The Swedish Club

FORWARD DEFENCE

War Risks Clauses in Charter Parties

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In an era of asymmetric warfare, evolving threats from state and unaffiliated bad actors as well as political uncertainty, war risks clauses provide a key protection for Owners and Disponent Owners with the aim of avoiding danger if necessary and compensating Owners for the additional risks if possible.

War risks clauses are contractual provisions which address specific risks in the setting of the charter party, and via the charter party can have a direct impact on other contractual arrangements, such as bills of lading. They displace the default position at English law, particularly the safe ports regime, which imposes a far higher threshold on a Master / shipowner to refuse to continue the contractual voyage.

The most common forms of war risks clauses in charter parties are the VOYWAR and CONWARTIME BIMCO forms. The latest version of these forms as of writing are VOYWAR 2025 and CONWARTIME 2025, though the changes to the last forms (amended in 2013) are minimal.

War Risks

As the war risks regime is contractual, Members should be on the lookout for any alteration to the contractual terms, as parties are free to agree (for instance) a different definition for war risks. Similarly, Members should be careful to check which version of the war risks clauses is incorporated into their charter contracts, and (in the case of Disponent Owners) ensure that war risks clauses in the head charter are incorporated back-to-back in any sub-charter.

War risks clauses are intended to give the Master / Owners (and by extension Disponent Owners) the right to refuse to continue with the contractual voyage, even if cargo has already been loaded. In some cases, the shipowner will have the right to terminate the charter.

War risks are generally excluded under Rule 11 Section 5 of the Club's Rules, so Members are strongly advised to consider their insurance position before committing to any voyage involving war risks.

War risks clauses are distinct from war clauses, which typically allow a party to cancel a charter party in case war breaks out (whether declared or not) between two or more listed nations.

What is a war risk?

There is no universal definition of a war risk. Parties are therefore free to define war risks as broadly or as narrowly as they please.

However, the definition of war risks under the common standard form contractual war risks clauses is deliberately drafted in extremely broad terms and includes several risks which a layman might consider to be several steps removed from "war" (whether conventional or otherwise).

In the most commonly used war risks forms, CONWARTIME 2013[1] and VOYWAR 2013[2], drafted by BIMCO for time and voyage charter parties, respectively, war risks are defined as "*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/seizure (hereinafter "Piracy"); acts of terrorists; 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 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."

This definition is broad enough to cover hostile acts by pirates, militia, terrorist groups and criminal organisations, not just officially recognised state or paramilitary forces. Both CONWARTIME and VOYWAR forms have been updated in 2025, but the definition remains the same, and we anticipate that it will take some years before the 2025 versions become the dominant form in use.

More controversially, the definition is arguably sufficiently broad to include non-violent actions by NGOs and protest organisations, whose acts amount to "malicious damage" and which may conceivably become dangerous to the vessel and/or its contents.

Under CONWARTIME, the risk may exist before or after the charter has been fixed. Under VOYWAR, the test is by reference to the loading of the contractual cargo.

> **Definitions of war risks should be checked, and the Club notes that several other common charter forms differ.**

For example, the war risks clause in SHELLTIME 4 refers to a far narrower definition as follows:

"any blockade, war, hostilities, warlike operations, civil war, civil commotions or revolutions"

[1] https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/war_risks_clause_for_time_charters_2013
[2] https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/war_risks_clause_for_voyage_chartering_2013

How is the War Risks Clause triggered?

The war risks clause can typically be triggered by the Master and/or the Owners.

In the BIMCO standard forms, the standard required is *"the reasonable judgement of the Master and/or the Owners"* that proceeding on the voyage may expose the vessel to war risks.

> **Owners' judgement must be exercised in good faith (and not as a device for financial gain) and be objectively reasonable.[3]**

The extent of the danger required is different under the older and newer forms.

a. Under the older BIMCO forms (such as CONWARTIME 1993), the threat of exposure to war risks must be a "real likelihood" or "a serious possibility" and not a "fanciful likelihood based on speculation".[4]

b. Under the newer BIMCO forms (such as CONWARTIME 2013 and 2025) all that is required is that the area *"may be dangerous or may become dangerous"*.

Effects of the War Risks Clauses

The key feature of the standard war risks clause is that it allows Owners to refuse to complete the contractual voyage if triggered.

The precise further consequences under the BIMCO War Risks Clauses differ depending on whether the charter in question is a voyage charter or a time charter, and whether cargo has been loaded.

