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**Which are the new issues and concerns
regarding charterparty
force majeure and exception clauses
in relation to the blockade (and unblockade)
of ports in Ukraine?**

by

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- Kodros Shipping Corporation v Empresa Cubana De Fletes (The Evia (No 2)) [1982] 2 Lloyd's Rep 307 (HL)
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- Reinante Transoceanic Navegacion SA v The President of India (The Apiliotis) [1985] 1 Lloyds Rep 255 (QB (Com Ct))
- Seadrill Ghana Operations Ltd v Tullow Ghana Ltd [2018] 2 Lloyds Rep 628 (QB (Com Ct))

- Taokas Navigation SA v Komrowski Bulk Shipping KG (GMBH & Co) (The Paiwan Wisdom) [2012] 2 Lloyd's Rep 416 (EWHC 1888 (Comm))
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A. Introduction

The Ukrainian-Russian conflict has been a central issue of the highest political, social, and legal importance during the last 2 years. The relationship between the two countries after many challenging years was rekindled and on 24 February 2022 obtained the form of an armed conflict. It became soon clear that a difficult battlefield was raging at and from the sea. Major Ukrainian ports and shipping routes closed causing widespread disruption to global shipping. Numerous vessels were trapped in the closed ports, while others were damaged by sea mines and bombings.¹ Even today, many vessels are experiencing longstanding delays and are sustaining damages or even total loss of cargo.² All these disruptions and delays bring to the surface charterparty issues due to the parties' failure to comply with their contractual obligations under the charterparties. It is anticipated that in the close future these disputes will reach the courts. The parties seeking to resolve the situation will try to rely on exception clauses, force majeure, and English law doctrines. This essay analyzes the new issues and concerns regarding charterparty force majeure and exception clauses in relation to the blockade of the ports in Ukraine.

B. Historical and factual background

On 24 February 2022, the Russian Federal Agency for Maritime and River Transport (Rosmorrechflot) posted a message stating that after a warning from the Russian Defense Ministry '*navigation in the Sea of Azov was suspended*'.³ Moreover, the Russian Department of Navigation and Oceanography issued a warning stating that navigation in the North-Western part of the Black Sea north of the parallel 45-21 N was prohibited '*due to counterterrorist operations carried out by Russian Navy ships*'.⁴ A day after, the Ukrainian government in a letter to the International Maritime Organization (IMO) announced that all Ukrainian ports were closed for entry and exit.⁵ A

¹ Borys Kormych and Tetiana Averochkina, 'Ukrainian Maritime Industry under Fire: Consequences of Russian Invasion' (2022) 8 Lex Portus 7.

² Anastasios Maraslis, 'The Repercussions of the Ukraine Conflict for Shipping and Insurance' (*The Maritime Executive*, 27 September 2023) <<https://maritime-executive.com/editorials/the-repercussions-of-the-ukraine-conflict-for-shipping-and-insurance>> accessed 30 March 2024.

³ 'Rosmorrechflot Confirms Suspended Navigation in Sea of Azov' (*Interfax*, 24 February 2022) <<https://interfax.com/newsroom/top-stories/73960/>> accessed 31 March 2023.

⁴ John Konrad, 'Northern Black Sea Is Now a "Warlike Area" as Navy Fails to Protect Shipping in NATO Waters' (*gCaptain*, 2 March 2022) <<https://gcaptain.com/black-sea-warlike-operations-navy-nato/>> accessed 2 May 2023; Martin Fink, 'Naval Blockade and the Russia-Ukraine Conflict' (2022) 69 *Netherlands International Law Review* : International Law, Conflict of Laws 411, 414, 422.

⁵ 'IMO - Circular Letter No. 4518' (24 February 2022) <<https://wwwcdn.imo.org/localresources/en/MediaCentre/HotTopics/Documents/Black%20Sea%20and%20Sea%20of%20Azov%20-%20Member%20States%20and%20Associate%20Members%20Communications/Circular%20Letter%20No.4518%20->

measure justified to be taken to ‘ensure the safety of seafarers and ships’.⁶ It was said that more than a hundred cargo ships and their crews were trapped at Ukraine’s closed ports, unable to leave because traveling through the Black Sea involved ‘extreme risk’.⁷ There was a common fear that Russian warships would fire at any vessel sailing in the area and that the surrounding waters were mined.⁸

At the time of writing (March 2024), the traffic in the Port of Odesa has been revived, the Kerch Strait appears to be open and the Russian ports in the Sea of Azov are regularly visited. On the other hand, the ports of Berdyansk, Mariupol, Kherson, and Skadovsk remain closed ‘until the resumption of control over them by Ukraine’.⁹

C. The Ukrainian ports’ blockade

The Ukrainian-Russian conflict can be characterized as an international armed conflict falling under the law of naval blockade.¹⁰ This part of law remains mainly uncodified based on international customary law with only soft law references.¹¹ According to the most popular definition, the ‘blockade’ is described legally as ‘a belligerent operation to prevent vessels and/or aircraft of all States, enemy and neutral, from entering or exiting specified ports, airfields, or coastal areas belonging to, occupied by, or under the control of an enemy State’.¹² Thus, it is a legal instrument not covering all types of dominance over maritime areas. Legally speaking, there are specific conditions to be met before the term can be attributed and specific results to follow. For a blockade to be legally established, three legal requirements must be met: it must be

%20Communication%20From%20The%20Government%20Of%20Ukraine%20(Secretariat).pdf>.

