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IRAN UPDATE: IMPACT FOR LINER CLIENTS

BACKGROUND

Escalating tensions between the United States and Iran have led to attacks on Gulf energy and transport infrastructure. With Iran proclaiming that the Strait of Hormuz, the narrow maritime passage linking the Persian Gulf to the Gulf of Oman and the Indian Ocean, is “closed”, alternatively under Iran’s exclusive control, and Iranian-backed Houthi groups once again threatening vessels in the Red Sea, global trade faces severe and widespread disruption. Current reports indicate that a significant number of container ships are trapped west of the Straits of Hormuz, and several have been attacked.

As a result, liner companies are facing increasing challenges, including being unable to reach designated discharge ports or progress with an agreed rotation, and potential cargo claims. In this briefing note, we will take a look at some of the most common issues and ways to navigate them.

Deviation and liberty clauses

In general, carriers are under an implied or express duty to prosecute the voyage by the usual and customary route, and an intentional breach of that duty amounts to a deviation, which may, in the ordinary course of things, entitle cargo owners to damages. However, where the

discharge port is inaccessible the carrier may be relieved of the obligation to proceed to it. Liberty clauses, whether in bills of lading or slot agreements, allow the carrier to divert from the otherwise usual and customary route or mode of carriage in certain defined circumstances, which generally include “war”, “war-like operations”, “hostilities” and, potentially, the closure of ports or seaways. Liberty provisions are construed strictly under English law, as they excuse the party relying on them from adhering to their contractual obligations. In order to rely on the provisions, parties will need to show that the events affecting them fall within the terms of the specific clauses.

The ongoing de facto closure of the Strait of Hormuz by Iran, as well as the potential and well-documented threat to vessels passing through the Strait of Hormuz, are likely to fall within these defined events, albeit careful thought will need to be given where the situation is changing rapidly. Liberty clauses often permit affected parties to take an alternative route (if available), discharge the cargo at a different port, or return cargo to the port of loading, following which responsibility (and the associated costs) for the cargo generally falls to the customer.



Change of destination or consignee

Contracts may require affected parties to notify their counterparty of an intention to deviate, in which case it is important to follow the notice requirements closely. Even if there is no such requirement, it is often prudent to notify the counterparty setting out: (i) the contractual basis on which the affected party exercises their right to deviate; (ii) the risks in following the customary route; (iii) the nominated alternative port; and (iv) the contractual consequences of the deviation (for example, some contracts may provide that owners' obligations under the bill of lading are fulfilled when the goods are discharged at the alternative port).

The shipper may change the identity of the consignee on the bill of lading without the carrier's consent, provided that: (i) at the material time, the shipper still has the right to dispose of the goods; and (ii) no third-party rights are affected. The right to change the consignee will therefore cease upon delivery of the goods (either to the original place of delivery, or to an alternative, as permitted under the relevant Liberties clause), or if the shipper transfers the right of suit. Alternatively, the bill of lading may be cancelled and reissued if: (i) all the parties agree; and (ii) this will not adversely affect third parties who may have relied on representations in the bill of lading. However, fraudsters have been known to switch bills in order to deceive customs authorities or circumvent regulations. Parties should therefore be aware that switching bills can increase the risk of fraud, or third parties' suspicion of fraud. Risks are heightened where the first set of bills is still in circulation, and this should be avoided.

Force majeure

If the ongoing situation has rendered a particular contract more challenging to perform than expected, the affected party may be able to rely on a force majeure ("FM") clause if there is one in the contract. FM clauses are often found in bills of lading, vessel sharing agreements and slot agreements. Civil law systems (such as the UAE) often have a force majeure regime codified, however this article deals with the English law position only, where there is no such codification.

English law has no general concept of FM and therefore a party's ability to claim relief for a FM event depends entirely on the wording of the FM clause. This means that clauses need to be specific in the identification of FM events, because there are no implied principles for the parties to fall back on. FM events are usually defined as certain acts, events, or circumstances beyond the control of the parties. Events commonly include: war, civil commotion, acts of terrorism, restraint of governments or compliance with laws and regulations. If the effect on the party is purely economic, that is unlikely to fall within the clause. It is likely that the current hostilities involving Iran will fall within the remit of most FM clauses, but it will always be a question of construing the particular clause. Some FM clauses expressly exclude events which were foreseeable at the date of the contract. If the clause is drafted this way, parties may not be able to rely on the clause to excuse performance of contracts entered into after the hostilities began on 28 February.

It is always important to check what the effect of an FM declaration will be and the applicable timing/form. Some FM clauses will provide that a contract may be terminated in case of an FM event, some will suspend the performance of obligations, and some will provide a right of termination only after a period of suspension. Similarly, some clauses will provide that the affected party's right of termination will be without liability, but this is not always the case. Some FM clauses may provide for a different method of delivery/performance.

Be aware that a wrongful claim or incorrect service of an FM notice may amount to a breach of contract. In some circumstances, and depending on the wording of your contract, this may mean the other party can claim damages or terminate the contract.



COMMENT

In any of the above cases, if there is a subsequent dispute, any Court or Tribunal will examine the factual position and the parties' actions and decision-making processes very carefully. Accordingly, it is essential that any shipping company seeking to rely on a protective clause, or that has to respond to a notice, should keep a good record of what is decided and the reasons for doing so. Where additional costs are incurred, again, these should be well documented. It is possible that issues of mitigation may come into play, it is therefore worth having an eye on the reasonableness of any step taken in seeking to minimise any losses.

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