India Steam Navigation Co.”

- For the exception to apply, the restraint must be in existence at the time it is relied on - *Watts, Watts and Co. -v- Mitsui and Co.*²⁶
- It will not apply where there is merely an apprehension of a future restraint, even where that apprehension is significant and natural.

There may be circumstances where the risk of the operation of a restraint of princes is so immediate that it will suffice to exclude the shipowner from liability for resulting loss or damage - *Nobel's Explosives Co. -v- Jenkins and Co.*²⁷ Master held to have acted reasonably in landing a cargo in Hong Kong en route to Japan rather than run the risk of cargo being confiscated by Chinese war ships waiting outside the port.

The authorities on this issue therefore appear to distinguish between an *apprehension* and a *risk* that a “*restraint of princes*” will come into being. It seems that only where there is an immediate *risk* (presumably to be judged objectively) of this, as opposed to an apprehension, would a party potentially be able to rely on the exception.

EXAMPLE

A vessel is berthed in Hong Kong and has been cleared to depart to a nearby port in a SARS-free Chinese Province where no quarantine regime has yet been instituted for vessels arriving from Hong Kong. The master fears, however, that such a regime will

²⁶ [1917] AC 227 Owners feared that the Dardanelles would be closed before their vessel could pass through them, and so refused to nominate a vessel. As at the date of refusal numerous vessels were passing through the Dardanelles without difficulty. The Charterers accepted this as repudiation. The House of Lords held the Owners liable and unable to rely on the exception.

be instituted before its arrival, and that the cargo would perish during the period of this quarantine. He therefore decides to land the goods in Hong Kong. A cargo interest sues.

Result: A court may follow Nobel's Explosives and decide that the exception will apply if the master's refusal to depart for a port where no quarantine regime was in place at the time, was reasonable, based on all the information known to him at the time. It is suggested, however, that to be sure of being able to rely on the exception, an Owner should instead adopt the approach taken in Watts, Watts and Co. and wait until the quarantine regime has in fact been put in place before refusing to sail.

In cases where a vessel goes to a port and is quarantined on arrival, where the Owner knew that his ship was inevitably bound to be subjected to quarantine restrictions by reason of local laws, he probably will not be able to rely on this exception.

EXAMPLE

The authorities in Australia issue a notice of quarantine affecting all vessels arriving from Hong Kong. If the vessel then undertakes a voyage from Hong Kong to Darwin, the Owner will not be able to rely on the "restraint of princes" exception if for example a cargo interest claims against it for the late arrival of its cargo, or any damage suffered by the cargo, as a result of the vessel being quarantined in Darwin.

²⁷ [1896] 2 QB 326 - The Master was held to have acted reasonably in landing a cargo in Hong Kong en route to Japan rather than risk its being confiscated by Chinese warships just outside the port.

Conclusion

It should be emphasised that in this speech on the effects of SARS and Bird Flu only a few potential scenarios have been examined. There are a myriad of different situations that could arise in relation to shipping activities, especially as the future development of viruses such as SARS and Bird Flu are generally unclear.

Although the SARS virus appeared to peak in several places in 2003 the very nature of the disease, caused by a new strain of a known family of viruses, means that there is no immediate prospect of it being eradicated. The effects therefore may continue to be felt long after the initial controversy hit the headlines. The recorded cases of Bird Flu, both human and animal, are continuing to emerge on an almost daily basis. New cases were reported in Egypt this month and 4 people were hospitalised in Indonesia on 31st August. Taking into consideration the huge numbers of journeys now undertaken by the large number of vessels involved in transporting goods all over the world, the risks and potential impact on the global shipping industry if the viruses continue to spread could be huge.

The thought to take away, if you are a Charterer, is to make sure you have a comprehensive off-hire clause covering all possible events. If you are an Owner then avoid the words “whatsoever” or “any other cause” in your charter.

Post script - The “GOLDEN VICTORY”

I thought it would be interesting to look at a very topical charterparty case which is currently going through the Courts and, in some quarters at least, is regarded as re-writing the law on damages. First of all the facts.

