

RR&CO UPDATE: CONSIDERATION OF ISRAELI PORTS NEAR TO GAZA (20 MAY 2021)



Rocket attack on the port of Ashdod on 12 May 2021

The maritime security consultancy Dryad Global advised on 12 May 2021:

- “Key targets have included Ashkelon, Ashdod”;
- On 12 May 2021: “associated maritime Ports of Ashkelon and Ashdod have been closed”;
- “Footage released by local witnesses shows rockets impacting the port facility at Ashdod and the offshore area beyond the main anchorage. It is understood that a rocket landed in the vicinity of the Maltese flagged Cargo vessel MONA (IMO9101534) and the Panama flagged cargo vessel AHMET ONEL (IMO8420361).”;
- “Including rocket attack on an oil facility near the port of Ashkelon. In a statement released by the Izz ad-Din al-Qassam Brigade (military wing of the Palestinian Hamas organisation) it was stated that they had targeted an “Israeli Gas Platform off the coast of Gaza”. ”;
- “Port and energy infrastructure are at this stage assessed to be proxy targets with any damage resulting from the indiscriminate nature of attacks however such targets are known to be part of the wider strategic intent of Hamas and the PIJ. Hamas and the PIJ are known to have limited direct targeting capability and limited access to guided munitions.”; and
- “It is assessed that there is no stated intent to target wider commercial shipping however today's statement by the Palestinian al Qassam indicates a clear intent to target the economic interests of Israel where possible. **As such Ports and offshore infrastructure remain at heightened risk with attacks and associated damage a realistic possibility.** Attacks against bespoke targets including port, energy and offshore infrastructure are highly likely to feature in any protracted engagement”.

Accordingly, the current conclusion for the ports Ashkelon and Ashdod, which are very near to Gaza and experiencing a larger number of attempted rocket attacks, is that there is a risk of damage to vessels and so, subject to developing circumstances (to be considered for the time the vessel is expected to arrive), then there would arguably be a war risk and if there is such a danger this may also make the port unsafe. The earlier closure of the port of Ashkelon indicates that the local authorities also consider there to be a realistic damage risk to ships and maritime infrastructure.

ISRAELI PORTS	Ashkelon	Ashdod	Haifa	Eilat
Distance from Gaza	21 km	38.1 km	159 km	221 km
Latest Status	“During the period 12-18 May 2021, the Israeli Home-Front Command has issued... 200 Alerts on the city of Ashkelon” and “For you information - in principal - calling Ashkelon port will require the Israeli Navy permit”	“During the period 12-18 May 2021, the Israeli Home-Front Command has issued 55 alerts on missile attacks on Ashdod's marina area” and “ops are temporarily stopped (about 15 min.) when siren sounds warning of incoming rockets”	“Have not been alerted even once.” and “Perfectly safe”	“Have not been alerted even once.”

We will continue monitoring the situation.



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Inputs on the War risks and Situation in Ashkelon and Haifa Ports

By Yoav Harris, Advocate.

Haifa, 19th May 2021

Ever since the current escalation taking place between the State of Israel and Hamas, during the period 12-18 May 2018, the Israeli Home-Front Command has issued 55 alerts on missile attacks on Ashdod's marina area (located 38.1 Km from the Gaza Strip) and 200 Alerts on the city of Ashkelon (located 21.km from Gaza Strip). The cities of Haifa and Eilat which are located at the distance of 159.km and 221 Km, respectively from the Gaza Strip, have not been alerted even once.

With more than 90% percentage of interceptions of the launched missiles the 'Iron Dome' provides relative security which together with shelters and the following of the Home-Front Commands' instructions, enable the ports of Ashdod and Ashkelon (mainly operating as tanker's port) to operate during the current period.

The daily working plan of Ashdod Port for the 19th May 2021, lists 19 vessels which are under loading or discharging operations at the piers out of total of 32 vessels located at the piers themselves and about 50 vessels waiting on anchor, out- side the port, 17 of them are bulk carriers, which arrived at Ashdod Port during 12-18 May 2021.

