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Ukraine Conflict and Charterparties - FAQs

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In light of the current situation in Ukraine many Members are understandably contacting the Club to ask for advice. The below summary aims to give broad advice in response to the questions we are most commonly asked.

The views expressed below are general and the contractual, cargo and factual circumstances will be different in each case. This note is therefore intended for general guidance only and should not be relied upon as legal advice. Should you require specific advice on a situation please contact us.

1) Can an owner refuse to sail to a Ukranian or Russian port and, if the vessel is already at a Ukranian or Russian port, can an owner leave the port/berth?

a) Unsafe berth/port:

Under English law there is no implied or common law obligation upon charterers to ensure that the berth/port they nominate is safe for the vessel, her crew and her cargo. However, owners will still have legal obligations to the crew, to cargo interests and to H&M and P&I insurers, to ensure their interests are safeguarded.

Because no implied or common law obligation is imposed upon charterers under English law, an express safe port/berth warranty is usually included in the charterparty as an express contractual obligation, eg NYPE 2015, cl 1 ("*Trading limits – The Vessel shall be employed in such lawful trades between safe ports and safe places within the following trading limits …*"). It may also be extended to included anchorages and places.

i. How is "danger" assessed - when will a port be "unsafe"?

Where an express safe port clause is included in the charterparty, the classic test under English law is set out in The Eastern City [1958], namely that a port will only be safe if "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" and see here.

Accordingly, owners will need to gauge whether, in each case, by following charterers' orders, their ship is likely to be exposed to danger, not just when approaching the berth or alongside the berth, but also looking ahead to when the ship is anticipated to leave port limits.

ii. Legal as well as physical safety

English law interprets “danger” not just as physical danger but also as legal “danger” such as where the vessel’s trading or cargo becomes illegal or where the vessel’s subsequent trading will be “blighted” or the vessel blacklisted due to having called at that port, with that cargo. And see here.

iii) How quickly do owners need to react to charterers’ orders?

An owner will be permitted a ‘reasonable” time to consider the situation and determine whether the clause is triggered - *see The Houda [1994].* There is no definition of what a reasonable time is but it is likely that the more imminent the danger is, the quicker an owner will be expected to react before it will be held to have waived his right to ask for alternative orders.

The need for factual enquiry and evidence: Members should gather as much contemporaneous evidence as possible to show what the situation is locally and what the anticipated risks are of the vessel calling to the port in question. For example, Members should ask local correspondents and agents about local port restrictions and the crew may wish, if possible, to take photos/videos of conditions at the port and gather information from other ship operators about what steps they are taking and whether any damage has been suffered by other vessels and, if so, where this occurred.

b) War risks

In addition to any rights under unsafe berth/port charter party clauses, owners may have rights under war risks clauses in their charterparties and bills of lading.

i. What is meant by “war” under English law?

Under English law there is no precise definition of what a “war” is. Nor does a conflict have to be declared by any international or Government body in order to be viewed as “war” under English law.

Parties to charterparties will therefore need to consider whether the situation – as based on the facts reasonably known to the parties when the question arises – is likely to fall within the definition of “war” in their contracts.

ii. What is meant by “war” within CONWARTIME 2013 and VOYWAR 2013?

The widely used BIMCO war risks clauses for time and voyage charters (CONWARTIME 2013 and VOYWAR 2013 states) state:

(ii) “War Risks” shall include any actual, threatened or reported: war, act of war, civil war or hostilities; revolution; rebellion; civil commotion; warlike operations; laying of mines; acts of piracy and/or violent robbery and/or capture/seizure (hereinafter “Piracy”); acts of terrorists; acts of hostility or malicious damage; blockades (whether

imposed against all vessels or imposed selectively against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever), by any person, body, terrorist or political group, or the government of any state or territory whether recognised or not, 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 the Vessel.

Therefore, the test for determining whether CONWARTIME 2013 and VOYWAR 2013 has been triggered and whether to proceed is based on whether an area is dangerous. The level of danger is likely to need to be high although owners do not need to enter into a complex analysis of degree of risk and whether or not it is more or less likely to occur (as opposed to CONWARTIME 2004). See also here.

