UK DEFENCE CLUB

CONFLICT

The impact on charterparties and issues for consideration

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INTRODUCTION

Risks of war and civil unrest impacting the shipping industry are nothing new, but today's unstable political environment has recently brought these risks to the fore. Non-state actors, such as pirates, continue to plague some areas, with criminals in many regions of the world keen to exploit local political instability.

Certain countries such as Ukraine have become involved in war or conflict, exposing ships to danger and delay and giving rise to difficult decisions as to whether a particular voyage or employment order must be performed.

In this publication, we discuss possible ways in which contractual parties can protect themselves against such risks in a maritime context. At the end of the publication is a checklist of points to consider both at the pre-fixture stage in terms of drafting considerations, and post-fixture, in terms of assessing your rights and obligations under a charterparty when issues relating to performance arise.

CHARTERPARTY PROTECTION

A common scenario is one where a time charterer issues orders for the ship to proceed to an area that the owner is concerned may expose it to risk, whether that be from war, hostilities, civil unrest or piracy.

The owner will then need to consider whether it is entitled to refuse the charterer's orders and, equally, the charterer may need to consider whether it can insist on compliance with its orders. The terms of the charterparty will be crucial in determining the parties' respective rights at this stage. The following points will be relevant.

Trading limits

A time charter for worldwide trading or to a specific place coupled with an agreement that the charterer will pay extra war risk premium will make it hard for the owner to refuse orders to proceed to a war-affected zone, subject to any protective clauses or common law defences.

To maintain a degree of control, an owner can negotiate exclusions of specific countries from the ship's permitted trading area. If a country is excluded, an owner has a firm basis on which to reject any orders to call at any of its ports, providing a straightforward solution and primary layer of protection for the owner. The importance of careful drafting of this clause cannot be overestimated.

As well as listing all areas known to pose a geopolitical risk, where possible, open provisions that permit parties to amend or add to the trading exclusions in the event that any particular area should become unsafe should be considered. If the intention is that the ship may be allowed to trade within certain specific areas, but subject to the terms of the charterparty, including war risk clauses, that must be made absolutely clear.

CHARTERPARTY PROTECTION
continued

Protective clauses

Where a particular area is not expressly restricted within the trading limits, an owner may nevertheless be able to rely on a general protective clause to assist it in the event that it is sent to an area where it considers there to be a risk of war or piracy. In the current uncertain times, it is more important than ever to ensure that charterparties contain provisions dealing with such matters. Some of the key considerations are discussed below.

War risks clauses

War risks clauses come in various forms and it is common to see a combination of provisions. It is important to ensure that they complement rather than conflict with each other.

Alternative performance clauses

Alternative performance clauses can offer an owner valuable protection in the event of war or civil unrest. Broadly, these provisions permit an owner to refuse to proceed to or through a war risks area and require its charterer to issue alternative orders for the ship and any cargo on board. BIMCO's Conwartime and Voywar clauses are perhaps the most common examples, though many modern charter forms contain their own versions as standard. See, for example, clause 35 of the Shelltime form, clause 36 of the ShellLNGTime, and clause 17 of the Gencon 1994 form.

In determining whether an alternative performance clause may apply to any given situation, it will be necessary to consider whether (i) the factual circumstances fall within the "war risks" definition and (ii) there is a sufficient level of risk involved.

Where a situation falls short of outright war, there can be scope for debate as to whether it falls within the applicable definition of "war risks". Broader clauses, such as the BIMCO clauses, extend beyond war and civil hostilities to malicious damage, laying of mines, blockades and, in the later versions, terrorist acts. "War" is defined as a situation in which two or more governments are engaged in operations involving the use of force against one another[1]. The term "hostilities" refers to acts or operations of war committed by "belligerents" and presupposes an existing state of war. The reference to "malicious damage" may, however, apply more broadly in the absence of a state of war, where there is an intent to do damage to the ship rather than damage that is incidental to another act.

[1] Kawasaki K.K.K v Bantham (1939) and Pan America World Airways (1975)

As to the level of risk, the English courts have set out some guidelines. In The Triton Lark[2], a case where the owner sought to take a route around the Gulf of Aden for fear of a pirate attack, the court was considering the 1993 Conwartime clause. The judge decided that there had to be a "real likelihood" that the ship would be exposed to a war risk. This requires a degree of probability "greater than a bare possibility", which includes an event with a less than 50% chance of happening.

The wording of the 2013 Conwartime was amended, according to BIMCO, in order to overcome what the clause's drafting sub-committee described as uncertainties caused by The Triton Lark in relation to the measuring of risks. The test of determining whether to proceed is now based on whether an area is dangerous. An owner will also have to establish that it or the master formed a "reasonable judgment" in good faith, based on a careful risk assessment, that there was a real risk to the ship itself.

