Transiting the Strait of Hormuz: War Risk, Unsafe Port and Frustration

June 2019

Situation Update

The attacks on the Kokuka Courageous and Front Altair south of the Strait of Hormuz on 13 June 2019 and the earlier sabotage of four tankers on 12 May 2019 off the Fujairah emirate, one of the world’s largest bunkering hubs, have brought tensions in the region to the forefront of the world news. It remains unclear who is responsible for the 12 May and 13 June attacks and whether these amount to acts of war or, perhaps more likely, terrorism.

Strait of Hormuz

The Strait of Hormuz is a narrow strait in the region connecting the Persian Gulf with the Gulf of Oman and the Arabian Sea. Vortexa, an energy analytics firm, report that 22.5 million barrels of oil have flowed through the Strait of Hormuz a day since the start of 2018. This reportedly accounts for about a third of all the world’s seaborne trade oil, the majority of which is destined for the Asian markets, mainly Japan, India, South Korea, and China.

Although no party has claimed responsibility for the most recent, or the earlier, attacks, tensions in the area are running high and there is considerable uncertainty as to how events may now unfold. Against this background it is, therefore, opportune to revisit the potential charterparty issues which were discussed in an earlier article on the Steamship Mutual website from 2012.

The focus of that article was the issues facing Members letting or taking vessels on time or voyage charter terms which may be ordered to the region, specifically compliance with charters’ orders, port safety, frustration and consequential matters. These are largely repeated below.

War Risks Clauses

Most time and voyage charters nowadays incorporate fairly detailed war risk clauses that aim to safeguard owners and vessels’ interests in circumstances where the owner or master considers that proceeding to a port would expose the vessel and crew to war risks. These are commonly on BIMCO’s CONWARTIME 2013 or VOYWAR 2013 terms or their previous, 2004, 1993 versions or similar.

CONWARTIME 2013 provides that:

“War Risks shall include any actual, threatened or reported:

war, act of war, civil war or hostilities; revolution; rebellion; civil commotion; warlike operations, laying of mines; acts of piracy and/or violent robbery and/or capture/assassination (hereinafter ‘Piracy’); acts of terrorism; acts of hostility or malicious damage; blockades (whether imposed against all vessels or imposed selectively against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise however), by any person, body, terrorist or political group, or the government of any state or territory whether recognised or not, which, in the reasonable judgement of the Master and/or the Owners, may be dangerous or may become dangerous to the Vessel, cargo, crew, or other persons on board the Vessel.

VOYWAR 2013 contains an identical definition.

Under older, narrow clauses it has been necessary to consider whether a situation amounts to war. The leading English authority, Spinney’s Case (1960) determined that the main characteristics of war included considerations of: (i) conflict between opposing sides with territorial, political or other identifiable objectives of dominion; and (ii) the character and the amount/nature of armaments’ conflict. War like operations will trigger a war risks clause regardless of whether or not there has been a formal declaration of war. ‘Warlike operations’ and hostilities are wider than ‘war’ and can extend to belligerent acts, although Spinney’s Case suggests that they may require to be done in the context of war or similar.

A blockade requires the use of force to cut off access of vessels and must be effectual and constantly enforced. A blockade of the Strait of Hormuz and the repercussions likely to flow from that may well fall within the remit of the War Risk provision however consideration would need to be given to the nature and duration of the blockade, as well as the surrounding political and military circumstances.

Orders to a War Risks Area

As result of the The Triton Lark, significant changes have been made to the CONWARTIME wording. The 2013 version at Clause (b) provides that:

The Vessel shall not be obliged to proceed or required to continue to or through, any port, place, area or zone, or any waterway or canal (hereinafter “Area”), where it appears that the Vessel, cargo, crew or other persons on board the Vessel, in the reasonable judgement of the Master and/or the Owners, may be exposed to War Risks whether such risk existed at the time of entering into this Charter Party or occurred thereafter.

Should the Vessel be within any such place as aforesaid, which only becomes dangerous, or may become dangerous, after entry into it, the Vessel shall be at liberty to leave it.

