



Israel-Gaza conflict: contractual implications

The Israel-Gaza conflict has escalated significantly after Hamas launched a major attack on 7 October. This article answers some of the trade-related and contractual questions shipowners might have in this turbulent and highly volatile situation.

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Less than two years after the start of the war in Ukraine there is now another conflict which is resulting in great human cost and also threatens to disrupt trade. The attack by Hamas on Southern Israel on 7 October and the subsequent siege of the Gaza strip by Israel currently threatens the operational security of two important Southern Israeli ports: Ashkelon and Ashdod.

If the conflict spreads, there may be repercussions for global trade in the region. This article outlines some of the Frequently Asked Questions primarily related to Defence issues. 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 Israeli ports be refused?

- Advice should be sought on your specific situation before doing so. The ports close to the Gaza Strip are in a very different situation from those further north such as Haifa. At the moment the answer is likely to be ‘yes’ in relation to the port of Ashkelon (primarily a tanker port) which has been bombed and is currently not operating. However, vessels are still discharging while moored at sea buoys but the situation has to be reviewed on a daily basis. The position in Ashdod is slightly more ambiguous but it is unlikely to be considered unsafe. The port is currently reported by local correspondents to be working normally. The Israeli navy is reported to maintain a substantial presence in the area which may give some comfort to port users. Hazardous material cargoes require case-by-case approval prior to entry and some categories such as explosives and toxic gases are not permitted. Haifa also has a restriction on hazardous materials. In a recent development, vessels entering Ashdod or Haifa have now been ordered to wait in an area 18 nautical miles west of the Haifa and Ashdod breakwater until they receive instructions to enter the port.

2. If the charterparty contains a safe port warranty can orders to ports in neighbouring countries (Lebanon and Egypt) be refused?

- There is currently nothing to suggest that the conflict has spread to neighbouring states and orders to ports in neighbouring states cannot be refused on grounds of safety.

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 Israeli ports or at least Southern 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 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. We are very far from the stage where frustration argument could start to bear any weight in relation to orders to Israeli ports.

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.

6. Can an owner refuse voyage orders given by a time charterer to proceed to an Israeli Mediterranean port by relying upon a CONWARTIME 2013 clause?

- There is a risk that commercial vessels may be exposed to collateral damage in Southern Israeli ports but there has been no damage to any vessels so far. At present, the clause could arguably be relied upon in relation to orders to Ashkelon but it is questionable whether it could be relied on to refuse orders to Ashdod. At the moment there would be a risk for the owners that refusing orders to Ashdod on the basis of the war risks clause could be a repudiatory breach of contract and it would be better to seek a negotiated solution if the owners or the master are reluctant to go into Ashdod.

As things currently stand this clause could not be relied upon to refuse orders to any other Israeli port.

7. Who is liable to pay the significantly increased Additional War Risk Premiums (AWRP) in respect of calls to Israeli Mediterranean ports?

- 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

We are receiving reports of possible delays in Ashdod and in Haifa as vessels are sent there; who is responsible for what?

8. If the vessel is on time charter, does she remain on hire during delays?

- Yes. Unless there is an express clause in the charter providing otherwise or perhaps a *force majeure* type clause. The vessel remains at the service of the charterer and is fully efficient in all respects.

9. 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.

10. 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 invoke a force majeure-based argument 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.

11. 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. As things stand the conflict is unlikely to constitute a Force Majeure event unless the vessel had orders to load at Ashkelon and they could not be complied with. 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 Ashkelon to load cargo may 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 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 carriers 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.

12. Are carriers 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, carriers 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: (a) Act of war or (b) 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 carrier to discharge the cargo at an alternative discharge port where the contractual discharge port is no longer safe. If the carrier exercises this right, discharge at the alternative port will not be a breach of the bill of lading contract and the carrier should be able to rely on the wording in defence of any claims for late or non-delivery. The carrier 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 Israel 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).

13. If Members have potential claims against their counterparties arising out of the conflict in Israel 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.

The situation in the area is extremely volatile. We are closely following developments and will provide updates upon request.