Ports & Terminals

June 2013

STRIKE!

This article first appeared in the June 2013 issue of Port Strategy and is reproduced with their kind permission. www.portstrategy.com

When ports suffer from strikes, industrial action or other disruption and a terminal cannot work, who foots the bill?

The Port of Hong Kong is the world's third-busiest by volume. As a major export and transhipment port for cargoes on the lucrative Asia-Europe routes, the port and its customers depend on quick and reliable service. In fact, some industry sources estimate that container handling time in Hong Kong is nearly a third less than that at nearby mainland Chinese ports.

But what happens when terminal operations suffer significant disruption, such as the well publicised 40-day strike at the Port of Hong Kong? A reduced rate of cargo operations means vessel waiting times will rise, potentially affecting shipping and logistics across an entire region. What are the consequences of such disruption to shipowners, charterers, managers and their customers?

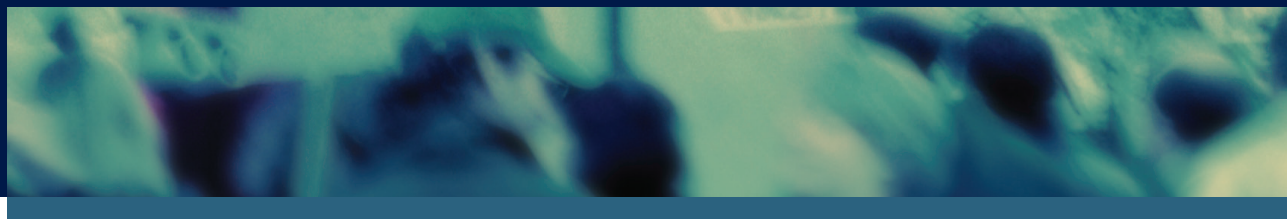
This article identifies some of the issues which shipowners and others should have in mind in these circumstances. We focus on charterparties, but similar issues will arise under other contracts of affreightment and bills of lading. In addition to Hong Kong, these issues could affect any international terminal suffering from disruption.

Force majeure and frustration

Are the parties entitled to refuse to perform a charter by reason of force majeure or frustration?

Depending on the specific provisions in the charterparty, parties may be able to argue that performance has been discharged by force majeure and/or Act of God provisions.

However, force majeure is not a free-standing principle of English law. The English courts have consistently stated that commercial parties are expected to know that the future is uncertain and to make their agreements accordingly. "Strikes" are referred to as a force majeure event in many standard clauses, but not universally: parties will



need to carefully consider whether the industrial action affecting them falls within the parameters of the clause. If there is a force majeure event and notice of force majeure is required to be served on counterparties, the notice and documentary provisions should be complied with strictly.

A contract will be frustrated where there is an unforeseeable change of circumstances which either makes a contractual obligation incapable of being performed, or which renders performance radically different from that which was undertaken. Mere inconvenience, hardship or financial loss will not amount to frustration, and, generally speaking, it is very difficult for a party to establish that a contract has been frustrated. Strikes, closure or significant disruption at a port is unlikely to amount to frustration of a time or voyage charterparty on grounds of increased cost or delay.

Off-hire

If there are delays to shipments to or from ports because of strikes or industrial action, then the question arises as to whether owners or charterers must pay for those delays. Time-charterers, faced with the prospect of long waiting times outside an affected port or paying for the extra time and bunkers needed to steam to an alternative, may seek to argue that the vessel is off-hire. The specific off-hire clause will need to be very carefully considered, but if the charterparty incorporates one of the usual off-hire clauses (such as NYPE '93 clause 17) then charterers will find it very difficult to argue that the vessel is off-hire. If there has been an unlawful refusal to pay hire, owners will need to consider whether they can terminate the charterparty (especially if rates have increased in response to the disruption).

Unsafe ports

Issues may arise as to whether ports suffering from disruptions are safe, whether ports fall within the trading limits in the charterparty and whether owners are entitled to deviate to another port.

A port suffering disruption to operations caused by strikes or similar action is unlikely to be unsafe in a legal sense. A port is safe if a ship can reach the port, use it and return from it without, in the absence of some abnormal occurrence, being exposed to dangers which cannot be avoided by good navigation and seamanship. Where a port is legally safe, but ongoing disruption is taking place, owners may seek to argue that they do not need to call there by reason of the trading limits set out in the charter.

If the port does not fall outside the express trading limits, then the parties need to consider whether the port, whilst safe, is excluded from the trading limits for any other reason. In this respect, parties should consider whether the industrial action falls within the definition of riot or insurrection, if these are named exceptions in the charterparty.