The matter of a tanker chartered under a voyage charter and the influence of a military escalation in Israel has been dealt with under a Supreme Court Judgment in civil appeal 7802/11 TRANS KA TANKERS Vs. VITOL EBERGY S.A. In that matter, under a fixture dated 26.07.2006 the vessel *Bereket Va* had been chartered for the carriage of 5,000 tons of methanol between the load port of Marsa al Brega Libya to the discharge port of Marmara Turkey. The agreed laydays for loading the cargo was 10-15.8. 2006. However, the Owners kept on postponing the loading of the cargo, arguing that they should be exempt from the

damages caused due to the postponement because during that time the vessel was located at the east of the Mediterranean Sea and was subject to the military activities which took place during that period, between the State of Israel and the Hizballah located in Lebanon.

This argument was rejected by the Court which held that the above military activities had begun on 12.7.2016 and was perfectly known to Owners on the date of the fixture (26.7.2016). Therefore, under such circumstances, if the Owners wished to determine in the agreement that these events should be considered as a risk which should exempt the Owners from its liabilities, it should have been drafted in specific wording in the charter party agreement, and the general exemption of "all going well, weather and safe navigation permitting" can not be considered as covering known military activities, especially when considering the importance of the time schedule for the arrival, loading and discharge of the vessel under a voyage charter party. Therefore, the Owners were found liable by the Court for the damages which were caused due to its delay in loading the cargo.

Currently at the present time, as mentioned above, Haifa and Eilat ports are not in the range of any threat, and Ashkelon and Ashdod ports are operating, under the supervision of the Israeli Shipping and Ports Authority, and the Israeli Defense Forces and the Israeli Home Front Command.

Israel Attacks - Impact On Maritime Domain



By Dryad Global | May 12, 2021 | Israel, Hamas, Ashkelon, Ashdod, Palestine

 No Comments

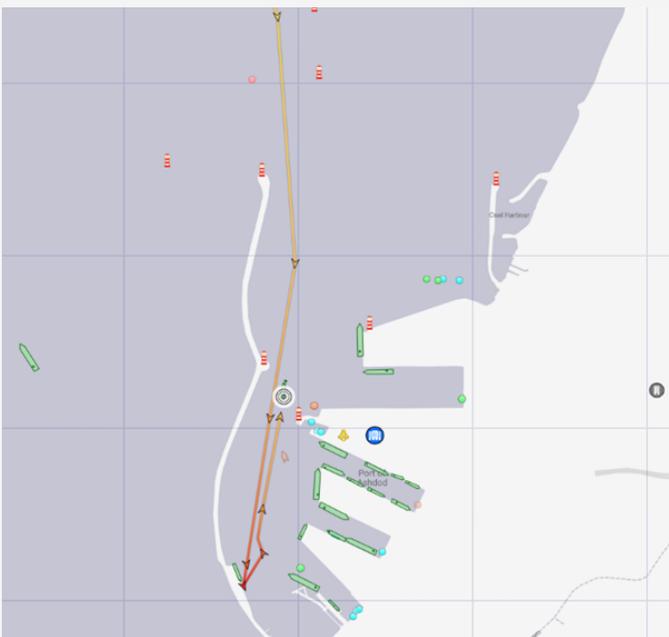
Tensions between Israel and Palestine have risen substantially in the past 12 days.

Tensions between Israel and Palestine have risen substantially in the past 12 days. Following the eviction of 12 Palestinian families from their homes in the Sheikh Jarrah neighbourhood in East-Jerusalem, protests erupted which resulted in violent clashes between protesters and security forces. In the last 48 hours there has been a significant escalation of force which has seen Hamas and the Islamic Jihad Movement in Palestine (PIJ) conduct multiple indiscriminate rocket attacks against Israeli cities.

On the early morning of 11 May, according to the Israeli Defence Force (IDF), Hamas fired some 200 rockets, including several targeted at Jerusalem. At the time of reporting, according to the IDF 1,050 rockets have been fired at Israel from within the Palestinian territory. Roughly 80-95% of these rockets are understood to have been intercepted by the Israeli Iron Dome missile defence system.

Key targets have included Ashkelon, Ashdod, Tel Aviv, including Israel's main airport

Ben Gurion which was subsequently forced to close. There have also been reports of alerts in Gaza border communities, and the Southeastern cities of Beersheba and Dimona.



