

Circular From GARD

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The Effect On Contractual Obligations of the Cessation of the Black Sea Grain Initiative

The Black Sea Grain Initiative that allowed grain products to be shipped from Ukrainian Black Sea ports has now ended. Our article focuses on what that means for owners' and charterers' contractual obligations.

There have been many developments since we last updated our [article](#) on the impact on contractual obligations of the war in Ukraine.

The key developments include:

- The Black Sea Grain Initiative (BSGI) as a result of which nearly 33 million tonnes of food products had been exported from Ukraine expired on 17 July 2023 with Russia announcing its intention not to renew.
- Russia and Ukraine have warned that they may strike commercial vessels heading to the other country's Black Sea ports.
- Access to the northern part of the Black Sea, west of Crimea, is prohibited by the Russian Navy.
- The Sea of Azov is closed to commercial vessels except those that operate with Russian approval.
- The security level has increased at Ukrainian and Romanian Danube ports because of strikes against port infrastructure on the Ukrainian side. The Ukrainian Danube ports were not part of the BSGI.
- Strikes have been made against port infrastructure in Odessa putting into question whether the port could be used even if the BSGI were revived.
- The threat to shipping from mines has increased in the Western part of the Black Sea area.
- Ukrainian forces struck the Olenegorsky Gornyyak from Russia's Northern Fleet (used to transport troops and equipment) in the port of Novorossiysk and also struck the Sig tanker, a sanctioned vessel used to transport fuel for Russian forces in the Black Sea near Crimea.

For a more comprehensive list of developments see our update [here](#).

In this article we look at some of the pressing issues that arise out of this new reality. It should be borne in mind that our comments are based on the factual circumstances as at the date of publication. In a war

situation, things change quickly and much depends on your contractual wording so please seek advice from your FD&D advisor where necessary.

Safety of ports in Ukraine and Russia

Are Ukrainian ports safe?

Ukrainian sea ports in the Northwestern area of the Black Sea are no longer 'safe' ports as the term is understood contractually. The security guarantees given to shipping by both sides under the BSGI are no longer in effect which means that the Ukrainian Black Sea ports are effectively blockaded and out of use for commercial vessels. The reality is that although the BSGI expired on 17 July, no new ships had been approved since 27 June. The last sea export of Ukrainian grain under the BSGI left Odessa early on 16 July, ahead of the deadline.

The ports on the Ukrainian side of the Danube are open, but port infrastructure has been targeted several times by Russian attacks (particularly the grain silos). Russia has also made it clear that any commercial vessel in the Black Sea calling at Ukraine is at risk.

Are the Danube ports safe?

The answer to this is not clear. It is always difficult to characterize a port as unsafe when there is a perceived threat but not actual damage to ships, particularly where shipments from ports like Izmail have been continuing. In addition, most loading is done by lightering barge so the risk of damage from a strike on land is probably reduced. Nonetheless, traffic to and from the Danube ports is much reduced and war risks pricing has been erratic and high.

Are Russian Black Sea ports safe?

In a tit for tat announcement, Ukraine said it would be targeting shipping bound for Russian Black Sea ports. On 4 and 5 August there were Ukrainian strikes on two vessels: the Russian navy vessel Olenegorsky Gorniyak in the port of Novorossiysk and the tanker Sig carrying fuel for Russian troops in the Black Sea near Crimea. However, there has been no attack on commercial shipping so far. It is unlikely that the Ukrainian forces would attack non-Russian commercial ships but there may be a danger of their being caught in crossfire. All Russian waters fall within a Joint War Committee Listed Area (War Risk Area) and certainly there is a risk to commercial shipping of damage by drones (whether deliberate or not). There is also still an ongoing risk to shipping from mines. Despite these risks, given that there is still substantial trade out of Russia and no commercial vessel has been damaged, the Russian Black Sea ports are still likely to be considered as 'safe'.

Legal issues arising out of the cessation of the BSGI

Given that the options for carriage of goods to the Ukrainian ports are now few and all the vessels authorised to use the BSGI have left the Ukrainian BSGI ports, the relevant legal questions are limited but we have outlined the position on a few issues below that may be helpful.