Under VOYWAR:

a. If cargo has not yet been loaded, Owners may cancel the contract of carriage or refuse to perform such part of it as may expose the vessel, cargo, crew or other persons on board the vessel to war risks.

b. If cargo has been loaded, Owners do not have to continue with the contract of carriage. This means that they do not have to continue to load cargo for any voyage, or to sign bills of lading, waybills or other documents evidencing contracts of carriage for any port or place, or to proceed.

c. Owners may by notice request Charterers to nominate a safe port for the discharge of the cargo or any part thereof. Charterers then have 48 hours to nominate a safe port.

d. If they fail to do so, Owners may discharge the cargo at any safe port of their choice (including the port of loading) in complete fulfilment of the contract of carriage.

[3] *The Triton Lark* [2012] 1 LLR 151. Although this case related to the CONWARTIME 1993 form, the ratio regarding financial gain is considered to apply equally to the CONWARTIME 2013, 2025 and other war risks forms.
[4] Ibid

Under CONWARTIME:

a. The vessel shall not be obliged to proceed or required to continue to or through, any 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 the charter party or occurred thereafter.

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

c. Owners may by notice request Charterers to nominate a safe port for the discharge of the cargo or any part thereof. Charterers then have 48 hours to nominate a safe port.

d. If they fail to do so, Owners may discharge the cargo at any safe port of their choice (including the port of loading) in complete fulfilment of the contract of carriage.

Under both forms, Owners can choose to proceed through an area exposed to war risks against payment by Charterers of additional war risks premium and any additional insurances that Owners may reasonably require. However, Owners are not obliged to take this option, even if war risks insurance is available.

Crucially, both forms also contain:

A provision that actions taken under the War Risks Clause will not be a deviation; and

An indemnity from Charterers to Owners for claims arising out of the vessel proceeding in accordance with the War Risks Clause.

Differences with previous editions of the War Risks Clauses

Standard form clauses are regularly reviewed and renewed by the industry.

> **A mismatch in clauses in the charter chain can lead to exposure, particularly for a Disponent Owner / intermediate charterer.**

By way of example, CONWARTIME 1993 was significantly altered following the Court decisions in *The Triton Lark* and *The Paiwan Wisdom,* as explained in further detail by the BIMCO drafting committee's guidance notes.

The advantage of deliberately choosing to incorporate older versions of a standard clause is that these are more likely to have been considered by the courts and hence have a clear and established interpretation. This provides certainty.

BIMCO Guidance Notes

BIMCO issues guidance notes with its standard form clauses which are freely available on the BIMCO website and offer useful guidance on the intention behind the drafting of their standard clauses.

However, this guidance is of limited value when construing a contractual term as a matter of English law. War risks clauses are contractual and hence consensual in nature, and do not require the same historical unpacking for the purposes of interpretation as, say, a convention ratified by a state might.

It follows that the standard rules of contractual construction apply: where the parties have used unambiguous language, the Court must apply it, and where there are two possible constructions, the Court is entitled to prefer the construction with is more consistent with business common sense,[5] regardless of what the original drafters of the clause might have intended.

Contractual construction remains a unitary exercise, where each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated.[6] It bears highlighting that the latest editions of CONWARTIME included changes made as a direct result of the English courts interpreting the clause in a way which did not marry with the way the BIMCO drafting committees had intended the clause to be interpreted.

[5] Rainy Sky v Kookmin Bank [2011] UKSC 50
[6] Wood v Capita [2017] UKSC 24

Hire position

The standard position in a time charter is that hire is *prima facie* payable unless Charterers can bring themselves within an exception to hire.

A justified refusal to proceed under a war risks clause will typically not be an exception to hire, which will continue to be payable.

Similar to a claim for deviation, a claim by Charterers in respect of hire paid to Owners typically stands or falls with the declaration under the War Risks Clause. If Owners were not entitled to rely on the War Risks Clause, the vessel is likely to either be off-hire, or otherwise the hire can be claimed as damages, for instance for failure to comply with the employment clause.

Bill of Lading position

The default position is that Owners as carriers are obliged to carry the cargo to the discharge port with utmost despatch.[7]

Bills of lading on the common standard forms (such as CONGENBILL) will incorporate all terms of the charter party "germane to the contract of carriage". Unless otherwise specified, this will include the War Risks Clauses.

In practical terms, this may not prevent cargo interests from bringing claims in respect of losses caused by actions taken under the War Risks Clause (particularly in jurisdictions which do not recognise incorporation of contractual terms by reference where the parties have not seen these). Owners may therefore have to rely on any indemnity under the War Risks Clause for compliance with the terms of the War Risks Clause.

