

Trading in Uncertain Times

The impact on charterparties and issues for consideration



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Introduction


The past few decades have seen a trend of globalisation and integration across the world with the breakdown of conventional borders both via expanding international trade and increasing digital connectivity.

However, there are signs of growing resistance to further integration with an emerging trend of protectionism, identified by UNCTAD as one of the ten key trends for 2019. The current shifting political landscape enhances geopolitical risks, as demonstrated most recently by tensions in the Straits of Hormuz which dominated the summer of 2019 and gave rise to numerous contractual issues alongside understandable safety concerns.

In this publication, we focus in on some of the key geopolitical risks at play in today's world and 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 things go wrong.

Types of geopolitical risk at play

Topographic map of the Eastern Mediterranean Sea region, including Italy, Greece, North Africa, the Black Sea, the Adriatic Sea and the Ionian Sea.



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. Meanwhile, increasing limitations on unfettered globalisation imposed by governments in the form of economic sanctions are having a growing impact on cross-border trade. Ships passing through the Straits of Hormuz this summer have been subjected to a perfect storm of geopolitical risk in the form of civil unrest linked to economic sanctions in a region plagued by piracy.

Economic sanctions

The economic targeting of particular jurisdictions, individuals and entities through trade or financial restrictions has proven to be an attractive and effective political tool.

US sanctions



The combination of the central role of the US dollar in international commerce with the reality of eye-watering fines and other penalties imposed by the US authorities, has focused the shipping sector's attention firmly on the sanctions actions promulgated by US authorities.

The potential reach of US sanctions is incredibly broad. As well as primary sanctions directly impacting US entities and those under US jurisdiction, non-US persons may also be affected by "secondary sanctions". Penalties for violation are extremely prohibitive and can include significant fines and imprisonment. In some cases, ships, owners, charterers and others may be deprived of access to the US banking system and US ports. A designation to the US "blacklist" – the Office of Foreign Assets Control's ("OFAC") list of Specially Designated Nationals ("SDNs") – results in an entity's near complete inability to conduct international trade using the US dollar or relying on any counterparty with a US touchpoint.

Although the United States has used sanctions for many years, under the Trump administration the sanctions tool has been significantly expanded with the snapback of sanctions on Iran, the re-imposition of certain sanctions on Cuba, the promulgation of new measures on Venezuela and the continuing strengthening of restrictions on Russia. The result of this activity has been a record number of additions to the US "blacklist" and unprecedented enforcement penalties. We look at some of the recent key developments in US sanctions below.



Iran

US sanctions targeting Iran date back to shortly after the 1979 Iranian Revolution and fluctuated until the mid-1990s when the formal, more comprehensive embargo began. Sanctions steadily increased from then on, up to a point where the trading community is compelled to choose either to continue transacting with Iran or to have access to the US banking system. In January 2016, the Joint Comprehensive Plan of Action ("JCPOA") – the "Iran Nuclear Deal" between Iran, the P5+1 (China, France, Russia, the United Kingdom and the US plus Germany) and the EU came into effect, providing for substantial sanctions relief in exchange for important limitations on Iran's nuclear development activities.

In May 2018, however, President Trump announced that he was withdrawing the US from the JCPOA and reimposing all US sanctions on Iran after a short grace period. The goal of the withdrawal was to compel Iran to return to the negotiating table in order to agree to greater nuclear and non-nuclear program related restrictions that had not been considered under the JCPOA.

The US sanctions on Iran are highly complex and will likely be impacted by the growing tensions in the Persian Gulf, and the upcoming 2020 US presidential election. While it is clear that the relationship between Washington and Tehran has continued to deteriorate, exactly how this will play out in the realm of sanctions (or otherwise) remains highly uncertain.



Venezuela

While certain US sanctions have been imposed against Venezuela for several years, the latest round of strengthened measures began in August 2017 with the goal of pressuring President Maduro to leave office. Measures have been steadily increased since then, which has had a significant impact given the historically robust trading relationship between Venezuela and the US. 2019 has seen the culmination of some of these efforts, as the United States disputed President Maduro's re-election, announced Washington's recognition of Juan Guaidó as interim President, and redoubled its efforts to compel President Maduro from office.