⁶ ‘IMO - Circular Letter No. 4522’ (2 March 2022) <<https://marina.gov.ph/wp-content/uploads/2022/03/Circular-Letter-No.4522-Communication-From-The-Government-Of-Ukraine-Secretariat.pdf>>.

⁷ Elisabeth Braw, ‘The Invasion of Ukraine Is Causing Crisis at Sea’ (*Foreign Policy*, 7 March 2022) <<https://foreignpolicy.com/2022/03/07/ukraine-shipping-supply-war/>> accessed 1 April 2023.

⁸ Martin Fink, ‘The War at Sea: Is There a Naval Blockade in the Sea of Azov?’ (*Lieber Institute West Point*, 24 March 2022) <<https://lieber.westpoint.edu/war-at-sea-naval-blockade-sea-of-azov/>> accessed 29 March 2023.

⁹ ‘IMO - Circular Letter No. 4557’ (4 May 2022) <[https://wwwcdn.imo.org/localresources/en/MediaCentre/HotTopics/Documents/Black%20Sea%20and%20Sea%20of%20Azov%20-%20Member%20States%20and%20Associate%20Members%20Communications/Circular%20Letter%20No.4557%20-%20Communication%20From%20The%20Government%20Of%20Ukraine%20\(Secretariat\).pdf](https://wwwcdn.imo.org/localresources/en/MediaCentre/HotTopics/Documents/Black%20Sea%20and%20Sea%20of%20Azov%20-%20Member%20States%20and%20Associate%20Members%20Communications/Circular%20Letter%20No.4557%20-%20Communication%20From%20The%20Government%20Of%20Ukraine%20(Secretariat).pdf)>.

¹⁰ Magne Frostad, ‘Naval Blockade’ (2018) 9 *Arctic Review on Law and Politics* 195.

¹¹ Fink (n 4) 417; San Remo Manual on International Law Applicable to Armed Conflicts at Sea 1994.

¹² The US Commander’s Handbook on the law of naval operations (2022 edn) para 7.7.1.

declared and notified, enforced impartially and effectively upheld. Once it is legally established, it can then generate belligerent rights.¹³

In this case, it appears that the Russian Federation has not established a blockade that could result in belligerent rights. We are just provided with a vague statement about a suspension of navigation in the Azov Sea¹⁴ and a prohibition of navigation in the Black Sea.¹⁵ Despite having achieved a decrease in navigation, Russia did not comply with the legal requirements and thus has not established a naval blockade in the legal sense.

However, this cannot undermine the consequences of the Ukrainian-Russian conflict on global shipping. A 'de facto blockade' has been established and since February 2022 significant Ukrainian ports are closed to trade. This had a devastating effect on worldwide shipping, influencing parties' legal obligations and drastically tipping the balance of pre-existing contracts.¹⁶ From these difficulties, several issues arise under the context of charterparties.¹⁷ Vessels damaged by sea mines, rocket attacks, and bombings in the Black and Azov Seas, vessels blocked in Ukrainian waters, cargoes damaged or totally lost, as well as parties suffering difficulties to comply with their contractual obligations due to the blockade are just a few of the numerous claims that are expected to reach the justice.¹⁸ If it were a case of a legally established blockade, the situation would be quite clear since we would have a precedent to follow. However, the specialty of the situation rises questions concerning the application of English law doctrines and clauses. Issues related to war risk, frustration of contracts, force majeure, and the safety of ports are likely to be triggered.¹⁹ Acknowledging that there is currently no case law on the issue, this essay will attempt to answer these questions. Whether and under what conditions do force majeure and exception clauses apply in the blockade imposed on Ukrainian ports?

It is worth noting that, although the situation seems to have stabilized locally during the past few months, we should not forget that it remains both complex and fluid. For this reason, all the below guidelines reflect the position

¹³ Fink (n 4).

¹⁴ 'Rosmorrechflot Confirms Suspended Navigation in Sea of Azov' (n 3).

¹⁵ Fink (n 4) 422.

¹⁶ Gregory J. Barden, and others, 'Conflict in Ukraine: Force Majeure and English Law' (*Jones Day*, March 2022) <<https://www.jonesday.com/en/insights/2022/03/conflict-in-ukraine-force-majeure-and-english-law>> accessed 6 April 2023.

