

Israel-Gaza conflict: contractual implications FAQs

The following FAQs have been put together to provide general guidance and to highlight the type of contractual issues that might arise following the conflict in Israel-Gaza. The situation is very fluid and Members are advised to contact the Club for advice in respect of their specific contractual arrangements and circumstances.

1. Are Israeli ports legally unsafe?

Most charterparties (e.g. the NYPE and the Asbatankvoy) will contain the warranty that the ship is to trade “always via safe ports / berths” (or equivalent words). A port is only safe if, 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.

We understand that, as of 23rd October, 2023, ports towards the north of Israel such as Haifa and Hadera are open and fully operational. The situation is less clear in the Southern Israeli ports of Ashdod and Ashkelon, closer to the Gaza region. While the port of Ashkelon is officially open, it is practically closed with ship's required to enter the port with the assistance of the Israeli navy. Similarly in Ashdod, while the port is open, it is working under emergency conditions. Members should seek advice regarding the safety of calling at specific ports.

As far as the consequences of a port being unsafe are concerned, the position may differ depending on whether the issue arises under a time or a voyage charter.

Under a time charter, where a charterer orders a ship to an unsafe port or place, its order is likely to be unlawful and, as such, an owner should not be obliged to follow it: an owner is accordingly entitled to reject an unlawful nomination or order and ask for alternative orders.

The position is however different under a voyage charter: in such a case, and depending on the actual wording of the relevant clause(s), the charterer may be under an obligation to nominate an alternative safe port and / or the owner may be entitled to proceed or to wait at an alternative safe port / place. In some circumstances, however, the voyage charter may become frustrated should the unsafety of the port be prolonged and where there is no obligation to nominate an alternative safe port or a right to proceed to one.

Before refusing any orders on the grounds of unsafety, Members should seek legal advice regarding calling at specific ports as wrongfully refusing the charterer's orders can result in the owner being in repudiatory breach of the charterparty.

2. Can owners refuse to call at Israel ports, relying on standard war clauses

Different charters are likely to have bespoke clauses dealing with the occurrence of war risks and it is therefore essential that these are reviewed carefully.

However, taking the BIMCO Conwartime Risks Clause for Time Chartering 2013 (“Conwartime 2013”) as a reference (and, in so far as applicable, Voywar 2013 for voyage charters), “War Risks” are described within clause (a)(ii) of Conwartime as:

“actual, threatened or reported: war, act of war, civil war or hostilities...civil commotion... warlike operations...acts of hostility or malicious damage...by any person, body, terrorist or political group, or the government of any state or territory whether recognised or not”.

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2. Can owners refuse to call at Israel ports, relying on standard war clauses (cont.)

Clause (b) of Conwartime 2013 gives an owner the right to refuse an order to go to a particular place or port if the ship “in the reasonable judgement of the Master and / or Owners, may be exposed to War Risks”. The issue to consider, therefore, is whether the requirements to exercise reasonable judgement as to the danger posed by such acts in clause (a)(ii) and/or the risk of the ship being exposed to such risks required by clause (b) will have been met if an owner wishes to exercise its right to refuse to proceed to a particular Israeli port.

Useful guidance on the application of the test under clause (b) was provided by the Court in the case of the Triton Lark [2011] EWHC 2862 (albeit on the Conwartime 1993 which was not materially different from the relevant provisions of Conwartime 2013) and it was held that whilst the evaluation of risk must be based on evidence, the degree of risk does not need to be as high as 50/50 although must be more than a “bare possibility”.

The above tests would need to be applied to the developing situation at the specific port in question. So far there has not been any damage to any ships reported in any Israeli ports and we suggest that Members seek specific advice before refusing any orders as wrongful refusal can result in repudiatory breach of the charterparty.

3. What if a ship is delayed in reaching an Israeli port or during cargo operations?

We understand that for certain Israeli ports, e.g. Ashdod, delays have been experienced as ships are being asked to wait some distance off the port before being allowed to proceed into port with the assistance of the Israeli navy. As far as the consequences of any delays in reaching the port are concerned, the position may differ depending on whether the issue arises under a time or a voyage charter.

Generally, the position under a time charter is straightforward: a ship will remain on-hire throughout the period of delay as the ship is fully efficient in all respects and able to comply with charterers' instructions. This position may differ if there is an express clause in the charterparty stating otherwise.

The position under a voyage charterparty is more complex. Which party bears the risk of any delay will depend upon the specific contractual terms and, in particular, whether the ship has been able to reach a location to validly tender NOR in order to allow laytime to commence.

The general position under a berth charterparty is that laytime will not commence until the ship has reached the berth and tendered NOR (unless the charterparty contains a WIBON provision) and so the owner bears the risk of the delay prior to arrival at the berth.

Under a port charterparty, if no berth is available upon arrival then the ship must have reached the position within the port where waiting ships usually lie in order to validly tender NOR (unless the charterparty contains a WIPON provision). Much will depend upon the exact terms agreed in the charterparty and we would advise Members to contact the Club for guidance if they are faced with delays upon entering an Israeli port.

If there are delays during cargo operations, laytime and/or demurrage will continue to run unless there is a specific exception clause in the charterparty. If there are any delays after cargo operations have completed, the owner will need to demonstrate that charterers are in breach of charterparty in order to claim detention for the period of the delay. It is worth noting here in the context of delay that force majeure is not a concept recognised under English law and, in order to apply, it would need to be incorporated by way of a specific clause in the charterparty.