At the time of reporting, it is understood that the associated maritime Ports of Ashkelon and Ashdod have been closed. Footage released by local witnesses shows rockets impacting the port facility at Asdod and the offshore area beyond the main anchorage. It is understood that a rocket landed in the vicinity of the Maltese flagged Cargo vessel MONA (IMO9101534) and the Panama flagged cargo vessel AHMET ONEL (IMO8420361). Data from [Marine Traffic](https://www.marinetraffic.com) indicates that the MV MONA has

since departed port.

Earlier footage showed the impact of a rocket attack on an oil facility near the port of Ashdod. In a statement released by the Izz ad-Din al-Qassam Brigade (military wing of the Palestinian Hamas organisation) it was stated that they had targeted an "Israeli Gas Platform off the coast of Gaza." Meanwhile, a Chevron spokeswoman stated that, "in accordance with instructions received from the Ministry of Energy, we have shut-in and depressurised the Tamar Platform". It is understood that Chevron continue production from its offshore asset at the Leviathan field whose platform is further north offshore Israel, close to the port of Haifa.

Thus far targeting by Hamas and the PIJ has been indiscriminate with the intent of causing significant civilian casualties and damage to infrastructure. Port and energy infrastructure are at this stage assessed to be proxy targets with any damage resulting from the indiscriminate nature of attacks however such targets are known to be part of the wider strategic intent of Hamas and the PIJ. Hamas and the PIJ are known to have limited direct targeting capability and limited access to guided munitions. Despite this, militants are known to be well resourced with indirect weaponry allowing for a sustained and protracted engagement against Israeli cities. Militants are also understood to have access to the Iranian made Fajr-5 surface – to – surface rocket; however, this is understood to be a prestige weapon system and in limited supply. The Fajr-5 is understood to have a range of 75km and was originally designed as an unguided artillery system and is understood to remain in service as an unguided anti-ship missile used by the IRGC(N). It is assessed that there is no stated intent to target wider commercial shipping however today's statement by the Palestinian al Qassam indicates a clear intent to target the economic interests of Israel where possible. As such Ports and offshore infrastructure remain at heightened risk with attacks and associated damage a realistic possibility. Attacks against bespoke targets including port, energy and offshore infrastructure are highly likely to feature in any protracted engagement.

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RR&CO TANKER NOTE
“WAR RISKS” SUMMARY COVERING
THE ISRAEL/GAZA CONFLICT
2021

EXECUTIVE SUMMARY

War Risk Clause - Type of risk must fall within the defined factors (of relevance: war/hostilities, warlike operations, civil war/commotions and/or revolutions), which the current May 2021 Israel/Hamas conflict does, but such war does not currently pose a damage/prohibition risk to our Clients’ tankers calling at Haifa (such port is considered “*perfectly safe*” by local correspondents), especially if vessel’s ETA’s are well in the future (when the conflict may be over). Master/Owners can only exercise their discretion to reject such a port call if such a decision is made “*fairly as between both parties*” to the C/P, and not unreasonably nor in an arbitrary manner. Therefore, it is not possible to rely upon the War Risks clause to avoid calling at Haifa at the current time.

Safe Port Warranty - Unsafety of Haifa cannot be shown as tankers are calling there with no issue, nor have missiles struck any vessels or port facilities to date (such an escalation is unlikely due to the limited range of Hamas’ rocket arsenal). One has to evidence “a danger” to start arguing a breach of this warranty, and there is no such danger at Haifa arising from the May 2021 Israel/Hamas conflict currently. Charterers are therefore not in breach of the safe port warranty at the current time.

Frustration Doctrine - Merely a *state of war* between Israel/Hamas in Gaza is insufficient to evoke frustration. Frustration is onerous to prove, requiring: (a) post C/P execution event (this may prohibit frustration from being arguable when vessels are fixed whilst the current conflict is ongoing as it is then a known circumstance when entering into the C/P); (b) being so fundamental an event to ‘strike at the root of the contract’ and entirely beyond what was contemplated by the parties when entering into the C/P; (c) not due to the fault of either party; and (d) rendering further performance impossible, illegal or makes it radically different from that contemplated by the parties at the time of entering into the contract. If performance is now commercially unprofitable, but it is still legally and physically possible, then there is no frustration. In the subject circumstances, performance is still legally and physically possible and there is little (if any) impact on profitability so frustration cannot be relied upon by Owners at the current time.

