

SARS, THE LAW OF QUARANTINE,
AND THE EFFECT ON CARGO AND CHARTER PARTIES

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I. INTRODUCTION

Much has been written about Severe Acute Respiratory Syndrome since it captured the world's attention in early 2003. SARS was first seen in southern China.¹ The disease is thought to have been spread by a medical doctor who spent one night at a Hong Kong hotel in November 2002.² The global community is appropriate in calling for quarantine and isolation of suspect cases. The World Health Organization correctly notes that control of the disease relies on the rapid identification and management of contact.³ There is not, as of yet, a vaccine, treatment or cure. The disease comes from a family known for its frequent mutations, which raises issues for the future. The incubation period is 10 days, which allows enables SARS to spread between two cities anywhere in the world very quickly. The volume of international air travel allowed SARS to spread very quickly. Immediate response is necessary to contain the disease. Such response requires political commitment that may be disfavored commercially and the legal implications may vary from country to country.

¹ WORLD HEALTH ORG., DEP'T OF COMMUNICABLE DISEASE SURVEILLANCE AND RESPONSE, SARS UPDATE 83 (2003).

² *Id.*

³ WORLD HEALTH ORG., DEP'T OF COMMUNICABLE DISEASE SURVEILLANCE AND RESPONSE, SARS TRAVEL UPDATE, (July 5, 2003).

Regulations and restrictions have been imposed in all transportation related endeavors. According to statistics provided by the Center for Disease Control, 131,132 people were placed in quarantine as of July 25, 2003.⁴ Quarantine, the separation and/or restriction of movement of persons who are not ill but are believed to have been exposed to infection to prevent transmission of diseases, was developed in the 14th century.⁵ It has rarely been implemented on a large scale in the past century.⁶ Quarantine is a valuable tool for public health officials and governments.

The Centers for Disease Control and Prevention has issued guidelines for the cruise ship industry regarding the procedures to follow to avoid the spread of SARS.⁷ Since SARS is thought to be spread by close person-to-person contact, the confined quarters of a vessel provide a fertile breeding ground for the disease. Passengers or crewmembers that develop SARS like symptoms should be isolated from other people as much as possible. If SARS is suspected on board, the captain should immediately report

⁴ CENTERS FOR DISEASE CONTROL AND PREVENTION, MORBIDITY AND MORTALITY WEEKLY REPORT 52(29):680-683 (July 25, 2003).

⁵ *Id.*

⁶ *Id.*

⁷ CENTERS FOR DISEASE CONTROL AND PREVENTION, INTERIM GUIDELINES ABOUT SEVERE ACUTE RESPIRATORY SYNDROME (SARS) FOR CRUISE SHIP PASSENGERS AND CREW MEMBERS (May 8, 2003).

the illness to the nearest U.S. Quarantine Station as required by law. The health officials will then assist with managing the situation. CDC Guidelines and recommendations also exist for airlines with regard to cleaning of commercial aircraft to ensure the health of air passengers.

The CDC, through the Division of Global Migration and Quarantine, is empowered to detain, medically examine or conditionally release individuals suspected of carrying certain communicable diseases. This authority is vested in the Public Health Service Act.⁸ The practice of quarantine allows those infected to receive appropriate care and helps contain the spread of the disease.⁹ As a result of prompt and appropriate attention, the World Health Organization announced on July 5, 2003 that SARS had been contained and that all travel restrictions had been lifted.¹⁰

In the United States, a state's authority to quarantine is derived from its "police power", which allows states to enact laws for the health, safety and welfare of its citizens. There may be great variation among state and local laws. Additionally, at the national level, the

⁸ 42 U.S.C. 264 (2003).

⁹ CENTERS FOR DISEASE CONTROL AND PREVENTION, SARS FACT SHEET: ISOLATION AND QUARANTINE (May 6, 2003).

¹⁰ U.K. DEP'T OF HEALTH, SARS U.K. TRAVEL ADVICE (Sept. 2, 2003).