The danger must be based on evidence rather than speculation. Speculation and a bare possibility would not be included. It is therefore recommended for Members to make enquiries with local agents in order to assess the situation – and see "*The need for factual enquiry and evidence" above.*

iii. Can charterers oblige owners to proceed to a "war" zone?

If an English court or arbitration tribunal finds that the vessel will be exposed to a risk of "war" at a port or place to which the vessel is ordered within the meaning of this clause, owners will be entitled to exercise the rights stated in the charterparty clause, for example, not to sail to, alternatively, to leave the port and to ask charterers for alternative voyage orders. See for instance, the BIMCO war risks clause for time charters (CONWARTIME 2013) - See here.

Note that under this clause, owners can exercise their rights even if the risk of "war" existed at the time of entering into the charterparty.

Note also that the clause also states that the vessel shall also not be obliged to load contraband cargo or to pass through any blockade.

Similar rights for owners are also stated in the BIMCO war risks clause for voyage charters VOYWAR 2013 - See here.

iv. Can owners override charterers' orders in order for owners to comply with the requirement of laws, regulations and other requirements from third parties?

Under both the BIMCO time and voyage war risks clauses (CONWARTIME 2013 and VOYWAR 2013), the vessel is allowed to comply with the requirements of owners' insurers and the orders, directions, recommendations or advice given by ship's flag, or any government to whose laws owners are subject or which has power to compel compliance with their orders or directions.

v. Who is to bear the additional costs of proceeding through a war risk area?

Under both CONWARTIME 2013 and VOYWAR 2013, if the vessel proceeds to or through an area exposed to war risks, charterers are liable to reimburse owners any additional insurance premiums incurred due to the war risks.

In addition, under CONWARTIME 2013, if owners become liable under the terms of the crew's employment contract to pay any bonus or additional wages to the crew as a result of sailing into a war risk area, charterers are liable to reimburse owners for such additional crew costs.

vi. What are owners' rights and obligations if owners legitimately refuse to proceed to a war risk area?

Under CONWARTIME 2013, if owners refuse to proceed to the loading or discharging ports, owners must immediately inform charterers. Cargo cannot be discharged at any alternative port without first giving charterers notice of owners' intention to do so and requesting charterers to nominate a safe port for such discharge. If charterers fail to nominate within 48 hours of the receipt of owners' request, owners can discharge the cargo at any safe port of their own choice. All costs, risk and expenses for the alternative discharge shall be for charterers' account.

vii. "… where, in the reasonable judgement of the Master and/or the Owners, the Vessel …may be exposed to War Risks." How will a court or tribunal assess this?

If owners have express rights in the charterparty to ask for alternative orders or to cancel the charterparty where "*in the reasonable judgement of the Master and/or the Owners, may be, or are likely to be, exposed to War Risks...*" how will a court or tribunal assess whether owners are entitled to exercise such rights?

- ***"In the reasonable judgement of the Master and/or the Owners"***

English law lays down two main elements when considering whether a party has acted "reasonably". Firstly, the judgment or decision made by the party must be made "in good faith"; secondly, it must be "reasonable", when viewed objectively.

For example, in *The Triton Lark* [2011] owners argued that if the vessel sailed via the Gulf of Aden, she would be "exposed to War risks" (namely, the risk of piracy) within the meaning of Conwartime 1993, namely: *"(2) The Vessel…shall not be ordered to…any…place…where it appears that the Vessel, her cargo, crew or other persons on board the Vessel, in the reasonable judgement of the Master and/or the Owners, may be, or are likely to be, exposed to War Risks..."*

Explaining how "*in the reasonable judgement of"* is to be interpreted, Teare J stated that: "*Assuming that CONWARTIME 1993 conferred a discretion or power on the owners to make a decision which could affect both parties there was no necessity to imply any term as to how that discretion or power must be exercised because the clause said expressly that the owner's judgment must be "reasonable". The effect of that clause is that the Owners must make a judgment. It must be made in good faith; otherwise it would not be a judgment but a device to obtain a financial gain. Further, the judgment reached must be objectively reasonable. An owner who wishes to ensure that his judgment is objectively reasonable will make all necessary enquiries. If he makes no enquiries at all it may be concluded that he did not reach a judgment in good faith. But if he makes those enquiries which he considers sufficient but fails to make all necessary enquiries before reaching his judgment I do not consider that his judgment will on that account be judged unreasonable if in fact it was an objectively reasonable judgment and would have been shown to be so had all necessary enquiries been made."*

