

# Contractual implications FAQs

## 1. Are Ukrainian 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 28th February, 2022, all Ukrainian ports are closed and some may be under attack by Russian forces: as it is clear from case law that “danger” may extend to political unsafety and the risk of war, then it is likely that all Ukrainian ports can, at present, be regarded legally unsafe, although the situation must be kept under constant review.

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.

## Contractual implications FAQs

### 2. Can owners refuse to call/remain at Ukrainian/Russian 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 sub-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”.*

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 judgment of the Master and / or Owners, may be exposed to War Risks”*. The issue to consider, therefore, is whether the requirements to exercise reasonable judgment as to the danger posed by such acts in sub-clause (a)(ii) and/or the risk of the ship being exposed to such risks required by sub-clause (b) will have been met if an owner wish to exercise their right to refuse to proceed to a particular Ukrainian or Russian port.

Useful guidance on the application of the test under sub-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”.

Applying the above tests to the current situation in Ukrainian ports, it is arguable that an owner could bring itself within the definition of “War Risks” as per sub clause a(ii) as the circumstances would appear to amount to an *“actual, threatened or reported...war”*. Also, as the recent attack allegedly sustained by at least three ships in Ukrainian waters and in the proximity of the port of Odessa would indicate, there is a real likelihood, i.e. more than an even chance, of ships being exposed to War Risks in accordance with clause b). Accordingly, an owner could lawfully refuse to proceed to any Ukrainian port and ask charterer for alternative orders.

The position may however be different in relation to Russian ports in the Black Sea: at the moment, all Russian ports seem to be open and fully operational and there are no reports of any incidents occurring which would fall within the definition of War Risks as per sub clause (a)(ii). It is essential however that the situation is kept under constant review.

## Contractual implications FAQs

### 3. What if a ship is prevented from reaching a Ukrainian port?

If the closure of Ukrainian ports and sea areas were to render the performance of a particular charterparty impossible or radically different, then under the English legal doctrine of “frustration” the charterparty can be said to be “frustrated” and is discharged automatically, meaning that the parties are relieved from their obligations under the charterparty. A charterparty is more likely to be frustrated if it specifically requires a ship to load or discharge in Ukraine (for example, a voyage charter specifying Ukraine, as opposed to a time charter offering a wider range of ports), or if sanctions are brought in which would render the performance of the charterparty illegal under English law. The current situation in Ukraine is fluid and it is unclear how long delays and interruptions will last, so parties should exercise caution and take legal advice before proceeding on the basis that any charterparty is frustrated.

Alternatively, the charterparty might contain a war cancellation clause which expressly allows a party to terminate due to a war between Ukraine and Russia or other countries. The standard (unamended) BIMCO war cancellation clause provides the right for “either party” to cancel the charterparty “on the outbreak of war (whether there be a declaration of war or not)” between any of the two named countries in the clause. Under the standard clause, no notice period is required and the only requirement is an outbreak of war between two or more of the countries listed (which, unless specifically amended, includes Russia but does not include Ukraine). Again, the terms should be reviewed carefully and legal advice sought before cancelling any charterparty.

If a charterparty is not frustrated or otherwise terminated, there may still be issues relating to off-hire or the performance of particular voyages. Depending on the terms of a charterparty, it may be possible for the parties to argue that the events in Ukraine represent a “force majeure” event that means they are excused from particular obligations under the charterparty. It should be noted that force majeure is not a concept of general application under English law and, in order to apply, it would need to be incorporated by way of a specific clause in the charterparty. Time charterparty terms will also need to be checked carefully to determine whether hire is payable for any time lost due to an inability to call at Ukraine.

## Contractual implications FAQs

### 4. What will be the legal consequences of a ship becoming trapped?

#### i) Time charter position

If a ship is trapped in a geographical location because of the hostilities, for example at a particular port or anchorage, the starting point under some standard charterparty clauses (e.g. clause 15 of NYPE 46 and clause 21 of SHELLTIME 4) is that the charterer remains obliged to pay hire. This is because it is unlikely to fall within one of the specified standard off-hire events.

If a ship remains trapped for a significant period of time, it is anticipated that potential claims relating to late redelivery or hull fouling etc may arise. In such circumstances and depending upon the charterparty wording (e.g. NYPE lines 103-104), the charterer may raise the “*restraints of Princes, Rulers and People*” exception as a defence. However, these words usually cover forcible interference by a government or state preventing or impeding the performance of the charterparty and whether this would apply to the current situation is not clear.

#### ii) Voyage charter position

It is common to include a clause in a voyage charter such as “*freight is deemed earned upon loading, discountless and non-returnable, ship and/or cargo lost or not*”. Accordingly, even if the ship is trapped, freight will be earned if cargo has been loaded on-board.

Under a standard voyage charter, such as GENCON, arrival of a ship beyond the agreed laycan may place the owner at risk of cancellation. In circumstances where the ship is delayed but may still be able to load the cargo within a reasonable period, we would suggest that the parties discuss the situation as soon as possible to explore a practical solution such as extending the laycan.

If the ship is trapped at a closed port, disputes of demurrage and/or detention are likely to occur in which case the apportionment of liability will likely depend upon any applicable force majeure and/or laytime/demurrage exception clauses in the charterparty.

#### iii) War risk insurance

Ukrainian and Russian waters in the Black Sea and the Sea of Azov have been added to LMA’s Joint War Committee’s listed areas. Full details can be found here: [Joint War \(lmalloyds.com\)](https://www.lmalloyds.com) Members should notify their war risk underwriters if a ship is to proceed to/remain at the listed area and seek guidance and/or additional premium requirement etc.

We would also mention that blocking and trapping insurance could respond to a physically blocked/trapped ship due to war risks. Again, Members should consult with their war risk underwriters if they require specific advice.

## Contractual implications FAQs

### 5. What are the current sanctions and how will they affect charterparties?

The situation regarding the imposition of sanctions on Russia is very fluid and, since the outbreak of armed conflict on 24th February, 2022, the position has changed daily. As of 28th February, 2022, the EU, US and UK have imposed sanctions on certain Russian banks, entities and individuals. Some Russian banks have also been barred from using the SWIFT payment system.

Information regarding the US, EU and UK sanctions can be found at the following websites:

US sanctions: [Ukraine-/Russia-related Sanctions | U.S. Department of the Treasury](#)

EU sanctions: [EU restrictive measures in response to the crisis in Ukraine - Consilium \(europa.eu\)](#)

UK sanctions: [UK sanctions relating to Russia - GOV.UK \(www.gov.uk\)](#)

Many charterparties contain specific protective sanctions clauses, such as the BIMCO Sanctions Clause for Time Charter Parties 2020, which specify the allocation of risk and the parties' rights under the charterparty in the event that one of the parties or the trade/activity itself are subject to sanctions. In the absence of such a clause, a charterparty may be treated as frustrated if sanctions make it illegal for the charterparty to be performed.

As the situation is ever changing and sanctions issues are complex, it is important for Members to carry out due diligence and seek advice if they have any sanctions concerns in respect of their specific contractual arrangements.

We would also direct Members to the Club's publication '[Trading in Uncertain Times](#)' which provides further commentary and guidance on some of the issues that may arise as a result of the situation in Ukraine.

As always, if Members have any questions in relation to the above issues they are invited to contact the Club for further information.