Department of Health and Human Services, as well as the Department of Homeland Security, also exert control. State and federal health authorities may have concurrent power to quarantine; however, the federal government is charged with preventing the introduction of communicable diseases from foreign countries into the United States. Federal isolation and quarantine are authorized for the following communicable diseases: cholera, diphtheria, infectious tuberculosis, plague, smallpox, yellow fever and viral hemorrhagic fevers. SARS has also been added to this list. The Coast Guard is empowered to assist with enforcement of quarantine regulations.¹¹

The interdependence of world economies and markets has amplified the impact of SARS. The World Health Organization advises one full year of surveillance to determine whether the disease has abated.¹² Scientists are unsure whether SARS acts like Ebola virus, existing somewhere in nature and likely to reappear at any time.¹³

Certain geographic areas have had greater incidence of SARS. There is a correlation between the cities and their proximity to navigable water. China (Mainland), Hong Kong,

¹¹ CENTERS FOR DISEASE CONTROL AND PREVENTION, SARS FACT SHEET: LEGAL AUTHORITIES FOR ISOLATION/QUARANTINE (April 23, 2003).

¹² WORLD HEALTH ORG., *supra* note 1.

¹³ *Id.*

Hanoi, Vietnam, Singapore, Toronto, Canada, Taiwan and Beijing, China.¹⁴

Scientists working closely with SARS are also cognizant of other risks, such as a bioterror threat. The statistics are serious. The Center for Disease Control reports 8,400 cases of SARS with almost a thousand deaths. SARS seems to be under control today, but it is impossible to predict the likelihood of reemergence. The source of the disease is unknown. On September 18, 2003, the CDC reported a 27-year-old medical researcher in Singapore became infected while working in the laboratory.

Although SARS has received a lot of publicity, there are still many unanswered questions. At the time this article was written, there was not a single case opinion or arbitration regarding SARS and the impact on cargo or charter parties. The following is a brief introduction to a few important cases regarding quarantine and cargo related issues.

As with any contract, a charter party is subject to interpretation. The spread of SARS has adversely affected businesses across the board. How should these losses be allocated? Several decisions have provided guidance

¹⁴ CENTERS FOR DISEASE CONTROL AND PREVENTION, SARS GUIDELINES AND RECOMMENDATIONS: INTERIM GUIDELINES FOR BUSINESSES AND OTHER ORGANIZATIONS WITH EMPLOYEES RETURNING TO THE UNITED STATES FROM AREAS WITH SARS (May 14, 2003).

regarding which party bears the risk of loss. However, the decisions are by no means consistent, which necessitates a few words for each. The age-old question for charterers has always been "How to avoid paying hire?" while the owners, of course, are concerned with receiving compensation for every possible hour. Quarantine issues may affect off-hire or breakdown issues in any charter party.

II. CHARTER PARTIES

A.

Tweedie Trading Co. v. George D. Emery Co.¹⁵

This case involved a voyage from Barbados to New York. The vessel had a foul bill of health at arrival in New York and the quarantine flag was hoisted. The crewmembers that had taken ill were removed and 10 new men were sent as replacements. The health authorities did not allow the replacement men to board until all of the ill crewmembers were removed. The new men eventually boarded and brought the ship up to her berth.

The charter party contained a clause that the payment of hire would cease, *inter alia*, for "...the loss of time from deficiency of men..." Charterer argued that they did not

¹⁵ 154 F. 472 (2d Cir. 1907).

owe hire for the time between the discharge of the sick men and the arrival of the replacements, as this was a deficiency of men. The Owner disagreed, and categorized that time as an "inefficiency of men". The court was persuaded by the charterer and interpreted the obligation of the owner to have at all times on board a complement of men in such conditions to put her "in an efficient state to [prosecute] her service."¹⁶ The court held that the hire ceased during the period the vessel arrived at the quarantine station, New York Harbor until she left quarantine for her berth in New York.¹⁷

B.

THE SANTORA; Clyde Commercial Steamships, Ltd. v. United States Shipping Co.¹⁸

In this case, the time charter was similar to that in Tweedie Trading v. George D. Emery Co. The vessel was in Colon where some dispute arose as to the color of the winch men. This dispute was resolved, but in the interim, the master posted notices forbidding the men to go ashore. Several crewmembers violated the master's order and went ashore. The men returned and the vessel sailed for Baltimore where it was detained for 36 hours due to

¹⁶ *Id.* at 473.