War cancellation clauses

War cancellation clauses trigger a right of cancellation if war or hostilities break out between two or more stated countries. This is clearly a more drastic solution than that offered by the alternative performance clauses. One example of such a provision is clause 34 of the ShellLNGTime 1 form, which in The Golden Victory[3] case was held to have given the charterer a right to cancel the charter upon the outbreak of the second Gulf War in 2003. Similar clauses include the BIMCO War Cancellation Clause 2004 and clause 33 of the Shelltime 4 form.

War expense clauses

War expense clauses permit an owner to pass the costs of any additional war risks premium, crew bonuses and other expenses, depending on how the clause is worded, to the charterer. The value of such clauses, and the importance of careful drafting, was highlighted by the surging premiums and expenses seen at the height of the tensions in the Straits of Hormuz in summer, 2019. With some insurers seeing a tenfold increase, the commercial impact of an unexpected increase in premiums could be severe. Particularly where a ship is unexpectedly delayed in a war risk area.

[2] Pacific Basin IHX Limited v. Bulkhandling Handymax AS (The Triton Lark) [2012] EWHC 70 (Comm)
[3] Golden Strait Corporation v Nippon Yusen Kubishka Kaisha (The Golden Victory) [2007] UKHL 12

CHARTERPARTY PROTECTION
continued

Piracy clauses

BIMCO's Piracy Clause 2013 has been drafted for voyage and time charters as well as contracts of affreightment. It follows a similar pattern to BIMCO's war risks clauses, offering an alternative performance option in the event of a perceived piracy risk or an indemnity from the charterer in respect of any additional costs involved in transiting a high risk area. The definition of piracy in these clauses is relatively broad: "any actual, threatened or reported acts of piracy and/or violent robbery and/or capture/seizure". As with most of the war risk clauses, the master's reasonable judgment is relevant and the level of risk required is as discussed above in the context of war risks.

Although some war risks clauses incorporate piracy into the definition of war risks, the BIMCO Piracy Clause offers more bespoke protection in terms of the provision for the ship to be off-hire during a hijacking. Ad hoc piracy clauses, particularly with regard to off-hire have been closely scrutinised by the English courts. Much has turned on the drafting of such clauses. In The Captain Stefanos[4], the difference between on-hire and off-hire turned on the position of a 'slash' and a comma in the relevant clause. In The Eleni P[5], the courts considered the interpretation of the word "captured" in a piracy context and deliberated over the question of whether an attack which had occurred just outside the Gulf of Aden fell within the scope of the Gulf of Aden piracy clause.

Force majeure clause

Force majeure clauses are commonly found in voyage charters or contracts of affreightment. They typically relieve the parties from performing the contract when certain circumstances beyond the control of the parties arise.

Force majeure is not an English law concept. It originates in civil law and therefore only operates under English law contracts if an express force majeure provision has been agreed. As such, its operation depends entirely on the scope of the wording. Force majeure clauses will commonly refer to war or warlike events and may even extend more generally to "hostilities". The wording will be key to determining whether the parties can rely on the clause. Depending on the clause parties may be entitled to suspend performance or, in extreme cases, terminate the contract.

[4] Osmium Shipping Corporation v. Cargill International SA (The Captain Stefanos) [2012] EWHC 571 (Comm)
[5] Eleni Shipping Limited v Transgrain Shipping BV (The Eleni P) [2019] EWHC 910 (Comm

CHARTERPARTY PROTECTION
continued

Delay

Questions of off-hire or demurrage may arise, for example, where a ship is delayed en route or in entering a port or able to enter a port but is delayed or detained there due to blacklisting issues.

As a general principle, a charterer is required to pay hire continuously unless it can bring itself squarely within an applicable off-hire clause.

Many geopolitical events will not fall within the unamended NYPE off-hire clause as they are likely to be considered to be extraneous to the ship. For that reason, in the case of The Saldanha13, the ship was not off-hire under the unamended NYPE clause 15 during a hijacking by pirates. However, the court indicated that if “whatsoever” had been added to the list of off-hire events, then she would have been off-hire.

Bespoke clauses are recommended to deal with specific delays due to geopolitical events. For example the BIMCO Piracy Clause for Time Charters provides that the ship “shall remain on hire throughout the seizure and the charterers’ obligations shall remain unaffected, except that hire payments shall cease as of the ninety-first (91st) day after the seizure and shall resume once the Vessel is released”.

As for voyage charters, an owner might consider including express laytime and demurrage exceptions that respond to certain geopolitical delays, such as detention by local authorities, blacklisting or war risks.

Unsafe ports

Charterparties often contain express safe port warranties. Even where they do not, a safe port warranty can sometimes be implied. Such a warranty confers on a charterer a duty to nominate a port that is prospectively safe for the ship.

