THE STRAIT OF HORMUZ: HOW CAN YOU MANAGE THE RISKS?

On 20 June 2019 the US narrowly pulled back from retaliatory military strikes on Iranian targets. This was a move planned in response to Iran's targeting of a US drone allegedly operating in Iranian airspace. These events follow a series of attacks on vessels in the Gulf of Oman area, most recently on the "Front Altair" and the "Kokuka Courageous".

This comes closely after the Joint War Committee's recent addition of Oman, the UAE and the "Persian or Arabian Gulf and adjacent waters including the Gulf of Oman west of Longitude 58°E" as Listed Areas. Listed Areas are areas of perceived enhanced risk. There are no doubt escalating tensions in the region and orders to a Listed Area may result in owners and charterers prejudicing their standard H& M cover.

Shipowners and charterers operating in this climate will want to consider and remind themselves of their rights and obligations under their existing and future contracts of carriage and their potential exposure should the situation develop further.

Can owners refuse to transit the Strait of Hormuz or call at a port in the Arabian/ Persian Gulf on grounds of risk of "war risks"?

The starting point in a time charterparty context is that whilst charterers can give orders as to routing and the owners/the Master are contractually bound to follow legitimate orders, the Master retains ultimate control of the safety or security of the vessel, her crew and her cargo[1]. The main question therefore is the severity of the risk and the assessment made by the Master.

Where the charterparty contains a War Risks Clause, such as Conwartime or Voywar, the issue is whether in the reasonable judgment of the Master, the vessel, her cargo, crew or other persons on board the vessel **may be, or are likely to be, exposed to war risks.** This was considered in The Triton Lark[2] case in the context of piracy. The test it established is relevant in relation to dangers faced by vessels within the Listed Areas if the current situation falls within the definition of "war risks" for the purposes of the clause.

Despite many allegations that Iran is responsible for these attacks, there has been no clear confirmation of who is behind the attacks and Iran has categorically denied their involvement. In the circumstances, at this stage, we do not consider the current situation comes within "war", "acts of war", "warlike operations" or "hostilities" for the purposes of the war risks clause. A state of "war" includes situations in which two or more Governments (whether or not they are legally recognised) are engaged in operations involving the use of force with each other[3]. Whilst the concept of "hostilities" is wider than that of "war" or "warlike operations", it has been interpreted as meaning acts of or on behalf of a sovereign power[4]. However if the war risk clause includes events such as "acts of malicious damage", the current attacks would fall within the clause.

The Court in the Triton Lark held that owners could only refuse where there was a "real likelihood" that the vessel will be exposed to the danger (in that case, piracy). The likelihood must be based on evidence rather than speculation. A "real likelihood" includes an event that is more likely than not to happen, but also an event which has a less than even chance of happening. A bare possibility would not be included. The degree of probability can be reflected in phrases such as "real danger" or "serious possibility".

"Danger" is defined by reference to both the extent and prevalence of the risk and its nature and severity.

It could be said that the number of attacks versus ships transiting the Strait per day is low. Despite this, the unpredictability of the attacks in terms of timing and nature arguably gives rise to a real sense of danger.

The type of vessel will also be a factor to take into consideration. All the attacks so far have been on oil tankers. Arguably bulkers may be less at risk. An LNG vessel which serves the oil and gas industry may similarly be at risk and may be mistaken for an oil tanker. The consequence of an attack on an LNG vessel would be catastrophic.

Although the Triton Lark found that strictly one should not look at the consequences of an attack to determine if the risk of attack is serious, it is likely and understandable that the grave impact of an attack would weigh heavily on the mind of a reasonable Owner/Master.

Following the decision in the Paiwan Wisdom[5], if the charter provides for worldwide trading, there is no general requirement that the relevant risk must have increased materially since the date the charterparty was fixed for the provisions of the Conwartime to apply. In other words, owners will still be entitled to refuse a future order to transit the Strait of Hormuz if it appears in owners' reasonable judgment when the order is given that there is a real likelihood of exposure to war risks, even if the risk has not increased since the date of the charterparty.

Could blockage or closure of the Strait of Hormuz frustrate the charterparty?