¹⁷ *Id.*

¹⁸ 152 F. 516 (S.D.N.Y. 1907).

quarantine regulations. The charter party contained a quarantine provision which stated: "That whilst the steamer is in Central American ports the crew shall not be allowed on shore, and the steamer shall be liable for any delay and expense of quarantine and all other detention which may arise from a violation of this clause." Notwithstanding this clause, the owners were not obligated to set off the hire. No evidence was presented to causally link the quarantine detention with the men going ashore at Colon. Charterer sought a setoff regarding the hire for the three days in detention at Baltimore. The court stated:

I do not think that it follows that the clause regarding restraints of people suspends the payment of charter hire during the ordinary course of a voyage undertaken for the charterer's gain, when some period of quarantine was ordinarily to be expected.¹⁹

Charterer's request for a setoff was denied. The court determined that deductions of hire are addressed in the breakdown clause and the quarantine clause. The court distinguished the facts from Tweedie Trading Co. v. George Emery Co., stating that unlike Tweedie, the charterer incurred no damage.²⁰ The court refused to allow suspension

¹⁹ *Id.* at 519.

²⁰ *Id.*

of charter hire by implication, stating that the quarantine clause simply did not apply to the facts.²¹

The points raised by the court give pause, almost 100 years having elapsed, as the everyone in the shipping world could have certainly expected some period of quarantine during the early months of 2003 in certain ports. Following this line of cases, if the charterer were on notice, does that force him to make each business decision knowing that he may be held liable to pay hire even in times where government regulations detain the vessel simply because the potential for quarantine exists?

**C. NO LIABILITY FOR OWNER FOR OFF HIRE DUE TO QUARANTINE
- CHARTERER NOT OBLIGATED TO PAY HIRE FOR DEFICIENCY OF MEN**

Clyde Commercial S.S. Co., Ltd. v. West India S.S. Co.²²

West India and Clyde Commercial entered into a typical charter contract, which provided that owner would not be liable for delay caused by act of God, government action or other outside impediments. Several of the crewmembers, including the second and third engineer, developed a contagious fever while at Colon, Panama. The master advised the chartered that there would be a delay until the men were fit for duty. The master further advised that he

²¹ *Id.*

²² 169 F. 275 (2d Cir.), *cert. denied*, 214 U.S. 523 (1909).

hoped to get away the next morning. The vessel then proceeded to Texas as planned. Upon arrival in Texas, the vessel was held under quarantine for seven days. Pursuant to Texas law, any vessel coming from a port that was the site of a contagious disease outbreak was automatically detained for a period of ten days in quarantine. The vessel was held in Texas for a period of seventeen days, for disinfection and observation. Texas law mandated an additional seven-day detainment in instances where a sickness had occurred on board during the voyage. Detention was further prolonged past seven days because new cases of fever were discovered.

Charterers refused to pay the hire and the owners initiated suit. The charter contained a standard Off-Hire Clause. The District Court held that the charterer was not obligated to pay the hire for the period of time the men were ill, determining that this delay was caused by a "deficiency of men". The charterer argued that the deficiency of men was due to the quarantine. This argument was not convincing. The court held that detention by quarantine is a restraint of princes or people.²³ The court held that the time off hire in Texas was a result of the

²³ *Clyde Commercial*, 169 F. at 278 (citing *Street et al. v. The Progresso*, 42 F. 229 (D.C. Pa. 1890)).

quarantine, which would be covered by the Restraint of Princes, Rulers and People exception. As such, the court held that the charterer was obligated to pay the seventeen days as if no delay had occurred. The charterer had use of the vessel and was not relieved of the duty to pay hire, notwithstanding the delay.²⁴

D.

