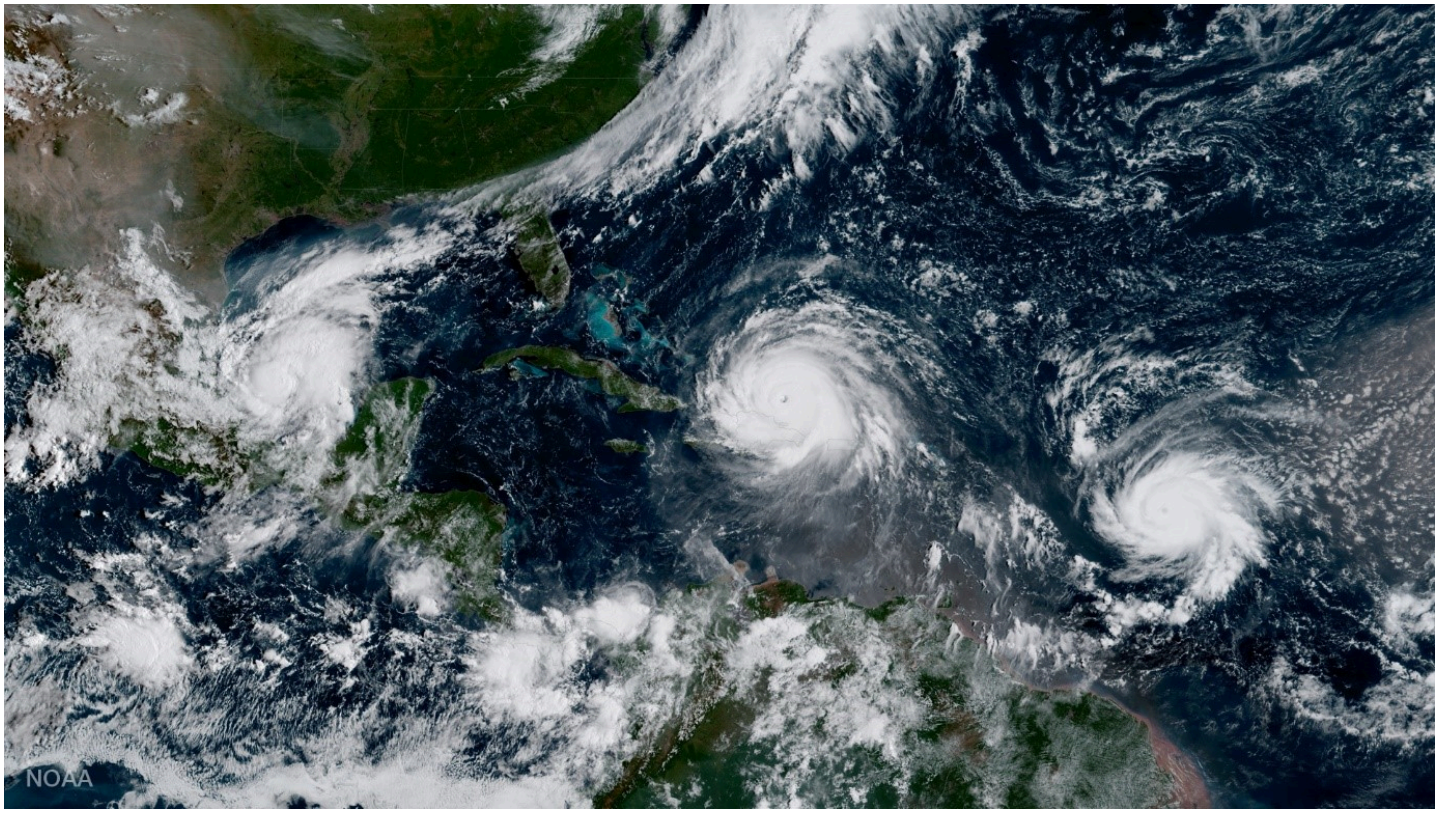

The impact of extreme weather on contracts of carriage

Extreme weather can have an impact on many aspects of the contracts of carriage entered into by shipowners and operators; from deviation, load and discharge port issues, to cargo damage and frustration of the contract.

