# The Chinese/Australian trade wars and implications for shipping

In this article, we will take a brief look at some of the complications that can arise with respect to both voyage and time charterparties when there is significant delay, such as that experienced to laden vessels off shore China.

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We are all conscious of the influence geopolitical events have on shipping; a good recent example is the trade spat between China and Australia. This is currently raging in the South China Sea which is having a huge knock-on effect on international trade. We will not go into the reasons behind the cause of the dispute but the consequence is that China has imposed a trade ban on Australian coal and this has caused significant delay to ladened vessels lining up off shore China waiting for discharge. As we know there is nothing more that owners and charterers dislike in the world of shipping than a delayed or stuck vessel.

## Concerns under a voyage charterparty

More often than not by the time the ship has arrived at the discharge port in China, her owners will have received a significant freight payment. Now provided the vessel was able to tender a valid Notice of Readiness (NOR) the laytime and demurrage provisions should kick in and at least the owners should be in the position of receiving demurrage. As we know, however, the demurrage rate is normally not adequate compensation for the value of the vessel's earning capability at market rate so owners are always keen to get the vessel moving and delivered into its next fixture.

One of the big issues for owners in this scenario is, of course, serving a valid NOR and getting time running. Whether or not demurrage will become payable depends upon the terms of the charter and in particular, when a valid Notice of Readiness may be tendered. A correctly tendered NOR is the trigger to the commencement of time counting for the purposes of laytime (or demurrage if already on demurrage). If the charter is not a berth charter and contains a WIPON (Whether in port or not) provision such that the NOR can be tendered upon arrival at the anchorage rather than upon reaching the designated berth, waiting at anchorage should not prevent the vessel from being an arrived ship. Provided that she is legally and physically ready in all respects to discharge and has obtained free pratique, the laytime clock will start.

By contrast a voyage charterer in the above scenario may want to be able to stop time running at its earliest opportunity. That said, the voyage charterer for example may have entered into a sale and purchase contract with the buyers of the coal. The terms of this sale contract may not be back to back with the laytime and demurrage provisions of the voyage charter. If no demurrage is payable, the charterer will be losing money hand over fist *vis a vis* owners and will no doubt look to the charter to try and find a way to minimise such losses.

One clause which may assist charterers in these circumstances is the Exceptions to laytime clause. If applicable, this may stop time from running and thus, may result in significantly less, if any, demurrage being payable to owners. However, such clauses are construed strictly. In the absence of an express application of such a clause to demurrage, an Exceptions to laytime clause will normally be construed as applying only to the period covered by laytime. Furthermore, such exceptions clauses in most standard voyage charters do not contain wording that is sufficiently wide in scope to encompass delays resulting from congestion only and in the absence of a strike that subsequently causes congestion.

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If charterers are unable to invoke any exceptions to the laytime clause they may look to plead a case of *force majeure*. They may seek to try and argue that the ban on coal imports from Australia was an unforeseen event at the time the charter was entered into and qualifies to relieve them from their contractual obligations under the charter or to at least suspend performance whilst the ban remains in place. This is a doctrine of law recognized in civil law jurisdictions but not in English common law. As such, unless there is express wording in the charter giving effect to the concept of *force majeure* , charterers will not be able to rely upon it before the English courts and tribunals. Even where there is an express *force majeure* type clause, as with any exceptions clause, it will be construed against charterers as the party seeking to rely upon the same to excuse performance of their obligations and, charterers will need to show that the event in question is named in the clause. Charterers will need to show that at the time of fixing the vessel the ban was not foreseeable which may be difficult. In addition, charterers will need to show that there were no reasonable steps that could have been taken to avoid or mitigate the consequences of the event.

What might be described as the equivalent doctrine to *force majeure* under English law is that of the common law concept of Frustration. Where, as a result of an event beyond the control of the parties and for which there is no contractual provision in the contract, performance of the charter becomes impossible, or the principal purpose for entering into the contract as envisaged by the parties is rendered radically different, then the charter will automatically come to an end. Both parties will be discharged of their ongoing obligations. A significant period of delay may, in the context of a voyage charter, lead to frustration. However, the courts are reluctant to make such a finding. Financial hardship for one or other of the parties will not generally be sufficient to trigger frustration. The current ban is likely to be lifted at some point in the future thus the charters will ultimately be capable of being fulfilled.