- **What does "*exposed to War Risks*" mean? What is meant by "*exposure*" and how serious must the relevant risk be?**

This was the subject of a second hearing in *The Triton Lark* [2012] where Teare J said that: "*What is dangerous will depend upon the facts of the particular case. It will depend upon both the degree of likelihood that a particular peril might occur, in this case acts of piracy, and the gravity or otherwise of the consequences to the vessel, cargo and crew should that peril occur. That approach seems to me to be consistent with the overriding priorities set out by BIMCO in their*

Special Circular no 6 dated 28 July 1993 to which I referred in para 32 of my judgment, in particular, that the master must be given the tools to enable him to keep the vessel cargo and crew out of harm's way but that such tools must be no more than those which are reasonably necessary to allow the master to do his job. Thus, whether or not the Gulf of Aden was dangerous to Triton Lark on account of acts of piracy will depend upon the degree of likelihood that they will occur and the gravity of the consequences to the vessel, cargo and crew should they occur."

However, Teare J did not decide whether, on the facts, owners had successfully triggered the Conwartime 1993 clause because the case was, instead, remitted back to the arbitration tribunal to decide on the facts.

viii. "What if the parties entered into the charter party after Russia's invasion into Ukraine on 24 February 2020: can owners still exercise the rights given in the charterparty eg under Voywar 2013?

As can be seen from above, the likelihood of risk and the degree of risk are important features when assessing whether owners will be found to be entitled, for example, to exercise express rights given in CONWARTIME 2013 or VOYWAR 2013.

Accordingly, where a charterparty nominating Black Sea (or nearby) ports is entered into after Russia's invasion of Ukraine on 24 February 2022, it may be that owners will be held, by entering into the charterparty, to have accepted the risks inherent in performing the charterparty voyage/s in the Black Sea area, notwithstanding the express rights given in the charterparty.

In that event, owners may be held not to be entitled to exercise express charterparty rights, eg to ask for alternative orders or to cancel the charterparty - that is, unless owners can show that the nature and/or likelihood of the risk of a Black Sea voyage has increased since entering into the charterparty: see, for example, *The Product Star (No. 2)* [1993], where the vessel was ordered to load at Ruwais, UAE, under a Beepeetime 2 charterparty that had been entered into when the Arabian Gulf was well known to be an area which was exposed to war risks (namely, the Iran/Iraq war).

However, in *The Product Star (No. 2)*, the charterparty was for six months (extendable for a further six months), to carry petroleum cargoes from the UAE, and the vessel had already lifted four such voyages before owners, for the first time, asked charterers for alternative voyage orders. It is thought that it is therefore less clear in the current Ukraine situation whether an English court or tribunal would find that, where an owner enters into a charterparty that nominates Black Sea (or nearby) ports after Russia's invasion of Ukraine on 24 February 2022, the owner will have, similarly, accepted all war risks that arise in the area. This is particularly so where the geographical extent and/or severity of the "warlike operations" etc may have changed or increased since the charterparty was entered into.

2) If an owner refuses to sail to a Ukranian port or leaves a Ukranian port and requests new orders, will the ship remain on hire?

Where owners legitimately request alternative voyage orders and these are followed by the vessel, owners will be complying with charterers' orders and the vessel is likely to remain on hire.

This position is made clearer where the charterparty includes wording similar to the BIMCO CONWARTIME 2013 clause which provides that "*(j) When acting in accordance with any of the provisions of Sub-clauses (b) to (h) of this Clause anything is done or not done, such shall not be deemed a deviation, but shall be considered as due fulfilment of this Charter Party."*

3) Can an owner or charterer cancel the charterparty?

i. "Outbreak of war" clauses in charterparties

As with unsafe port, English law does not include an implied right of cancellation of charter if war or warlike hostilities breaks out. For this reason, express charterparty cancellation clauses in the event of 'war" are common.