Following Guaidó's recognition, the Trump administration issued its most far-reaching sanctions order to date, allowing the US Department of the Treasury to impose sanctions on any sector of the Venezuelan economy that it determined to be complicit in deceptive or corrupt transactions in support of the Maduro government. This process resulted in the addition of the state-owned oil company *Petróleos de Venezuela, S.A.* ("PdVSA") to the SDN list in April 2019 followed by further sanctions in August directed at the Venezuelan government more generally.

As a major international petroleum firm in its own right and the primary source of Venezuela's income and foreign currency, the impact of the PdVSA sanctions has been felt very broadly across the shipping sector. The US government has blacklisted numerous ships, owners, and charterers for engaging in providing "material support" to Venezuela and its oil sector. At the time of writing, the impact of the further sanctions remains to be seen.



Cuba: the "180 Day Rule"

The United States has imposed sanctions on Cuba ever since the early 1960s. Taken together, the economic measures in place against Cuba, which are governed by the Cuban Asset Control Regulations ("CACR"), consist of amongst the broadest embargoes the US has ever enforced. They not only deny Cuban residents access to the US financial system but also prohibit non-US ships from calling at US ports if they have visited Cuban ports within the prior 180 days. The provision is commonly referred to as the "180 Day Rule."

An amendment to the CACR in October 2016 introduced an exemption for ships carrying permitted cargoes from third countries to Cuba. This signaled a potential easing of the 180 Day Rule. However, in June 2017 President Trump announced the start of an unwinding of this relief and there are recent indications from the US Administration that the 180 Day Rule may once again be tightened.

The current body of US trade sanctions is highly complex and navigating them safely is challenging. If there is any doubt about whether a particular activity breaches US sanctions, specialist legal advice should be sought to avoid the risk of potentially severe consequences.

UN and EU sanctions

United Nations and European Union sanctions have also become more stringent. North Korea, for example, is under sanctions imposed by the US, the UN and the EU.



UN Sanctions

The UN has long had its own sanctions regime promulgated by the UN Security Council. The UN views sanctions as an alternative to armed intervention and a means to express global disapproval with actions undertaken by regimes and individuals. The UN emphasises that the effectiveness of sanctions is enhanced when they are imposed alongside “peacekeeping, peacebuilding and peacemaking.”

Because they are imposed under the authority of the UN Security Council, the impact of UN sanctions is arguably truly global in scope. Although there is variation in how successfully and enthusiastically they do so, each of the body's 193 member states is legally compelled to comply with and implement the Security Council's sanctions. Since 1966, the Security Council has established 30 different sanctions programs; today there are 14 such regimes in effect. Each of the sanctions programs is broadly administered by a separate Sanctions Committee and usually a related expert panel. The programs differ significantly in scope – the ISIL (Da'esh) and Al-Qaida sanctions regimes include over 300 individuals and entities, whereas the Central African Republic sanctions regime only has 13 names. The oldest current UN sanctions regime is that against Somalia which comprises an arms embargo, an asset freeze, a travel ban and a charcoal ban.

In order to promulgate sanctions, the Security Council requires unanimity from the Permanent Members – China, France, Russia, the United Kingdom and the United States. This has regularly made imposing sanctions in response to politically controversial situations (in which one or more permanent members are on opposite sides of an issue) impossible. As such, while it is possible that the UN could follow the United States' lead and create new sanctions on Syria or Venezuela (or enhance measures against North Korea), given the tensions between Beijing, Moscow, and Washington this seems unlikely in the near term.



EU Sanctions

While the EU has been a less enthusiastic implementer of sanctions than the United States, the 28-member bloc is nevertheless the second most active jurisdiction in imposing sanctions. One of the reasons for the EU's lower level of activity comes from the unique challenges of the EU system – EU sanctions require unanimity from all 28 member states, each of which have competing domestic and foreign policy interests. Reaching such an agreement – especially on close-at-home issues like Russia – has often proved challenging.

Generally, EU sanctions are either targeted sanctions (for example asset freezing measures, prohibition of funds available to individuals and travel restrictions) or trade/sectoral sanctions (for example restrictive measures against the proliferation/use of chemical weapons). While all EU states must comply with EU measures, actual compliance varies among the members, as do penalties for violations, which are also determined and administered at the member state level.