**Concerns under a time charterparty**

Due to the nature of a time charter there is less opportunity for argument as to who is responsible for particular situations. We will run through some areas of potential dispute.

For example, it is even less likely that time charterers will be able to show that the contract has been frustrated. Here, subject to the provisions of the off-hire clause, the risk of delay clearly lies with the charterer.

The standard off-hire clauses will not come to the aid of charterers either. Whilst there is clearly a loss of time to the charterer, the vessel remains fully efficient and at the disposal of the charterer ready to perform the service immediately required of her.

Could a standard mutual exceptions clause in a time charter such as clause 16 of the NYPE 46 form help? If the ban on imported thermal coal from Australia can be considered as mandated by the Chinese government then does this constitute a “restraint of Princes, Rulers and People” type mutual exception of liability? The problem for charterers seeking to rely upon this type of clause is that they would need to show that the ban prevented them from discharging their obligation to pay hire – not easy to do.

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The restraint of Princes exception may, however, be of help to time charterers when it comes to late redelivery of the vessel. Significant delay at anchorage in China may lead to an overrun of the maximum duration of the charter. In the absence of a "without guarantee" qualification to the duration, charterers may find that they are liable to owners for damages as late redelivery would constitute a breach of this term of the charter. Whereas, this mutual exceptions clause may negate any such liability.

The issue of hire and prompt payment is always a concern for an owner. Unlike the payment of freight which is for the most part usually paid up front, hire is payable periodically throughout the duration of the charter, commonly every 15 days. Desperate charterers who for whatever reason are not receiving a steady income from sub-charterers or buyers under the sale & purchase contract may simply withhold payments of hire due. This in turn will mean that owners will have to look to their charterparty for available remedies. The drastic measure of withdrawing the vessel from service and terminating the charter should be undertaken with caution but whilst this frees up the vessel for new employment, the cargo on board must still be delivered to the receivers as owners' separate obligations under their bills of lading will survive any withdrawal.

There may be an express right to suspend services where hire is due and is outstanding. But, to what extent such a step is going to persuade charterers to pay is questionable. The vessels are idling at anchorage with no immediate berthing prospects so, other than to continue waiting, no immediate service of the ship is required by charterers.

The exercise of a lien is sometimes a powerful tool in the hands of an owner. However, liening cargo on board and/or liening sub-freights have their own legal and practical niceties to contend with such as the need to have the contractual right of lien in the charter also incorporated into the bill of lading and for Chinese law to recognize the right to lien cargo. Or, the likelihood that any sub-freight due under a sub-voyage charter to the Time Charterers has for the most part largely been paid.

One major issue which both parties should consider under the time charter where there is significant delay is the issue of hull fouling and who takes responsibility for cleaning. Hull fouling is likely to become an issue due to the prolonged stay in Chinese waters. In the absence of an express clause in the charter stating otherwise, the costs of hull cleaning will not generally fall to charterers, whether by implied indemnity as a result of compliance with charterers' orders or otherwise. The risk of fouling is considered as an ordinary risk of trading and as such will fall to Owners.

## Cargo and crew issues common to both voyage and time charters

Whichever charter is in play, there is potential for a cargo of coal to self-heat and ultimately catch fire. A prolonged voyage may increase this risk. This in turn will give rise to questions about the dangerous nature or otherwise of the cargo and how the cargo has been cared for during the voyage.

Crew changes are difficult enough with Covid-19 restrictions being imposed in many ports; the delays to vessels discharging their coal and subsequently sailing to ports where crew can be disembarked and fresh crew taken on will only compound these problems.

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It was reported recently in the shipping press that there is a rumour about the possibility of China lifting the ban on Australian coal. Hopefully the rumour is true and shipping will have one less headache to cure.

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