¹⁷ Ingrid Hu and Michael Biltso, 'Russia - Ukraine Crisis: Impact on Charterparties' (*Kennedys Law LLP*, 9 March 2022) <<https://kennedyslaw.com/thought-leadership/article/russia-ukraine-crisis-impact-on-charterparties/>> accessed 31 May 2023.

¹⁸ 'Impact of Ukraine War on Global Shipping' (*Allianz Global Corporate & Specialty*, December 2022) <<https://www.agcs.allianz.com/news-and-insights/expert-risk-articles/shipping-safety-22-ukraine-war.html>> accessed 31 May 2023.

¹⁹ 'Update on the Situation in Ukraine' (*MS Amlin*, 25 February 2022) <https://www.msamlin.com/content/dam/ms-amlin/consumer/Marine-and-Aviation/p-and-i-circular/MS%20Amlin_Update%20on%20the%20situation%20in%20Ukraine_25.02.2022.pdf.downloadasset.pdf> accessed 6 April 2023.

at the time of writing (March 2024), without guarantee that they will not be subject to changes from day to day.

D. War risks clauses

It is common practice to include war risks clauses in charterparties regulating the obligations of the parties in case a war-related risk arises.²⁰ The terms of these clauses are widely ranging and for this reason, each specific case should be treated separately giving special attention to the exact wording of the clause. Currently, the recommended clauses by BIMCO are CONWARTIME 2013²¹ and VOYWAR 2013²² respectively for time and voyage charterparties.

It is interesting to note that, although these clauses are broadly referred to as 'war risk clauses', they are usually not limited to situations where a formal declaration of war has been issued.²³ Bearing in mind that in the Ukrainian-Russian conflict there has been no formal declaration of war, it is useful to acknowledge which actions are provided in the BIMCO clauses. Specifically, 'War Risks' shall include: *'any actual, threatened or reported: War, act of war, civil war or hostilities; [...] warlike operations; laying of mines; [...] blockades (whether imposed against all vessels or imposed selectively against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever), 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'*.²⁴

From the wording of the clause, we understand that the Ukrainian-Russian conflict is in line with the BIMCO meaning of 'war risk'.²⁵ However, there are many elements of the clause that need further clarification in order to reach accurate conclusions. The activation of the war clauses, as well as their effects, vary depending on the type of charter and the exact wording of any cancellation clause provided in the contract.

In time charters, there is rarely a cancellation clause provided.²⁶ However, the vessel is not obliged to proceed or required to continue to any

²⁰ Jamie Wallace and others, 'Ukrainian & Russian Hostilities – Charterparty and Cover Issues' (*Standard Club*, 25 February 2022) <<https://www.standard-club.com/knowledge-news/ukrainian-russian-hostilities-charterparty-and-cover-issues-4177/>> accessed 6 April 2023.

²¹ War Risks Clause for Time Chartering (CONWARTIME) 2013.

²² War Risks Clause for Voyage Chartering (VOYWAR) 2013.

²³ Wallace and others (n 21).

²⁴ CONWARTIME 2013 s (a)(ii); VOYWAR 2013 s (a)(ii).

²⁵ BIMCO, 'Ukraine Situation – Contractual Implications' (24 February 2022) <<https://www.bimco.org/insights-and-information/contracts/20220224-ukraine-situation>> accessed 31 May 2023.

²⁶ Jamie Wallace, 'Ukraine / Russia - Port Update' (*Standard Club*, 25 February 2022) <<https://www.standard-club.com/knowledge-news/ukraine-russia-port-update-4179/>> accessed 5 April 2023.

port or area where, in the reasonable judgement of the master, it exposes her to danger.²⁷ In this case, the charterers are given the chance to issue new orders and nominate an alternative safe port upon owners' notice of refusal. At charterers' failure to nominate a safe port, the owners are free to discharge the cargo at any safe port of their choice at the charterers' costs, risks and expenses.²⁸ Alternatively, if the vessel does proceed into an area of enhanced risk, the charterers shall reimburse the owners with any additional premium required.²⁹

In the past, much controversy was around the time that the identified risks arose. According to the clause, the owners were allowed to exercise discretion of whether to call or not in situations they considered a port dangerous. However, the charterers were trying to avoid the discretion given to the owners by alleging that if war risks pre-existed at the conclusion of the charterparty and thus had been contemplated by the parties, CONWARTIME could not be triggered.³⁰ The *Kanchenjunga*³¹ was indicative of this position. The House of Lords held that by unequivocally accepting the charterers' nomination, the owners had waived their rights to refuse charterers' orders. This issue was finally resolved by the amendment of the clause which applies '*whether such risk existed at the time of entering into this Charter Party or occurred thereafter*'.³² The owners are now entitled to refuse to proceed in a war risk area, irrespective of when the risk arose, provided they have reasonable grounds for their refusal. This will depend upon the construction of the charterparty in question as well as the factual matrix of each case.³³ In the *Triton Lark*,³⁴ the court introduced an objective test by reference to the level of danger. According to this, the courts need to check whether the master formed a 'reasonable judgement' as to the possibility of exposing the vessel to danger. The question to be addressed is whether there was a real likelihood that the vessel would be exposed to risk, in the sense that the place would be dangerous. What is dangerous will be determined upon both the degree of

²⁷ CONWARTIME 2013 s (b).