The vessel was chartered by her Owners to NYK on a 7 year charter from July 1998. The charter provided that either party could cancel the charter in the event of war between any 2 or more of... the United States of America... and Iraq. The Charterers, wrongfully, redelivered the vessel to the Owners in December 2001, 4 years before the Owners contractual date for redelivery. The outbreak of the second Gulf war occurred 14 months after repudiation and, crucially, before the hearing of the arbitration, and 32 months before the charterparty would have expired as a matter of contract. The Owners claimed damages for the wrongful repudiation of the charter, on the basis of the full 7 year term, i.e. for the unexpired 4 years, and argued that the events subsequent to the redelivery were irrelevant unless they could be said to be inevitable or probable at the time of the breach.

The Owners argument was that the Gulf war was not probable at the time of the breach. The Charterer submitted that they would have cancelled the charter under the war clause after the outbreak of the second Gulf war in 2003 and that this was a probable event and therefore the correct measure of damages was from the date of the repudiation to the date of the outbreak of the war when the cancellation

would have taken place. As I have already said, the war started before the arbitration hearing.

You are all aware of the basic principle of damages established under *Hadley -v- Baxendale* [1850] 49 EX 341. Damages in respect of a breach of contract should be such as may fairly and reasonably be considered either arising naturally from the breach of contract or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as a probable result of its breach.

It was held in the "*ELENA D'AMICO*" [1980] 1 *Lloyd's Rep.* 75, the normal measure of recovery in cases of premature wrongful repudiation of a time charter is that the damages will generally be assessed on the basis of the difference between the contract rate for the balance of the charterparty period, i.e. from the date of breach, the market rate for the chartering of a substitute vessel for that period. I was brought up, so to speak, that that case is correct and it has indeed been followed in many cases.

What did the Arbitrators decide? The Arbitrators decided that they were, reluctantly, bound by the "SEAFLOWER" where the test was propounded that you must look at whether or not the charter would inevitably have come to an end earlier than its due date, not whether or not the unexpected event was pre-destined as at the date of the repudiation. They found that the Charterer would have cancelled the

charter under the war clause on the outbreak of the second Gulf war and therefore the Owners' damages were limited to the shorter period.

The Owners appealed to the Commercial Court where Mr Justice Langley held that the probability was that the contract would have come to an end earlier than its due date and it was therefore right to limit the damages to the shorter term.

The Owners went on up to the Court of Appeal where Lord Mance (as he was about to become) delivered the leading Judgment. He held that the basic rule for assessment of damages was compensatory as per *Johnson -v- Agnew [1988] C367*. He said that the aim in assessing damages on a substitute charter was not to eliminate from consideration any of the original charter terms, or any effect they may have had. In this instance, he held, the charter always had, inherent in it, the uncertainty resulting from the war clause.

As a result, the Owners were never entitled to absolute certainty that the charter would run its full 7 year period. An uncertainty could only be disregarded if damages were being assessed after the end of the charter period and no war had taken place or if damages were being assessed during the original charter period and there was no significant prospect of any such war. The Judgment emphasised the greater importance of achieving an assessment of damages that accurately reflected the actual loss that the Owners could be seen to have suffered.

The question is whether or not this is fair. Where a charter contains an option which may or may not arise, it could be said to be inconsistent with the general principle to allow the measure of damages to be affected by subsequent events that are not in fact inevitable at the time of breach. Contrary to the objective of the principle, this suggests that the party in breach could rely on delaying tactics in the hope of an unexpected event occurring and reducing their liability. To do so could lead to an injustice with the party in breach being awarded for its breach on the chance occurrence of an unexpected event. As such, the Owners felt that subsequent events should be considered irrelevant, following the *"ELENA D'AMICO"* unless they can be said to be inevitable, as at the date of the breach, which the outbreak of war was not.

What do you think? Does this decision give more certainty or less certainty? The advantage of the *"ELENA D'AMICO"* is that you have certainty in the sense that you just look at the situation as at the date of the breach.

In any event, the case is being heard by the House of Lords, probably at the beginning of 2007 so watch this space! I should add, as you may already have guessed, that my firm acts for the, so far, unsuccessful Owner!

Bird Flu, SARS and their effects on Charterparties

MLAANZ 2006

Lindsay East
Partner
Shipping Group


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Bird Flu, SARS, their effect on Charterparties

- Introduction
- History of quarantine
- What is SARS and bird flu?
- Where did bird flu come from, what are the current geographical problems?
- Is bird flu fatal – latest figures?



