GREECE SHIPPING BULLETIN
MARCH 2022

Welcome to the first edition of our monthly Shipping Bulletin, in which we will be analysing and commenting on current and relevant topics of focus.

Our topics in this month's Bulletin are

- Russia – Ukraine conflict – Impact on Charterparties
- Covid related disruption and the impact on charterparties

Please feel free to contact us for any questions you may have. Details of our team members can be found in the final page of this Bulletin

RUSSIA-UKRAINE CONFLICT – IMPACT ON CHARTERPARTIES

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"A primary concern for most shipowners will be how best to protect their position under charterparties which might involve a call at Ukrainian ports, and primarily, the safety of their vessel and crew."

As the situation in Ukraine unfolds at a dramatic pace following the Russian invasion of 24 February 2022, we consider some of the myriad potential impacts on the performance of charterparties.

Additional War Risks Insurance Premia

P&I insurance offered by the International Group of P&I Clubs and standard H&M insurance, all exclude losses arising from war risks. Russian and Ukrainian waters in the Black Sea and the Sea of Azov have now been designated as listed areas by the London-based Joint War Committee and will therefore now be the subject of additional premia. These are generally paid by owners but recoverable from charterers, depending on the terms of the charterparty.

Many war risks policies contain provision that if war breaks out between any of the "Five Powers" (i.e. Russia, the UK, the US, France, and China) that cover will terminate. Therefore, if another of these states officially enters the fray there is a high degree of probability that such cover will cease, particularly where there is provision for automatic termination.

Port Safety

A primary concern for most shipowners will be how best to protect their position under charterparties which might involve a call at Ukrainian ports, and primarily, the safety of their vessel and crew. Most time charters contain an express warranty as to port safety. Case law has established that for a port to be deemed safe, a vessel must be able to safely approach it, perform its operations and depart from it safely (subject to there being an abnormal occurrence which creates the situation of danger). A vessel is unlikely to be able to do any of the above at Ukrainian ports due to the Russian hostilities. We understand that all Ukrainian ports have now closed therefore it seems unlikely from a practical/commercial perspective that charterers would maintain an order for a vessel to proceed there. Further, whilst owners are usually under a strict duty to comply with charterers' orders (e.g. under clause 8 of the NYPE 1946 form), they are not bound to do so in circumstances where the safety of the vessel or crew may be compromised (see *The Hill Harmony* [2001] 1 Lloyd's Rep 147). In situations where an order given by a time charterer was legitimate in that the port was safe when it was made but then subsequently becomes unsafe, charterers have a duty to issue new orders.

The situation under a voyage charter will depend on the particular terms (for instance, whether there is a duty to nominate a different port, whether owners must wait at a safe place or whether the parties are entitled to terminate the charter). Where there is no contractual alternative, a party may be able to claim that the contract has been frustrated (i.e. where a party can argue that the contract has been rendered incapable of performance), thus releasing the parties from their further obligations, although this doctrine is not lightly invoked by the courts.

In both time and voyage charterparties there may be additional specific clauses dealing with such situations, such as one of the BIMCO CONWARTIME War Risks Clauses or the Voywar clauses in the Gencon charters, which give owners protection in not being obliged to proceed to an area where they may be exposed to "war risks".

There have also been a number of unfortunate situations where vessels are already at Ukrainian ports which are unsafe and now closed. This raises complicated logistical issues as to how to safely extricate the vessel and crew (for instance, in circumstances where there may be active hostilities and the normal functioning of the port is disrupted with no pilot available/willing to come aboard) and how to deal with any cargo on board, as well as contractual issues such as where redelivery will take place if the charter is terminated pursuant to a war cancellation clause (see below), damages for breach of any unsafe port warranty and who is to be responsible for loss of time whilst such issues are resolved.

We understand that Russian ports in the Black Sea continue to operate. However, there may be fact specific circumstances that may give rise to issues of port safety.

War Cancellation Clauses

Many time charterparties contain war cancellation clauses giving parties the option to cancel the charterparty in the event of the outbreak of war between certain countries, often including Russia, the US and the UK.

Whether such clause is triggered will depend on the wording of the clause itself. Certain clauses refer to ''warlike hostilities or warlike situation''. Neither of these terms are sufficiently clear and their meaning is open to interpretation by the courts. A key question will be whether there has been an outbreak of war between Russia and any other major power mentioned. This will depend on the role the various major powers might take up which could lead to direct military conflict with Russia. Generally, the English courts take a wide and practical approach to the definition of war and it will be construed in a common sense way, rather than in accordance with any formal definitions under public international law (see *Kawasaki v. Bantham Steamship* (1939) 63 Ll.L.Rep. 155 (C.A.)). "War" is also to be distinguished from "warlike activities and hostilities short of war" or ''warlike situation''.