²⁸ *ibid* (h).

²⁹ *ibid* (d).

³⁰ Nigel Cooper QC, 'Perils to International Trade' in Baris Soyer and Andrew Tettenborn (eds), *Charterparties: Law, Practice and Emerging Legal Issues* (1st edn, Informa Law from Routledge, Swansea University, Institute of International Shipping and Trade Law, Annual Colloquium 2018) 56.

³¹ *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep 391 (HL).

³² CONWARTIME 2013 s (b).

³³ *Taokas Navigation SA v Komrowski Bulk Shipping KG (GMBH & Co) (The Paiwan Wisdom)* [2012] 2 Lloyd's Rep 416 (EWHC 1888 (Comm)).

³⁴ *Pacific Basin IHX Ltd v Bulkhandling Handymax AS (The Triton Lark)* (2011) [2012] 1 Lloyd's Rep 151 (EWHC 2862 (Comm)).

likelihood that danger might occur and the gravity or otherwise the impact on the vessel if that peril occurs.³⁵

For voyage charters, a war risks clause typically provides the carrier with a right to cancel in certain circumstances.³⁶ For example, VOYWAR 2013 allows the owners to cancel the charter or to refuse its performance if, in the reasonable judgement of the master, the performance of the contract may expose the vessel to the defined 'War Risks'.³⁷ In particular, the owners shall not proceed to or remain at a port exposing the vessel to war risks and, likewise in time charter, they shall give the charterers a notice to nominate another safe port. Upon charterers' failure, they may cancel the contract or discharge the cargo at a port of their own choice in complete fulfillment of the contract.³⁸

Concluding, war risks clauses come in different shapes and forms leading to different conclusions. For this reason, each case must be evaluated individually based on the specific facts and the war risks clause incorporated.³⁹ Regarding the above-mentioned BIMCO war risks clauses, it is already clarified that the Ukrainian-Russian conflict falls within the meaning of the 'war risks' under sub-clause (a)(ii). Moreover, the attacks sustained by various vessels in the region during the last months would indicate that there is a 'real likelihood' of the ship being exposed to war risks in accordance to sub-clause (b). Thus, the level of danger in the area is deemed high and an owner should generally be entitled to rely on the war risks clause in the charterparty to lawfully refuse to go to a Ukrainian port and request alternative orders from the charterers.⁴⁰

E. Frustration of the charter

The parties involved at the carriage may seek a solution at the doctrine of frustration. As a matter of English law, a contract is 'frustrated' if an unforeseen event occurs which is outside the parties' control and makes either the contract impossible to perform by physical obstacles or by supervening illegality, or the performance radically different from what had been envisaged

³⁵ 'Ukraine-Russia Conflict - The Impact on Shipping' (*Steamship Mutual*, 27 March 2022) <<https://www.steamshipmutual.com/ukraine-russia-conflict-impact-shipping>> accessed 6 April 2023.

³⁶ Wallace and others (n 21).

³⁷ VOYWAR 2013 s (b).

³⁸ *ibid* (b), (c) and (h); 'Update on the Situation in Ukraine' (n 20) 2.

³⁹ 'War in Ukraine - Impact on Contractual Obligations' (*Gard*, 6 April 2022) <<https://www.gard.no/web/updates/content/33217469/war-in-ukraine-impact-on-contractual-obligations>> accessed 6 April 2023.

⁴⁰ 'Ukraine - Contractual Implications FAQs' (*UK Defence Club*, 1 March 2022) 2 <https://www.ukdefence.com/fileadmin/uploads/uk-defence/Documents/Ukraine/Ukraine_FAQs_V5.pdf> accessed 6 April 2023; 'FAQs: English Law Charterparty Issues Relating to Hostilities between the Ukraine and Russia' (*SKULD*, 1 March 2022) <<https://www.skuld.com/topics/port/port-news/europe/faqs-english-law-charterparty-issues-relating-to-hostilities-between-the-ukraine-and-russia/>> accessed 6 April 2023; 'War in Ukraine - Impact on Contractual Obligations' (n 40); 'Ukraine-Russia Conflict - The Impact on Shipping' (n 36).

in the contract, provided there is no fault or breach of either party.⁴¹ The effect of frustration is that once established, automatically as a matter of law and without election of either party, the charter is brought to an end and both parties are excused from further performance of their contractual obligations. Thus, claims for sums due under the charter or damages which are dated before that moment are enforceable, whereas sums which would have fallen due after cease to be payable.⁴²

