

SOUNDINGS

Yemen: Charterparty considerations

The deterioration of the situation in Aden province, gives rise to potential charterparty issues in relation to the prospective safety of the Port of Aden.

The position in Aden province and the Port of Aden remains fluid, with continuing reports of warring factions. Specific enquiries that Members may have will therefore depend on precise factual scenarios as well as the terms of any charterparty that has been entered into. However, general guidance on some of the key considerations is set out below.

Should Members wish to discuss these or any other issues in more detail, then they should speak with their usual contact within the Managers.

What is a safe port/berth?

Generally, the terms of time, time-trip or voyage charterparties will impose an obligation on the charterer to only nominate safe ports and/or berths.

The usual test for whether a port or berth is safe is if at the relevant time the relevant ship can reach it, use it and return from it without being exposed to an avoidable peril, provided that an abnormal event does not occur.

Risks to crew or cargo may still make a port or berth unsafe even if there is no physical danger to the ship.

What if the port or berth was safe when nominated but does not appear to be safe now?

By nominating a safe port or berth a charterer is warranting that the usual test set out above can be complied with. However, if a nomination is given and then the port or berth becomes unsafe, it is possible that a time charterer will be under an obligation to nominate an alternative safe port or berth. Under a voyage charter there is no general obligation for the charterer to nominate an alternative safe port or berth. War Risk clauses may help clarify the parties' obligations.

How do War Risks clauses help?

Under Bimco recommended Conwartime 2013 clause for time charterparties and Voywar 2013 clause for voyage chartering "war risks" include any actual, threatened or reported:

continued overleaf

“...war, act of war, civil war or hostilities; revolution; rebellion; civil commotion; warlike operations; laying of mines; acts of piracy and/or violent robbery and/or capture/seizure (hereinafter “Piracy”); acts of terrorists; acts of hostility or malicious damage; blockades (whether imposed against all vessels or imposed selectively against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever), by any person, body, terrorist or political group, or the government of any state or territory whether recognised or not, which, in the reasonable judgement of the Master and/or the Owners, may be dangerous or may become dangerous to the Vessel, cargo, crew or other persons on board the Vessel.”

Provided that the relevant charterparty does not contain terms to the contrary, then the following will generally apply:

Conwartime 2013

A ship will not be obliged to continue to, through or remain at a place if, in the reasonable judgment of the master or the owner, the ship, the cargo or crew may be exposed to “war risks” as defined. If so, the owner is under an obligation to inform the charterer of the refusal to proceed. If cargo is onboard, no cargo shall be discharged at any alternative port without the owner first giving the charterer notice of its intention and requesting the charterer to nominate safe port(s) for such discharge. Should the charterer fail to give such a nomination within 48 hours of receipt of the notice from the owner, the owner may discharge the cargo at any safe port of its choice. All costs, risk and expenses associated with the alternative discharge will be for the charterer’s account.

Additional premium may be incurred by an owner if a ship proceeds through a war risk area. This, together with crew bonuses, will be for the charterer’s account. Actions taken in accordance with Conwartime 2013 will not, under the terms of the clause, be considered a deviation.

Voywar 2013

If the ship, cargo or crew, in the reasonable judgment of the master or the owner, may be exposed to “war risks” as defined then if no cargo has been loaded and the contract provides a range of load or discharge ports, the owner may require the charterer to nominate any other safe port within the range. A failure to do so within 48 hours will allow the owner to cancel the charter.

If loading has already commenced, or at any point before discharge is completed, an owner will not be obliged to continue loading, sign contracts of carriage, or proceed, or continue on any voyage.

Similarly, an owner may require the charterer to nominate a safe port for discharge of the cargo (or any part thereof). If the charterer does not do so within 48 hours of receipt of such notice the owner may

discharge the cargo at a safe port of its choice, including the load port. The charterer will be obliged to pay for any additional expenses of such discharge and freight remains payable (provided the new discharge port is not the load port) as if the cargo was delivered to the original discharge port. Additional (pro-rated) freight may be earned if the new discharge port is more than 100 miles from the original.

An owner may also, provided that notice is given to the charterer, take a longer route to avoid a war risks area and can earn extra pro-rated freight if the route is more than 100 miles longer than that which was originally planned.

As with the Conwartime 2013, any additional premium will be for the charterer’s account and actions in accordance with the clause will not be considered a deviation.

Members are recommended to review the operation of their charterparty clauses in the context of the situation at the Port of Aden.

Is a charter frustrated if a ship is unable to get to a port or berth because of concerns about local warring factions?

As the situation at the Port of Aden is very fluid it is not clear to what extent, and for how long, the port may be inaccessible and therefore what delay a ship may encounter trying to use the port.

A charter may contain provisions for alternative orders to be given in the applicable war risk or other clauses. However, if no such alternative orders are provided then the doctrine of frustration may be relevant. A contract may be frustrated if after the contract was made the situation changes (through no fault of the parties) to such a degree that the contract becomes impossible to perform or is deprived of its commercial purpose. Each party would then be discharged from future (but not past) obligations under the contract. As neither party was at fault for the frustrating event, neither may sue for breach. The appropriateness for a party to consider a contract to be frustrated must be assessed contemporaneously and not with the benefit of hindsight.

There is no set criteria for how and when a charter may be frustrated. It will depend on the circumstances of each charter. However, as a general guide the expected length of the delay (to the extent that it can be approximated at the time) against the unexpired period of the charter will be a relevant factor. A time charter with a long unexpired portion is less likely to be frustrated than a short trip or voyage charter.

Notify War Risks insurer

Finally, Members should notify their war risks insurer to ensure that they are adequately covered and to confirm whether any additional premium is required.

If Members have any questions please contact your local Managers’ office.

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