

Toby Stephens (Partner, Singapore) Jean Koh (Partner, London) and Angus Edgell (Associate, London) - HFW

THE UKRAINIAN SITUATION – Managing the risks

This article is intended to give broad guidance on potentially relevant issues arising from the current situation in Ukraine. However, circumstances are changing quickly and Members should consider seeking Club advice on a case by case basis.

Russian military were ordered into rebel held areas of Ukraine on 21 February 2022 followed by a full scale attack on Ukraine on 24 February 2022. Previously, on 15 February 2022, the Joint War Committee had added Ukrainian and Russian waters in the Black Sea and Sea of Azov as Listed Areas.

The position is fluid and information can appear contradictory and is often unverified. We understand however that the current position is as follows:

1. Ukraine has suspended all commercial shipping at its ports
2. Russia has ordered the Sea of Azov closed for the movement of commercial vessels until further notice
3. Russia's ports on the Black Sea remain open for navigation and use by commercial vessels

Members operating in these areas will want to consider their rights and obligations under their existing and future contracts and identify any specific exposures that they may have.

Can owners refuse to transit or call at a port in Ukrainian and Russian waters in the Black Sea/Sea of Azov?

Where a charterparty contains a War Risk Clause (such as Conwartime or Voywar), depending on the wording of the specific clause, an owner may be entitled to refuse the order of the charterer to proceed to a war risk affected port, seek alternative orders from the charterer or even cancel the charterparty. The question to be answered is whether, in the reasonable judgment of the Master, the vessel, its cargo, crew or other persons onboard **may be or are likely to be exposed to war risks**. In the case of *The Triton Lark* it was held that owners could refuse orders in circumstances where there was a "real likelihood" that proceeding to the port would expose the vessel to the danger described – it must therefore be based on evidence rather than speculation and owners should make all necessary enquiries and carry out their own due diligence in order to form their judgment.

As matters currently stand, it appears that commercial vessels cannot now call at Ukrainian ports or Russian ports in the Sea of Azov therefore in practical terms the question is unlikely to arise for the time being.

The recent attacks on vessels by military forces suggest that there would be a real likelihood that a vessel would be exposed to war risk dangers at most of the Ukrainian ports. As to Russian ports on the Black Sea, the dangers and risks would need to be considered on a case by case basis and owners should note that a wrongful refusal of orders can be a costly mistake. It should be noted that from an insurance perspective, losses arising from war risks are excluded from standard P&I cover.

Could closure of these ports and the Sea of Azov frustrate a contract?

This will depend on the terms of the relevant contract as well as the duration of the closures. For a contract to be frustrated, it must either be impossible to perform or there needs to be a radical change to the nature of the contractual obligation. Delay and extra expenses alone will not be sufficient for a contract to be frustrated (except in exceptional circumstances in relation to duration).

In time charters, charterers usually have a geographic range that they can order the vessel to and therefore, the ability for the vessel to call elsewhere would make it harder for a time charter to be frustrated in these circumstances. In contrast, voyage charters, COAs, bills of lading and sale contracts have the potential to be more affected as they usually involve named ports, although it should be emphasised that frustration requires a high threshold under English law.

The effect of frustration is that both parties are released from their contractual obligations from the time of the frustration, but any claims / rights which had accrued before the frustration will still be intact.

Terminate a contract on the basis of force majeure?

There is no free-standing principle of force majeure under English law therefore it will be necessary to review the contract in question to establish whether there are any force majeure provisions agreed.

Are these ports "safe ports"?

If the charterparty contains a safe port / safe berth warranty, a master is entitled to refuse an order to an unsafe port and charterers will be responsible for any losses suffered by owners as a result of proceeding to an unsafe port.

The basic position is that a port is not safe unless, at the relevant time, a ship can reach, use and return from it without being exposed to a danger which cannot be avoided by the exercise of good seamanship (see *The Eastern City*). Whether it is possible to use the ports in this manner will depend on the individual facts of the port in question.

The safety of the port has to be judged prospectively – in other words, at the time the voyage order was given. This point will be particularly relevant as it is likely that most voyage orders to Ukrainian ports would have been given before the physical invasion of Ukraine by Russian troops and the attacks suffered by vessels at the various ports in Ukraine. The relevant port(s) may therefore have been safe at the time the orders were given but subsequently become unsafe. In time charters, if a port subsequently becomes unsafe, a master is entitled to refuse to continue the voyage to the ordered port and ask for alternative orders. However, for a voyage charter, once the charterers have nominated a (one) named port, they will usually have no right nor obligation to send the vessel to another port, and therefore an owner does not have the contractual right to ask for alternative orders from the voyage charterer.

How do the US, EU and UK sanctions affect my contract?

Wide ranging sanctions have been and are being put in place against various Russian entities and individuals. If performance of the Charterparty would be illegal following sanctions, it may become frustrated. Sanctions provisions within contracts should be reviewed to see how and to what extent this will have an effect.

There have been reports of Russian vessels being detained as part of the sanctions against Russia. Members should consider the possibility of Russian authorities taking action against vessels whose flag state have imposed or supported sanctions against Russia.

CONCLUSION

The situation in Ukraine and in the Black Sea/Sea of Azov continues to develop quickly, therefore Members will want to keep the situation under close review. A review of the clauses in all relevant contracts will be required to establish the position in respect of individual cases.