Passage planning and routing

The default position is that Owners are free to plan their own route for the vessel. The customary (or "usual") route should be used, and the presumption will ordinarily be that this is the most direct route, though this is open to challenge on the facts.[8]

There is a separate obligation to proceed with utmost despatch under the contract of carriage contained in or evidenced by the bills of lading.

> **Under a time charter, Owners are obliged to follow Charterers' orders as to employment, which includes the choice of route.[9] In general, a war risks clause will override this right, and will provide that any change of course will not amount to a deviation under the charter.**

However, this is subject to limitations, especially in circumstances where Owners have agreed to go via a particular route.

In the recent Supreme Court decision of *The Polar,*[10] the court found it material that the war risks involved were known to all parties at the time of contracting and that the owners had specifically agreed to go via the route in question. This meant that it was "not open" to the owners to rely on the war risks clause to refuse to proceed, in line with the decision in *The Paiwan Wisdom*[11] and *The Product Star*[12].

[7] *The Hill Harmony* [2001] 1 LLR 147
[8] Ibid
[9] Ibid
[10] *The Polar* [2024] UKSC 2
[11] *The Paiwan Wisdom* [2012] 2 LLR 416
[12] *The Product Star* [1993] 1 LLR 397

The war risks clause analysed in *The Polar* was part of the BPVOY4 form, with loosely equivalent wording to CONWARTIME 2004, and which therefore did not have the wording *"whether such risk existed at the time of entering into this Charter Party or occurred thereafter"* present in CONWARTIME 2013 and 2025.

That wording has not yet been tested by the courts, and there is a question as to what extent this changes the position. In particular, it is unclear whether the new wording added to CONWARTIME 2013 (and retained in CONWARTIME 2025) can cover a situation where Owners enter into a charter party with the intention of using the war risks clause as a device for financial gain (per *The Triton Lark*). It is believed that this is not the case.

Practical steps

As set out above, and as a starting point, the primary responsibility of the Master is to the safety of the vessel, her crew and her cargo (per *The Hill Harmony*[13]). In addition, Owners and the Master are entitled to take a reasonable amount of time to confirm orders and to confirm the position, without this being a breach of charter or an off-hire event.[14]

> **It follows that in considering whether to make a declaration under a war risks clause, Owners should take care to consider information from a number of different sources, and ideally should take advice from independent third parties, such as local correspondents, security consultants and similar.**

Finally, Owners and Charterers would be well-advised to consider their insurance position before entering into a charter party which requires the vessel to pass through any area in which there is a heightened risk of war risks.

What if there is no war risks clause?

In the absence of applicable wording under the charter contract, the parties will need to fall back on existing applicable doctrines, such as the implied safe ports warranty[15] and the doctrine of frustration.

There are limits to each of these options. For instance, a war may frustrate a voyage charter, but a time charter with a wider trading limit may be unaffected. In addition, ongoing and violent terrorist activity in the region may not be sufficient to render a port unsafe.[16]

Frustration will not automatically apply simply because the charter has become more difficult (and expensive) to perform.[17]

Owners may also rely on the implied indemnity under clause 8 of the NYPE form (and equivalents), for complying with Charterers' orders. Compliance with those orders must have been an "effective cause" of Owners' loss, and Owners will be unable to recover in respect of risks which they have agreed to bear (for instance in respect of trading areas or routes).[18]

Members are reminded that the concept of "force majeure" does not exist as a standalone doctrine as a matter of English law. Force majeure can only apply if a force majeure clause is expressly incorporated into the charter party. That said, the English courts (and arbitral Tribunals) have substantial experience of dealing with force majeure clauses, and there is a large body of authority dealing with their interpretation.

Finally, if the charter contains a Clause Paramount, Owners will be entitled under Article IV rule 4 of the Hague Rules (with or without the Visby Protocol) to make a "reasonable deviation" to save life or property at sea. A reasonable deviation has been held in this context to mean a deviation that a prudent owner would make, having regard to all the circumstances.[19]

[13] Ibid
[14] *The Houda* [1993] 1 LLR 333
[15] *The Eastern City* [1958] 2 LLR 127 still provides the classic quote that "a port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship".
[16] *The Saga Cob* [1992] 2 LLR 545
[17] *In The Eugenia* [1964] 2 QB 226, the Court of Appeal held that proceeding around the Cape of Good Hope would not frustrate a voyage from the Black Sea to Inda via Suez in circumstances where the Suez War blocked the canal.
[18] *The Island Archon* [1994] 2 LLR 227
[19] Foscolo v Stag [1931] 4 LLR 165