

London Arbitration 8/26

Voyage charter - Gencon 1994 form - Loading ammonium nitrate in Sea of Azov - Russian authorities refusing permission to proceed into Kerch Strait - Charterers ordering the vessel to return to load port for discharge - Owners claiming damages for detention and additional expenses - War Risks ("Voywar 1993") clause - Whether charterers in breach by loading a dangerous cargo, nominating an unsafe port, failing to prepare cargo documentation required to enable the vessel to pass the Strait, failing to take action to obtain permission, and failing promptly to nominate an alternative safe port - Whether the authorities' action was arbitrary and unforeseeable and frustrated the charter.

The subject vessel was chartered by the claimant owners to the respondent charterers for the carriage of a cargo of ammonium nitrate in bags from an Azov Sea port to a Black Sea port. The charterparty was evidenced by a fixture recap which incorporated the terms of a clean Gencon 1994 Form charter. The fixture provided for any disputes to be referred to arbitration in London. Disputes arose and the parties appointed Full Members of the LMAA.

The reference was conducted on a documents-only basis under the LMAA Terms 2021. The two party-appointed arbitrators did not appoint a third.

The disputes concerned claims by the owners for damages arising from the fact that, having loaded, the vessel spent a lengthy period between January and March 2023 waiting to transit the Kerch Strait before ultimately returning to the loading port and discharging there. The charterers denied liability.

Charterparty terms

The charterparty included at clause 17 a war risks clause with the wording of the Voywar 1993 clause.

Factual background

The background to the dispute was the Russia/Ukraine war which had been going on for some time when the fixture was concluded. There had recently been an explosion on the Kerch Bridge which crossed the Kerch Strait. On 8 October 2022 a Decree of the President of the Russian Federation gave strengthened powers to the Russian Federal Security Service (the FSB) to restrict or prohibit the movement of citizens and vehicles crossing the Kerch Strait.

The vessel arrived at the Kerch/Kavkaz roads on 30 December 2022, passed the necessary inspections and sailed through the Strait into the Azov Sea, arriving at the loading port on 6 January 2023. Loading of the cargo of ammonium nitrate was completed on 9 January 2023 and the vessel sailed on 13 January 2026. It arrived at the north entrance to the Kerch Strait on 15 January 2026. The FSB did not permit the vessel to proceed into the Strait. It transpired after enquiries that the reason for this was the cargo. Ammonium nitrate is a fertiliser which is also potentially usable in explosives.

There were various exchanges between the parties relating to the detention. On 27 January 2023 the owners advised the charterers that they should have provided the authorities with a letter confirming the intended use of the cargo. On 7 February 2023 the owners notified the charterers that "it is war/war like zone, the owners hereby notify the chrs to act under governing cp/law and to revert their solution w/in 48 running hours latest". On 15 February 2023 the owners contacted the charterers and said that there was no other solution than to discharge the cargo where it was loaded. They invited the charterers to confirm that they were ready to do so, adding: "Owners already gave notice to the chrs in previous mails under full terms and conditions of governing cp containing main body cls 17".

On 23 February 2023 the owners' solicitors sent the charterers a letter holding them responsible for the delay, referring to clause 17 and requesting that they issue alternative discharge orders. The charterers responded on 25 February 2023 stating that they were working to resolve the situation. They nominated four possible alternative discharge ports but denied all allegations and claims made. On 28 February 2023 the owners' solicitors responded objecting that the charterers were not entitled to nominate four discharge ports, asking the charterers to nominate one instead.

On 13 March 2023 the Russian Ministry of Transport published an official information letter which made it clear that vessels loaded with certain cargoes, including ammonium nitrate, would not be allowed to pass the Kerch Strait.

On 14 March 2023 the owners again asked the charterers to provide alternative discharge orders. On 15 March 2023 the charterers ordered the vessel to return to the loading port for discharge. An addendum to the charter was made on 17 March 2023 to confirm the parties' agreement that the vessel sail back to the loading port. The cargo was discharged there between 23 and 27 March 2023.

