



## **War in Ukraine - Impact on contractual obligations**

The war in Ukraine has led to a large volume of queries being received by our team of Defence lawyers. Some owners and operators have vessels currently at Ukrainian or Russian ports or bound for them whilst others have concerns about whether they are contractually bound to go to Russian ports in the future.

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We outline some of the Frequently Asked Questions primarily related to Defence issues below. While many questions will depend on the specific facts, we provide some general guidance which will be supplemented as events unfold. These answers are based on the charterparty being subject to English law. The answers may be different if the charterparty is subject to another legal system.

## Issues of safety

The classic definition of unsafety from *The Eastern City* case applies to both voyage and time charters, but the consequences of unsafety are different.

“A port will not be safe unless, in the relevant period of time, 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...”

*1 If the charterparty contains a safe port warranty can orders to Ukrainian ports be refused?*

- Advice should be sought on your specific situation before doing so, but the answer is likely yes. Since 24 February, the northwest Black Sea waters, bordering Ukraine, are closed to all shipping. Ukraine is under sea blockade, carried out by the Russian Black Sea Navy Fleet. Merchant ships nearing the zone prohibited for navigation are warned by Russian Navy ships via VHF, that navigation near and in Ukrainian waters is prohibited, because the Russian Navy is performing “counter terrorist operation,” and all ships entering this zone are considered as terrorists. Ukrainian ports would not be considered safe for most vessels and in the very unlikely event of the vessel being ordered to them, they can be refused.

*2 If the charterparty contains a safe port warranty can an order to Russian ports be refused?*

- Russian ports may be unsafe for Ukrainian crew. We have received reports of some Ukrainian crew being taken off and questioned about their political beliefs and on one occasion it was reported that a Ukrainian crew member was not returned to the vessel. The prevailing view among lawyers at the moment is that Russian ports are unsafe for Ukrainian crew. As to the question of whether owners would be obliged to change Ukrainian crew members to deal with this safety issue, there are conflicting views on this but probably the better view is that it is not incumbent on the owners to change the crew in order to render the port safe. If this issue arises please discuss it with FD&D handler.
- Russian ports may be unsafe for vessels with EU/UK/US connections. There have been reports (from NK IOC) of the detention of two vessels affiliated with Western- European states in Russian territorial waters. The detentions are thought to be linked to a Russian decree of 8 March but information is sketchy both about the detentions and the underlying legislation so care should be taken before relying on this as a reason to refuse to call there. If vessels were being detained indefinitely in Russian because of links with the EU/UK/US this would be likely to render the ports unsafe for those vessels. There is also an increasing risk from mines when entering Black Sea ports although again the position is unclear and each case has to be considered on the basis of the facts at the time. In a further recent development Russia is now a JWC listed area which shows increased concern on the part of the Joint War Committee about calling at Russia. The situation can change quickly, and risks may well increase in the future.

*3 If there is no express safe port warranty in the charterparty, can one be implied?*

- It can be implied but this is quite difficult. It is most likely to be implied in a time charter with wide trading limits and will not be implied in a voyage charter or time charter trip

with named ports. Please consult with your claims handler before assuming that the charterparty has an implied safe port warranty.

*4 What if the charter does not include an express or implied safe port warranty?*

- There may be other clauses that would enable you to refuse calls to Russian or Ukrainian ports see the commentary below on war risk clauses.

*5 Can the owner ask for revised orders if the port becomes unsafe?*

- Yes, if it is a time charter, no if it is a voyage charter. In the case of a time charter the charterer must provide revised orders.
- In the case of a voyage charter there is no automatic right to renomination but in the vast majority of the cases the parties reach an agreement to cancel the charterparty.
- In the absence of an agreement the vessel would have to wait outside the port until the charter became frustrated (see below). This is not a practical solution so a negotiated solution should be found.

## **Frustration**

There are various scenarios where the question arises of whether charterparties have been frustrated, i.e., impossible to be performed or their principal purpose is radically changed. It is very difficult to prove frustration under English law and it is always better to seek a negotiated end to the charter rather than relying on frustration. Furthermore, the results of frustration are unlikely to be ideal for either party since the losses lie where they fall. Money paid in advance for services not provided when the contract was terminated can be recovered by the party who paid it although the court can order those expenses incurred should be deducted from it.

*6 Are the charterparties for vessels trapped in Ukraine frustrated?*

- We are now getting to the stage where for some time charters the frustration argument is strengthening given that there seems to be no way out for the trapped vessels in the foreseeable future. However, each case will depend on its own facts (including when the vessel was trapped and the duration of the charter). We would recommend that your claims handler is consulted before any notice of frustration is submitted.
- Voyage charters are more likely to be frustrated but there is no practical difference to the owners since they will not be able to claim detention as a result of the delays and their best chance of obtaining payment of freight may simply be to wait it out.
- If charterparties are treated as frustrated by charterers, the vessel owners will still have obligations towards any cargo that has been loaded, and early advice should be sought by them on their responsibilities and options.

