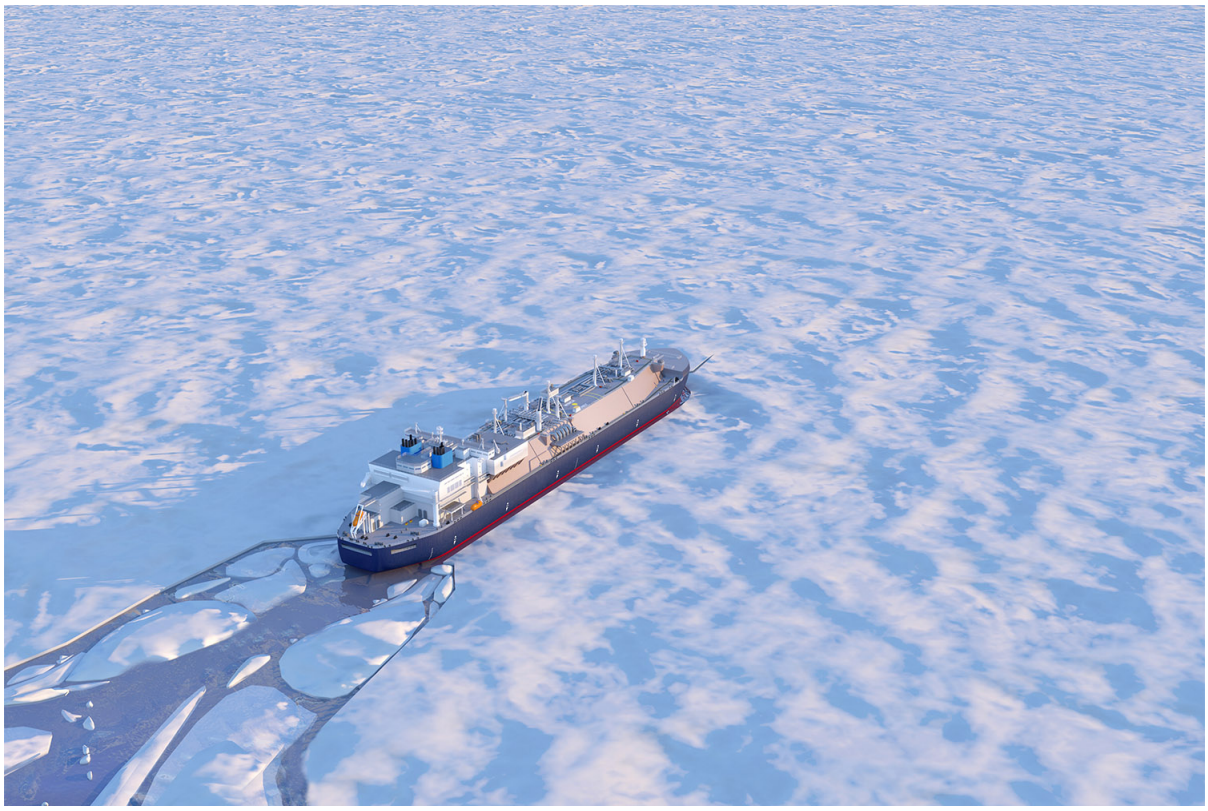

Ice damage – navigating the charterparty terms

When vessels suffer damage from ice, shipowners often look to hold charterers accountable. But the legal landscape surrounding such claims is anything but straightforward. In this article, Tony Riches, partner at Penningtons Manches Cooper, unpacks the nuances of ice-related charterparty clauses, offering guidance on how owners can best position their claims.

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Ice clauses tend to fall into one or more of the following categories:

• Clauses allowing charterers to employ the vessel in ice within certain parameters (for example, a ship is allowed to follow ice breakers but must not force ice).

If a vessel is ordered to a port in breach of such clauses, the charterer's employment orders might be considered unlawful. However, the owner's responsibility for safe navigation usually remains, and if the owner chooses to proceed where there is an observable danger to the vessel, that may displace the charterer's liability.

Problems can also arise where additional wording is included without adequate definition. For example, parties might agree that a ship may trade in a type of ice, such as 'broken ice' or 'in channels regularly cleared by ice breakers'; leaving open the questions of what 'broken ice' means or what 'regularly' should mean (is it measured only by frequency, or does it depend on the weather conditions?).

• Clauses allowing charterers to employ the vessel in ice but only after obtaining the owner's agreement and/or giving the master the right to refuse to enter and/or depart the port if they fear ice damage, or becoming frozen in.

These clauses are similar to the first category, in that they relate to the charterer's lawful employment of the vessel. However, they introduce a scheme of obligations and/or rights on top of the usual employment terms which can significantly affect liability for ice damage. Again, if the owners decide to proceed and damage then ensues, they may not be able to claim from the charterers – it depends on the terms of the clause.

• An agreement that charterers will indemnify the owners for damage/loss caused by trading in ice.

There are various iterations: a blanket indemnity (which is rare); an indemnity only for additional port costs (e.g. additional tugs, ice breakers, etc.); or an indemnity only for time lost, loss of profits, or for the costs only of physical repairs. Such clauses are generally the strongest basis for a claim for the type of loss expressly covered, although owners still need to prove that the loss was caused by operating in ice and not by something else.

