Contractual Implications of the Ukrainian/Russian Conflict - FAQs

Introduction

The situation in Ukraine is developing rapidly and remains fluid. The Club provides below some general guidance which addresses some of the most pressing questions at this challenging time.

Although every effort has been made to ensure the accuracy of the below information at the time of posting, we highlight that the following commentary is, given the nature of the geopolitical tensions at present, subject to change. Members are strongly encouraged to contact local agents and/or lawyers for the latest updates if affected.

Members should note that according to the Ministry of Infrastructure of Ukraine, as of the time of writing, all Ukrainian ports are currently closed. Furthermore, the Republic of the Marshall Islands Ship Security Advisory 02-22 has suggested that commercial ships have been targeted by missiles approximately 21nm South of Mariupol, Ukraine, and has advised commercial vessels to avoid any transit or operation within the EEZ of Ukraine or Russia within the Black Sea. Multiple shipping liners have stopped booking export cargo destined for Russian and Ukrainian ports.

1. What’s the impact of sanctions on the charterparty?

Usually, the charterparty would include a sanctions clause on their rider terms (e.g. BIMCO Sanctions Clause for Time Charter Parties 2020, BIMCO Sanctions Clause for Container Vessel Time Charter Parties 2021 or BIMCO Sanctions Clause for Voyage Charter Parties 2020) which aims to address the commercial implications and further allocate the liabilities between the parties, in the event that sanctions affect or even prevent the performance of the charter.

In accordance with those clauses, at the date of the charterparty and throughout its duration the parties warrant that they are not a ‘sanctioned party’ as defined in the clause and further agree that if such warranty is breached, then the party not in breach is entitled to terminate and/or claim damages. The warranty on behalf of the owners extends to the vessel’s registered owners, bareboat charterers, immediate disponent owners, managers, the Vessel and any substitute. Equally, the warranty on behalf of the charterers extends to any subcharterers, shippers, receivers and cargo interests.

Furthermore, and along with their right to terminate, which remains unaffected, the Owners are entitled to request from the Charterers to provide alternative orders, if the activity (i.e. activity,

service, carriage, trade or voyage) has become sanctioned. The Charterers have 48 hours to provide alternative instructions, failing which the Owners have the option to proceed to a safe port or voyage of their choice.

In the event that the parties do not have a specific clause in their contract that addresses sanctions and if their contract is affected by the current sanctions regime in a way that this can no longer continue, the parties may be able to rely on frustration (see further below) to bring their contract automatically to an end.

Sanctions against Russia have already been introduced, but it is anticipated that more sanctions will follow. Members are advised to frequently review the ever-evolving sanctions regime, in order to ensure that their operations are not affected.

2. War clauses - is there a right to terminate?

Many charterparties today incorporate detailed war risk clauses, with the aim of protecting the interests of the shipowner and the vessel in the scenario where the owner or Master considers that proceeding to a port would expose the vessel to “war risks”. These are seen in, for example, BIMCO’s CONWARTIME or VOYWAR terms (2013 or earlier iterations of the same), wherein “war risks” are defined as:

“*any actual, threatened or reported: war, act of war, civil war…warlike operations…acts of hostility… 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*.”

This broad “war risks” definition does not exclusively apply to situations of formally declared war. The threshold test to invoke the clause is to first establish if a “war risk” exists and then to assess the risk and level of danger to the ship, which must be a tangible danger. Whether or not a situation is dangerous depends on the nature, severity, extent and prevalence of the danger for the individual ship.

On 16 February 2022, the Joint War Committee of London marine insurers added the Ukrainian and Russian waters around the Black Sea and Sea of Azov to its list of areas deemed “high risk” (the “Listed Areas”). In light of the ongoing hostilities and the abovementioned reports of dangers to commercial vessels transiting the region, at the time of writing the terminology of the standard war risk clauses can likely be relied on by Owners seeking to avoid calling at of in the vicinity of Ukrainian or Russian ports -

Although less common in time charters, in many voyage charterparties the parties may also have the contractual option to terminate a charterparty in the event that the performance of the charter could place the Vessel, cargo, crew or other persons on board the Vessel at risk of war risks – an example of such a right to terminate is set out in VOYWAR 2013. If a party is considering exercising an option to terminate, it should be noted that the option must be

exercised within a reasonable time of war breaking out – the courts will often construe options to cancel strictly against the party with the option to terminate.

