

Circular From WOE**Date: 19 January 2024**

Threats To Vessels In The Red Sea – Important Factors

For Members To Consider

This circular provides guidance on various issues arising out of the recent attacks in the Red Sea and addresses the possible practical, insurance and legal factors for Members to consider.

1) Background

One of the major threats to maritime security in recent years in the shipping industry has been piracy. This incident threat has decreased over the past a few years. However, during December, there has been an increase in attacks, carried out mainly by members of Yemen's Houthi rebels against vessels sailing through the Red Sea. These attacks have largely consisted of missile and drone strikes targeting commercial vessels primarily, which the Houthi rebels believe to be destined for and/or have departed from Israeli ports or are vessels owned, managed and/or operated by Israeli entities.

These events have caused wide-ranging damage, to both individual vessels and the global trade industry as a whole, with oil major BP recently suspending all shipping operations via the Red Sea, joining Maersk, MSC and other major trade business in their avoidance of Red Sea shipping routes. It is estimated that approximately 12% of global trade and 40% of Asia-Europe trade passes through the Red Sea.

As at today's date, reports of approximately 55 ships belonging to major shipping lines have diverted to cross the Cape of Good Hope on Africa's southern tip. Such a diversion adds around 3,000 nautical miles and days (if not, weeks) to the sailing times of vessels booked to transit the Suez Canal with significant operational, logistical, and cost implications.

Incidents such as these attacks, which quickly develop and change in 'real-time', may understandably cause concern for Members, both in respect of safety issues for their crew, vessel and cargo and regarding additional liabilities under charterparties, bills of lading or any other related documents.

In this circular, we set out some practical considerations and legal analysis under many of the standard terms governing the contractual relationship between owners and charterers in accordance with English law. We offer a range of suggestions as to how Members may proactively mitigate potential loss and damage

through working collaboratively with a range of stakeholders across the trade industry, bearing in mind that the legal position and contractual mechanisms available to Members may vary and should be reviewed on a case-by-case basis to account for the specific circumstances of each situation. Accordingly, Members should assess carefully their relevant contracts and seek additional advice from the Club, where needed.

2) Practical Issues

Where an attack is an anticipated risk, Members should take preventative measures to mitigate this risk. In respect of Somali piracy, particularly for vessels transiting the Gulf of Aden, a common standard reaction was devised. It is typical, for example, that a war risk policy requires compliance with “Recommended Best Practice”.

The current basis for preparedness in this respect is set by BMP5. In accordance with BMP 5, ships that are planning a passage through the Southern Red Sea and Gulf of Aden should conduct a thorough ship and voyage specific threat and risk assessment considering any additional advice from their flag State. These assessments should include a specific update with input from official sources such as UKMTO for the period of operation, the latest update from relevant shipping associations, ownership details, and trading history of the ship in the last 3 years. The industry recommendation to use the Maritime Security Transit Corridor (MSTC) remains unchanged in light of the recent attacks. The MSTC is the amalgamation of the International Recommended Transit Corridor (IRTC), the Bab el-Mandeb Traffic Separation Scheme and the Traffic Separation Scheme West of Hanish Islands, and a two-way route directly connecting the IRTC and the Bab el-Mandeb Traffic separation Scheme.

The United States Department of the Treasury announced on 18 December 2023 further sanctions targeting an Iranian-backed network, who are alleged to be providing funding for Yemen’s Houthi rebel group through Iranian commodity sales. The United States is also in discussions with allies to create a naval task force to chaperone merchant ships through the Red Sea. In response to these latest developments, the Houthis have warned countries that may take any action to assist or cooperate with the United States navy could lead to further escalation and possible attacks targeting some of their vessels/assets.

Members should be proactive in their attempts to avoid issues arising from the fast-moving situation in the Red Sea. As at the date of this publication, a number of shipping lines have issued advisories instructing their vessels to “reach safe areas and pause their journey in safe waters with immediate effect until further notice”.

At first instance, it will generally be reasonable for owners to request that routes through the Red Sea be avoided, on a commercial basis, due to safety concerns. Owners should, however, ensure that all contemporaneous documents (including any correspondence or other evidence relied upon in the decision-making process) are retained to preserve a clear record of events should a dispute later arise.

3) Legal implications

a) Where the vessel is under charter, can an owner take an alternative route to avoid transiting the Suez Canal?

i) Where BIMCO's CONWARTIME or VOYWAR clause is incorporated into the charter party:

As in most cases, the charterparty will be the first reference point in establishing owners' respective rights and obligations following receipt of any employment orders from charterers. Specific provisions are often included in relation to the outbreak of war or warlike situations.

BIMCO's CONWARTIME and VOYWAR clauses should, in theory, address any conflict which arises between the charterer's entitlement to give directions as to the employment of the vessel and the responsibility of owners to avoid exposing the ship, cargo and crew to war risks (including the risk of piracy) in the performance of the charter.

In this context, War Risks include any:

"...act of war, civil war, hostilities; warlike operations; ... acts of piracy and/or violent robbery and/or capture/seizure ... blockades (whether imposed against all vessels or imposed selectively against vessels or certain flags or ownership...) by any person, body, terrorist or political group, or the Government of any state..."

The CONWARTIME 2013 clause states that, unless the prior written consent of the owner is obtained, the charterer shall not order the vessel to transit a place, area or zone where it appears in the reasonable judgement of the master and/or owners, that the vessel, her cargo, crew or other persons on board the vessel, may be, or are likely to be, exposed to War Risks. Should the vessel enter any such place which only becomes dangerous (or is likely to become dangerous) after her entry to it, she shall be at liberty to leave it.