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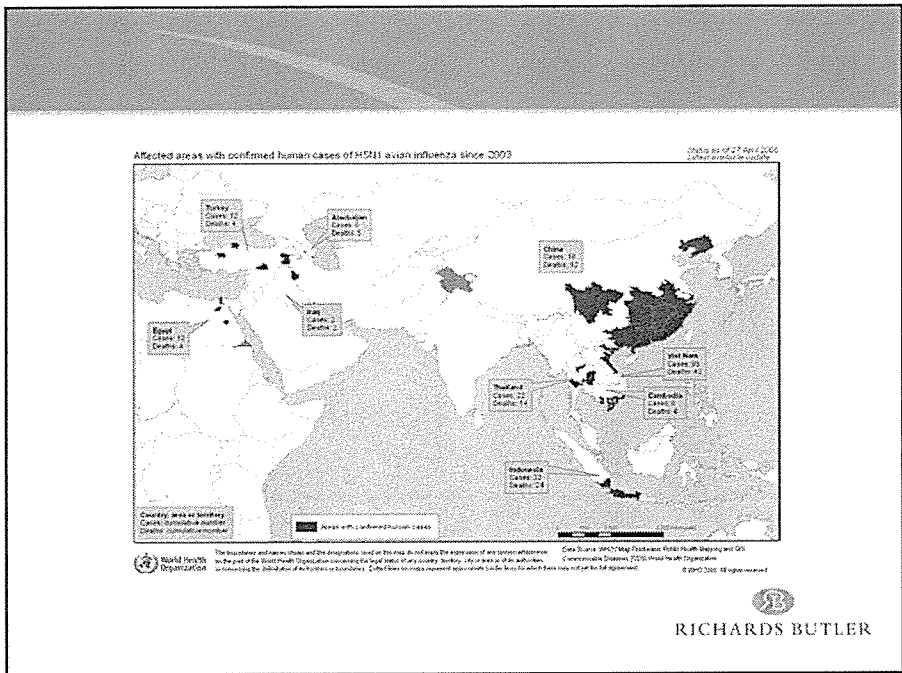
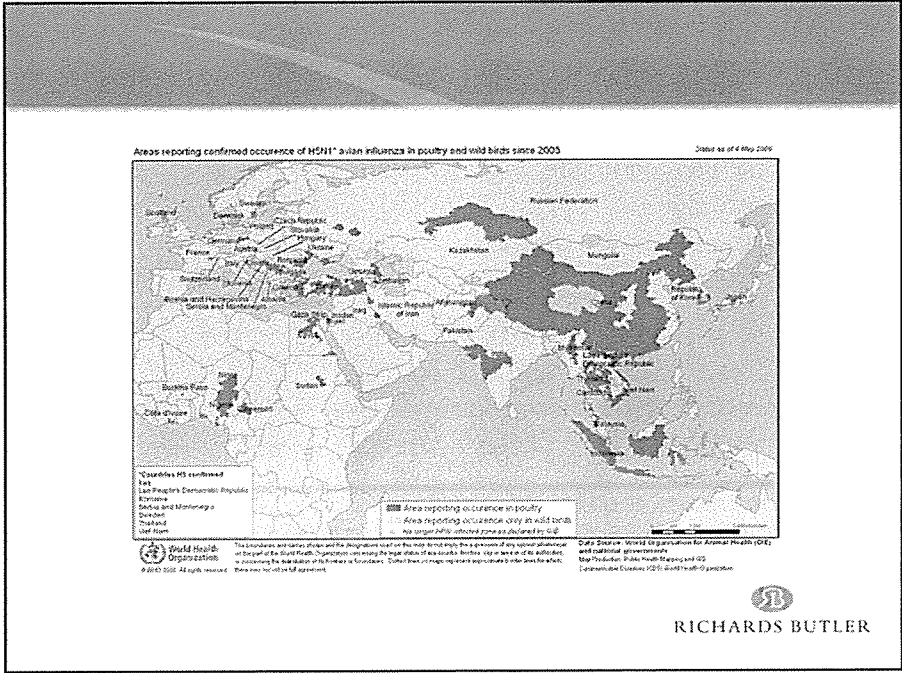
Impact of SARS and Bird Flu on the shipping industry

- What happened after the SARS outbreak in 2003?
 - Hong Kong
 - Singapore
 - Shipping Corporation of India
- How widespread is the bird flu epidemic?
 - Impact on French poultry business
 - Ban on imports to Russia
 - Restrictions in China
- The case of the "MARY ANN"
 - Action of the Greek Government


