

## Japan – Shipping issues post Earthquake/Tsunami and Nuclear Incidents

The Club has and will no doubt continue to receive for the foreseeable future many enquiries from concerned members and our business partners regarding the effects which the prevailing situation in Japan will have on their trading activities. In dealing with an ever changing, dynamic situation we hereby set out some general guidelines and recommendations. It is, however, imperative that members seek specific advice which will invariably depend on the facts, the applicable contract and governing law.

The Club is of course available and ready to assist our members and business partners if and/or when specific questions or problems arise. In addition various websites, including the Club website, invariably provide necessary advice. We provide such website addresses at the end of this article.

### Unsafe Ports

One of the major issues arising for both owners and charterers is whether a particular port is safe, and the effect that the answer to this question will have on both parties' performance of the charterparty.

#### The test for safety

Both time and voyage charters typically impose a duty on the charterer to nominate only safe ports and/or berths through an express clause in the Charterparty.

The classic test is that a port (or berth) is safe if 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 unavoidable danger. There is also a requirement that good seamanship and navigation be used at all times. A nominated port could be unsafe where, for example, due to natural or physical causes there is danger to the vessel in reaching, entering, using and leaving the port. If there is a risk to the crew but not to the ship the port may still be unsafe. The warranty of safety includes the approach to the port.

The warranty on the part of the charterer is prospective, i.e. that the port must have been safe to approach, use and depart from at the time of nomination. There would be no breach of warranty by the charterer if the un-safety arises from causes which could not be anticipated at the time of nomination. However, if an order was given before the earthquake to go to a Japanese port which is now unsafe, time charterers are under a duty to now nominate an alternative, safe port.

#### Is a port at which there is a risk of radiation poisoning unsafe?

A port could also potentially be unsafe because of a risk of radiation poisoning to the crew. It may also be that the port would be unsafe because of the risk of radiation affecting the vessel itself.

It is important however, that any decision to refuse to visit a Japanese port on grounds of unsafety due to risk of contamination is made reasonably and objectively. An argument that Tokyo is currently unsafe because of a perceived risk of radiation would not be sustainable, for example. Clearly the posi-

tion is fast moving and it is important that up to date information is obtained from, for example, the IAEA website at <http://www.iaea.org>.

### **Are ports which are closed unsafe?**

There is also the question of whether ports currently closed are unsafe.

The fact that a ship may have to wait for a time before entering a port does not make it unsafe. However, a sustained period of delay may prompt a party to investigate more closely the causes of this delay. These causes could render the port unsafe. The longer the delay as a result of these causes, the more reason a party may have for considering the port to be unsafe.

### **Employment orders**

If Charterers nominate a port that is known to be unsafe, Owners are within their rights to refuse to go there and to ask Charterers to nominate a safe alternative.

There are no directly relevant authorities as regards an owner's entitlement to refuse a charterer's orders to proceed to a designated port. However, the test is an objective one. If an owner were to refuse to proceed to any Japanese port, and his concerns as to any radiation risk were ill-founded and objectively unjustified, the refusal would constitute a breach of that owner's obligations. Owners should seek further advice as appropriate.

It is not possible to say that any voyage order to call at any Japanese port is illegitimate and can be refused by Owners. Many ports outside the earthquake and tsunami zone are open and operational. Owners and the Master will need to analyse the particular situation, taking into account the port in question and the circumstances and prevailing facts at the time.

### **Deviation**

In considering the question whether a vessel is at liberty to deviate due to the risk of radiation, regard should of course be given as to the express terms of the charterparty and the contract of affreightment. However, the Master has the right to divert in order to avoid danger, whether navigational or otherwise, affecting his vessel or property or life on board the vessel. Whether such a decision to divert is justified will depend on the facts of the particular situation.

In a situation where cargo has to be delivered at an alternative port, the liberty clause in the relevant bill(s) of lading should be considered to see whether deviation to an alternative port is reasonable. Many liner bills of lading include wide liberty provisions.

For a vessel on voyage charter, discharging at a port other than the nominated discharge port may require either an agreed variation between the parties, reliance on a provision in the charter along the lines of "so near thereunto", or a finding of supervening impossibility. The latter is essentially equivalent to a finding of frustration (for which, see below).

### **Delay: who bears the responsibility?**

Where ports and waterways are closed or damaged, there will inevitably be a delay in the performance of either a time or voyage charter. Further, even if a port is operational, there may be delays where for example equipment at the port has been damaged, or the transport systems to and from the port have been affected.

In the case of a time charter, it is usually the charterer who suffers the consequence of the delay. Hire will generally continue to run either until the charter is frustrated or (subject to the charter terms) the vessel is ordered to another port. Whether a charterer can claim off-hire depends on both the circumstances and the wording of the off-hire clause. Where an off-hire clause incorporates simply the words "any other cause", a wholly extraneous reason for delay, such as port closure, is unlikely to qualify as an off-hire event. However, where this phrase is qualified by the word "whatever", the clause is significantly widened and it seems that any conceivable clause could potentially put the vessel off-hire.

