Ship's Papers

Transport and Trade

War and charterparties

With war appearing imminent, now may be the time to consider how war will effect your rights and obligations under your voyage charterparty.

If the factual position falls within the provisions of the clause, any option to cancel must be exercised within a reasonable time of war breaking out.

War cancellation clauses
These clauses give either the owner or charterer or both the right to cancel the charter if there is an outbreak of war or in some cases hostilities.

The wording of the particular clause should be carefully examined to ascertain whether it covers the applicable facts.

If the factual position falls within the provisions of the clause, any option to cancel must be exercised within a reasonable time of war breaking out. If an option is exercised after a reasonable time has elapsed this may not be a lawful exercise of the option and as such may give the other contracting parties a right to claim for wrongful repudiation of the charterparty.

Parties must exercise the option to cancel or redirect 'honestly and in good faith' and not 'arbitrarily, capriciously or unreasonably'[1]. For example it would not be acting in good faith to attempt to rely on a war cancellation clause to escape from a contract that has become onerous or unprofitable, owing to shifts in the chartering market rather than to any genuine war risk.

War risk clauses
The effect of a war risk clause in a charterparty depends on its particular wording. Voywar is BIMCO's standard war risks clause for voyage chartering.

The essence of the clause is to give owners who find themselves affected by 'War Risks', as defined in the clause, various rights and liberties to discharge their charter obligations in ways different from those specifically envisaged or stipulated by the charter.

BIMCO has introduced Voywar 1993. However Voywar 1950 is still commonly used.

Voywar 1950 gives owners, in certain circumstances set out in the clause:

- The right to cancel the charter before the vessel commences loading;
- The right to refuse to load, or continue loading or sign a bill of lading or proceed on any adventure;
- The right to discharge the cargo at the loading port or carry other cargo for the charterers to another port (not originally nominated by charterers);
- In accordance with charterer's orders to discharge the cargo at a safe port in the vicinity of the nominated port of discharge;
- The right to act in accordance with any directions or recommendations or organised or authorised bodies.

In the English case, *Evia No.2*[2] the House of Lords held that the Baltime War Clauses did not exclude the operation of the doctrine of frustration. There is no reason to think that the result would be any different in respect of the Voywar clause.

The burden of additional war risk insurance expenses under charterparties
Generally, in printed forms of voyage charters (i.e. Gencon) there is no standard provisions stipulating that the insurance is to be arranged and paid for by the charterers. In such charter parties, owners are liable for extra insurance expenses.

These costs might be passed on to charterers by a suitably worded clause. Voywar 1950 states that in certain circumstances charterers are liable for the extra insurance costs.

1 *Abu Dhabi National Tanker Co v Product Star Shipping* [1993] 1 Lloyd's Rep 397

2 *Kodros Shipping Corp v Empresa Cubana de Fletis* [1983] 1A.C.736 (H.L.)

Force Majeure clauses
Force Majeure clauses may entitle either party to the contract to cancel or suspend performance upon the outbreak of war. 'War' or 'warlike' operations may be specifically referred to in the clause as a specified event entitling the parties to be excused from performance, in whole or in part, of the contract.

Safe port
The classic definition of a safe port is that of Sellers LJ in the English case, 'Eastern City'[3] where he stated:

> '...a port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship...'

Many voyage charterparties contain an express safe port warranty. If there is no express safe warranty it is well established that there can be no implied warranty of safety if the voyage charterparty refers to a named port.

When the charterer nominates the port, it must be prospectively safe i.e. its characteristics, both permanent and temporary must be such that in the absence of some unexpected and abnormal event it will be safe for the ship when she actually arrives there.

If the charterer complies with the obligation to nominate a safe port, he may come under a further obligation if the port becomes unsafe as the result of a supervening event, to withdraw his original nomination and nominate a safe port. Although it has been decided that time charterers have such an obligation (as a time charterer has a continuing right and obligation to give orders for the vessel's employment) it not clear whether voyage charterers have such an obligation.

Frustration of charters
As well as the clauses mentioned, you should also consider whether in the event of war the contract will become frustrated.

Frustration is defined in the 7th Edition of *Cheshire and Fifoot's Law of Contracts* as 'Events which occur without fault of the parties after a contract has been made and which makes its performance pointless, impossible, or more difficult or costly than anticipated, may bring about the termination of the contract by operation of the law on the basis the contract has been frustrated.'

In the English case *Chrysalis*[4], Mustill J determined that:

> '…Except in the case of supervening illegality, arising from the fact that the contract involves a party in trading with someone who has become an enemy, a declaration of war does not prevent the performance of a contract; it is the acts done in furtherance of war which may or may not prevent performance, depending on the individual circumstances of the case…'

At common law frustration immediately brings a contract and the obligations of the parties to it to an end. Rights which existed at the time of the frustration continue and those which did not then exist can never arise. Unconditionally accrued rights, including the right to sue for damages for any breach occurring prior to frustration are not affected. So if a payment under the contract fell due before the frustrating event, the obligation to make it remains.

Although, Victoria, New South Wales and South Australia have *Frustrated Contracts Acts* which modify the common law rules concerning the effects of frustration, these Acts expressly exclude their application to voyage charterparties.

Security precautions
Charterers need to check that they have adequate arrest and detention clauses in place, so that the burden of delays due to security precautions are passed to owners.

We would be happy to review your charterparties and to provide advice on these matters.

This newsletter is written as a general guide only. It is not intended to contain definitive legal advice which should be sought as appropriate in relation to a particular matter.

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3 *Leeds Shipping Co Ltd v Societe Francaise Bunge* [1958] Lloyd's Rep.127 (C.A.)

4 *Finelvet A.G. v Vinava Shipping Co.*

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