However, frustration is rarely successful under English law and requires very serious and significant events to be triggered. Mere hardship, difficulty, or property loss cannot give rise to frustration, whereas delay and additional expenses almost always fail to establish a radical change of circumstances from those contemplated by the parties.⁴³ The fact that the charterparty has become more expensive, even transformed into a commercial disaster, is not sufficient to bring about frustration. As Lord Denning held in *The Eugenia*: '*It must be more than merely more onerous or more expensive. It must be positively unjust to hold the parties bound*'.⁴⁴

Generally, there is no frustration in case of events that are expressly dealt within the charterparty. If the contract makes provision for the supervening event or the changed circumstances, the doctrine cannot be invoked, since the contractual provisions will apply instead of general law.⁴⁵ Especially, if the agreed route has become impossible by reasons out of the parties' control, frustration can be activated only if the new route involves a performance radically different from the one the parties had contracted for.⁴⁶ As held in *The Eugenia*, the crucial time for determining the usual and customary route is the time of performance, rather than the time of concluding the charter.⁴⁷ Thus, vessels shall follow the usual route indicated by the facts prevailing at the time of navigation. On the other hand, if the issue concerns the loading or discharging process because access to the port is prevented or delayed to such an extent that overcomes the commercial purpose of the contract, frustration can be a fair remedy, provided that the loading failure is beyond parties' control.⁴⁸

Concluding, while each case shall be determined *in concreto*, it is unlikely that in the case of the Ukrainian ports a frustration of contract can be established. Firstly, if war risks are included in the contract, frustration cannot be triggered being a provided event that will be dealt within the content of the clause. But, even if there is no such clause, it is doubtful that either party can

⁴¹ 'Update on the Situation in Ukraine' (n 20) 2.

⁴² JHS (Julian Humphrey Spencer) Cooke and others, *Voyage Charters* (4th edn, Informa Law from Routledge 2014) para 22.34, 709.

⁴³ 'Update on the Situation in Ukraine' (n 20).

⁴⁴ *Ocean Tramp Tankers Corporation v V/O Sovfracht (The Eugenia)* [1963] 2 Lloyd's Rep 381 (CA).

⁴⁵ Cooke and others (n 43) para 22.7, 699.

⁴⁶ *ibid* 22.27, 706.

⁴⁷ *The Eugenia* (n 45).

⁴⁸ Cooke and others (n 43) para 22.30, 707.

establish that the carriage has become impossible or radically different from the one agreed.⁴⁹ If a Ukrainian port is indicated as a loading or discharging port in a time charter, it is improbable that the difficulties of that one voyage will radically affect the whole contract of carriage. Whereas the possibilities of frustration seem to be more in the case of voyage charters, the more recent the charterparty, the fewer the chances of success. Indeed, in the event that the contract has been concluded after February 2022, meaning that both parties agreed on the specific route and ports of call in the knowledge of the fluctuating shipping conditions in the Black and Azov Seas area, it is highly unlikely to establish successfully a radical change of circumstances amounting to frustration.

F. Force Majeure

The hostile events in Ukraine constitute a classic type of event beyond the control of either party.⁵⁰ For this reason, if a charterparty is not frustrated or otherwise terminated, and depending on the exact terms, it may be possible for the parties to claim that the events in Ukrainian ports represent a 'force majeure' that excuses them from the performance of their contractual obligations under the charterparty.⁵¹

It should be noted that force majeure is an established doctrine in civil law.⁵² On the contrary, it is not recognized under common law where frustration is the usual remedy.⁵³ Under English law, force majeure is an entirely contractual construct.⁵⁴ This means that there must be incorporated by way of an express force majeure clause in the contract if a party wants to invoke it.⁵⁵ In principle, force majeure lacks a definition under English law,⁵⁶ and the exact form of the clause remains within the parties' 'freedom of contract'.⁵⁷ Thus, force majeure clauses are of different kinds ranging from simple to more complex.⁵⁸ Today a large number of charterparties contains such a clause compelling the English courts to attribute to it some meaning. It is therefore quite likely that in

⁴⁹ Wallace and others (n 21).

⁵⁰ *ibid.*

⁵¹ 'Ukraine - Contractual Implications FAQs' (n 41) 3.

⁵² 'Ukraine - Contractual Implications FAQs' (n 41); Ewan McKendrick, *Force Majeure and Frustration of Contract* (2nd ed, Informa Law from Routledge 1995) 5.

⁵³ Nicola Cox, 'Ukraine Conflict and Charterparties - FAQs' (*West of England P&I Club*, 22 March 2022) <<https://www.westpandi.com/news-and-resources/news/march-2022/the-ukraine-crisis-and-charterparties-commonly-ask/>> accessed 6 April 2023.

⁵⁴ Gregory J. Barden, and others (n 17); Julien Rabeaux, 'Defence Guides: Frustration and Force Majeure' (*West of England P&I Club*).

⁵⁵ 'Update on the Situation in Ukraine' (n 20); 'Ukraine - Contractual Implications FAQs' (n 41).

⁵⁶ *Thomas Borthwick (Glasgow) Ltd v Faure Fairclough Ltd* [1968] 1 Lloyd's Rep 16 (QB (Com Ct)).