Some safe port warranties, such as that contained in the Shelltime form, only require the charterer to exercise due diligence in this respect. In the absence of this qualification the warranty is absolute, offering an owner greater protection.

Such safety extends beyond non-physical risks to political risks. In terms of sanctions, boycotts and blacklisting, it is conceivable that unsafe port arguments could apply in some cases since any of the above will clearly have an adverse impact on a ship's trading abilities and restrict the countries to which it can trade thereafter. A port may, therefore, be considered unsafe if there is a risk of the ship being detained or blacklisted.

Where a nominated port is unsafe or subsequently becomes unsafe, there is an obligation on the charterer to give alternative voyage orders. Whether or not an owner can insist on alternative orders being given will depend on the level of risk involved and in certain cases, such as a failure by the relevant port to remove the ship from a berth during a developing storm, whether the failure has been caused by a problem with the relevant port's systems. A single negligent act by a party for which the charterer is responsible may not be sufficient. Each situation will be fact sensitive and the threshold is generally considered to be high. This contrasts with the provisions of the BIMCO war and piracy clauses, which merely require the master to hold a reasonable view that there is an exposure to the risk in question.

The position may be more problematic under voyage charters where the ports are usually named and an owner is therefore deemed to have accepted the risks associated with that port when entering into the charter. If the situation has changed since the charter was entered into, parties may be able to rely on the "so near thereto as she may safely get" provision contained in many voyage charters which allows for the ship to deviate to a nearby port, though the benefit of this provision may be limited.

CHARTERPARTY PROTECTION continued

Unsafe ports (continued)

In order to be able to rely on a safe port warranty to resist a charterer's orders, the level of risk must be high. Whilst a clear declaration of war would usually be a sufficient indication of risk if it directly affected the port in question (or possibly its approach) mere civil unrest may not necessarily trigger the safe port provisions and it will then be necessary to consider the factual circumstances in more detail. In relation to war or piracy, it will be necessary to look into the frequency and pattern of past attacks and seek detailed advice on the current situation. If an area prone to piracy or war risks is considered navigable so long as precautions are taken, then it may be hard to rely on an unsafe port argument.

If an owner decides to accept a charterer's orders and a ship suffers damage as a result, the owner may be entitled to claim damages from the charterer for breach of the safe port warranty. However, owners should also be aware of the risk of unintentionally waiving their rights to rely on the protection of a safe port warranty. By way of illustration, in The Chemical Venture[6], where the crew had concerns about proceeding to Kuwait but agreed to do so in return for being paid a significant bonus by the charterer, the court held that the owner had waived its right to claim damages for the port being unsafe.

In The Kanchenjunga[7], in which the owner refused to load at Kharg Island during the Iran-Iraq war, it was found to have waived its right to refuse the charterer's orders because the master had tendered notice of readiness before sailing away, thus indicating an acceptance of the risks. Care should therefore be taken in relation to any decision to proceed with voyage orders.

[6] Pearl Carriers Inc. v. Japan Line Ltd (The Chemical Venture) [1993] 1 Lloyd's Rep. 508
[7] Motor Oil Hellas (Corinth) Refineries S.A. v. Shipping Corporation of India (The Kanchenjunga) [1990] 1 Lloyd's Rep. 391

COMMON LAW PROTECTION

Right to refuse orders when ship is exposed to danger

The master has an overriding responsibility in respect of safety of navigation and is entitled to refuse to obey charterer's orders which potentially endanger the ship, her crew or cargo.

This was recognised in the 2001 case of The Hill Harmony[8], in which the court considered the reasonableness of the master's refusal to follow the charterer's orders. The master refused orders to use the great circle route for a voyage from Vancouver to Japan and sailed a longer, more southerly route on the basis that, on a previous sailing, the ship had been damaged by bad weather on the great circle route.

The court established that the master would be entitled to refuse to follow the charterer's employment orders where, in his reasonable judgment, they potentially exposed the ship to danger. However, in that case, the master's decision was not considered to be justified based on the level of risk involved, demonstrating that the bar is a reasonably high one.

> "The master remains responsible for the safety of the vessel, her crew and cargo. If an order is given compliance with which exposes the vessel to a risk which the owners have not agreed to bear, the master is entitled to refuse to obey it: indeed,as the safe port cases show, in extreme cases the master is under an obligation not to obey the order."

[8] Whistler International Ltd v Kawasaki Kisen Kaisha Ltd. (The Hill Harmony) [2001] 1 Lloyd's Rep 147

Frustration

Contracts may be frustrated where there is an event which was unforeseeable at the time of forming the contract, which goes to the “heart” of the contract and which makes it incapable of performance.

Frustration is, effectively, the English law equivalent of force majeure. However, this is a less well defined concept than force majeure and it is rare in practice that contracts will be considered frustrated. The fact that the contract simply becomes more onerous or more costly to one party is irrelevant. For example, if the Suez Canal were to close unexpectedly, a voyage from the Mediterranean to the Far East would still be capable of performance because the ship could proceed via the Cape of Good Hope.