A war risks clause such as CONWARTIME 2013, would permit Owners to refuse orders to proceed to the Gulf if in the reasonable judgement of the Master or Owners the Vessel would be exposed to war risks. The test is objective reasonableness. In The “Triton Lark” (2011) (please see our earlier article on this case here), it was held that the Owners would have to establish that they had formed a reasonable judgment (this would require evidence of the decision making process that there was a “real likelihood” that the vessel would be exposed to war risks (in that case piracy). “Real” means that there must be some evidence, not for example mere speculation. The Judge in The Triton Lark also held that “likelihood” did not mean more likely than not. It could include an event which had a less than even chance of happening but it required a degree of probability greater than a bare possibility.

In a further judgment in the same case on 25 January 2012, the Judge observed that what is dangerous in the context of exposure to war risks will depend on the facts of the case and will include the degree of likelihood that a particular peril might occur and the gravity or other consequence should that event occur. Future developments will need to be carefully monitored to determine if these tests are met.

If the standard war risks clauses are triggered, they make provision for discharge of the cargo elsewhere if loaded already. In the case of the
SHELLTIME 4. If no cargo is loaded and charters give no substitute orders within 48 hours then the charter is automatically terminated. In any event, if the clause provides an option to cancel, it must be exercised promptly. Such clauses are often construed strictly against the party with the option to terminate.

While an owner carries the burden of normal insurance risks, it is common practice for additional premiums incurred for war risk insurance cover to be allocated to the charterer. For example, under CONWARTIME 2013, clause (d), if the vessel proceeds to or through an area exposed to War Risks, ‘the charterer shall reimburse to the owner any additional premiums required by the owners’ insurers and the costs of any additional insurances that the owners reasonably require in connection with War Risks’ For more information on the Club’s War Risk cover please see our War and Piracy Circular.

Remedies for loss and damage and Unsafe Ports

If a vessel suffered damage from a belligerent act when passing through the Strait of Hormuz, an Owner may have limited recourse against the charterer for damages in the context of an unsafe port unless, perhaps, the nature of the threat changes. A safe port warranty, whereby the Charterer warrants at the time of nomination a port that it will be safe during the vessel’s approach, call and departure without being exposed to danger in the absence of an abnormal occurrence, is limited to those parts of the approach to the port which are characteristic of that port, not all those in a region. The further the danger is from the port the less likely it is to interfere with the safety of the voyage. However, the Strait is a waterway through which access to all the ports of the Persian Gulf is obtained from those outside and since there is no other way of reaching those ports it might be arguable that the Strait is within the approach.

It may also be possible that a Charterer could be in breach of an obligation such as that in CONWARTIME 2013 not to order the vessel to or through a waterway reasonably considered to be dangerous. Accordingly, where, for example, an Owner has stated its position that it was unsafe to proceed and a Charterer affirmed its orders or, with knowledge of the situation, did nothing to prevent the vessel from continuing, the Charterer may be in breach and held liable in damages to the Owner.

It is important to note that, while the acceptance by Owners of the Charterers’ orders or their failure to refuse to proceed with the voyage will amount to a waiver of the right to do so, at least absent a change in circumstances, if the vessel or Owners suffer damage as a result and it is shown that the Charterers were in breach, Owners’ acceptance will not prevent them from claiming damages, see The “Kainohenjungu” (1987)9. However, there are circumstances whereby an Owners’ acceptance of a charterers’ nomination has been held to constitute a waiver of a claim for damages. In The “Chemical Venture” (1991) the crew refused to comply with Charterers’ orders to proceed to Kuwait despite Owners’ orders to the crew to comply with them. At Owners’ suggestion, charterers negotiated directly with the crew who finally agreed to proceed to Kuwait after charterers agreed to pay them a significant bonus. The court held that owners had waived their right to claim damages on a proper construction of correspondence exchanged with Charterers. Care should therefore be taken over any negotiations to proceed with or continue a voyage.

Charterers’ orders, or navigation?

The implied indemnity arising out of the master’s duty to obey Charterers’ orders as to employment under a time charter provide an alternative basis upon which an owner may recover damage caused by compliance with charterers’ orders. If a matter is dealt with fully by express terms of the charter, there may be no reason to imply an indemnity. Furthermore, this subject often gives rise to issues over whether the risk of damage was, on a proper construction of the charter, assumed by the Owner such that there is no indemnity or to causation issues such as whether the damage was caused from compliance with charterers’ orders or by the master’s navigation.

In the context of orders to proceed through the Strait of Hormuz, arguments as to whether damage was caused from compliance with those orders or the master’s navigation may be unlikely to arise given the narrow confines of the Strait unless it is a case of transiting via an area declared unsafe, rather than one declared to be safe, or deliberately proceeding through an area known to be mined.