EU sanctions apply to any EU national, whether in or outside EU territory, and any person or entity incorporated under the law of or doing business in an EU member state. The EU has over 40 sanction regimes, with many linked to United Nations sanctions programs.

The EU has also adopted a counter sanction under the EU Blocking Regulation to reduce the impact of the United States' Iran and Cuba sanctions, to which the EU does not subscribe. These blocking measures, originally adopted in 1996 and recently enhanced in light of the United States' withdrawal from the JCPOA, broadly prohibit EU businesses and persons from complying with US sanctions on Iran and Cuba. The result of the Blocking Regulation is that some businesses with ties to both the EU and the United States are caught between a requirement to comply with US sanctions and a prohibition against compliance from the EU. Navigating between these measures is possible but can be highly complex.

With the advent of Brexit the United Kingdom may have its own independent sanctions regime. In the immediate term, London may adopt the same measures as those in place under the EU. In the longer term, it is expected that there could be divergence between the EU and the UK in terms of sanctions which could make compliance more difficult.

Boycotts and blacklists

More localised sanctions can be found in many different guises. Here, we consider just a few such examples.



Arab League boycott of Israel

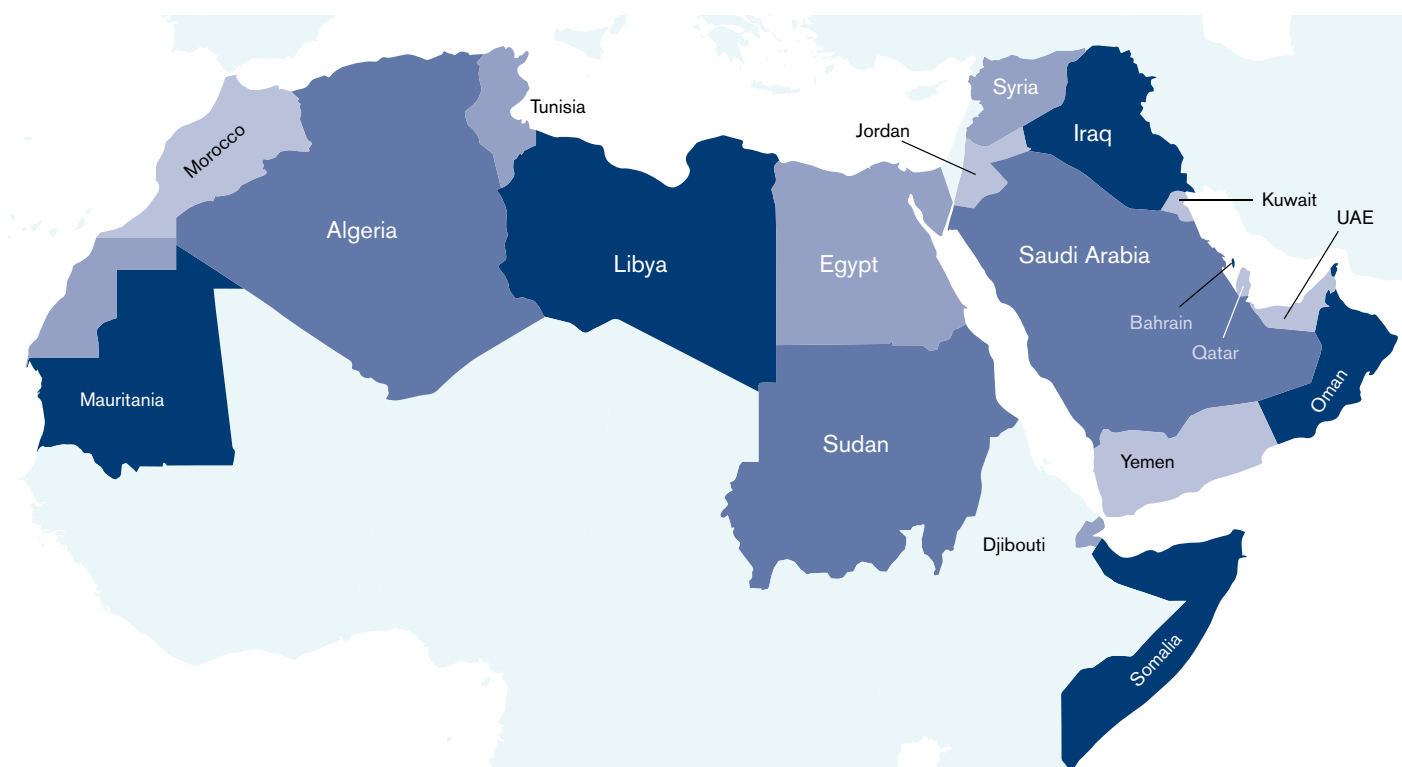
The Arab League, formed in 1945 by Egypt, Iraq, Jordan, Lebanon, Saudi Arabia, and Syria for the purpose of promoting the economic and social development of the Arab world, currently has 22 members.