The manner in which a nation may choose to engage will also be relevant. For instance, if NATO chooses to intervene, participating members are not seen as being involved as a nation per se.

Some clauses specify that the war must affect the performance of the charter. This would obviously have to be considered on a case-by-case basis. Where missiles are raining down at the ordered port this would presumably be clearly satisfied. However, lesser impacts such as more costly insurance could conceivably be invoked although it remains to be seen how these would be judged by a tribunal or court. Charterers would also likely argue that the clause should not be invoked too far in advance, prospectively.

If such a clause is triggered this could give rise to a tool to be used as leverage by a shipowner who

wishes to refuse to call at a particular port due to safety concerns and potentially even extricate themselves from an undesirable fixture. A party wishing to exercise such a right should exercise it promptly to avoid any challenges that the right was waived. Where the vessel is laden, further thought must be given to what happens to the cargo and the further obligations of owners under the bills of lading.

In the absence of an express war cancellation clause, a party may wish to consider any force majeure clause which may act to excuse a failure to perform but which will generally only be applicable where the clause is expressly triggered by such war, and where the party's inability to perform is caused by such event (all depending on the precise wording of the clause).

Sanctions

The US, EU, Canada and Britain have all announced a raft of sanctions targeting Russia. These include measures targeting a rapidly evolving list of individuals and entities as well as blocking access to the SWIFT international payment system for certain Russian banks. The UK has requested all ports to turn away Russian shipping, with the EU expected to follow. Where sanctions would make the performance of the charterparty illegal, for example on account of a particular cargo being owned by a newly sanctioned entity, there may be an argument that the contract has been frustrated (although the barrier is high). Owners should review the sanctions clause in any charters and update their due diligence relating to the given voyage to ensure that the voyage is lawful and permitted under the charter.

New charters

Parties should be careful to consider and negotiate any trading exclusions particularly if owners do not wish to trade to Ukraine or Russia within the charter period. Parties should also look to ensure that there are appropriate war risks/war cancellation clauses and sanctions clauses. Parties should ensure that appropriate insurance cover is in place and understand who will bear the cost. Unless specific cover has been arranged in respect of loss of hire due to incidents/delays arising in connection with war risks, most policies will not cover such loss and therefore special insurance arrangements should be put in place.

Should you have any queries about any of the above or related issues, please do not hesitate to contact the writers or any of their HFW colleagues.

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COVID RELATED DISRUPTION AND THE IMPACT ON CHARTERPARTIES

Since the WHO first declared COVID-19 a global pandemic in March 2020, the impact on the world's economy has been unprecedented. The maritime industry is no exception to this as is evidenced by the knock-on delays now being suffered in the supply chain of goods and those working within it have had to quickly adapt to deal with the changes. These range from complications with crew changes to the shut-down of ports and delays with cargo operations as well as having to get to grips with the new rules and regulations being introduced in order to minimise the risks to both the crew and the operation of the ship.

With the rapid roll out of vaccination programmes across the globe, there came a glimmer of hope that we could all start to settle into the "new normal". However, the subsequent outbreak of new strains of the virus such as the "Delta" and "Omicron" variants, has resulted in a further wave of infections and so the question remains as to whether COVID is here to stay.

With that in mind, we set out below some practical guidance on questions that HFW have recently dealt with in relation to COVID-19, in order to assist P&I Clubs and their members to navigate through these murky waters.

I have the BIMCO Infectious or Contagious Diseases Clause 2015 incorporated into the Charterparty, am I fully covered?

At the start of the COVID-19 crisis, the BIMCO Infectious or Contagious Diseases Clause 2015 (the "IOCD Clause") for both time and voyage charterparties, certainly provided a high level of protection for Owners who by way of example, could refuse to enter the affected port, leave the port with or without the cargo on board and be indemnified by Charterers for any losses suffered whether or not the Owners decided that the vessel should depart or remain.

The IOCD Clause will apply if it can be shown that the Vessel was sent to an *"affected area"* and there was a risk arising as a result of the *"disease"*.

Disease is defined as a highly infectious or contagious disease that is seriously harmful to humans. We take the view that COVID-19 is likely to still fall within this definition. However, with the development of the vaccines, it may become more difficult to bring COVID-19 within the scope of this term and the point may be open to argument. It could be said that the insurgence of new strains of the virus means that it still remains both highly contagious and seriously harmful. However, it is not known how subsequent strains may develop. Some may be milder than others, such that they may not meet the required threshold.

In connection with this, Owners and operators may want to consider defining *"disease"* at the outset and including that this is to cover COVID-19 as well as any outbreak of subsequent strains.

With regards to an *"affected area"*, this includes any port or place where there is a risk of quarantine or other restrictions being imposed in connection with the disease.