There is also the question of whether there has been a breach of the provision that a berth be "always accessible" or "reachable on arrival". Clauses such as these do not affect the commencement of laytime, but an owner will have a claim for damages for detention arising out of the charterer's breach of warranty that the berth could be reached on arrival. (It should be noted that in the case of the "reachable on arrival" provision, this assumes that the vessel had arrived at the port.)

## Force Majeure

Some, but by no means all, contracts contain "force majeure" clauses which exclude one or both parties' liability in specified circumstances. There is no general doctrine of force majeure in English law, so it is the content of the clause itself which is paramount and a party seeking to rely on its terms must bring himself within the clause.

The wording of the force majeure clause in question must be wide enough to cover the particular event. Further, the party seeking to rely on the clause must be able to prove that the event in question was beyond his control and further that it prevented or hindered its performance of the contract, and/or caused a delay.

Certain events such as those presently occurring in Japan may well come within the ambit of most force majeure clauses, either as an "act of God" or as another cause beyond the parties' control. However, whether a party is able ultimately to rely on a force majeure clause will depend on a close analysis of the particular factual situation.

## Frustration of the Charterparty

A further issue to consider is whether a charterparty or a contract of affreightment is frustrated by the closure of various ports, and by delays arising from such closures.

All these ports will reopen at some point, and the question therefore is whether their temporary closure means that the contract is frustrated. A charterparty is frustrated, and therefore brought to an immediate end, 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 rest of their obligations.

When considering the issue of whether a charterparty can be frustrated by delay, there is no definitive rule as to how long that delay must be – it will depend on the circumstances of each individual case, with particular emphasis on how long the delay is expected to be as against the unexpired duration of the charterparty. Time charters for a trip and voyage charters are more likely to be frustrated therefore, than time charters.

The charterparty may also be frustrated where the vessel itself has been damaged in the earthquake or tsunami.

The charterparty may of course make provision for supervening events causing delay, in which case the legal consequences of the event must be determined by the provisions of the contract. However, the provisions of the charter must be carefully considered to see whether its terms are wide enough to cover the new situation. The fact that a charterparty makes specific provision for supervening events does not preclude the possibility of frustration where the provision does not apply to the situation in question, or where the degree of delay or disruption is greater than contemplated by the charter. Further, as stated above, it may be that the delay means the nominated port is unsafe and that there is thus a right to ask for alternative orders.

The English courts are generally reluctant to make a finding of frustration unless the circumstances are exceptional. Essentially, frustration occurs when the law recognises that, without either party being in default, a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render that performance "radically different" from that which was undertaken by the contract. Any such finding will be very dependent on the facts of each individual case.

## Bills of Lading

It is important to remember that the bill of lading evidences a separate contract: the contract of carriage, as opposed to the contract relating to the use or hire of the vessel. It will therefore have its own provisions, and any rights and obligations under the charterparty will not necessarily automatically transfer to the contract evidenced by the bill of lading.

Unless the relevant bill of lading incorporates the terms of the charter or contains suitable liberties, or the receiver otherwise consents, or the bill of lading contract has been frustrated, the discharge of cargo at a port other than that named in the bill of lading may be a breach of the owner's obligations to the bill of lading holder.

It is therefore essential to carefully check the terms of the contract evidenced by the bill(s) of lading independently of the charterparty terms.

## Useful links:

The following is a list of websites which may assist Members in carrying out factual investigations as to the situation in a particular port or area.

The Swedish Club:

<http://www.swedishclub.com/>

ISS P&I Japan, which has updates as to the status of the ports in Japan:

<http://www.iss-shipping.com/microsites/News.aspx?msid=194&menu=News>

Japanese Government Incident Website

<http://www.kantei.go.jp/foreign/topics/2011/earthquake2011tohoku.html>

Japan Meteorological Agency:

<http://www.jma.go.jp/en/tsunami/>

Japan Nuclear and Industrial Safety Agency:

<http://www.nisa.meti.go.jp/english/index.html>

World Health Organisation on nuclear concerns:

<http://www.who.int/hac/crises/jpn/faqs/en/index.html>

International Atomic Energy Agency:

<http://www.iaea.org/>

Japan Coast Guard Navigation Warnings:

<http://www1.kaiho.mlit.go.jp/TUHO/nwe.html>

Organisations such as AWT (<http://www.awtworldwide.com>) are continually monitoring the situation and are able to provide projections and model outputs tracking the release of radiation and dealing with associated issues.

*Disclaimer: This Member Alert is intended to provide only general guidance and information pertaining to the issues identified and commented upon herein. The content of this Alert is not intended to be, and should not be treated as being final and binding legal advice. If Members consider they are likely to or in fact have encountered problems or difficulties as discussed in this Alert, they are asked to contact the Club and obtain further legal advice relevant to their specific circumstances.*