⁵⁷ Robert Jardine-Brown, 'Force Majeure Clauses under English Law' (*Chambers and Partners*, 6 January 2016) <<https://chambers.com/articles/force-majeure-clauses-under-english-law>> accessed 29 May 2023.

⁵⁸ *Cero Navigation Corporation v Jean Lion & Cie (The Solon)* [2000] 1 Lloyd's Rep 292 (QB (Com Ct)); McKendrick (n 53) 9.

the near future, the courts will be forced to consider whether the blockade of the Ukrainian ports can trigger the application of the doctrine of force majeure.⁵⁹

The substantial difference from the doctrine of frustration is that force majeure offers more flexibility and milder effects. Whereas frustration, when invoked, automatically brings the contract to an end relieving both parties, force majeure may provide many alternative effects such as return of money, suspension or termination of contract.⁶⁰ As stated in *The Solon* ‘*it only operates on the happening of an event which would otherwise result in a breach*’⁶¹ and as long as this event lasts.

The starting point for a party considering triggering force majeure is to check whether the relevant charterparty contains such a clause. Each force majeure clause must be an object of close examination in relation to the exact wording and the obligations stated. If such a clause is included, it is possible that only the words ‘*force majeure*’ are used, rendering the court to interpret it based on the rules of commercial contracts.⁶² More usually, force majeure clauses are more detailed and contain specific triggers such as the BIMCO ‘Force Majeure Clause 2022’ which excludes liability for non-performance in case of ‘(i) *actual, threatened or reported war, act of war, civil war or hostilities; (...)* (iii) *blockade, generally imposed trade restriction; (iv) act of government or public authority whether lawful or unlawful (...)*’. Indeed, the conflict in Ukraine, even if not expressly listed, passes the threshold test of many force majeure provisions.⁶³

Subsequently, the party will need to demonstrate that one of the listed force majeure events was the cause of its inability to perform one or more of its obligations under the contract.⁶⁴ Therefore, it shall demonstrate that the blockade is the effective cause of the non-performance. This is more likely to happen in charterparties that have a close connection to Ukraine, for example as the loading or discharging port, and thus will be directly affected by the blockade. However, likewise with frustration, just the fact that a ‘*contract has become economically more burdensome*’, is not enough to invoke force majeure.⁶⁵ The more remote the causal link between the contractually defined ‘blockade’ and the performance, the less the chances to rely on the clause.⁶⁶

Lastly, the party must prove that the effects of the force majeure event were out of his control and could not be overcome or avoided by any alternative means. In this sense, the English courts have held that it must exercise any

⁵⁹ McKendrick (n 53) 7.

⁶⁰ McKendrick (n 53) 9.

⁶¹ *The Solon* (n 60).

⁶² Cox (n 54).

⁶³ Gregory J. Barden, and others (n 17); Wallace and others (n 21).

⁶⁴ Philip Stephenson, ‘BIMCO Publishes Force Majeure Clause 2022’ (*Standard Club*, 21 January 2022) <<https://www.standard-club.com/knowledge-news/bimco-publishes-force-majeure-clause-2022-4082/>> accessed 27 May 2023.

⁶⁵ *Thames Valley Power Ltd v Total Gas Ltd* [2006] 1 Lloyd’s Rep 441 ([2005] EWHC 2208 QB (Com Ct)); ‘Update on the Situation in Ukraine’ (n 20) 2.

⁶⁶ Gregory J. Barden, and others (n 17).

reasonable endeavours and demonstrate that it did not have other means to avoid or mitigate the effects.⁶⁷ This party shall therefore have the burden to prove that it could not perform its contractual obligations under the charterparty due to the blockade of the Ukrainian ports. This inability to perform was beyond its control, and there were no reasonable steps or alternative means that it could have taken to avoid the blockade or at least mitigate its consequences.⁶⁸ The standard of proof is very high and the interpretation by the courts is particularly narrow, hence the chances of success under English law are particularly low.⁶⁹

Concluding, the contractual force majeure provisions could be typically engaged in connection to the conflict in Ukraine.⁷⁰ The aim of such a clause is to resolve issues that arise if an unexpected and challenging event occurs.⁷¹ The blockade of the Ukrainian ports could be argued as such. At least early in February 2022, the parties could probably qualify to claim that the blockade of the Ukrainian ports constituted a force majeure event out of their control.⁷² However, as time flies and the blockade becomes a well-known fact, the required causal link weakens, reducing the possibilities of success.

G. Safe ports

The recent developments in Ukraine revive the old doctrine of safe ports. Many standard form charterparties include an express warranty to secure the port's safety on behalf of the charterer.⁷³ Pursuant to this, it is the charterer's primary obligation to order the ship only to ports which, at the time the order is given, are prospectively safe. The classic definition is given by Lord Justice Sellers in *The Eastern City*: '*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 damage which cannot be avoided by good navigation and seamanship*'.⁷⁴

From this definition, we understand that the safety warranty is not limited to the safety in the inner limits of the harbour,⁷⁵ but contains the vessel's approach voyage, use of port, and departure from it and all three requirements

⁶⁷ *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd* [2018] 2 Lloyds Rep 628 (QB (Com Ct)).