It is important that all parties carefully consider the terms of their governing charterparties and ensure that orders to vessels trading to affected areas are given in adherence to the applicable contractual terms. Each case will depend upon its specific facts.

3. Force Majeure - what does a party need to do to rely on a Force Majeure clause?

Force majeure is not an established principle in English common law and will not be implied, if it is not contractually incorporated. The parties usually include a force majeure clause into their charterparties to account for unexpected events beyond their control, which may prevent, hinder or delay the performance of the agreed charter. This clause will provide for a list of events which the parties regard as force majeure events and most importantly, it will expressly determine their effect and consequences to the contract. Generally, a successful invocation of the force majeure clause may result in suspension of the services and may relieve the parties of their obligations (wholly or partly) for the duration of the force majeure event and in some cases, even lead to termination of the contract.

Force majeure clauses may entitle either party to the contract to cancel or suspend performance upon the outbreak of war. ‘War’ or ‘warlike’ operations may be specifically referred to in the clause as a specified event entitling the parties to be excused from performance, in whole or in part, of the contract.

Whether a party can rely on force majeure is dependent on the existence of a force majeure clause, and the wording of it. However, it is usual that a party looking to rely upon a force majeure clause, should be able to prove that:

i. the clause expressly mentions the specific circumstances (such as outbreak of ‘war’ or ‘warlike’ operations);

ii. the causation test is met (i.e. but for the circumstances in question the party would have fulfilled its contractual obligations);

iii. the inability to perform is beyond the party’s control; and

iv. there were no reasonable steps that the party could have taken to minimise the effect of the force majeure event.

In addition to the above, there may be a requirement of giving a formal notice to the other party within a certain period stipulated in the clause, which is often strictly construed.

4. Are the Ukrainian ports “unsafe” in a charterparty context?

Charterparties often contain warranties that charterers will only order the vessel to “safe” berths, ports or anchorages (see e.g. the NYPE and Asbatankvoy forms). Depending on how the situation develops, there are likely to be concerns as to whether ports in the Listed Areas can be classed as “safe”.

A port is “safe” if vessels are able to proceed to load and proceed from the port without, in the absence of some abnormal occurrence, being exposed to dangers which could not be avoided by good seamanship or navigation. The approach to the port must also be safe in order for the port to be safe. “Safety” will be considered by reference to the particular ship on the particular voyage. In light of the situation at present, ports within the Listed Areas may be considered unsafe as a result of the ongoing conflict.

5. If there is no war risk clause, can a party terminate the contract based on frustration?

In the absence of an applicable war clause in the contract, the parties may have significant difficulties terminating the charterparty. Frustration of a contract can only occur when an unexpected event following the formation of the contract has rendered the performance of the contract impossible, illegal or radically different, without the fault of either party.

Whether parties can successfully rely on the doctrine of frustration is mainly a factual question, and factors like the duration and extent of the disruption, must be carefully assessed. Most importantly, parties must show that the disruption has radically affected the commercial purpose, the continuation or even the existence of the contract.

It is worth noting that if the contract has simply turned onerous or uneconomical to one party due to the circumstances (e.g. delays and port congestion, increased bunker prices, war risk insurance premium or freight rates etc), then that in itself may not be sufficient to allow that party to frustrate the contract.

6. Can the ship refuse to accept orders to call or remain off the Listed Areas and request charterers to nominate an alternative port?

The Master/ shipowner has the ultimate responsibility for the safety of their vessel, the crew and the cargo. The Owners should carefully review the relevant war risk clause in their charterparty but the status of the current hostilities in the area most likely does give the shipowners the right to reject charterers’ orders to call or remain off the Listed Areas.

In a time charterparty scenario, where the BIMCO CONWARTIME Clause is incorporated, the Owners have the right to request from the charterers instructions to nominate an alternative safe port to discharge the cargo. Should Charterers fail to nominate an alternative port within 48 hours, then Owners are entitled to discharge at any safe port of their own choice.

In the case of voyage charterparties, the situation is a little more complex. Charterers have no general duty or right to re-nominate and much will depend on the particular charterparty terms. If the charter (and the B/L) have a liberty clause (e.g. “so near thereto as she may safely get”), then the Owners may discharge the cargo at a different safe port, but different wording may oblige the vessel to wait at a safe place, or indeed, provide the Owners with the right to terminate the charterparty. Care must be taken in the reading and application of each charterparty term.