QUARANTINE FEE PAID BY CHARTERER even where vessel does not arrive in port

In the Matter of the Arbitration between Good Explorer Maritime, S.A. as Owner of the Good Explorer and Justice Navigation, Ltd. as Charterer²⁵

This matter involved multiple claims by the charterer regarding deficiencies that led to the vessel being placed off-hire after departing from Busan. The vessel awaited clearance at the mouth of the Yangtze where she was shifted to a repair berth and did not re-enter charterer's service. One of charterer's enumerated claims was for recovery of the quarantine clearance fee required by the Port Authorities. The panel found the clearance fee was a normal port expense for charterer's account.²⁶

E. CHARTERER NOT LIABLE ABSENT EXERCISE OF CONTROL

²⁴ *Clyde Commercial*, 169 F. at 278-79.

²⁵ Society of Maritime Arb. Award Dec. No. 3195 (July 21, 1995).

²⁶ *Id.*

In the Matter of the Arbitration between Global Container Lines Ltd., Disponent Owner of the M/V GLOBAL EAGLE and Riceland Foods, Inc. as Charterer²⁷

In this case, charterer entered a sales contract for bulk rice to be loaded on the Mississippi River. The charter party was dated November 5, 1998 and the vessel's itinerary included New Orleans, continuing on to multiple ports including Jeddah. The vessel had not held any foodstuffs for nine-months prior but initially did not pass the USDA inspection due to paint and rust scale in the holds. The rice was loaded aboard barges in Arkansas and no fumigation certificates were issued. The charterer acknowledged that these barges were not fumigated. At New Orleans, loading commenced. At some point thereafter, foreign contaminants were found in the rice and the loading was stopped. The survey identified organic material, including fragments of corn, wheat and millet. Loading continued and the bills of lading reflected that foreign organic material was observed in the rice. An LoI was issued in exchange for a clean bill of lading which read: 1) "Quality and Quantity unknown"; 2) Foreign Materials Found in Cargo During Loading".

²⁷ Society of Maritime Arb. Award Dec. No. 31794 (July 7, 2003).

When the vessel arrived in Jeddah, live beetles were found in hold number 4. That cargo was fumigated following the receiver's demand. Owner sought demurrage and claimed that all expenses were for charterer's account. The cargo was booked on FIO terms and the charter party provided that discharge was free of expense to the vessel. COGSA was not incorporated into the charter party.

The panel found in favor of charterer.²⁸ Relying on the survey reports, the USDA Carrier Exam and the USDA Phytosanitary Certificate indicated insect free cargo.²⁹ Prior to loading, the rice was parboiled to prevent infestation. The infestation appeared at the surface levels, which suggested a recent problem. The hatches were open for a 24-hour period at Jeddah. Since the beetles likely entered the hold during the port rotation, the responsibility lies with the owner. The charterer was not in control of the vessel employment and movements at that time.³⁰

II. CARGO

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

The quarantine defense has been allowed under common law and the Harter Act prior to 1893.³¹ The quarantine exception is also a statutory defense under the Carriage of Goods by Sea Act.³²

A.

CARRIER HAS NO LIABILITY FOR ACTS AT THE DIRECTION OF THE U.S. GOVERNMENT

Cheek Neal Coffee Co. v. Osaka Shosen Kaisha³³

Cheek Neal contracted for the shipment of coffee from Santos, Brazil to Galveston, Texas on board the Manila Maru. The bill of lading contained several clauses regarding quarantine. Clause number 2 states, "The ship and/or carrier shall not be liable for the consequence of quarantine". Clause number 3 states: "... Quarantine expenses of whatever nature or kind to be borne by the shipper, consignee and/or owner of the goods."³⁴ The goods arrived in New Orleans on October 25, 1926.

Although the plaintiff claimed the goods were delivered in Brazil in good order and condition, the defendant disagreed. The basis for defendant's disagreement was the discovery of bubonic plague on board at Lower

³¹ See *Clyde Commercial*, 169 F. at 278; *Cheek Neal Coffee Co. v. Osaka Shosen Kaisha*, 36 F.2d 256 (E.D. La. 1929); *The Progresso*, 42 F. 229.

³² 46 U.S.C. app. § 1304(2)(h) (2003).

³³ 36 F.2d 256 (E.D. La. 1929).

³⁴ *Id.* at 256.