One of the key features of the League is the blacklisting of ships trading to Israel or flying Israeli flags, known as the Arab Boycott Blacklist ('the blacklist'). Ships calling at an Israeli port are added to the blacklist which is maintained at the Central Boycott Office in Damascus. Details of boycotted ships are then circulated to the national boycott offices of other States in the Arab League.

A ship's recent trading history will be verified from its logbooks and public websites. Most Arab League nations expect logbooks to date back six months prior to the call (or at least covering the previous ten ports of call). The blacklist references ships' IMO numbers, enabling them to be identified following changes of name and ownership. Ships remain on the blacklist for life or until de-blacklisted. De-blacklisting is possible, but on a one-off basis only.

Enforcement varies from country to country within the Arab League but, generally speaking, ships cannot call at countries applying the boycott after they have recently visited Israel (or in some cases if they have visited Israel at any time), or if they have other Israeli connections, fly an Israeli flag, are Israeli owned or managed or carry Israeli cargo, crew or passengers. The position taken by respective countries varies widely, but broadly speaking, ships in breach of the boycott may face detention or fines. Crewmembers with Israeli stamps on their passports may not be allowed shore leave, or repatriation.

The United States has a set of laws that prohibit compliance with any unauthorised boycott, including the Arab League's boycott of Israel. These regulations are very complicated and the consequences of running foul of them is very serious. Members are urged to seek specialist legal advice concerning compliance with the Arab League's boycott.





Turkey and Cyprus

Following the Turkish invasion of Cyprus in 1974 the Northern part of Cyprus (occupying about 40% of the island) is no longer under the control of the Republic of Cyprus. According to the Republic of Cyprus, the ports of Famagusta, Kyrenia and Karavostasi in the North are "closed" and ships that call there are likely to face issues if they subsequently call at any of the "open" ports in Southern Cyprus, such as Limassol, Larnaca and Vassiliko, with the same master on board. The restriction applies to the master rather than to the ship itself. Penalties for breach include imprisonment for up to two years or fines up to about EUR 17,000.



Ukraine and Crimea

The eruption of a dispute between Russia and the Ukraine over Crimea's political status led to the closure of Crimean ports to international shipping in 2014 by the Ukrainian Government. Restrictions are applied to all ships calling at Crimea regardless of their flag or ownership. Any call to Crimea is considered a breach of Ukrainian legislation on Temporary Occupied Territories which can lead to penalties such as detention, prosecution, fines, confiscation and even imprisonment. This applies to all ships and crew irrespective of nationality. Any call since 2014 is considered a breach.



Qatar

A Saudi-led coalition, comprising Saudi Arabia, the UAE, Bahrain, Egypt, Yemen and various other countries in the region severed diplomatic relations with Qatar in 2017, citing Qatar's support for terrorism as their motivation. The alliance countries have closed their air space and territorial waters to Qatar and closed their ports to Qatar-flagged ships. Saudi Arabia also closed its land border with Qatar, Qatar's only land border with another country, and Egypt has closed its airspace to all flights to and from Qatar.



China and Taiwan

Due to long-running political tensions between China and Taiwan cross-Strait trading has been restricted. In 2008, regulations were introduced which permitted direct trade between China and Taiwan by ships registered in either country, but the same is still subject to obtaining certain licences and approvals are also required. Restrictions still apply to foreign ships, though licences may be obtained in some cases. Ships that trade directly between Taiwan and the mainland without the proper approvals will be detained.