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Purpose of the Talk

- Purpose of the talk is to examine the effect of quarantine measures on obligations of Owners and Charterers under Time and Voyage Charterparties
- Liability of Owners to third party cargo claimants


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Part A – The effect of the Law relating to the quarantine of vessels on the obligations of Owners and Charterers

- The position of the Time Charterers
 - New York Produce Exchange Form 1946
 - Example – Voyage from Turkey to New Orleans
- Obligation of the Charterer to pay hire
 - Clause 4 of the NYPE form:
“That the Charterer shall pay for the use and hire of the said vessel at the rate of... to the Owners...”
 - Clause 8 of the Shelltime 4 form:
“Charterers shall pay for the use and hire of the vessel at the rate of... from the time and date of her delivery... until the time and date of her redelivery to Owners.”


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Off-Hire Clauses

- Clause 15 of the New York Produce Exchange form:
“That in the event of the loss of time from deficiency of men or stores... or by any other causes preventing the full working of the vessel, that payment of hire shall cease for the time thereby lost;”
- Clause 21 of the Shelltime 4 Form:
“On each and every occasion there is a loss of time (whether by way of introduction in the vessel’s service or from reduction of the vessel’s performance or in any other matter) (i) due to deficiency of personnel... or any other similar causes preventing the efficient working of the vessel;... the vessel shall be off-hire from the commencement of such loss of time...”



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Off-Hire Clauses (cont...)

- What is meant by “deficiency of men/personnel – does this prevent the “full/efficient working of the vessel”?
- If the vessel can work efficiently then not off-hire?
- What is meant by any other cause in the NYPE form?
- Compare with Shelltime 4 form?
- What happens if ship suspected of carrying typhus? See “AQUACHARM”.
- What happens if the word “whatsoever” are included?
- See comments in the “LACONIAN CONFIDENCE” in relation to a suspected communicable disease?



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Exceptions Clauses

- Charterer may seek to rely on exceptions clauses
 - Clause 16 of NYPE
"The... restraint of Princes, Rulers and People... always mutually accepted"
- Shelltime 4
"(a) ...neither the vessel, her Master or Owners, nor Charterers, shall, unless otherwise in this charter expressly provided, reliable for any loss of damage or delay or failure of performance hereunder arising or resulting from... quarantine restrictions... or restraint of Princes, Rulers and people."
- Quarantine regulations can be an example of "restraint of Princes" etc.



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Exceptions Clauses (cont...)

- Meaning of Clause 16 of NYPE
- The "OLIVA" – burden of proof
- Can Charterer still pay hire, if so, no exception
- Reliance on exception only where not negligent



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Shelltime 4: Differences from NYPE

- Shelltime 4 specifically refers to quarantine restrictions
- Provision in relation to “delay” due to “communication”
- Charterers can be compensated for delay for actions of Owner/Agents
- If on Shelltime 4, decide whether to allow crew shore leave
- No judicial authority on these points


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Position under Voyage Charters

- Consider whether there is a specific “quarantine” clause – look at the question of a “free pratique” clause
- Quarantine
 - Vessel not ready to load or discharge as quarantine will prevent this
 - See *John & James White -v- The Steamship Winchester Co.* [1886] – Vessel not at Charterer’s disposal
- Clause 17(a) of Asbatankvoy Charter deals with the question of quarantine
- *“QUARANTINE” Should the Charterers send the vessel to any port of place where a quarantine exists, any delay thereby causes the vessel should count as used laytime; but should the quarantine not be declared until the vessel is on passage to such port, the Charterer shall not be liable for any resulting delay.”*


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Position under Voyage Charters (cont...)

- Distinction between the situation:
 - Where a port is already quarantined when the order is given; and
 - Where quarantine is declared when the vessel is en route.
- Example – Voyage from Hong Kong to Los Angeles


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Free Pratique

- Definition and consequences of not having free pratique
- WIFPON
- Example – Voyage from Sydney to Auckland, having originated in Hong Kong
- Specific clause inserted into charterparty requiring free pratique before Notice of Readiness can be given
- Clauses may become more common if SARS or bird flu cases increase


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Safe Ports

- Safe ports
 - "In many charters, Charterer has duty only to order the vessel to safe ports"
 - Can a port infected with SARS or bird flu be considered "safe"?
- Authorities are unclear
 - Most authorities deal with physical or political characteristics of a port
 - Whether port unsafe because infected with SARS or bird flu is a question of fact


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Safe Ports (cont...)