*7 Are charterparties for vessels bound for Ukrainian or Russian ports frustrated?*

- Voyage charters and time charter trips for Ukraine are likely to be frustrated since it is impossible to get there but is less likely to be if the charterparty contains a “or so near thereto as she may safely get” provision in relation to the port. Time charters will not be frustrated since the owner can call for alternative orders and the charterers are obliged to provide them.
- Russian ports can still be reached and as things stand, they are not unsafe except potentially for vessels with Ukrainian crew on board. There is a possible argument that Russian ports could be unsafe for certain vessels with EU/UK/US links but this is far from clear at the moment although the situation may change over the coming weeks.

## *8 Are charterparties for Russian vessels to UK ports frustrated?*

- The UK has banned any vessels owned or operated by anyone connected to Russia from UK ports. EU ports are proposing to impose similar restrictions. In those circumstances voyage charters and time charter trips of those vessels to UK ports are likely to be frustrated since the ban is indefinite.
- Time charters of those vessels are unlikely to be frustrated at the moment, but the situation may change if the banning of Russian vessels becomes more widespread within the trading zone for those vessels.
- Practical solution: a negotiated solution should be found.

## **Contractual clauses: war risk, cancellation etc.**

Contractual clauses have been developed to address the allocation of war risks. These may be negotiated on a case-by-case basis between the parties, or they may elect to use standard industry clauses, such as the BIMCO war related clauses. These clauses will vary but we have considered below some common clauses that have been the subject of questions from Members.

### *9 Can an owner cancel if the charter contains a clause allowing for cancellation in the event of war between the following countries: United Kingdom, United States of America, France, the Russian Federation, the People's Republic of China (the so-called Five Powers)?*

- No – because there is not currently a war between any two of those countries.

### *10 Can an owner cancel if Ukraine is included in the list?*

- Yes – there is war between the Russian Federation and Ukraine.

### *11 Can an owner refuse voyage orders given by a time charterer to proceed to a Russian port in the Black Sea by relying upon a CONWARTIME 2013 clause?*

- Whilst it is clear that owners may refuse orders to go to a Ukrainian port by reason of being exposed to “war risks,” it is not so clear in respect of Russian ports. The presence of a Ukrainian crew may expose the vessel to war risks as defined within the clause, but this is a question of fact to be determined at the material time and in respect of the intended port of call. Furthermore, the clause gives owners the express liberty to call at an alternative port to change the crew where there is concern for their safety.

### *12 Who is liable to pay the significantly increased Additional War Risk Premiums (AWRP) in respect of calls to Russian ports in the Black Sea?*

- If such a call is considered to involve going through a war risks area as defined in the CONWARTIME 2013 and this clause is included in the charter, then charterers will be responsible for the AWRP. The same is equally true of the VOYWAR 2013 clause.

## **Delay**

Vessels are currently stuck in Ukraine. Although vessels are not currently being detained in Russia it is possible that a vessel could go into a Russian port in the Black Sea, load her cargo and subsequently be prevented from departing. Who is responsible for what?

### *13 If the vessel is on time charter, does she remain on hire whilst detained?*

- Yes. Unless there is an express clause in the charter providing otherwise. The vessel remains at the service of the charterer and is fully efficient in all respects (subject to any force majeure provisions in the charter).

*14 If the vessel is on voyage charter, can Owners claim for the loss of time/delay to prosecution of the voyage?*

- During cargo operations laytime and demurrage run as usual unless there are specific laytime or demurrage exceptions clauses which are triggered. Once cargo operations have been completed and the vessel's documents have been returned, owners will only be able to claim against charterers for the delay by way of detention. However, to claim the same charterers must be in breach of the charter which they would not be if the delay was the fault of neither party.

*15 If cargo operations are delayed does the ASBATANKVOY exceptions clause interrupt the running of laytime or demurrage?*

- No. Unless specifically referred to the general exceptions clause does not apply to the running of laytime and demurrage.

## **Force majeure**

Under English law, there is no common law concept of 'force majeure' so the application and effect of a Force Majeure Clause will depend entirely on what the clause states and care must be taken to understand and follow them precisely. If there is no clause, neither party will have a right to rely on the principles and they will potentially have to fall back on the English law doctrine of frustration which is notoriously difficult to argue successfully for the reasons discussed above.