Due to the spread of the virus worldwide, there has also been much consideration on what can now be reasonably considered as an *"affected area"*. At the outset of the pandemic, the meaning was construed more widely. However, it is possible that a Court or Tribunal would now afford the term a more narrow interpretation to avoid all ports across the globe being caught within its scope. The question is likely to turn on the facts and whether the circumstances at the relevant port of call had deteriorated since the time of entering into the Charterparty and/or the voyage orders were given.

The application of the IOCD Clause in response to COVID-19 has also highlighted an imbalance in the allocation of risk as between Owners and Charterers. In light of the above, BIMCO have been working on a new version of the clause which should be in circulation very soon.

It is expected that this will be less favourable to Owners, for example we understand that under the new clause, Owners will have a stricter obligation to ensure they have complied with all safety measures and will not have an automatic right to be able to refuse to call at a port where there is an outbreak. Accordingly, when entering into new charterparties, parties should carefully check which version of the IOCD Clause is sought to be incorporated.

Can I seek an indemnity from Charterers for any losses suffered due to COVID 19 as result of complying with their orders?

This question arises mainly in connection with time charter parties, which impose a duty on Owners to comply with Charterers' orders (for example clause 8 of the NYPE form).

It has been established in case law that to compensate Owners for this strict requirement, there is an implied indemnity available to Owners to recover any losses suffered following compliance with those orders from Charterers. The question is whether this extends to orders which result in losses being suffered as a result of COVID-19. The answer to this becomes more significant in cases where protective clauses, such as the IOCD Clause, have not been included in the charterparty.

With regards to voyage charterparties it has been held that an implied indemnity is not so readily available as under these contracts both parties are aware of the vessel's itinerary at the time of contracting and so accept the risk from the outset.

Whilst this question will turn on the facts and be subject to the specific contractual provisions applicable, as a general proposition, we are of the view that as a result of the longevity of the virus, it will be difficult for Owners to seek an indemnity from Charterers for any losses suffered due to COVID-19 as a result of complying with their orders.

This is because the dangers of COVID-19 are now not novel and as such, it is open for Charterers to state that Owners were fully aware of the risks when the charter was entered into and the orders were given.

Owners will therefore, need to give careful consideration as to the risks operating at the time of entering into the contract and compare these against those prevalent at the time the delay/loss is suffered. If the rates of the virus rapidly increased during that time, such that the nature of the risk that Owners had accepted to bear at the outset was no longer the same as the risk which was operating at the relevant time, then Owners may be able to claim an indemnity from Charterers.

This will require a close investigation into the facts including the rates of COVID-19 during the relevant period, how the virus was predicted to develop and the restrictive measures imposed locally and we would recommend that in the first instance, a local correspondent be retained to assist with these investigations.

Owners should also consider prior to entering into the Charterparty whether there are ports which are likely to pose high risks to the performance of the contract. In these cases Owners could try and add them to the trading exclusions with the charterparty so that they can be avoided altogether, although there may be commercial considerations which might prevent this.

Can I impose any requirements to call at a port due to Covid-related concerns or refuse to proceed at all?

The most prudent approach would be to include relevant provisions in the applicable charterparty from the start, e.g. by way of an amended IOCD Clause (see above). If there are no such provisions, or those inserted are inadequate in the circumstances, Owners would need to ensure they act reasonably and pro-actively or else risk such measures being subject to a successful challenge by Charterers.

To this end, it is suggested that Owners give notice to Charterers, seek to agree the intended measures in advance, and make arrangements with and warn any relevant third parties, e.g. agents and pilots, as necessary and as early as possible. Further, any measures taken should be necessary, effective and based on genuine health & safety concerns.

The issue of necessary and effective means was discussed in a recent arbitration award (see: LMLN 4/22) along with whether Owners had a duty to comply with Charterers' orders when Owners expressed Covid-related concerns, and repercussions where they did not. In that case, the Vessel was ordered by Charterers to call in China in early March 2020. Understandably, at the time, there were genuine apprehensions on Covid as the world was dealing with a novel and fast-spreading pandemic.

In order to assist the Vessel to berth, pilots were required to go on-board. Their temperatures were taken at the pilot station and found by the pilot company to be in order. However, prior to them embarking the Master unilaterally asked that their temperature was taken again by way of a contactless hand-held infrared thermometer. The Master's readings showed that the pilots had elevated temperatures above those allowed by Owners' safety manual and the pilots were then requested to take a further reading by way of a mercury thermometer. The pilots refused and, consequently, the Master did not permit them to board the Vessel. A stand-off with the pilot company followed as it denied substitute pilots and demanded a formal apology from Owners. In the meantime, the Vessel lost its berthing line-up, resulting in almost a week's worth of delays.