Force Majeure / General Exceptions Clause - Act of war, riot and civil commotion are included as force majeure / exceptions events in the Asbatankvoy tanker C/P form. The current conflict is certainly all three of these events, but Owners cannot rely on this exclusion because such conflict has not caused Owners to fail to perform. As it currently stands the May 2021 Israel/Hamas war has had no impact on tankers calling at Haifa. Therefore, the situation does not fall within the scope of the Asbatankvoy’s General Exceptions clause at the current time.

War Cancellation / Outbreak of War Clause – No such term is included in the Asbatankvoy form. Industry standard war cancellation clauses do not include Israel or Hamas or the Occupied Territories (or any states in the Middle East) in the list of named countries. Usually, it is the major powers of US, China, Russia and UK that are listed, for the obvious reason that such an outbreak of war between these states would likely have a significant impact on shipping (and the world at large). A clause giving Charterers the option to cancel the charterparty for a conflict in the Middle East would defeat the purpose of having *certainty* in C/P’s, as there is frequently “war or hostilities” between Israel and her neighbours.

RR&CO LEGAL COMMENTARY **(COVERING THE SITUATION AS OF MID-MAY 2021)**

WAR RISKS under Clause 20(b) of the Asbatankvoy Charterparty form

Purpose of the Clause is, like the Voywar clauses in the Gencon charters, that the War Risks clause of the Asbatankvoy C/P deals with the situation where the contemplated voyage is affected by war risks. Clause 20(b) is wider than Voywar clauses as it includes, within the relevant risks, *the operation of international laws* and applies, in the case of port entry, to *prohibition* as well as *danger*.

Masters' Discretion & Renomination: The clause grants the Master or Owners a broad protective discretion, together with a 48-hour renomination option for the Charterers. Under the Asbatankvoy form, the Master or Owner must consider that reaching, or entry into, the relevant port is *dangerous or impossible* due to one or more of the specified war risks.

Master's / Owners' Discretion must involve the consideration of relevant matters and cannot be exercised unreasonably or in an arbitrary manner, as per Government of The Republic of Spain v. North of England S.S. Co., Ltd. (1938) 61 Lloyd's Rep. 44, where it was noted:

"[the master] was bound to exercise that discretion fairly as between the parties, and not merely do his best for the shipowners ... disregarding the interests of the charterers".

Namely, the Master/Owners, advised by their local contacts in Haifa, maritime security and safety bulletins and general shipping news and knowledge of the current situation, would have to reasonably fear that the relevant port would be dangerous or impossible to call at due to one or more of the listed war risks (see discussion below). Such consideration must involve evaluation of various factors such as the prevailing frequency of attacks/incidents, the perceived level of threat at the relevant time and the type of assets/vessels targeted (e.g. if attacks to date have been military installations / urban cities rather than ports, or, for example, on bulk carriers rather than tankers or not on ships at all).

Situation in Haifa is currently unaffected by the ongoing conflict between Israel and Hamas in Gaza. Our trusted local correspondents M.Dizengoff P&I (established in 1928 and who advise all IG P&I Clubs) advised us on Friday 14 May 2021 that:

"Haifa port is perfectly safe. On top of that ... [we] believe the war would be ended in a week or so... Currently Israel is under war situation".

Accordingly, it would not be possible for the Master or Owners to argue that they can exercise their discretion to reject a Charterers' order to call at the Israeli disport Haifa, as such a view would be held as being *"unreasonable"* or *"arbitrary"*, especially in relation to calling at Haifa in the coming months. In particular, there is no evidence of any targeting of tankers offshore or alongside at Haifa, nor of any specific targeting of the Port of Haifa itself (being outside of the range of almost all of the Hamas rockets).