Published 02 September 2024

Extreme weather events may have an impact on the trading of cargo vessels, for example during the recent hurricanes Harvey, Irma and Maria in the USA and Caribbean, as they give rise to legal and cover questions in relations to the contracts of carriage agreed by the carrier.

We outline below some of the issues which may arise in connection with an extreme weather event, based on English law.

Deviations from planned route

Cargo-carrying vessels may deviate from their planned route to avoid and/or shelter from an extreme weather event such as a hurricane. This may, in turn, give rise to a late delivery of cargo and lead to potential losses for cargo receivers.

Cargo receivers who have incurred such losses will not be entitled to recover where their cargo has been carried under bills of lading that incorporate the Hague or Hague-Visby Rules, both of which state in Article IV Rule 4:

"Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this convention or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom …"

The above provision may also protect shipowners from claims by charterers, for losses arising from deviation where the Hague or Hague-Visby Rules have been incorporated into the terms of the charterparty.

Changing the place of discharge in the bills of lading

It may not possible for cargo to be discharged at the place of discharge named in a bill of lading. In such instances, the terms of the bill of lading may entitle the carrier to discharge the cargo elsewhere.

However, if the terms of the bill of lading do not entitle the carrier to discharge elsewhere, it may nonetheless be possible for the carrier to agree with the holder of the bill of lading that the cargo is to be discharged at a substitute place of discharge. Best practice in such circumstances, is to obtain an LOI in IG wording with a specific instruction to discharge at a substitute port.

If a substitute port is agreed, the parties should make every effort to retrieve and destroy or void all bills of lading naming the original place of discharge. Otherwise, the carrier will run the risk of an original bill of lading being used to sell the cargo. In such instances, the carrier will be liable to the buyer for non-delivery of the cargo at the original place of discharge, and the carrier will not be insured for that liability under the terms of his P&I cover. The charterparty may require discharge without production of the bill of lading in exchange for a Letter of Indemnity (LOI) in a wording agreed by the International Group of P&I Clubs (IG). If so, the owner/charterer must honour that obligation.

It may not be possible for the cargo to be carried to the place of discharge named in a bill of lading, but the terms of the bill of lading do not entitle the carrier to discharge elsewhere. If, in such circumstances, it is not possible to agree with the bill of lading holder that the cargo is to be discharged elsewhere, the contract of carriage may become frustrated. We will discuss this further below.

The cover available for discharge at other port or place

Rule 34 of Gard Rules for ships excludes "*liabilities, costs and expenses arising out of the discharge of cargo at a port or place other than that stipulated in the contract of carriage*".

Reasonable deviations, however, are permitted under the Hague-Visby Rules and there may be various 'liberty' or 'Caspiana' clauses that give the carrier such right if it becomes impossible or dangerous for the vessel to reach or stay at the stipulated port. In such circumstances, the ship is often entitled, pursuant to the terms of the contract, to discharge the cargo *'or so near thereunto (i.e. to the named port) as she can safely get*' and the carrier is not in breach of contract if this is done. As long as the liberty clause is triggered by the extreme weather, cover remains available.

One option available is to switch the original bills of lading with new bills listing the alternative discharge port. This may not be possible if the original bills are in the banking system and there is already an LOI in place for delivery without production of the original bills. From an insurance coverage point, any agreement to discharge in an alternative port must be on terms no less favourable to the insured than those that are applicable under the Hague or Hague-Visby Rules. This can usually be achieved by agreeing to carry the cargo on the same terms as the existing bill of lading.

However, it is recommended practice to obtain new orders and an LOI in the approved International Group wording. The wording can be found as an Appendix to the Gard Rules of and in the Forms section on the Gard website.