The War Risks clause is therefore likely to provide the simplest answers to the issues that arise. Owners’ obligations under the charter are also likely to be affected by the Owners and master’s responsibility for the navigation of the vessel given the House of Lords decision in The Hill Harmony (2001)10 that the choice of ocean route as a matter of the vessel’s employment. However, it could provide some operational flexibility, for example for deviate or delay for the vessel’s safety while being held in breach of charter.

Frustration

The doctrine of frustration often arises in the context of hostilities. In the words of Lord Justice Bingham, the effect of frustration is “…to kill the contract and discharge the parties from further liability under it…” The “Super Servant Two” (1996)11. It can be said that a charter is frustrated and becomes void immediately and if, during its performance, a fundamentally different situation arises through no fault of either party, and for which the parties have made no provision in the charter, so that it would be unfair in the new circumstances to require them to perform the balance of their obligations. Clearly, frustrating events are more likely to arise in relation to a voyage charter or time charter trip than a longer period hire charter with wide trading limits.

Will War or Threats of Hostilities Frustrate a Charter?

No. This was made clear by Mustill J in The “Chrysallis” (1989)12.

“Except in the case of supervening illegality, arising from the fact that the contract involves a party 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.”

Cases dealing with issues of frustration in the context of hostilities arise from the nationalisation of the Suez Canal by the Government of Egypt in 1956 and the subsequent blocking of the waterway. This resulted in vessels having to undertake a longer passage around the Cape at considerable expense. In “The Eugenia” (1983)13, Lord Denning held that this did not amount to a fundamentally different situation so as to frustrate charterparty in question:

“To see if the doctrine applies, you have first to construe the contract and see whether the parties have themselves provided for the situation that has arisen. If they have provided for it, the contract must govern. There is no frustration. If they have not provided for it, then you must compare the new situation with the situation for which they did provide. Then you must see how different it is. The fact that it has become more onerous or expensive or one party has not thought it is not sufficient to bring about a frustration. It must be positively unjust to hold the parties bound.”

Having said that, the presence of war risks clauses in the charter does not necessarily prevent the charter being frustrated. The fact that contractual obligations become more onerous or expensive or difficult to perform is unlikely to frustrate the contract. However, since there is no possibility of an alternative route in relation to trade into and out of the Persian Gulf, frustration may be more arguable should the Strait of Hormuz be blocked. Generally, delay can be a frustrating event but is a question of fact whether or not the period of delay is sufficient to constitute frustration; see Universal Cargo Carriers v Pedro Citahi (1957)14.

Even if Strait of Hormuz was blocked it may be that would not be sufficient to immediately frustrate contracts of carriage to or from the Persian Gulf.
The situation will need to be assessed over a longer period of time taking into account the reaction to the international community to determine its effect.

Conclusion
The current events of themselves are unlikely to amount to acts of war, however if there is an escalation such that the powers in the region threaten one another this may change. Accordingly, and whilst it is hoped that there will not be any further attacks Members should be paying close attention to the war risks and sanctions clauses in their contracts, as well as any safe port warranties.

1 Liabilities costs and expenses arising from war or acts of terrorism are excluded under R21 of the Club’s Rules although claims in excess of the proper value of the entered ship (deemed not to exceed US$100m) can be covered, and “ground up” cover is available from the Club for both Hull War and P&I War risks
3 Written by Stephen Kirkpatrick of Reed Smith
4 Spinney’s (1948) Ltd v Royal Insurance Co. [1980] 1 Lloyd’s Rep 406
5 Pacific Basin Ix Ltd v Bulkhandling Handymax A/S (The “Trion Lark”) [2011] EWHC 2862 (Comm)
6 Motor Oil Hellas (Corinth) Refineries S.A. v Shipping Corporation of India (The Kanchenjunga) [1990] 1 Lloyd’s Rep. 391
7 The “Chemical Venture” [1993] 1 Lloyd’s Rep. 506
8 Whistler International Ltd v Kawasaki Kisen Kaisha Ltd., (The “Hill Harmony”) [2001] 1 Lloyd’s Rep 147
9 The “Super Servant Two” [1990] 1 Lloyd’s Rep. 1
10 The “Chrysalsis” [1983] 1 Lloyd’s Rep. 503
12 Universal Cargo Carriers v Pedro Cistal [1957] 1 Lloyd’s Rep. 174