Quarantine Station on October 24, 1926. At that time, a crewmember that had previously taken ill was insolated. The passengers and 62 crewmembers disembarked and were detained by medical authorities for observation. The United States Health Service sent the crew to the United States Marine Hospital, placed the vessel under fumigation and denied docking privilege in New Orleans until the entire cargo was discharged and fumigated on lighters. Upon delivery, the coffee was found damaged by water.³⁵

The issue before the court was whether there was any negligence on the part of the carrier with regard to the quarantine operations.³⁶ The court concluded that the goods had arrived in good order as evidenced by the clean bill of lading.³⁷ As such, the carrier must show that the damage was caused by an exempted peril pursuant to the bill of lading.³⁸ The president of the steamship line testified that upon learning of the presence of bubonic plague on board, he notified the medical officer in charge of the United States Public Health Service.³⁹ The president was instructed that the ship was to be held at Lower Quarantine Station and that the entire cargo was to be discharged. He

³⁵ *Id.*

³⁶ *Id.* at 257.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 258.

was able to convince the authorities to allow the vessel to proceed upriver, as no facilities existed for discharging the cargo at the mouth of the river. He further attempted to procure covered lighters, to no avail.

The chief fumigator and the assistant surgeon of the United States Public Health Service directed the manner in which the tarpaulins were to be placed on the lighters during the fumigation. The manager of the stevedoring company testified about his efforts to procure covered lighters and that the lighters were dry before the cargo was received. He also testified that he disagreed with the placement of the tarpaulins and that he would have placed them flush against the sides of the lighters to keep the rainwater off the cargo. However, he was required to follow instructions from the United States Public Health Service.⁴⁰

The court was persuaded that the United States Public Health Service was in control and that their representatives dictated the manner in which the lighters were to be fumigated. Therefore, finding no liability on the part of the carrier, the case was dismissed.⁴¹

B. CARRIAGE OF GOODS BY SEA - OWNER LIABLE FOR QUARANTINE

⁴⁰ *Id.*

⁴¹ *Id.*

The owner is only entitled to the quarantine defense for certain kinds of damage. The carrier is not entitled to the defense where the carrier agrees to complete the quarantine by contract with the shipper.

Hearty et al v. Ruganda⁴²

This case involves a shipment of pears from Buenos Aires, Argentina, to New York. The pears were to be shipped on board in refrigerated chambers equipped with quarantine facilities. The United States Department of Agriculture imposed regulations regarding control of the Argentine fruit fly. These regulations included the refrigeration of goods and maintenance of a certain temperature. If the goods were not maintained at the required temperature, quarantine would result. On discharge in New York, the pears were in a ripened condition and were quarantined in shore refrigeration until June 3, 1952, at the Plaintiff's expense.

The Plaintiff's complaint alleged that the carrier breached its duties as set forth in the bill of lading. The complaint also alleged that the carrier knew of the regulations but maintained a higher temperature than allowed, which caused the pear to ripen and led to

⁴² 114 F. Supp. 869 (S.D.N.Y. 1953).

quarantine in New York. The complaint also seeks special damages for delay, arguing that the discharge on May 15, 1952 was not delivery. The bill of lading stated that the goods would be "stowed in refrigerated chambers" and that the "vessel is equipped with quarantine facilities". The issue in this case was whether the carrier was entitled to exoneration under the Carriage of Goods by Sea Act.⁴³ The quarantine exception states that neither the carrier nor the ship is responsible for loss or damage arising from or resulting from 'quarantine restrictions'. The court found that carrier knew of the government requirements with respect to the maintenance of certain temperatures in refrigerated chambers relating to the control of the Argentine fruit fly as evidenced by the language in the bill of lading.⁴⁴

IV. CONCLUSION

Certain instances of cargo damage will not entitle the carrier to the quarantine defense. Even in situations of quarantine restriction, the carrier may be liable for decay of agricultural products due to negligent ventilation.⁴⁵ The quarantine defense shield the carrier from shippers

⁴³ 46 U.S.C. app. § 1304(2)(h).

⁴⁴ 114 F. Supp. at 869.

⁴⁵ Schnell v. The Vallescura, 293 U.S. 296 (1934).

claims where the cargo has failed to pass a government imposed quarantine, over which the carrier has not control.