Parties' submissions

The owners claimed damages for detention at the charter demurrage rate for 68 days between 15 January and 24 March 2023 and additional expenses caused by the detention on the grounds that the charterers were in breach as follows:

- (1) by loading a dangerous cargo which resulted in the vessel's detention;
- (2) by nominating a discharging port in breach of the warranty for "1 good safe port berth always afloat always available" ("GSPB AAAA");
- (3) by failing to prepare cargo documentation and to take any relevant action to enable the vessel to pass the Strait; and
- (4) by failing promptly to nominate an alternative safe port under clause 17 or otherwise.

The charterers denied breach. They maintained that there was no legal obstacle to completion of the voyage when the fixture was concluded. Performance became unfeasible because of the Russian authorities' act prohibiting the vessel from passing the Kerch Strait. This was arbitrary and unforeseeable, and frustrated the charter.

The owners alleged that the risk of delays was or should have been known to the charterers. Delays were foreseeable and did not amount to frustrating events. Any delay could not amount to frustration because it was induced by the charterers' breach.

Dangerous cargo

The parties discussed in their submissions the applicability of article IV, rule 6 of the Hague-Visby Rules (incorporated into the fixture) but there was plainly no question of physical danger. The argument centred around the question whether there was danger in the legal sense.

The owners argued that the vessel was prevented from passing through the Strait as a result of prohibitions and/or restrictions imposed by the Russian authorities regarding the carriage of the cargo. They contended that the legally dangerous nature of the cargo should be defined by reference to the laws of the Russian Federation and/or any other local law restriction or prohibition of any country that might have jurisdiction and which could

impose legal obstacles over the carriage of the cargo. Additionally, they said that the charterers were obliged to notify them and/or not to load the cargo to the extent that a prohibition and/or a ban and/or a restriction existed at the time of loading.

Held,

The owners' difficulty was that there was no evidence of any legal restriction existing before loading began. Despite indicating that they might do so, they did not bring forward any Russian law evidence. In contrast, the charterers did adduce expert evidence from a Russian lawyer to the effect that until 13 March 2023 there were in force no legal restrictions on sea transportation of cargoes such as this one through the Kerch Strait.

The owners had also asserted that other vessels carrying similar cargoes had been delayed or detained in similar circumstances in November 2022, ie before the fixture was concluded. Again, they adduced no evidence to this effect. The detention arose because of the FSB's unforeseeable and arbitrary exercise of its discretion. At the time the fixture was concluded and even when the cargo was loaded, no one could have known or anticipated that the FSB would act in the way that it did. Had the parties had any such knowledge they would, no doubt, not have concluded this fixture.

The owners' case that the cargo was in some way dangerous would be rejected.

Safe port

The owners said that the charterers were in breach of what they contended was an express warranty by the charterers to nominate a discharge port that was at all times "GSPB AAAA". The vessel could not safely get to the discharge port which was, self-evidently, not "always accessible". They alleged that by 26 January 2023 several vessels had been awaiting permission to pass the Strait for over 50 days, which showed that significant delays had occurred long before the fixture was concluded. However, again the owners did not adduce any evidence to support the contention.

The charterers pointed out that the evidence suggested that it was only from around the time that this vessel was detained, ie at the end of January 2023, that the FSB began temporarily and unpredictably to restrict passage through the Strait. At the time the fixture was concluded, it could not be said that there was any unsafety or inaccessibility, and any such qualifications that might have occurred subsequently could not have been foreseen. They referred to *Kodros Shipping Corporation v Empresa Cubana de Fletes (The Evia) (No 2)* [1982] 2 Lloyd's Rep 307, in which Lord Roskill said that the warranty of safety related:

"... to the characteristics of the port or place in question, and ... means that when the order is given that port or place is prospectively safe for the ship to get to, stay at, so far as necessary and in due course, leave. But if those characteristics are such as to make that port or place prospectively safe in this way, I cannot think that if in spite of them, some unexpected and abnormal event thereafter suddenly occurs which creates conditions of unsafety where conditions of safety had previously existed and as a result the ship is delayed, damaged or destroyed, that contractual promise extends to making the charterer liable for any resulting loss or damage ..."

