

**What if war involving North Korea actually happens?
Cancellation clauses in charterparties, MOAs and shipbuilding contracts**

By Zoe Jackson

US Secretary of State Rex Tillerson believes that the threat of war with North Korea is still growing, despite recent comparative calm, diplomatic talks and their likely participation in the Seoul Winter Olympics. Though the two Koreas intend to march there under one flag, North Korea plans a major military parade the day before the 9 February opening ceremony. Its governing regime has not changed, and the Korean peninsula is more tense than at any time since the 1950s.

As well as enormous loss of life and huge damage, large-scale conflict in the region could soon involve other major powers besides the US, and might spark military activity in other world theatres. Plainly this would disrupt and in many cases prevent international trade, with the consequences for global shipping particularly severe.

Many types of maritime contracts contain clauses which allow either or both parties to cancel in the event of “war”. This article considers the cancellation provisions of charterparties, ship sale and purchase agreements and shipbuilding contracts, with particular reference to the possibility of war in the Korean peninsula.

What is “war”?

Surprisingly there is hardly any guidance in English case law on the meaning of “war” in relation to maritime contracts outside the insurance arena. A court or tribunal is required to take a “common sense approach” to this.

A “war” seems to require the “*state or condition of Governments contending by force*” (see *Bantham*). However, limited involvement in hostilities (supplying 14 aircraft to support an operation to suppress Serbian air defences in Kosovo) was held by a majority of arbitrators in *The Northern Pioneer* not to give rise to a war involving Germany, which provided the planes and was the relevant flag state.

North Korea has recently sent test missiles into the Sea of Japan, but common sense would say this was not “war”. However, an exchange of missiles between North and South Korea, or between North Korea and America is likely to constitute “war”, even if no ground troops or naval forces are involved.

War Clauses in Charterparties

Many standard forms have clauses permitting either party to cancel in the event of “war” between major powers or involving the vessel’s flag state. Clause 34 of the ShellLNGTime 1 Form states that:

“If war or hostilities break out between any two or more of the following countries: United States of America, the countries or republics having been part of the former USSR.... People’s Republic of China, United Kingdom, Netherlands and the country that the vessel is registered in, then both Owners and Charterers shall have the right to cancel this charter provided that such war or hostilities materially and adversely affect the trading of the vessel for a period of at least ____ days”.

Where a charterparty provides for a vessel to trade within a specific range, it may also be agreed that war involving countries within that range entitles either party to cancel. So a fixture with South Korea in its load or discharge range might allow cancellation in the event of war between the US, South Korea and North Korea - and even if, say, China did not become involved.

Most charterparty war cancelling clauses are clear and not likely to give rise to legal problems. There might in some cases be issues as to whether “war” or “hostilities” have started, but as noted above this is not likely to offer difficulty in the case of a missile exchange involving North Korea. It might however still be necessary to consider whether the relevant war or hostilities have “*materially and adversely affect[ed] the trading of the vessel*” for the required period.

Note too that such a clause must be exercised promptly, or it may be waived (see *The Northern Pioneer*). Absent specific (and unusual) wording, neither side gets compensation for losses when such a clause is invoked.

War Clauses in MOAs

None of the standard form ship sale contracts has an express war cancellation clause. It is possible that a sale contract requiring delivery of a ship in South Korea (or elsewhere in North Asia) could become legally *frustrated* due to the outbreak of war, but that would depend on the precise circumstances. Part of English common law, contractual frustration is often difficult to establish.

Buyers entering into MOAs might consider a clause permitting cancellation if war breaks out in the region. Demand for tonnage might fall dramatically, and a buyer may wish to avoid his commitment in the event of war between signing the MOA and taking delivery, which is often weeks or months later.

War Clauses in Shipbuilding Contracts

South Korea is a major shipbuilding nation and plainly war there would have a huge effect on world shipbuilding. However, there are no specific war cancellation clauses in the standard form shipbuilding contracts. Instead “war” is treated as a defined “force majeure” event, which extends the contractual delivery date, giving the shipbuilder more time to complete the vessel. However, such contracts also usually provide a “long stop” date (which includes any force majeure delays) by which the vessel must be delivered or the buyer can cancel and recover his pre-paid instalments. Thus the risks of serious consequences of war will usually lie with the seller.

Buyers might nowadays also consider seeking express rights of “war cancellation” for all shipbuilding contracts involving South Korea, Japan and China. They might otherwise have to wait until the contractual cancelling date, which may mean long delay before recovery of their money and might in these events give rise to solvency concerns.

What protective action can be taken?

For shipping interests, the consequences of war involving the Korean peninsula would be very significant, and the region remains unstable and dangerously unpredictable. All should keep a close eye on developments and the wider geopolitics, and continually review their exposures under the above types of contract, seeking advice as appropriate in relation to all matters likely to involve performance in or around this part of Asia.

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