⁶⁸ 'Update on the Situation in Ukraine' (n 20) 2.

⁶⁹ *ibid.*

⁷⁰ Gregory J. Barden, and others (n 17).

⁷¹ Emily McCulloch, 'New BIMCO Force Majeure Clause for 2022' (*West of England P&I Club*, 2 February 2022) 1 <<https://www.westpandi.com/news-and-resources/news/february-2022/new-bimco-force-majeure-clause-for-2022/>> accessed 27 May 2023.

⁷² Gregory J. Barden, and others (n 17).

⁷³ *Vardinoyannis v The Egyptian General Petroleum Corporation (The Evaggelos Th)* [1971] 2 Lloyds Rep 200 (QB (Com Ct)).

⁷⁴ *Leeds Shipping v Société Française Bunge (The Eastern City)* [1958] 2 Lloyds Rep 127 (CA).

⁷⁵ *Kodros Shipping Corporation v Empresa Cubana De Fletes (The Evia (No 2))* [1982] 2 Lloyd's Rep 307 (HL).

must be satisfied for a port to be considered safe.⁷⁶ Otherwise, we have a breach of the obligation *'if the vessel is employed upon a voyage to a port which she cannot safely reach. It is immaterial in point of law where the danger is located, though it is obvious in point of fact that the more remote it is from the port the less likely it is to interfere with the safety of the voyage'*.⁷⁷ This note can prove particularly interesting in connection with vessels approaching ports through the Sea of Azov. Of course, the charterer cannot guarantee that a particular route to port is safe, however, he must ascertain that his order must be of such a voyage *'which an ordinarily prudent and skilful master can and a way of making in safety'*.⁷⁸ At *The Saga Cob*, Lord Justice Parker stressed out that a port can be rendered unsafe due to war and hostilities if *'the "political" risk is sufficient for a reasonable shipowner or master to decline to send or sail his vessel there'*.⁷⁹

The charterers' primary obligation is an 'absolute' one. The crucial test is *'whether, on the particular facts, the particular warranty of safety has or has not been broken'*,⁸⁰ irrespective of whether the charterers were careless or if they had knowledge. If it has been broken, the charterer is liable and owes compensation.⁸¹ The crucial time for determining charterer's compliance is the time the order is given. At that time the port must be prospectively safe for the ship at the appropriate time in the future, to reach, use and leave. Thus, it must be reasonably expected that at the time when the vessel arrives at the port, the current issues of the port will have been solved and no new issues will have arisen.⁸²

The doctrine does not imply that the owners must proceed to an unsafe port or continue to use it if the situation changes at some time after the order is given and the port becomes 'unsafe'.⁸³ In this case, the charterer's order does not have to be incontestably obeyed.⁸⁴ While the owners are not under a duty to check the safety of the nominated port, where there is doubt, the master may take a reasonable time to investigate.⁸⁵ If the owners conclude that the port is unsafe, they are entitled to refuse orders, not proceed to the nominated port

⁷⁶ Evelyn Komaki, 'How to Play It Safe in an Unsafe Port: Guidance for Charterers and Owners' (*Penningtons Manches Cooper*, 17 September 2021) <<https://www.penningtonslaw.com/news-publications/latest-news/2021/how-to-play-it-safe-in-an-unsafe-port-guidance-for-charterers-and-owners>> accessed 29 April 2023.

⁷⁷ *G W Grace & Co, Ltd v General Steam Navigation Company, Ltd (The Sussex Oak)* [1949/1950] 83 Lloyd's Rep 297 (KB).

⁷⁸ *ibid.*

⁷⁹ Terence Coghlin and others, *Time Charters* (7th edn, Informa Law from Routledge 2014) 10.17, 200; *K/S Penta Shipping A/S v Ethiopian Shipping Lines Corporation (The Saga Cob)* [1992] 2 Lloyds Rep 545 (CA); *Ullises Shipping Corporation v Fal Shipping Co Ltd (The Greek Fighter)* [2006] 1 Lloyds Rep Plus 99 (EWHC 1729 QB (Com Ct)).

⁸⁰ *Unitramp v Garnac Grain Co Inc (The Hermine)* [1979] 1 Lloyds Rep 212 (CA).

⁸¹ *The Evia (No 2)* (n 76).

⁸² Coghlin and others (n 80) para 10.50, 209.

⁸³ Wallace and others (n 21); Coghlin and others (n 80) para 10.1, 197.

⁸⁴ Coghlin and others (n 80) para 10.59, 213.