Held,

The FSB's intervention arose after the charter was concluded and was wholly unexpected. It would amount to an abnormal occurrence, so the owners were unable to establish breach of the safe port warranty

Failure to prepare documentation and take action

The owners submitted that the charterers were in breach of an obligation to ensure that all cargo-related documents "including but not limited to import/export clearances, permissions and certificates of origin", were in order so as to avoid and/or minimise any delay. In addition, they failed to comply with any necessary cargo-related formalities to ensure the vessel's passage and prompt arrival at the port of discharge. They submitted that the intended use of the cargo (agricultural) should have been stated in the Certificate of Origin and/or the bills of lading, and that an application should have been made to the Secretary of Defence in Russia confirming that the intended use of the cargo was agricultural.

Held,

On the evidence, Russian law did not require documents to set out the intended use of cargo. As the charterers pointed out, if the situation had been otherwise, the vessel would not have been allowed to leave the loading port. Although the Certificate of Origin and bill of lading did not spell out expressly the intended use of the cargo, both described it as "Ammonium Nitrate Grade B" which the IMO Solid Bulk Cargoes Code defined as being for agricultural purposes (fertiliser). There was no evidence suggesting that the absence of any express indication as to the intended use of the cargo had any relevance to the FSB's refusal to allow the vessel to proceed.

There was no evidence that the charterers were required to write to the Russian government or that it would have made a difference. The charterers did write to the FSB Border Office for the Republic of Crimea on 3 February 2023, giving details as to their identity and the intended purpose of the cargo. The FSB did not alter its decision. It stated that the vessel was temporarily prohibited from passing through the Strait. There was no indication of any reasons or any suggestion that any document was missing or inadequate.

The owners complained that the charterers failed to take various steps and were obstructive. The evidence showed that both parties acted reasonably. They urged each other to do something but there was nothing useful that either could do.

The owners did not establish the alleged breach.

Nomination of alternative port

The owners submitted that the charterers were in breach of their obligations under clause 17 as they continuously delayed giving alternative orders and/or making relevant arrangements for the vessel's release from detention. To the contrary, the charterers insisted on instructing the master to resume the voyage. They should have nominated a safe port within 48 hours of being requested to do so. Alternatively, they should have ordered the vessel to another safe port immediately upon its detention when it was or should have been obvious that it would not be able to pass but would, instead, be delayed for a commercially unacceptable time. The owners suggested that the critical time was 20 January 2023.

The charterers' case was that the circumstances which prevented the vessel proceeding were connected with the ongoing war between Russia and Ukraine. They accepted that the vessel had been detained by reason of chaotic political measures of the Russian Federation. They relied on expert evidence which made clear that the Russian government had asserted power to "organise and coordinate measures to protect the Kerch Strait" and to prevent a possible threat to the security of that Strait. They made a positive case that these measures were unforeseeable and unavoidable, such that the charter was frustrated and carriage of the cargo to the discharge port was not possible from around 20 January 2023 (when official letters made clear that the FSB was prohibiting passage).

Held,

The FSB's measures and the consequential delay was not an ordinary incident of the voyage that the owners had bargained to undertake. The measures were an abnormal occurrence exercised arbitrarily by the Russian government in the context of the Russia/Ukraine war and transit of the Kerch Strait.

Performance of the contractual voyage was not possible from 15 February 2023 (and the FSB would not permit it from 15 January 2023). In circumstances where the cargo was already loaded and bills of lading issued, the parties would not have expected the charter to be treated as thereby frustrated (and indeed they did not do so at the time). The charterers were under an implied obligation to cooperate to do what was required to ensure that discharge took place promptly at an appropriate place, and this required them to give prompt instructions to enable such discharge to take place.

