



Update on the situation in Ukraine

Below you will find an overview and a general guidance in respect of the ongoing situation in Ukraine and the effect it may have on shipping. Although we monitor the situation closely, please note that the information below is subject to change at any time as the situation is developing rapidly.

1. Which ports are closed?

All Ukrainian Black Sea ports are closed including Odessa, Chernomorsk, Pivdenny (Yuzhny), Nikolaev, Dneprobugsky. The situation at the Russian Black Sea ports is reported to be stable.

The Ukrainian ports in the Sea of Azov are closed, including Berdyanks and Mariupol. Reportedly, navigation in the Sea of Azov has been temporarily suspended. The Kerch Strait was open only outbound (southern transit). However, it was recently reported that any passage of the Kerch Strait is now prohibited.

Shipowners, charterers and operators are strongly advised to contact local agents or correspondents for the latest advice should they have a vessel trading to the geographical areas affected by the conflict. In case assureds have a concern about potential cover issues, please do not hesitate contact your underwriter for advice.

2. What contractual issues are to be expected?

A number of disputes may potentially arise under charter parties and contracts of carriage. These may include, for instance, disputes related to safety of ports, sanctions regime, deviation, detention, demurrage, off-hire disputes, force majeure events, frustration, cancellation of contracts and others.

We will briefly mention some general positions that would normally apply under standard contractual arrangements. Please keep in mind that each case may be different and you are encouraged to contact MS Amlin when in doubt.

- **Unsafe ports or berths**

Various charter parties contain a warranty of safety of the port or berth by the charterer. It follows that charterers are obliged to nominate a safe port or safe berth and if in breach of this obligation, they will be liable for the damage caused.

What constitutes a safe port is described in *The Eastern City* [1958] 2 Lloyd's Rep. 127:

"... 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..."

The safety of a port is very fact-specific and as the facts are changing rapidly, it is recommended that the situation is closely monitored.

- **Deviation**

Whether shipowners are allowed to deviate will depend on the terms of the charter party. Standard charter parties usually provide the vessel with the liberty to deviate for the purpose of saving life and/or property.

Furthermore, acting in accordance with a war risk clause may not be deemed a deviation but considered as due fulfilment of the contract. Some war risk clauses are more restrictive than others when it comes to exercising the rights allowed under the clause to refuse following the voyage orders or to deviate.

War clauses in charter parties may also entitle parties to cancel the contract if certain conditions are met. However, the terms of the war risk clause should not be interpreted in isolation as any such decision may have an impact on the contract of carriage and may attract liability for the carrier.

- **Force Majeure and Frustration**

Parties may look into their force majeure clause to see if the circumstances they are facing could qualify as a force majeure event. It should be reminded that the concept of force majeure does not exist in and of itself under English law. This means that there must be an express force majeure clause in the contract if a party wants to invoke force majeure in order to suspend performance or terminate the contract. A party who seeks to rely on a force majeure clause will usually bear the burden of showing that: it could not perform its obligations under the contract due to the relevant force majeure event; the inability to perform was beyond the party's control; there were no reasonable steps the party could have taken to avoid the event or the consequences. This is a high standard of proof, and it is usually not that easy to successfully rely on a force majeure clause. Just because a contract has become more expensive to perform would not necessarily constitute force majeure.

Furthermore, parties may look at the doctrine of frustration. Frustration occurs where there is an unforeseen event which makes the contract either impossible to perform, or the performance is radically different to what has been envisaged in the contract, provided there is no fault of either party. In general, frustration is very difficult to argue and establish, and it will require very serious and significant events to be triggered. Mere hardship, inconvenience or material loss will not frustrate a contract. Nor will mere delay in obtaining the cargo from the intended source. If frustration is successfully invoked, the contract will come to an end.

3. Sanctions

The effect on the charter will mostly depend on the exact scope of the sanctions imposed as well as on the sanctions clause that was agreed in the contract. For example, if the standard BIMCO Sanctions Clause for Time Charter Parties 2020 or the BIMCO Sanctions Clause for Voyage Charter Parties 2020 is applicable, Owners may be in breach if they or the vessel's interests are sanctioned. Charterers, on the other hand, may be in breach of the standard clause if they, sub-charterers, receivers or cargo interests are a sanctioned party. In light of the above, clients are advised to perform a thorough sanctions check in order to minimise the risk of being in breach of the charter party.

If sanctions are imposed in such a way that performance of the charter party can be considered illegal, the charter party may be treated as frustrated.

Currently, the sanctions imposed (new and old) can be found on the websites of the EU, OFAC, UK treasury via the following links:

- European Council:
[EU restrictive measures in response to the crisis in Ukraine - Consilium \(europa.eu\)](https://ec.europa.eu/eu-foreign-affairs/en/eu-restrictive-measures-in-response-to-the-crisis-in-ukraine)
- UK: [UK: UK sanctions relating to Russia - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/collections/uk-sanctions-relating-to-russia)
- US Department of the Treasury, OFAC:
[Ukraine-/Russia-related Sanctions | U.S. Department of the Treasury](https://www.treasury.gov/press-releases/Pages/2022/02/20220201a)

Would you have any questions or issues regarding the ongoing situation in Ukraine, please contact your contact person at MS Amlin.

This information is meant for guidance only and is not a detailed analysis. Please note that no warranties are made regarding the thoroughness or accuracy of the information contained in this circular. Nothing in this circular should be interpreted as providing definitive guidance on any question relating to policy interpretation, underwriting practice, or any other issues in insurance coverage.



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