Named load and discharge ports in voyage charters

When it is not possible to load or discharge cargo from the port and/or berth named in the voyage charter, other terms of the charter may give a right to the owners of the vessel to load or discharge cargo at a substitute place.

For example the very commonly used Gencon 1994 voyage charter form states at Clause 1:

"*The said vessel shall proceed to the loading port or place stated in Box 10 or so near thereto as she can safely get and lie always afloat, and there load a full and complete cargo...and being so loaded...the vessel shall proceed to the discharging port or place stated in Box 11...or so near thereto as she may safely get and lie always afloat...*"

Similar *"or so near thereto as she can safely get"* clauses can also be found in bills of lading, see above.

The best practice where loading or discharge of cargo at a contractually specified place is not possible, is likely to be an agreement between the owners and charterers of the vessel as to where and how cargo is to be loaded (or discharged).

Force Majeure

Under English law there is no general concept of *Force Majeure*, or general right to declare *Force Majeure* as a way of avoiding or limiting contractual obligations. However, where terms in a charterparty or bill of lading specify what is to be considered "*Force Majeure*", including various weather conditions, and set out what rights and obligations the parties are to have if Force Majeure occurs, those terms will be effective. When making a Force Majeure declaration or when faced with such a declaration, the relevant charterparty clause must be examined for notice provisions.

Frustration of contracts

The fundamental principle of frustration of a contract is that the very purpose of the contract is rendered worthless.

If it is not possible to load or discharge a cargo at the place of loading or discharge specified in a contract of carriage, e.g. a bill of lading or a charterparty, and there is no term in the contract permitting a substitute place to be used, the contract may be frustrated. If a contract is frustrated, the parties will no longer be obliged to perform it, and neither party will be able to recover from the other for any losses arising from non-performance.

However, identifying whether or not a contract of carriage is frustrated, as a result of prevailing circumstances, can be a very difficult exercise. It may depend upon how long the circumstances have prevailed, how long they are likely to prevail, whether the cargo being carried is perishable, and various other factors.

Payment of hire under time charters

Hire continues to be payable for a vessel under time charters, unless circumstances have arisen which bring the vessel "off hire" as defined in the charterparty terms. Whether or not delays caused to vessels by extreme weather will have brought time chartered vessels off hire will depend upon the charter terms agreed for each vessel.

Damage to cargo

Cargoes may be adversely affected by extreme weather before shipment. Crews will therefore need to be more careful when assessing apparent good order and condition with a view to clausing bills of lading. Of particular concern in this respect are Group A cargoes under the IMSBC Code which are cargoes liable to liquefaction due to having a moisture content above the transportable moisture limit (TML).

Where cargo carrying vessels have been unable to avoid the effects of extreme weather with the result that cargo on board has become damaged, the carriers of the cargo may have a defence to claims for that cargo damage under Article IV Rule 2 of the Hague and Hague Visby Rules which states:

"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

(c) Perils, dangers, and accidents of the sea and other navigable waters..."

The above defence will only be available, however, to carriers who have exercised due diligence to make their vessel seaworthy before and at the beginning of the voyage, as required by Article III Rule 1 of the Hague and Hague-Visby Rules.

Conclusion

Extreme weather events and other natural disasters, for example an earthquake and a resulting tsunami, are inevitable. The order of priority when disaster strikes is always to safeguard people and prevent or mitigate damage to the environment. Thereafter, our Members and clients may well be challenged by the legal knots that form from damage to cargo, delay, and the use of alternative ports for loading and discharge. We thank Jon Boaden of Mills and Co, Newcastle for his advice on English law and helping us to untie some of those knots.

*Questions or comments concerning this Gard Insight article can be e-mailed to the *Gard Editorial Team. We are always happy to consider topics suggested by our readers. If you have any suggestion for future articles, please contact us.