Charterers sought to recover their losses first by way of an off-hire claim under clause 15 of the NYPE form due to "default of officers or crew". However, it was found that such a default would require a refusal by officers or crew to perform all or part of their duties as owed to the ship owner, which excludes the negligent or inadvertent performance of those duties (see: *The Saldanha* [2011] 1 Lloyd's Rep 187). As the Master and crew were merely seeking to implement company policy or otherwise ensure the safety of the crew, vessel and cargo, their actions fell outside the ambit of that clause (i.e. the Vessel was not off-hire under cl.15 in the circumstances).

That said, Charterers were successful in arguing that the Owners were in breach of the employment clause, cl. 8, NYPE. According to this, the Master is under the order and

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directions of the charterers so far as the vessel's employment and agency are concerned. With this in mind, charterers' instructions were found to have been entirely legitimate as they simply required the vessel to embark pilots to take it to berth. Since the Master had not done so by reason of unilaterally imposing impromptu, ineffective and inaccurate safety requirements, owners were held to have been in breach.

In view of this, the Tribunal considered it was unnecessary to address in detail Charterers' argument that the Vessel's failure to proceed to berth was a deviation under the deviation/"put back" provisions of the charterparty. As a result, it only commented in passing that if it had been pressed it would probably find that the vessel was off-hire for as long as it did not proceed as per charterers' orders and directions. This being said, it is noted that deviation/put-back clauses have not been decisively dealt with by the English courts. Further, their interpretation heavily depends on how they are phrased. Accordingly, inserting carefully-worded provisions in charterparties cannot be recommended enough.

In general, in such cases Owners are not left without any protection. Importantly, a Master is justified in taking preventative actions where there is a risk to the crew, vessel or cargo even if these may cause delays to the voyage. Indeed, it is well established that a Master has an overriding responsibility in respect of safety (see: *The Hill Harmony* [2001] 1 Lloyd's Rep 147). Further, Charterers are not entitled to immediate compliance with their orders (see: *The Houda* [1994] 2 Lloyd's Rep 541). Therefore, a brief delay by the owners or a Master to make enquiries to ascertain whether there is a system in place to avoid the risk of infection would probably be justified. That said, a general fear of Covid-19 is unlikely to prove adequate by itself to justify all actions, nor would it provide owners with a blank check to refuse to perform the charter, or unilaterally implement any safety policy without more. As the tribunal characteristically put it:

> *"A general fear of COVID-19 did not provide the owners with carte blanche to refuse to perform under the charterparty, nor did it entitle them to unilaterally implement a temperature policy without notice to, or the agreement of, the charterers..... By unilaterally seeking to impose their own conditions for the attendance of the pilots the master and owners failed, in breach of clause 8, to follow the legitimate orders and directions of the charterers as regards the employment of the vessel and thereby failed to prosecute the voyage with due despatch."*

Accordingly, this case highlights the attitude likely to be adopted by the Court or Tribunal which will not lightly accept COVID-19 as a means of circumventing contractual obligations. It also demonstrates that Owners should seek to be upfront about any restrictive measures they may want to impose on-board and that this extends to warning not just Charterers but any relevant third parties, e.g. agents and pilots, as necessary and as early as possible to avoid being accused of unilaterally imposing arbitrary requirements.

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HFW GREEK OFFICE – LITIGATION

Our dry shipping team in Piraeus is headed by partners Dimitri Vassos and Dimitris Exarchou. Legal Director Philip Carney together with Senior Associates Natalie Jackson and Constantinos Bitounis back them up with considerable experience along with a team of mid level and junior associates. Within our shipping team, we can also call upon a team of sanctions lawyers to advise on current issues relating to sanctions.

The work encompasses all matters relating to bills of lading, charterparties, ship sale agreements, shipbuilding contracts and other types of agreement commonly used in the shipping industry including claims arising from cancellation or repudiation of charterparties, bills of lading, cargo rejection, conflicts between standard terms and conditions and typed clauses, off-hire disputes arising from various incidents including groundings and engine breakdowns.

Our wet shipping work, headed by Dimitri Vassos, includes instructions on actual and constructive total loss cases, salvage (including Scopic claims) following groundings or main engine breakdowns, collisions and fire/explosion cases (where we have acted for owners, property and liability underwriters). Jim Cashman, a well respected master mariner lawyer/ partner, now works mainly from the Piraeus office as an integral part of the office team.

The ship finance/corporate team in Piraeus frequently acts for leading ship finance lenders including a number of the major banks lending to the Greek shipping community. The team works closely with our London based Partner Gudmund Bernitz and specialises in advising ship owners and operators on sale and purchase, newbuildings and corporate transactions including joint ventures and mergers and acquisitions as well as other general corporate matters and is highly regarded for its thorough and responsive service. Joint venture and other high profile corporate mandates have also continued to strengthen the department's breadth and depth of instructions.

Our team would very much welcome the opportunity to work with you on a regular basis. If you would like to know anything further about the firm or any members of the team, please do not hesitate to contact me.

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