Further, the indemnity might not apply if the vessel was negligent, in the absence of express wording to that effect. The precise wording of such indemnities is critical, and their effectiveness can potentially be affected by other ice provisions in the charterparty.

Although standard form ice clauses are common within form charterparties such as NYPE 1946 (clause 25) and ASBATANKVOY (clause 14), and the BIMCO ice clauses, such clauses are often modified, sometimes with unintended consequences. It is not uncommon for ice provisions even to contradict one another. For example, a vessel is permitted to follow ice breakers in one clause but is prohibited from doing so in another. Problems commonly arise where language is taken from one standard clause and inserted into another. Suffice to say that where an owner intends to rely on

charterparty ice clauses, the clauses must be studied before making a claim.

Unsafe port claim

When ice has caused damage, owners will often argue that the ice made the port unsafe. However, typically, basing an ice damage claim on breach of a safe port warranty is generally more difficult than might first appear

Firstly, the presence of ice is seldom sufficient to make a port legally unsafe. Ice is rarely a surprise to the vessel; in most ports where it can be found, it is referred to in navigational publications. It can be anticipated, unlike other 'unsafe' features that cannot be guarded against (uncharted shoals, inadequate port systems, etc.). However, ice that is thicker or denser than usual for the time of year or made unexpectedly worse by local weather/tidal phenomena, could amount to an unsafe feature (unless so uncommon as to constitute an abnormal occurrence).

Correspondingly, it is often possible to avoid ice (or damage caused by it) by employing ordinary good seamanship: ice is usually visible, and measures can often be taken to keep it away from vulnerable parts of the vessel for example by trimming the stern lower in the water, properly employing tugs to clear ice and by careful manoeuvring at the berth. Where an owner knows about the danger, and proceeds anyway, they may not be able to recover for damage caused by the danger. A claim could be further jeopardised where the master had an express right (in an ice clause) to disobey the charterer's orders to proceed if they considered there was a risk of ice damage but decided to proceed anyway.

Secondly, most ports implement measures to assist vessels using the port, such as using ice breakers and specialist pilots. There is case law suggesting that the mere presence of ice is generally insufficient, on its own, to make a port unsafe where such measures are taken (there may of course be an argument as to the effectiveness and adequacy of those systems).

Thirdly, ice is not permanent and its form (coverage/thickness/density) changes depending on the weather. Owners will usually not be in breach of a charter by delaying entry for a reasonable period of time and a port will, generally, not be unsafe if a vessel can avoid the unsafety by waiting. If warmer weather is expected, the danger of damage caused by ice to a vessel might decrease. As this is a matter of navigation, the master/owners need to be proactive in their enquiries. The charterer may also be obliged by the contract terms to provide information concerning ice.

Finally, if in an ice clause the parties have agreed that a vessel must not follow ice breakers or break ice, but the master does this anyway, an unsafe port claim is unlikely to succeed (depending on any additional facts). This might seem unfair, as the restrictions are in the charter terms primarily to benefit the owners and restrict the charterer's employment of the vessel. However, the charterers can argue that the vessel was not obliged to proceed into ice (the owners should instead have sought fresh employment orders) and had it not done so, the damage would have been avoided.

Similarly, some ice clauses contain a requirement for owners to inform charterers when ice that might endanger the vessel is encountered and to request new orders, if they do not do so, and proceed into port anyway a court or tribunal could find that

the owners were not actually following charterer's orders at the time. An unsafe port claim would thereby be more difficult.

Evidence

Unless the wording of an ice indemnity clause is so wide that the charterer is liable for the damage regardless of causation or fault, the vessel will also need to produce comprehensive evidence to support its claim, including:

1. the location where the damage occurred, including whether it was in the channel, following an ice breaker, manoeuvring onto the berth, on arrival or departure etc (this can be difficult where propeller blade damage is not noticed until days later);

2. what the master/owners knew about the ice conditions at the damage location before arrival/departure;

3. the ice conditions encountered (this requires ice condition forecasts and reports (specific to the location), photographs at various times during the ice transit, video footage, details of ice breakers/tugs, accurate log entries about ice coverage and weather conditions);

4. the measures taken by the vessel to avoid ice damage (preferably in accordance with a risk assessment and/or the vessel's safety management system), including the prior planning for the ice transit; and

5. evidence of the mechanism by which the damage occurred and its causative connection to the specific unsafe feature, and why the damage could not have been avoided by good navigation and seamanship. This step, unless clear from the start, may take time to prove and often requires expert input.

Ice claims can be heavy on both factual evidence (documents, electronic data and witness statements) and expert evidence (master mariners, ice/weather experts, engineers/naval architects and/or port management). Where the owner's losses are modest (e.g. they could straighten propeller blades in a short time period without having to dock the vessel), the costs of evidencing the claim properly can become disproportionate. However, regardless of the size of the claim, an owner stands a better chance of a good outcome if they obtain detailed evidence from the vessel documenting the alleged incident as soon as possible. This requires robust procedures to ensure the crew record conditions as soon as a vessel encounters ice (including photographs/video), and for the documenting of decisions taken by the master.

Our guest author Tony Riches is an ex-mariner and partner at the Penningtons Manches Cooper law office in London. We thank him for allowing us to re-publish this article.

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