Note of caution

In any case where an owner is considering refusing a charterer's orders for safety reasons, caution must be exercised.

If an owner refuses to comply with orders which turn out to be legitimate, then it risks being in breach of charter itself and the charterer may consequently be entitled to place the ship off-hire, claim damages and, on the basis of the current case law, be entitled to terminate the charter. Members are advised to seek legal advice before relying on any of the principles discussed above to refuse their charterer's orders.

COMMON LAW PROTECTION continued

Charterers' implied indemnity

If a ship does proceed to an area in compliance with the charterer's orders and suffers damage due to war, hostilities, piracy or some other geopolitical event, then the owner may be entitled to claim an indemnity from its charterer.

Under English law, an owner is entitled, subject to certain restrictions, to an implied indemnity in respect of the consequences of complying with a charterer's orders.

The rationale for this principle was neatly explained in the judgment in the case of The Island Archon[9]:

> "... Under a time charterparty the shipowner puts the vessel at the disposal of the charterer, who can choose for himself what cargo he shall load and where he shall send the ship, provided that the limits prescribed by the contract are not exceeded. When deciding who has to bear the consequence of a choice being made in one way rather than the other, it is reasonable to assume that the consequences shall fall upon the person who made the choice, for it is the charterer who had the opportunity to decide upon the wisdom of the selection he makes. ..."

The indemnity only applies in cases where the risk in question is not one which is ordinary to the trade and is not something that the owner has already agreed to bear, under the terms of the charter. For example, where the charterparty contains a war premium payment provision, which envisages the owner accepting orders to transit a war risk area as long as a charterer pays the additional premium, arguably the implied indemnity may not operate because the owner may be deemed to have accepted this risk.

[9] Triad Shipping Co. v. Stellar Chartering & Brokerage Inc. (The Island Archon) [1994] 2 Lloyd's Rep. 227

CONCLUSION

Given the serious commercial consequences and the physical risks involved in trading to a high risk area, it is imperative that Members ensure their charterparties contain sufficient protection in terms of the ability to refuse orders which may expose the ship to risk. Equally, charterers will benefit from clarity as to the scope within which they are free to operate the ship.

On the following page we summarise the key issues to consider before fixing a charterparty and when dealing with any issues that might arise.

PRE/POST FIXTURE CHECKLIST

Key points to consider

ISSUES TO CONSIDER WHEN FIXING

- Exclude key risk areas (taking into account the current geopolitical situation).
- Make provision for parties to amend the scope of the exclusions.

Include protective clauses, such as:

- War risks clauses (e.g. Conwartime or Voytime 2013; BIMCO War Cancellation Clause 2004).
- War premium and expense provisions.
- Piracy clauses (e.g. BIMCO Piracy Clause for Time or Voyage Charters 2013).
- Bespoke clauses relating to any particular trade (e.g. Cuba 180-day restrictions).
- Force majeure clause.

Safe port provisions:

- Include an express safe port warranty ("safe port" offers broader protection than "safe berth").
- Avoid limiting the warranty to one of due diligence only (e.g. as in the Shelltime form).

Review off-hire or laytime/demurrage provisions:

- Do they respond to delays due to detention, piracy and other geopolitical risks?

ASSESSING HOW TO RESPOND TO VOYAGE ORDERS

- Check trading limits – is the relevant area excluded?
- Check protective clauses – do the factual circumstances fall within the definition in the clause and is there a sufficient level of risk involved?
- Are there any applicable force majeure clauses?
- Check safe port provisions – if a port is involved, was it unsafe at the time of nomination? Is there a sufficient level of risk?
- Is there a sufficient risk to the safety of the ship to refuse voyage orders at common law? Record any decision-making, including relevant information and evidence.
- Is the charter frustrated – has it become impossible to perform or is it merely more expensive or time consuming?
- Will the implied indemnity protect the owner in case damage does occur?
- Will the owner be able to claim hire/demurrage if the ship is delayed or detained?
- Carry out a risk assessment.
- Seek legal advice to confirm the scope of charterparty rights and responsibilities.
- Seek expert advice as to the level of risk involved and options for mitigation.

INFORMATION AND RESOURCES

AP area map:
https://www.ukwarrisks.com/ap-areas/

IMB piracy reporting centre:
https://www.icc-ccs.org/index.php/piracy-reporting-centre

IMB live piracy map:
https://www.icc-ccs.org/index.php/piracy-reporting-centre/live-piracy-map

Maritime Global Security Website:
www.maritimeglobalsecurity.org

UK War Risks:
www.ukwarrisks.com

Hellenic War Risks:
www.hellenicwarrisks.com

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