Nevertheless, for completeness, we will briefly run through the types of war risk factors that Master / Owners would consider when looking at whether calling at the relevant port is dangerous or impossible and therefore deciding whether they could reject the subject port call and request a new port.

War Risks (in the Asbatankvoy-form) are defined as one of the following listed events:

(1) war, (2) hostilities, warlike operations, (3) civil war, civil commotions, revolutions or (4) the operation of international law.

We take each of these in turn over the following pages.

(1) War

The leading English authority is Spinney's (1948) Ltd v. Royal Insurance Co. [1980] 1 Lloyd's Rep. 406. In considering whether a state of war exists, the Court / Arbitrators will pay attention to the following factors: (a) whether there is fighting or conflict between recognisable opposing sides who, have territorial, political or other identifiable objectives; and (b) the scale of the conflict and its impact on local public order.

War can include civil war and organised armed rebellion. No formal declaration of war is needed.

However, “war” does not include sporadic or warlike operations on a scale that does not amount to an established or reasonably settled state of armed conflict albeit we note that such operations are likely in most cases to constitute “hostile acts by a belligerent power” (being the wording used in Voywar terms) or “hostilities” (as used in the Asbatankvoy form).

Public national assertions falling short of a threat of war, as for example sanctions or the like, would seem not to be threats of war.

The current May 2021 conflict between Israel and Hamas in Gaza is likely to fall within the definition of “war” (indeed, Israel even describes it as a “war”).

(2) Hostilities, warlike operations

Mustill J. summarised definitions of these terms in Spinney's (1948) Ltd v. Royal Insurance Co. [1980] 1 Lloyd's Rep. 406 as follows:

*“The term “**hostilities**” refers to acts or operations of war committed by belligerents; it presupposes an existing state of war ... There seems no reason to doubt that the [term] applies to acts committed in the course of a civil war; and perhaps also to an organised armed rebellion ... “**Warlike operations**” has a wider meaning and includes such operations as belligerents have recourse to in war, even though no state of war exists ... Nevertheless the acts must be done in the context of a war...”.*

Accordingly, “warlike operations” have a wider definition than simply “war”. It may include a build-up of military hardware in a particular area, even though no state of war exists, but the operation must be carried out in the context of war. The current May 2021 conflict between Israel and Hamas in Gaza can certainly be described as “hostilities” and “warlike operations”.

(3) Civil war, civil commotions, revolutions

These risks cover gradations of disturbance essentially internal to a country. Clearly civil war is included within the word war and requires acts of a hostile nature. As Mustill J. said in Spinney's (1948) Ltd v. Royal Insurance Co. [1980] 1 Lloyd's Rep. 406:

*“a **civil war** is a war which has the special characteristic of being civil—i.e., internal rather than external. This special characteristic means that certain features of an international war are absent. Nevertheless, a civil war is still a war. The words do not simply denote a violent internal conflict on a large scale ...”.*

The learned Judge considered that there had to be “sides” in a civil war, identifiable by reference to a community (though not necessarily precise identity) of objective, leadership or administration; there need not be any desire to achieve a complete political overthrow, for the participants in a civil war may be activated by tribal, racial or ethnic animosities, although there must be a degree of coherence and community of purpose which helps to distinguish a war from a mere tumultuous internal upheaval.

It is less clear that a “**revolution**” need involve such acts at all for, in one sense, it suggests merely the replacement of one government or system of government with another (or replaced by anarchy) with a degree of success and permanence by non-constitutional means.

“**Civil commotion**” is a phrase used to indicate a stage between a riot and a civil war. A popular uprising or an insurrection of the people for general purposes is required, though not necessarily amounting to a rebellion against the government; the element of turbulence or tumult is essential, although the mere acts of a mindless mob would not suffice as per Levy v. Assicurazione Generali [1940] A.C. 791 at p. 800 and Spinney’s (1948) Ltd v. Royal Insurance Co. [1980] 1 Lloyd’s Rep. 406 at pp. 437–438.

The current May 2021 conflict between Israel and Hamas in Gaza might be described (by some) as a “civil war”, however this is subject to arguing that Gaza and Israel are a single state - which is not the consensus of the international community and contrary to the views of the specific involved parties. What we can say is that Gaza and the West Bank are claimed by the *de jure* sovereign State of Palestine.