The charterers had duties under clause 17. This clause not only gave the owners rights where a war risk gave rise to physical danger but also covered legal dangers such as detention or confiscation. The Russian government's arbitrary actions justified the owners invoking clause 17, at the very least on grounds that such actions amounted to an act of war. It was the charterers' own position that the vessel was detained and prevented from proceeding because the intended voyage involved a key area of conflict, and the FSB's powers were being exercised on grounds that the cargo being carried was a security risk. The owners reasonably judged that the vessel, its crew or cargo were exposed to such a war risk within the meaning of clause 17. It was clear that the FSB would enforce the prohibition by way of force and the fact that it was initially described as a temporary measure did not take it outside the scope of clause 17.

Under clause 17(c), the owners were not obliged to remain waiting and could request the charterers to nominate a safe port of their choice (including the port of loading) in fulfilment of the contract of carriage. On 15 February 2023 the owners unequivocally asked the charterers to give alternative orders under clause 17. Their response on 25 February 2023 and their actions until 15 March 2023 did not amount to compliance with that request.

As a result of the charterers' failure to give an effective nomination of an alternative port, the vessel was unjustifiably detained. The owners were entitled to recover damages for detention.

Frustration

The charterers contended that the charter had been frustrated from 20 January 2023 by reason of the unforeseen actions of the FSB from that date and that they were not at fault by reason of these actions which harmed an entire fertiliser industry.

Held,

Performance by way of proceeding to the discharge port designated in the charter was no longer possible from late January 2023. That was the practical reality but clause 17 made express provision for situations where performance was precluded by war risks. The owners were entitled to invoke clause 17. Accordingly, the charter was not frustrated in late January 2023.

If that finding was wrong, then the owners would have still been entitled to make recovery of the main element of sums claimed (ie for use of the vessel during the period of unjustified detention) since they would have been entitled to remuneration for the vessel's detention during that period as a matter of quantum meruit. The default measure for such a claim would be the agreed demurrage rate.

Whether under clause 17, their duty to cooperate to enable discharge to take place or by reason of the law of frustration, it was unsurprising that the charterers should bear the risk of such delay.

Quantum

The charterers suggested that clause 17 only allowed recovery of expenses. They objected to the charter demurrage rate being used to quantify the owners' loss.

Held,

Clause 17 did not exclude an owner's right to damages for detention where charterers had wrongfully failed to give orders.

The charterers failed to provide an alternative basis for assessing the owners' losses caused by the detention of the vessel. The demurrage rate appropriately reflected the parties' informed agreement as to the owners' recoverable loss for the vessel being kept waiting. The charterers' suggestion that the claim should be rejected as one for loss of profit was wrong since it reflected loss of use.

However, the owners were not entitled to damages in addition for provisions, bunkers or crew wages since such costs were taken into account in the demurrage rate. The owners also failed to establish other recoverable losses such as costs allegedly arising because of a missed dry dock slot, and loss of profit over the period of detention.

Accordingly, recovery was limited to damages for detention at the demurrage rate of US\$4,400 between 15 February 2023 when the owners requested new voyage orders and 15 March 2023, the date when such orders were given, namely 28 days at US\$123,200.

Conclusion

The charterers must pay to the owners the sum of US\$123,200, together with interest at 7 per cent per annum compounded at three-monthly rests from 16 March 2023 until payment. The charterers were to bear and pay their own costs of the reference and the owners' reasonable costs to be assessed if not agreed. The charterers were to pay the cost of the award. They were also to pay interest at the rate of 7 per cent per annum, compounded at three-monthly rests, on the costs so awarded from the date of the award in respect of the owners' recoverable costs, and from the date of any payment by the owners in respect of the cost of the award, down to the date of reimbursement by the charterers to the owners in each case.