War and civil unrest

Whilst situations of war do not give rise to the same challenges of interpreting legislation as sanctions, it can be equally complex to navigate the legal landscape. The legal definition of war itself can be a source of debate.

War, by definition, must be between two sides with opposing objectives and be of sufficient scale to affect public order. A threat of war is more difficult to define. There may be activities which fall short of a formal war but which nevertheless give rise to warlike risks for the ship involved. The difficult question then often arises as to whether the level of risk is sufficient to allow an owner to refuse a charterer's orders to proceed to, or remain in, such an area. For this reason, warlike situations are a fertile source of shipping case law.

Several key cases came out of the Gulf War and the Iran-Iraq conflict. The *Evia*¹ was discharging at Basrah when war broke out in 1980 and was trapped there for some time. The *Chemical Venture*² was severely damaged by a missile from an Iranian warplane. The *Kanchenjunga*³ sailed away from Kharg Island after an air raid there and, although physical damage was avoided, the charterer claimed its losses arising from the owner's refusal to load. These cases not only illustrate the potentially grave consequences of war on shipping but also form an informative body of case law relating to safety principles.

The "Arab Spring", a series of anti-government protests, uprisings, and armed rebellions that spread across North Africa and the Middle East in the spring of 2011, also caused disruption for shipping in the region. Notably, Tunisia, Egypt, Yemen and Libya were affected and the situation remains turbulent even today with many of the nations involved now in civil war. During the uprising in Libya, oil refineries were targeted making the loading of tankers problematic. Following the outbreak of the Yemeni civil war in 2015, as a result of Saudi Arabia's intervention, a blockade was set up which caused delays to ships destined for Yemeni ports. Yemen is situated on one of the critical access points for much of the world's oil shipments. The impact on shipping was therefore high. In 2018, a Saudi oil tanker was attacked in the Red Sea by Yemen's Houthis.

Other areas of conflict in recent years include the disputed waters of the South China Sea, the Black Sea, where tensions between Ukraine and Russia resulted in attacks on ships in 2018 and, most recently, the spate of attacks on ships in the Straits of Hormuz and off Oman in mid-2019. In the latter case, the attacks on ships in the area have been seemingly linked to the escalation of tensions between Iran and the US. Following the detention of tankers in the region explained by the Iranian regime as retaliation for the UK detention of Iranian-flagged tanker *Grace I* for alleged breaches of EU sanctions on Syria, the US and UK have strengthened their military presence in the area. These incidents have given rise to widespread concern for ships in the area, causing war risks premiums to soar and ships to turn off AIS to mask their location. Given the volume of world oil which passes through the Straits, any escalation to military action between the US and Iran would undoubtedly have a significant impact on the shipping industry.

¹ *Kodros Shipping Corporation v Empresa Cubana De Fletes (The Evia No. 2)* [1981] 2 Lloyd's Rep 613; [1982] 1 Lloyd's Rep 334; [1982] 2 Lloyd's Rep 307

² *Pearl Carriers Inc. v. Japan Line Ltd. (The Chemical Venture)* [1993] 1 Lloyd's Rep. 508

³ *Motor Oil Hellas (Corinth) Refineries S.A. v. Shipping Corporation of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep. 391

Piracy

Although increased patrols, protection and awareness has reduced the risk of piracy in some areas, it is still a prevalent risk, particularly in regions of economic poverty and inequality.

An attack can be devastating for crew and owners alike not to mention charterers and cargo owners. Aside from the clear risk to life, the commercial implications of a ship potentially being taken out of action for months at a time and potentially having her cargo stolen, culminating in payment of a large ransom, can be significant.

Piracy off Somalia and in the Gulf of Aden is a well-documented risk, though the number of attacks in that region has diminished somewhat. West Africa, particularly Nigeria, has also come to the fore as a global hot spot for piracy, with the number of attacks in the Gulf of Guinea increasing year on year. Attacks are also prevalent in South East Asia, mainly around Indonesian waters and the Malacca Straits.

The number of attacks has dropped in recent years due to the increased presence of armed patrols, though not all coastal states allow transit with armed guards on board. Armed guards and convoys help all stakeholders to protect their interests, personnel and assets. Ensuring ships are adequately protected and secured can be an important deterrent. However, additional precautions may need to be taken in some areas where attacks are known to be more aggressive.