However, such clauses are often triggered only if war breaks out between specific stated countries, eg between two or more of the US, UK, Russia, France or China. It is doubtful therefore whether the current invasion by Russia into Ukraine - at least whilst the US or UK have declared economic sanctions but have not themselves initiated physical warlike steps against Russia - would trigger such clauses so as to lead to cancellation of the charterparty under such express charterparty cancellation clauses.

ii. Can an owner terminate the charter party on grounds of frustration?

If performance of the charterparty becomes impossible or radically different, for example, if the vessel is fixed only to load or discharge at nominated port/s which are closed or where the cargo becomes illegal and the charterparty does not give the parties an alternative method of performance such as a contractual right to sail to an alternative port/s, an owner may be able to argue that the charterparty has been frustrated. And see here.

However, frustration of a contract under English law is extremely difficult to prove and is assessed in context, so the vessel may well have to wait for several days or even weeks to see whether, for example, the nominated port/s opens up again before an owner is in a position legitimately to argue that the charterparty has been frustrated.

In addition, frustration simply brings the charterparty to an end and does not itself give rise to a claim in damages by or against either party to the contract.

A less risky option for Members which the Club would in nearly all situations recommend is for the parties is to negotiate alternative method of performance of the charterparty, for example discharging the cargo at an alternative port.

iii. Can an owner terminate the charter party on grounds of Force Majeure?

Force majeure is not a doctrine that is readily recognised in English law as frustration is the usual remedy. Accordingly, many charterparties include express force majeure clauses.

If in such clauses only the words 'force majeure' are used then the court will try to give meaning to the words based the usual rules of commercial contractual interpretation. More commonly, force majeure clauses are more detailed and include specific provisions such as "war, blockades, civil commotion, strikes or acts of god". And see here.

Force Majeure clauses are interpreted strictly by the court and where there is ambiguity they are interpreted against the party trying to rely on them.

iv. What if charterers do not give alternative orders when requested and/or fail to pay hire or demurrage - can an owner terminate the charterparty on grounds of repudiation and/or renunciation?

If hire or demurrage is payable whilst a vessel is unable to enter a port and the charterer in that situation fails to pay the hire or demurrage that is due and payable, the owner may be able to treat the charterparty as terminated at common law based on charterers' renunciatory and/or repudiatory breach of charterparty.

However, here again, an owner will need to wait for a sufficient period of time and number of instalments of hire/amount of demurrage to be overdue before a charterer's non-payment and/or failure to give orders to the vessel will amount to repudiation of the charterparty. And see here.

v. What happens regarding the cargo on board if the charterparty is terminated?

If the charterparty is terminated, whether at common law (by frustration or by repudiation or renunciation of the charterparty) or, alternatively, by the express terms of the charterparty, an owner will still be under an obligation, as bailee, safely to carry any cargo on board and deliver it to cargo interests.

Owners may also be able exercise a lien on the cargo in order to recoup the cost of additional bunkers and expenses incurred, as long a such a lien is provided for in the charterparty, in the bill of lading and under the local law where the lien is being exercised. And see here.

4) What are the implications for bills of lading and contracts of carriage?

Since bills of lading are contracts relating to the carriage of goods as between the vessel owner/carrier and cargo interests, they may incorporate the same terms and conditions which are contained in the charterparty. If so, the comments above regarding war clauses may be applicable.

Equally, contracts of carriage are also capable of frustration under English law, although where there is cargo on board owners/carriers may be placed in a difficult position due to the duty of bailment owed to the cargo interests safely to carry the cargo to destination.

In the event that a vessel is delayed, particularly if she has a perishable cargo on board, the Club's advice should be sought to ensure that adequate steps are being taken to take care of the cargo. Each incident will be considered on its own particular facts to determine what may need to be done; for instance, whether the owner should make an application to sell the cargo or, alternatively, to discharge it elsewhere.

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