*16 If the Member has a force majeure clause in the charterparty are owners and charterers obligations suspended?*

- Everything depends on the wording of the clause which must be considered very carefully. The recently published BIMCO Force Majeure Clause 2022 is a good example of one of these clauses. It has been designed for use in a range of different contracts and could be used in either time or voyage charterparties, although it would be more common in the latter. It defines "actual, threatened or reported war, act of war" and "warlike operations" as being among the Force Majeure events. It is therefore likely that events in Ukraine would qualify as an event which would trigger the application of the clause. As always, the formalities of the clause must be followed and applied, for example, notice must be given by the party relying on force majeure. The clause does not operate to suspend payment obligations, i.e., hire must continue to be paid and laytime or demurrage will continue to run in accordance with its provisions. In addition, this force majeure clause will permit termination of the charterparty where the parties have agreed to this option and there is no cargo on board.
- In general terms, a vessel waiting off Ukrainian ports to load cargo may well be experiencing a force majeure event, which could substantially change the parties' rights and obligations to each other if there is a force majeure clause. Members and clients are recommended to seek guidance from their normal FD&D lawyer if they think a force majeure clause may be triggered.

## **Cargo issues**

Members are also concerned about potential claims from cargo owners under bills of lading if the cargo is damaged or delivery delayed or if delivery becomes impossible. The potential liabilities for owners will depend on whether the charterparty is incorporated into the bill of

lading and its terms. However, generally speaking, the Hague or Hague Visby Rules will be incorporated.

*17 Are owners likely to be liable under any bills of lading issued for any damage to the cargo as a result of the delay to the voyage and the ensuing delayed arrival of the cargo at destination?*

- On the basis that the bills should incorporate the Hague or Hague Visby Rules, owners will most probably be able to rely upon one or more of the defences set out in Article IV r 2 of the same. For example: (e) Act of war or (q) Any other cause arising without the actual fault or privity of the carrier.
- Many standard form bills of lading also qualify the discharge port with the protective wording “or so near thereto as she may safely get” which entitles the shipowners to discharge the cargo at an alternative discharge port where the contractual discharge port is no longer safe. If shipowners exercise this right, discharge at the alternative port will not be a breach of the bill of lading contract and they should be able to rely on the wording in defence of any claims for late or non-delivery. Shipowners should undertake an outturn survey to capture the condition of the cargo upon discharge in case it is subsequently damaged.

## Insurance covers

The events in Ukraine touch on all covers available to Members. If you have questions about coverage, please contact your claims handler. This article primarily covers defence issues, and we have therefore predominantly looked at issues relating to FD&D (Defence). *18 If Members have potential claims against their counterparties arising out of the war in Ukraine will the legal costs of pursuing these claims be covered by FD&D.*

- Our FD&D handlers will advise you on claims and will assist you as far as they can in finding a solution. If a claim must be brought FD&D will be provided subject to the usual rules.

## Sanctions

There is a constantly expanding list of sanctions and we do not intend here to provide detailed information on the dynamic sanctions regulation of the US, UK, and EU. As guidance for Members we are touching upon some of the questions that have most commonly been asked of defence lawyers.

*19 In the absence of a charterparty provision specifically requiring it, can owners require charterers to provide due diligence information about cargo and shippers and receivers before accepting a voyage and/or loading cargo?*

- In the absence of an express term, there is no direct implied term entitling owners to require charterers to provide due diligence information.
- Terms dealing with lawful merchandise or trading range/included/excluded cargoes might include specific wordings, but these can be very particular, and are often limited to one or more specific cargoes to be carried.
- If there is a sanctions clause in the charterparty, there is a reasonable argument that the charterers must provide information to enable due diligence to be carried out so that the sanctions clause can function, but this is uncertain.
- If there is a war risk clause in the charterparty, it may be possible to require this information if it is necessary in order to obtain war risk cover but again this is uncertain and much depends on the wording of the clause.

- These are issues that have not been explored in case law and so it is difficult to give a general answer on this point.
- The best way to deal with this type of issue is to have a strong sanctions clause requiring charterers to provide reasonable due diligence information requested by owners or their underwriters.
- Please contact your FD&D claims handler if this issue arises.

*20 Are the owners sufficiently protected if charterers provide a warranty that no applicable sanctions will be breached?*

- No. Sanctions' legislation requires each party to a transaction to undertake its own due diligence, and it would be no answer in the event of a sanctions breach, to point to a reliance upon a warranty.
- Parties must address the increasing sanctions risk at the stage where the charterparty is negotiated by inserting strong sanctions clauses requiring due diligence information to be provided and this should be duplicated down the charterparty chain.

*21 If the owners refuse to perform a charterparty because of reasonable but unfounded sanctions concerns, will they be liable to the charterers?*

- Probably yes. In those circumstances owners would likely be in repudiatory breach of contract unless their charterparty contained a sanctions clause allowing the owners to reject orders which in their reasonable judgment would expose them to sanctions. In order to rely on this the owners should be able to point to some respectable market intelligence that they relied on.

*22 Can a port be unsafe because of sanctions risks?*

- Probably not. The risk of blacklisting, or other commercial consequences of doing business with a particular entity at a port is not sufficient to render the port unsafe. However, this also has to be kept under review. Again if you are affected by this type of issue please contact your FD & D claims handler.