Guidance is available and now widely followed regarding the protection and hardening of ships. For instance, the Best Management Practice ("BMP") guide that is jointly produced by BIMCO, the International Chamber of Shipping, the International Group of P&I Clubs, INTERTANKO and the Oil Companies International Marine Forum, is regularly updated and offers helpful guidance to shipowners. The latest version, BMP 5, was produced in June, 2018 and has been updated to recognise more modern threats, such as missiles and mines, as well as broadening the area of focus beyond the Gulf of Aden to also cover the Red Sea, Indian Ocean and Arabian Sea, recognising the wider threat that currently exists.

2018 piracy incidents per area



Charterparty and common law protection

Topographic map of East Asia, including the Philippines, Singapore, Thailand, Taiwan, Vietnam and the South China Sea.



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 civil unrest, piracy or sanctions. 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

Where owners are fixing on the spot market, they inevitably have a certain degree of control over the ship's employment in terms of cargo and trade routes. By contrast, under a period time charter, an owner effectively places its ships in the hands of its charterer, subject only to agreed limits.

A 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 straight-forward solution and primary layer of protection for the owner. The importance of careful drafting of this clause cannot be underestimated.

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.

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 sanctions, war or piracy. In the current uncertain times, it is more important than ever to ensure that charterparties contain provisions dealing with sanctions, war risks and piracy. Some of the key considerations are discussed below.

Sanctions clauses

Sanctions clauses are not typically included in standard charter forms and bespoke provisions will often need to be added into the riders. BIMCO has published two sanctions clauses. BIMCO's Designated Entities Clause has been designed for use in either voyage or time charters, as well as ship sale and purchase and management agreements. Essentially it contains a warranty that neither party is subject to any sanctions and there are no SDNs involved in the voyage. In the event of a breach, the clause provides the innocent party with the rather extreme remedy of cancelling the charter.

BIMCO's Sanctions Clause for Time Charterparties, on the other hand, permits an owner a broad discretion to resist a charterer's orders, if an owner reasonably suspects such orders may expose it to sanctions, and to require alternative orders to be issued, failing which the owner may discharge any cargo at an alternative port at the charterer's time and cost. This clause is triggered where the voyage orders, in the "reasonable judgement of the Owners, will expose" the ship to a sanctions risk – an assessment which potentially leaves scope for debate. BIMCO has yet to produce an equivalent clause for voyage charters.

In some cases, bespoke clauses might be agreed to address a specific sanctions concern. For example, if Cuban trade is envisaged, an owner may require a clause that prohibits the charterer from sending the ship to Cuba within the last 180 days of the charter to avoid the ship being redelivered with a restriction still attached. An Arab Boycott clause might require an owner, for example, to guarantee that the ship has never traded to an Israeli port and is not blacklisted by any Arab country.

Protective clauses (continued)

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 25 of the Shelltime form, clause 36 of the ShellLNGTime, and clause 17 of the Gencon 1994 form.

In considering whether an alternative performance clause may apply to any given situation, it will be necessary to consider, firstly, whether the factual circumstances fall within the "war risks" definition and, secondly, whether 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 another⁴. 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.

As to the level of risk, the English courts have set out some guidelines in *The Triton Lark*⁵, a case where the owner sought to take a route around the Gulf of Aden for fear of a pirate attack. There has 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. 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 ShellNGTime 1 form, which was held to have given the charterer a right to cancel the charter upon the outbreak of the second Gulf War in 2003 in the *Golden Victory* case⁶. 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 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, has been 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.

⁴ *Kawasaki K.K.K v Bantham* (1939) and *Pan America World Airways* (1975)

⁵ *Pacific Basin IHX Limited v. Bulkhandling Handymax AS (The Triton Lark)* [2012] EWHC 70 (Comm)

⁶ *Golden Strait Corporation v Nippon Yusen Kubishka Kaisha (The Golden Victory)* [2007] UKHL 12

Protective clauses (continued)

Piracy clauses

BIMCO's Piracy Clause 2013, which has been drafted for voyage and time charters as well as contracts of affreightment, 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*⁷ 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*⁸, 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.