Vessels waiting in the Bosphorus that did not obtain approval under the BSGI

Prior to the termination of the BSGI the delays in obtaining the approvals had made this a less attractive option for vessels. According to the UN report on 15 July there were 29 vessels in Turkish waters awaiting approval under the BSGI. The contractual position in relation to delays to those vessels and the failure to obtain approval will very much depend on the wording in the contract. In most cases it is likely that the burden of delays in obtaining approval is on the charterers.

Now that the BSGI has come to an end, there seems to be no prospect of commercial trade to the ports covered by it, unless the deal is resurrected. Resurrection of the deal or agreement to a new deal looks unlikely at the moment. In the circumstances, it is likely that any voyage charter parties to those ports are now frustrated or will be imminently, unless they include an 'or so near there to as she may safely get provision'. In those cases, it is always better to seek a negotiated end to the charter or agreement to an alternative fixture since the losses fall where they lie once a contract is frustrated. For those vessels under time charter the owners will be able to seek new orders on the basis that the ports to which they were originally ordered are now unsafe.

Vessels with orders to call at Danube ports in Ukraine

Voyage Charters

Given that the Danube ports in Ukraine were not covered by the BSGI its termination does not affect those orders. It is possible that owners could refuse orders to Danube ports if they have a safe port warranty but the actual risk would have to be assessed in each case. In the absence of an express safe port warranty in the voyage, it is difficult to see any grounds on which the orders could be refused by the owners unless there is a favourable war risk clause such as VOYWAR 2013 which owners may be able to use to cancel the charter, providing the charter was not entered into after the recently reported attacks.

From the charterers' point of view, they may no longer be willing to carry out the charter because the war risk premium renders it uncommercial. In those circumstances if the charterers terminate, they are likely to be liable for breach of charter. The fact that the charter has become uncommercial for the charterers is not a basis for termination unless there is a specific agreement to that effect nor is it a basis for a frustration argument. In circumstances where the risk is high for owners and the contract makes no commercial sense for the charterers there is an incentive for the parties to renegotiate the terms of the charterparty.

Time charters

As mentioned above, it is not clear whether the Danube ports would be considered to be unsafe. However, given the heightened level of danger at least onshore at these ports it would be understandable if owners were now more reluctant to follow orders to load there. They may be able to rely on specific war risk wording to refuse orders such as CONWARTIME 2013 or similar bespoke wording, however the fact that trading out of these ports is continuing (although much reduced) will offer a counter argument to charterers.

Even if the owners do not have favourable war risk wording to rely on it may be in both parties' interests to negotiate an agreement for alternative orders to be given since the war risk premium has substantially increased.

Vessels with orders to call at Russian Black Sea Ports

Voyage Charters

The position in relation to calls to Russian Black Sea ports has not been affected by the termination of the BSGI. It may be possible for an owner to refuse a particular voyage instruction on the basis of a favourably worded sanctions clause, but it is unlikely that there would be any other contractual grounds given that commercial shipping has not been affected by the Ukrainian strikes. The war risk market is keeping an extremely close eye on the situation which the underwriters see as volatile, and quotes are now generally only valid for 24 hours rather than the previous 48.

Time charters

At the moment on balance Russian ports are likely still to be safe but this will have to be kept under careful review by owners. This means that there are unlikely to be grounds at the moment on which owners can refuse orders to Russian ports. We have not received reports of harassment of Ukrainian nationals for some months but that may be because they are not on vessels going to Russian ports. The perceived threat to US/European vessels also seems to have subsided from the high point at the beginning of the war since there has been a great deal of normal trade in and out of Russia.

The ending of the BSGI has not affected the contractual risks in relation to trade to Russian ports. It has effectively ended trade to Ukrainian northern Black Sea ports and raises contractual issues around safety and war risks in relation to Ukrainian Danube ports. For the small number of vessels still awaiting BSGI approval when the agreement expired the split of liabilities between the owners and charterers will depend on the contractual provisions. If there are no relevant contractual provisions those contracts may be frustrated, if not now, imminently (particularly in the case of vessels fixed to load at Odessa). In such circumstances the best solution is to renegotiate terms.

Recent attacks on two Russian vessels in the Black Sea have led to the market for war risks being considered to be volatile and quotes being valid for 24 rather than 48 hours. However, on balance as things stand at the moment, Russian Black Sea ports would likely still be considered to be 'safe' within the meaning of the charter party.

Source of Information: The Gard P&I Club