- Charterers warranty of safety is prospective – i.e. at the time Charterers give their order is port safe? See the "EVI/A"
- What happens if port becomes unsafe during the voyage to the port?
- Example:
 - Vessel under time charter from Auckland to the UK
 - At time of order, UK free of bird flu, but while voyage taking place, cases of bird flu developed
 - Is Charterer under an obligation to order the vessel to another port, will Charterer be in breach of his obligation to nominate a "safe port" if vessel continues to the UK.


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Part B - The effect of the law relating to the quarantine of vessels on the liability of the Owners of third parties under the Hague/Hague-Visby Rules

- What are the relevant exceptions so far as the Owners are concerned?
- Article IV, Rule 2(h)

"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from

(g) Arrest or restraint of Princes, Rulers or people...

(h) Quarantine restrictions can be an example of "restraint of Princes". See Voyage Charters, 2nd Edition at page 976



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Part B - The effect of the law relating to the quarantine of vessels on the liability of the Owners of third parties under the Hague/Hague-Visby Rule (cont...)

- Restraint must be in existence at the time it is relied on, see *Watts & Co. -v- Mitsui*
- Will not apply where there is merely an apprehension of a future restraint
- However, there may be circumstances where the risk of the operation of restraint of princes is so immediate, it will suffice to exclude the shipowner from liability, see *Nobel's Explosive Co. - v- Jenkins*.
- Authorities distinguished between an "apprehension" and a "risk"
 - Example – vessel berthed in Hong Kong allowed to depart for nearby port in a SARS free Chinese province where quarantine regime. Master fears that regime will be instituted, therefore lands the cargo in Hong Kong.



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No
Quarantine
regime

Part B - The effect of the law relating to the quarantine of vessels on the liability of the Owners of third parties under the Hague/Hague-Visby Rule (cont...)

- Will Court follow *Nobel* and decide exception will apply, question of fact. Is the risk obvious and real?
- What happens if vessel goes to a port where Owner knew the vessel would inevitably be subjected to quarantine restrictions – not able to rely on the exception
- Example - Australia issues notice of quarantine effecting all vessels arriving from Hong Kong. Vessel undertakes voyage from Hong Kong to Darwin, Owner not able to rely on the “restraint of Princes” exception


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Conclusion

- Have only examined a few potential cases
- Many different situations that could arise, especially as future development of SARS and bird flu is unclear
- Has SARS peaked in 2003? Nobody knows.
- Bird flu continuing to emerge on an almost daily basis – Indonesia/Egypt August/September 2006.
- Risks and impact of these types of problems on the global shipping industry could be very substantial


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Post Script – The “GOLDEN VICTORY”

- Facts
 - 7 year charter from July 1998
 - Cancellation in the event of war between USA and Iraq
 - Vessel redelivered in December 2001, wrongfully.
 - Gulf War started 14 months after repudiation – 32 months before contractual expiry
 - Claim by Owners for damages for the basis of the full unexpired 4 years
 - Is that relevant or not?
 - Charterer would have cancelled on outbreak of war
 - War came before hearing of arbitration


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Post Script – The “GOLDEN VICTORY”

- Basic principle of damages
 - *Hadley -v- Baxendale* [1854] 9 EX 341
 - “ELENA D’AMICO” [1980] 1 Lloyd’s Rep 75 – the usual rule?


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Post Script – The “GOLDEN VICTORY”

- Decision of the Arbitrators
 - Test in the “SEAFLOWER” [2000] 2 Lloyd’s Rep 37
 - Would charter have inevitably come to an end earlier than its due date?
 - Arbitrators find that it would, therefore Owners only recover damages for shorter period


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Post Script – The “GOLDEN VICTORY”

- Commercial Court
 - Held probability was contract would come to an end earlier than due date
- Court of Appeal
 - Are damages supposed to be compensatory – *Johnson -v- Agnew* [1980] AC 367 or not?
 - Is charter inherently uncertain as to its termination date?


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Post Script – The “GOLDEN VICTORY”

- Is this fair?
- Is this decision consistent or inconsistent with general principle?
- Should decision turn on whether or not war breaks out before or after Arbitrators consider case?
- Are subsequent events irrelevant?


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Post Script – The “GOLDEN VICTORY”

- What do you think?
- Case being heard by the House of Lords at beginning of 2007


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