(4) The operation of international law

This risk involves having to establish there was an international law (often these take the form of “conventions”) against calling at this port, such as IMO conventions prohibiting vessels from polluting certain areas. For example, a ship would be prevented, by IMO convention, from sailing in specified designated emission control areas (ECAS) which require 0.10% mm sulphur in fuel oil, should that ship not have suitable fuel oil onboard. The four current ECAS are: the Baltic Sea area; the North Sea area; the North American area (covering designated coastal areas off the United States and Canada); and the United States Caribbean Sea area (around Puerto Rico and the United States Virgin Islands).

There are no international laws / conventions against calling at Haifa. For completeness, sanction regimes, like the Arab boycott of Israel (or US sanctions on trade with Iran/Syria), would not fall within the category of “international law”, but would rather be merely public national assertions by one or more states.

UNSAFE PORT

An alternative approach is to argue that the subject port is unsafe due to the war. Under Part II Clause 1 of the Asbatankvoy-form charterparty, the Charterers must order the vessel to ports that the vessel “*may safely get (always afloat)*”. Similar terms are included in all industry standard tanker charter forms. This is the Charterers’ safe port warranty.

The usual test applies, as per Sellers LJ in the Eastern City (Leeds Shipping Co Ltd v Societe Francaise Bunge [1958] Lloyd’s Rep.127 (C.A.)), i.e. whether the vessel could proceed to discharge and proceed from the port without, in the absence of abnormal occurrence, being exposed to danger which good seamanship or navigation could not avoid.

Therefore, if the vessel is ordered to a potentially dangerous port nominated by Charterers, Owners’ right to damages for the nomination of an unsafe port will not be lost, unless the Owners accept the order in exchange for additional hire or freight payments, whereupon the right to claim for damages is likely to be waived.

If the Charterers comply with the obligation to nominate a safe port, they may come under a further obligation if the port becomes unsafe as the result of a supervening event, to withdraw their original nomination and nominate a new 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.

Currently, on the basis of the local correspondent's current advice as to the Port of Haifa being "*perfectly safe*", a breach of the safe port warranty in the Asbatankvoy charter would not be possible to pursue. Indeed, this can be checked (on a basic level) by looking at the number of tankers safely calling at Haifa.

FRUSTRATION

Frustration of the charter party may occur if ports essential to performance become unapproachable by reason of war or blockade for an exceptionally lengthy period of time (which is unlikely to be the case here as the war is predicted currently to only last weeks, but we will keep a close eye on developments).

In assessing whether frustration has occurred, factors such as whether or not the cargo is of a perishable nature and whether delivery is urgent in conjunction with the anticipated disruption must be taken into account.

In the Evia No. 2 (Kodros Shipping Corp v Empresa Cubana de Fletis [1983] 1 A.C. 736 (H.L.)), the House of Lords (now the Supreme Court) held that the Baltimore War Clauses did not exclude the operation of the doctrine of frustration. This would also, logically, apply to the Asbatankvoy War Risks clause, meaning that frustration can be argued.

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 Chrysalis (Finelvet A.G. v Vinava Shipping Co. [1983] 1 Lloyd's Rep. 503), 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. For avoidance of doubt, those rights which did not yet exist under the charter can now 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.

Therefore, *generally a state of war* would not enable Owners to declare frustration.

To develop this topic a little bit further and in summary, the doctrine of frustration means a contract may be discharged on the ground of frustration when something occurs ***after the formation of the contract*** (which means conflict that was present at the time of entering into the charterparty would likely not count, unless the conflict has massively changed in form and size) which renders it ***physically or commercially impossible to fulfil the contract***, or transforms the obligation to perform into a ***radically different obligation*** from that undertaken at the moment of entry into the contract.