⁸⁵ *Kuwait Petroleum Corporation v I&D Oil Carriers Ltd (The Houda)* [1994] 2 Lloyd's Rep 541 (CA).

and call for new orders.⁸⁶ Otherwise, if they knew or should have known that the port was unsafe, but nevertheless accepted the charterer's order as valid and proceeded, they may be found to have waived their right to claim damages for any losses suffered.⁸⁷

In such a case that a port becomes consequently unsafe, the charterers come under a new obligation to give alternative instructions.⁸⁸ At the same time, the owners are entitled to immediately cease obeying the charterers' order. Although the order was legitimate when given, it has now been transformed into one in which further compliance will expose the vessel to risks which her owners have not consented to bear, and thus shall not be obeyed.⁸⁹

It is worth noting that the charterers are not in breach if the danger is caused by an '*abnormal occurrence*'. Occurrences are abnormal where the danger does not arise from the qualities or attributes of the port itself, but from '*external and extrinsic factors*'. As indicated in *The Ocean Victory*, the charterers are not responsible in case the vessel suffers damages '*unrelated to the prevailing characteristics of the port*'.⁹⁰ On the other hand, Mr. Justice Mustill pointed out in *The Mary Lou* that '*the port was unsafe [...] because the defects were of sufficiently long standing to be, for the time being, a characteristic of the port*'.⁹¹ Thus, the English Courts assess the frequency and the likelihood of a danger occurring.⁹² It is therefore crucial to consider whether a 'political' risk is an abnormal occurrence or has become a characteristic of the port.

As stated in *The Apiliotis*,⁹³ the safe port may be a question of law but safety is a question of fact. Applying the above principles in the Ukrainian ports operating at this moment, we can come to no other conclusion than the fact that these are not prospectively safe. There is always the risk of attack en route supported by the incidents of damaged and seized vessels in the Black Sea.⁹⁴ Additionally, vessels are exposed to risks during the use of the port and the departure from it. The political instability and the hostilities in the Ukrainian ports as well as the 'de facto' blockade are sufficiently long-standing to be considered as an attribute of the port, a 'characteristic' in *The Mary Lou* definition. The situation would have been completely different in and before February 2022,

⁸⁶ Wallace and others (n 21).

⁸⁷ Komaki (n 77); Coghlin and others (n 80) para 10.64, 214; *The Kanchenjunga* (n 32).

⁸⁸ Coghlin and others (n 80) para 10.45, 208 and 10.51, 210.

⁸⁹ *Whistler International Ltd v Kawasaki Kisen Kaisha Ltd (The Hill Harmony)* [2001] 1 Lloyd's Rep 147 (HL).

⁹⁰ *Gard Marine and Energy Ltd v China National Chartering Co Ltd (The Ocean Victory)* [2014] 1 Lloyd's Rep 59 ([2013] EWHC 2199 QB (Com Ct)).

⁹¹ *Transoceanic Petroleum Carriers v Cook Industries Inc (The Mary Lou)* [1981] 2 Lloyds Rep 277 (QB (Com Ct)).

⁹² *Gard Marine & Energy Ltd v China National Chartering Co Ltd and another China National Chartering Co Ltd and another v Gard Marine & Energy Ltd and another Daiichi Chuo Kisen Kaisha v Gard Marine & Energy Ltd and another (The Ocean Victory)* [2017] 1 Lloyd's Rep 521 ([2017] UKSC 35).

⁹³ *Reinante Transoceanic Navegacion SA v The President of India (The Apiliotis)* [1985] 1 Lloyds Rep 255 (QB (Com Ct)).

⁹⁴ Kormych and Averochkina (n 1).

when the outbreak of hostilities could have been argued as '*an abnormal occurrence at an otherwise safe port*'. Applying *The Evia (No 2)*, at that time, the blockade could potentially have been an '*utterly abnormal and extraneous occurrence unconnected with the set-up of the ports*'. Thus, any damage to the ships would not automatically render the ports unsafe. However, as time has gone by, the argument for 'abnormal occurrence' has become weaker and it is doubtful that it can now be argued successfully.

H. Conclusion

From all the above, it is understood that the situation is fluid and fast-moving and no absolute conclusions can be drawn. Since no case law related to the subject matter is provided at the moment, this essay reflects only the basic principles and axes upon which the upcoming judgments will be constructed. Every case will need to be looked closely with regard to the specific clauses incorporated and depending on the crucial time of the breach. Charterparties conducted before February 2022 could more easily trigger the application of the doctrines of frustration and force majeure. In contrast, in the case of charterparties agreed after, owners may rely on the safe port warranty or on the incorporated war risks clauses to refuse orders.

The blockade of the Ukrainian ports brought back unexpected issues and concerns, strongly challenging the contractual position of the parties. Bearing in mind the immense effect that the blockade of Ukraine had on shipping, it is reasonable to expect intense disputes, ambiguous arguments, and strong defenses. There is no easy answer, and the judges should well consider how to reasonably share the burdens between the parties. It remains to be seen which arguments and defenses will survive and how the charterparties will be shaped to meet the commercial needs of the time.