

Soundings

Dire Straits? Charterparty implications of the recent attacks in the Gulf.

The recent spate of attacks on tankers in the Straits of Hormuz has brought into stark relief the risks faced by shipowners when trading to areas of political unrest. When faced with instructions to sail their ship to or through the area, many owners have understandably questioned whether they have a right to reject their charterer's orders. In this article, we look at some of the guiding principles owners need to be aware of when considering their position.

Background

Following increasing tension between the US and Iran, accompanied by tightening sanctions, the last two months have seen six tankers attacked in the Gulf region, two in May and four in June, the shooting down of a US drone and an escalation of military presence in the area. The Persian Gulf and adjacent waters, including the Gulf of Oman, has consequently been added to the Joint War Committee's list of high risk areas and war risks premiums for ships trading in those areas have increased significantly. Whilst no-one has yet claimed responsibility for the attacks, experts believe Iran is involved.

Whilst, we wait to see how matters will unfold, given the precarious and unpredictable situation in the area, many owners may wish to assess their contractual rights and protection in this context.

The legal issues

As a starting point, owners are obliged to comply with their time charterer's legitimate employment orders, subject to any exceptions agreed within the charterparty. The rights of parties will therefore vary from charter to charter, but these are some of the points that may need to be considered.

Trading areas

Many charterparties expressly exclude certain countries or regions from the trading area. In such cases, charterers cannot force owners to proceed there. Where, however, a particular area has not been excluded, the position is likely to be less straightforward.

War risks clauses

If the charter contains an express war risks clause, this may well offer owners protection, depending on how it is drafted.

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Some war risks clauses allow the charter to be terminated in the event of a war risk. Others allow the master to refuse the charterer's orders and request fresh ones. There may be provisions for dealing with cargo in cases where it is necessary to deviate. If not, then the consequences of deviation in terms of owners' duties under any bill of lading will need to be considered.

In the first instance, owners will need to consider carefully whether the clause is applicable in the relevant circumstances. The BIMCO Conwartime 2013 clause, for example, contains a broad list of trigger events, including war, hostilities, civil commotion, acts of piracy or terrorists and blockades. Other clauses are more restrictive, however.

Owners will also need to consider the level of risk required to trigger any war risks clause and assess whether the present risk is sufficiently high. The Conwartime 2013 clause, for example, operates in the event that, in the reasonable judgment of the master, the ship may be exposed to such a risk. Based on the courts' reasoning in the *Triton Lark EWHC 2862 (Comm)*, there must be a reasonable risk of a serious event affecting the ship. The mere fact that there are hostilities in the area may not be sufficient if the risk to the ship itself is relatively low.

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Unsafe port

In the absence of any express clauses, owners may need to fall back on other general provisions and principles. The safe port warranty may assist in cases where there is a risk to the ship at a particular port. However, the level of risk required to rely on such a warranty is reasonably high.

By way of example, in *The Saga Cob* [1992] 2 Lloyd's Rep. 545, there had been an attack on a ship at an Eritrean port within the previous three months and there had also been other attacks, yet the port was deemed not unsafe and the charterers were not in breach of the safe port warranty by ordering the ship there. By contrast, in *The Chemical Venture* [1993] 1 Lloyd's Rep. 508, there had been three attacks on ships in the previous eleven days at a single port. The court held that the port was unsafe and that it was negligent for charterers to send a ship there. Owners will therefore need to give careful consideration to the potential level of risk at the time the ship is due to enter the port.

Illegitimate orders

Owners have a right to refuse charterers' orders in the event that such orders are likely to expose the ship to danger. The master's overriding obligation to ensure the safety of his ship and the crew was recognised in the 2001 case of the *Hill Harmony* 1 Lloyd's Rep 147, a case which concerned the reasonableness of the master's refusal to follow charterers' routing orders based on his concerns as to the safety of the route proposed by charterers. In that case, the risk perceived by the master, which was based on his own experience of an incident when previously transiting the same route, albeit that many other ships had taken that route without coming to harm, was not considered sufficient to entitle him to refuse the orders.

Frustration or force majeure

A charterparty may be frustrated if there is an event which makes the charter incapable of performance, which was unforeseeable at the time of forming the contract and which goes to the "heart" of the contract. The bar is a high one. The fact that the contract simply becomes more onerous or more costly is insufficient, so if the ship can take an alternative, albeit longer, route or if there is only a relatively short delay waiting for a danger to pass, then the contract is unlikely to be frustrated. As a general principle, the expected length of the delay against the unexpired period of the charter will be a relevant factor.

Conclusions

These situations are rarely clear-cut and the present facts are evolving on a daily basis, so they must be considered on a case by case basis. In any event, legal advice should always be sought before relying on frustration or a force majeure clause to bring a contract to an end. If any decision to do so is subsequently judged to be incorrect, the party which relied on frustration or the contractual provision may find themselves exposed to a claim for repudiatory breach of the contract. Similarly, if owners refuse charterers' orders which are later found to have been legitimate, owners may be liable for breach of charter and off-hire claims.

In a world of growing protectionism and escalating tensions between nations, it is worth reviewing charterparties in the context of the protection they may offer in the event that trade is interrupted by war or warlike situations.

Please contact the Managers for further advice in relation to any of the issues discussed above.

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