To evaluate whether an event is a frustrating event, English Law will take into account all of the facts and circumstances of the case (as set out clearly in Chitty on Contracts (Sweet & Maxwell, 33rd ed.,

2018), Vol 1, Chapter 23: Discharge by Frustration: Illustration of the Doctrine: General: §23-020), and only consider it frustration when an event:

- (a) Occurs after the contract has been formed; *and*
- (b) Is so fundamental as to be regarded by the law both as striking at the root of the contract and as entirely beyond what was contemplated by the parties when they entered the contract; *and*
- (c) Is not due to the fault of either party; *and*
- (d) Renders further performance impossible, illegal or makes it radically different from that contemplated by the parties at the time of the contract.

Importantly, if the performance has now become commercially unprofitable, but is still legally and physically possible, then there is no frustration. This is the key reason why parties will commonly agree Force Majeure clauses to define types of events that allow the Parties to cancel or suspend performance (without such event having to satisfy the onerous criteria, listed above over (a) to (d), for ‘frustration’).

In the subject situation, performance is not currently impossible, illegal or radically different. Therefore, the May 2021 Israel/Hamas conflict does not, at this moment, frustrate tanker charterparties.

FORCE MAJEURE / GENERAL EXCEPTIONS CLAUSES

We note there is no implied concept of Force Majeure under English Law (unlike the Doctrine of Frustration), so Owners can only rely on Force Majeure events to escape from performing the contract and/or to avoid exposure losses arising from such an incident if Owners have a Force Majeure clause in the charterparty, sometimes called an “Exceptions” or “General Exceptions” clause and of course subject to satisfying the specific terms of that provision.

Force Majeure / General Exceptions clauses may entitle either party to the contract to cancel or suspend performance upon the outbreak of war. This is subject to “war” or “warlike operations” being listed as one of the force majeure events entitling the parties to be excused from performance, in whole or in part, of the contract.

Asbatankvoy’s General Exceptions Clause 19 states:

“And neither the Vessel nor Master or Owner, nor the Charterer, shall, unless otherwise in this Charter expressly provided, be responsible for any loss of damage or delay or failure in performing hereunder, arising or resulting from:-

...act of war

... or riot or civil commotion”.

The definition of war, riot and civil commotion is as set out above. So Owners can show that Israel is currently involved in a war against Hamas in Gaza, however for Owners to be able to rely upon this clause, Owners would need to show that their failure to perform (e.g. discharge the cargo at the Port of Haifa) “resulted from” such an “act of war” or “riot or civil commotion”. However, as it currently stands, the May 2021 Israel/Hamas war has no impact on tankers calling at the Port of Haifa. Therefore, the situation, does not, at the current time, fall within the scope of the Asbatankvoy’s General Exceptions clause.

WAR CANCELLATION / OUTBREAK OF WAR CLAUSES

If not included in the pro-forma charterparty terms, then Parties would usually have a “War Cancellation” or “Outbreak of War” provision in the charterparty’s rider terms. This is to reflect back-to-back the automatic withdrawal of many types of marine insurance cover if such major war(s) occur.

We refer you to such a term at Clause 29 of BPTime3 (first published in 2001), which states:

29. OUTBREAK OF WAR - Either party may cancel this Charter on the outbreak of war or hostilities between any two or more of the following countries: the United States of America, the Russian Federation, the United Kingdom, France and the People's Republic of China.

And similar one in ShellTime4 (amended Dec 2003 edition) at Clause 33:

Outbreak of War 33. If war or hostilities break out between any two or more of the following countries: U.S.A., the countries or republics having been part of the former U.S.S.R (except that declaration of war or hostilities solely between any two or more of the countries or republics having been part of the former USSR shall be exempted), P.R.C., U.K., Netherlands, then both Owners and Charterers shall have the right to cancel this charter.

No such provision is included in the Asbatankvoy (first published in 1977).

Nevertheless, for Clients' reference, these clauses give either the Owners or Charterers 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 party 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*" pursuant to Abu Dhabi National Tanker Co v Product Star Shipping [1993] 1 Lloyd's Rep 397. As an 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 movements in freight rates rather than as a result of any genuine war risk.

We sincerely hope the above preliminary legal commentary can help Owners and their Insurers to evaluate the legal position should there be further escalation / developments of the conflict in Israel and the Occupied Territories.

If you have any queries arising out of this conflict or other similar incidents / 'war risk' situations, please do not hesitate to contact RR&CO
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