Depending on the specific provisions in the charter, owners may be able to argue that performance has been discharged by force majeure and/or Act of God provisions. Force majeure is not a free-standing principle of English law, and parties will need to consider carefully the terms of their contracts, to see which force majeure events are identified in the relevant contract, and whether the events in question actually fall within the parameters of the clause.

Should the vessel become blocked or trapped within the Arabian/ Persian Gulf, a charterparty could conceivably be frustrated depending upon the duration of the charter and the likely duration of the interruption to service. However, it is generally highly unlikely that frustration will occur, as illustrated by the decision in The Sea Angel case[6], in which although a salvage vessel was detained for 108 days more than the agreed (20 day) charter period, there was still no frustration in circumstances where the risk of detention was foreseeable. Absent frustration or force majeure (and/or a breach of charter by either party) in a time charter context, the vessel is

1 The Hill Harmony [2001] 1 Lloyd's Rep. 147.

2 Pacific Basin IHX Ltd v Bulkhandling Handymax AS (The Triton Lark) [2012] EWHC 70 (Comm).

3 Pan American World Airways Inc v The Aetna Casualty & Surety Co & Others [1975] 1 Lloyd's Rep. 77

4 Atlantic Mutual v King [1919] 1 KB 309

5 Taokas Navigation SA v Komrowski Bulk Shipping KG (GmbH& Co) (The Paiwan Wisdom) [2012] EWHC 1888 (Comm).

6 Edwinton Commercial Corp vTsavliris Russ (Worldwide Salvage & Towage) Ltd (the Sea Angel) [2007] EWCA Civ 547

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likely to remain on-hire whilst trapped/blocked. On the other hand in a voyage charter context, the owners would generally bear the risk of delay, subject to contract terms dealing specifically with such a situation.

Are owners entitled to refuse to call at ports in the Listed Areas?

Depending on how the situation develops, there may be concerns as to whether ports in the Listed Areas remain safe, whether such ports fall within the trading limits in the charter and whether owners are entitled to deviate to another port.

A port is safe if ships 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. Safety is judged by reference to the particular ship on the particular voyage.

The approach to the port must also be safe in order for the port to be safe. In the Sussex Oak[7] it was held that "the Charterer does not guarantee that the most direct route or any particular route to the port is safe, but the voyage he orders must be one which an ordinarily prudent and skilful master can find a way of making in safety". Applying the approach in the Sussex Oak[8], for ports which require access via the Strait of Hormuz, the Strait is likely to be deemed part of the approach.

The Frankby[9] confirmed that the risk of hostile seizure en-route to the port can render the port unsafe. This was qualified in the Saga Cob[10], which held a port will be unsafe only if the risk of attack is a normal characteristic of the port to which the vessel is ordered. In the Saga Cob, the vessel was ordered to Massawa in August 1988 and sustained damage by Eritrean guerrillas who had been carrying out sporadic attacks in the area over the past months. Though such an attack was a foreseeable possibility, it was not found to be a normal characteristic of the port but an abnormal and unexpected event.

Applying the Saga Cob to the current situation in the Strait of Hormuz, the percentage of vessels attacked could be seen as relatively low in the context of the total number of vessels trading in the Gulf area. It is questionable that the attacks would be seen as a "normal occurrence" of the Strait of Hormuz. Therefore, at present refusing voyage orders to such ports on the grounds that they are unsafe may be risky. This may change however if there are further or more frequent or regular attacks.

Conclusion

The security situation in the Gulf is undoubtedly developing. Owners and charterers will want to keep the situation in the region under close review. There will be various relevant clauses in a charterparty (for example the war risks clause, trading limits clause, force majeure, safe port clause) which could potentially apply to the situation, and a careful review of these clauses and consideration of the dangers and risks the vessel is exposed to will be necessary.

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7 Grace v General Steam Navigation (The Sussex Oak) [1949] 83 Ll.L.Rep.297
8 Grace v General Steam Navigation (The Sussex Oak) [1949] 83 Ll.L.Rep.297
9 Palace Shipping v Gans Line [1916] 1 K.B. 138.
10 The Saga Cob [1991] 2 Lloyd's Rep. 398

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