Deviation

Owners will have to review the charterparty carefully to decide whether they are entitled to deviate to an alternative port. If permitted, they must do so in good faith and not arbitrarily, capriciously or unreasonably. Particular care must be given to ensure that: a) the carrier is entitled to deviate; b) the cargo may be safely discharged at the alternative port and; c) the cargo is only delivered to an entity entitled to delivery. If there is no express right to deviate, owners may seek to rely on an argument that this is a "reasonable deviation" under the Hague Rules (if applicable). Any additional costs or losses incurred by owners as a result of following charterers' orders to deviate from the agreed route may also be recoverable under an express or implied indemnity (or by way of a claim for damages if orders were illegitimate and followed under protest). However, deviation can have serious consequences if done unlawfully or in breach of the charterparty, including repudiation of contract and loss of insurance cover. Therefore, parties should seek guidance from their insurers and legal advisors before deviating.

Where cargo is re-routed, carriers will also have to decide whether they are entitled (and whether they feel commercially able) to pass any additional terminal handling charges, transhipment costs and freight costs incurred onto their customers.

Voyage charterparties

For a voyage charterer, the main concerns will be whether Notice of Readiness was validly tendered, whether laytime has commenced and, if so, whether charterers are able to rely on any interruption or exception to laytime (failing which, the vessel is liable to be on demurrage). Where the vessel is already on demurrage, a charterer's position will be more difficult, as exceptions to time running will need to be very clearly drafted in order to be effective. Parties who have chartered ships to load at an affected export terminal may incur significant demurrage liabilities or even cancellations if the laycan period passes without loading.

A force majeure clause will usually not interrupt the laycan period or the running of laytime or demurrage unless it uses clear words to that effect (both in the force majeure clause and the laytime and demurrage clauses). Any interruption of laytime or demurrage will only last whilst the specific force

A serious concern may be the duration of disruption: unlike, say, severe weather, strikes or industrial action can continue indefinitely and/or have lasting after effects.

majeure event applies. Accordingly, there may also be dispute over the timing of the cessation of the force majeure event - i.e. whether continuing delays are caused by the "aftermath" or consequential effects rather than the defined force majeure event itself.

Liner operators

For liner operators operating a scheduled liner service, the main threat from port disruption is the risk to their carefully-optimised schedules. For some time operators have been facing severe downward pressure on rates. Reliability is also a key factor for customers. The features that make modern liner services responsive to customers' needs (multiple ports of call, weekly services, hub-and-spoke configurations) also make such integrated services vulnerable: delays in one port can cascade throughout the entire liner service and ultimately affect other ports, causing congestion at ports other than the port initially affected. Therefore, delays caused by unexpected strikes or industrial action pose a serious business risk. Parties need to be fully aware of their rights of recourse under the charterparties and other connected contracts which form part of the agreements for the liner service. Liner operators' bills of lading will typically contain clauses allowing flexibility in terms of routing, transhipment, ports of call and transit times and to limit or exclude liability in accordance with international conventions.

Manufacturers

Some modern manufacturing systems rely on sophisticated "just in time" logistics management to maintain their lean supply chains – i.e. parts are delivered only shortly before they are used, cutting down on storage costs. Accordingly, strikes or industrial action at a port which delays delivery of the parts needed to continue the manufacturing process can cause significant disruption to the manufacturing and supply chain. Fabricators, suppliers and assemblers need to consider carefully the business interruption provisions in their contracts to see who bears the risk of delays to shipments.

A serious concern may be the duration of disruption: unlike, say, severe weather, strikes or industrial action can continue indefinitely and/or have lasting after effects. Alternative supply routes or even expensive airfreight may have to be considered. Recovery under business interruption insurance may be another option.

Conclusion

Disruption to the smooth operation of a port is a serious situation: the "snowball" effect can cause significant and undetermined delays to vessels and shipments. This presents risks to charterers, vessel owners, managers, cargo interests and their customers. Although most agreements will have some business interruption provisions, port disruption caused by strikes or industrial action is unlikely to frustrate the contract. Therefore, the contracts usually will have to continue to be performed. Most shipping industry participants are well used to dealing with such disruptions practically but, as the contractual arrangements are key to determining who ultimately will foot the bill, a careful review is essential.

For further information, please contact Scott Pilkington, Associate, on +852 3983 7788 or scott.pilkington@hfw.com or your usual contact at HFW.

Lawyers for international commerce

HOLMAN FENWICK WILLAN
15th Floor, Tower 1
Lippo Centre
89 Queensway, Admiralty
Hong Kong SAR
T: +852 3983 7788
F: +852 3983 7766

hfw.com