⁷ *Osmium Shipping Corporation v. Cargill International SA (The Captain Stefanos)* [2012] EWHC 571 (Comm)

⁸ *Eleni Shipping Limited v Transgrain Shipping BV (The Eleni P)* [2019] EWHC 910 (Comm)

Topographic map of the Gulf of Mexico and Central America, including Florida, USA, Mexico, Cuba, Belize, Honduras and The Caribbean Sea.



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, but 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 with 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. Each situation will be fact sensitive and the threshold to meet 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.

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, 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*⁹, 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 to do so, the court held that owner had waived its right to claim damages for the port being unsafe. In *The Kanchenjunga*¹⁰, in which the owner refused to load at Kharg Island during the Iran-Iraq war, it was seen 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.

⁹ *ibid*

¹⁰ *ibid*

Master's right to refuse orders where the safety of the ship is at risk

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

This was recognised in the 2001 case of the *Hill Harmony*¹¹, 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."

(per Lord Hobhouse in *The Hill Harmony*)

Force majeure

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.

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 more nebulous 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 are considering refusing charterers' 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, in extreme circumstances, even terminate the charter. Members are advised to seek legal advice before relying on any of the principles discussed above to refuse their charterers' orders.

¹¹ *Whistler International Ltd v Kawasaki Kisen Kaisha Ltd. (The Hill Harmony)* [2001] 1 Lloyd's Rep 147

Charterer's implied indemnity

If a ship does proceed to an area 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. This arises under clause 8 of the NYPE form.

The rationale for this principle was neatly explained in the judgment in the case of *The Island Archon*¹²:

"... 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, under the terms of the charter, to bear. 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.

¹² *Triad Shipping Co. v. Stellar Chartering & Brokerage Inc. (The Island Archon)* [1994] 2 Lloyd's Rep. 227

Delay

Questions as to 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. On the other hand, if a ship cannot enter a port, it will probably not be possible to tender a notice of readiness and so any delay will be for the owner's account.

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 Saldanha*¹³, 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".

A charterer cannot generally rely on an off-hire clause if it has caused the off-hire situation itself. So, for example, if the ship is detained due to boycotting which has arisen due to the charterer's own previous orders, then it may not be entitled to place the ship off-hire.

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.

¹³ COSCO Bulk Carrier Co. Ltd. v Team-Up Owning Co. Ltd. (*The Saldanha*) [2010] EWHC 1340

A topographic map showing the Korean Peninsula and the Sea of Japan. The map uses a color gradient where green represents lower elevations and brown/orange represents higher elevations. The Korean Peninsula is on the left, with North Korea in the north and South Korea in the south. The Sea of Japan is to the east. The Japanese archipelago is visible on the right side of the map.

Conclusion

Given the serious commercial consequences of breaching sanctions 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 resist 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 pages we summarise the key issues to consider before fixing a charter party and when dealing with any issues that might arise.

Topographic map of Japan, North Korea, South Korea and the Sea of Japan.

Issues to consider when fixing

Review trading limits:

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

Include protective clauses, such as:

- Sanctions clauses (e.g. BIMCO's Designated Entities Clause and BIMCO's Sanctions Clause for Time Charterparties)
- 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 she is delayed or detained?
- Carry out a risk assessment
- Undertake sanctions checks
- Seek legal advice to confirm scope of charterparty rights and responsibilities
- Seek expert advice as to the level of risk involved and options for mitigation

Information and resources

War and piracy

AP area map:

www.ukwarrisks.com/fileadmin/uploads/uk-war/Docs/2019_UKWR_Map_.pdf

IMB piracy reporting centre:

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

IMB live piracy map:

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

Maritime Global Security Website:

www.maritimeglobalsecurity.org

UK War Risks/Hellenic War Risks websites:

www.ukwarrisks.com, www.hellenicwarrisks.com

Sanctions

OFAC website:

www.treasury.gov/about/organizational-structure/offices/pages/office-of-foreign-assets-control.aspx

OFAC FAQs:

www.treasury.gov/resource-center/faqs/sanctions/pages/ques_index.aspx

OFAC SDN list:

<https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx>

UK Defence Club sanctions page:

www.ukdefence.com/knowledge-resources/sanctions

ukdefence.com

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