Similarly, the VOYWAR2013 clause provides that, owners shall not be required to continue to load cargo for any voyage or to proceed or continue on any voyage, or on any part thereof, or to proceed through any canal or waterway, or to proceed or to remain at any port or place whatsoever, where it appears, either after the loading or the cargo commences or at any stage of the voyage thereafter, that, in the reasonable judgement of the master and/or owners, the vessel, cargo, crew or other persons on board may be exposed to War Risks.

Furthermore, War Risks Clause for Voyage Chartering 2013 (VOYWAR2013) provides that if at any stage of the voyage after the loading of the cargo commences, it appears that in the reasonable judgement of the master and/or owners, the vessel, cargo, crew or other persons on board the vessel may be exposed to War Risks on any part of the route, including any canal or waterway, which is normally and customarily used in a voyage of the nature contracted for, and there is another longer route to the discharging port, the owners shall give notice to the charterers that this route will be taken. In this event, owners shall be entitled, if the total extra distance exceeds 100 miles, to additional freight which shall be the same percentage of the freight contracted for as the percentage which the extra distance represents to the distance of the normal and customary route.

The interpretation of CONWARTIME and VOYWAR provisions for the purposes of assessing the validity

of employment orders and the risk / implications for owners in rejecting them, where the circumstances so require, has been considered at length in English law authorities.

Whether the ship “may be” exposed to War Risks is a question which must be determined on a case-by-case basis taking into consideration all of the relevant facts. The English law authorities make clear that the phrase “*may be, or are likely to be*” suggest a single degree of possibility or probability and one can understand the expression “*may be*” as meaning “*likely to be*”. This threshold will be satisfied if there is a real likelihood that the vessel will be exposed to an attack which is based on evidence, rather than mere speculation [*Pacific Basin IHX Limited v Bulkhandling Handymax AS (2012)*].

It is important to note that the “*real likelihood*” test does not require the master / owner to form a reasonable judgement as to whether the vessel may be or is likely to be attacked. What it requires is for the master / owner to form a reasonable judgement that the vessel may be or is likely to be *exposed to* such attack. For further information regarding port safety, please see our [FAQs](#) on the Ukraine conflict.

ii) Where BIMCO’s CONWARTIME or VOYWAR clause is not incorporated into the charter party:

The parties’ respective obligations and liabilities will be established in accordance with any applicable express or implied terms.

Subject to overriding factors of safety and the express terms of the relevant charterparty, owners have an overriding obligation in relation to safety of the vessel whereby they can refuse charterers’ orders or deviate from the routing of the vessel.

In the *Hill Harmony (Whistler International Ltd vs Kawasaki Kisen Kaisha Ltd [1999] EWCA Civ J0520-9)* case, the (now) Supreme Court held that the obligation to prosecute voyages with ‘utmost despatch’ would ordinarily require the master to take the route which is shortest and therefore quickest. However, subject to safety considerations and the specific terms of the charter, time charterers may not only order a vessel to sail from A to B, but may also direct the route to be followed between the two. In the absence of navigational reasons for not taking the shortest and quickest route, the master had been contractually obliged to take it. The negligent navigation exception could not apply to protect the owners in respect of a choice not to perform these contractual obligations; and further could not cover the choice of route because this did not concern any matter of ‘seamanship’. Whether the negligent navigation exception could apply does not depend on where and when the relevant acts or omissions occurred. It is possible for a master to make a decision which could be covered by the exception before the vessel set sail, for example whether or not tug assistance would be required for unberthing manoeuvres [*Whistler International Ltd vs Kawasaki Kisen Kaisha Ltd [1999] EWCA Civ J0520-9 (Hill Harmony)*].

As established in *The Houda (Kuwait Petroleum Corporation v I&D Oil Carriers Ltd [1994] WLUK 266)*, the master/owners also have a reasonable time to consider charterers’ orders and to seek further information, clarify an ambiguous order or to verify its authenticity (even in circumstances where there is no immediate physical threat to the safety of the ship or cargo).

b) Additional War Risks Premium:

In response to the attacks and the heightened risk this poses for vessels passing through the Red Sea, and in particular closer to Bab el Mandeb straight, the Joint War Committee has widened the areas in the Red Sea that are categorized as "high risk".

In turn, this will have a 'trickle-down' impact on war risk insurance premiums for vessels intending to sail through such areas. Specifically, additional war risk premiums have risen to *circa.* 0.5%-0.7% of the value of a vessel, up from approximately 0.07% in early December 2023.

Where the vessel proceeds via the Red Sea and the BIMCO clauses outlined above have been incorporated into the charter party, charterers will be liable to reimburse owners for the cost of *“any additional insurances that the Owners reasonably require in connection with War Risks.”*

c) Termination of charterparty:

A charterparty may provide an express right of charterers to terminate for delay and/or failure to deliver a nominated vessel into the charter within the prescribed time.

Charterers must, however, proceed cautiously, particularly if the charterparty does not provide an express right for anticipatory repudiatory breach. Members exercise of this 'right', in circumstances where the charterparty does not provide for it (and nor does English law), could result in charterers' premature termination of the charterparty constituting a repudiatory breach itself, which in turn would give owners recourse for termination, plus potentially extensive damages.

Members should also be aware that sourcing a replacement vessel, if required, may be financially burdensome; as a consequence of vessels electing to deviate voyages, freight and hire rates have increased substantially and the market estimates that there will be a *circa.* 20% decrease in global vessel availability, owing to longer voyages under existing charterparties.

Should charterers elect to terminate the charterparty for non-delivery of the vessel, charterers must ensure to take steps to mitigate any subsequent loss as soon as possible.

We would also recommend before terminating a charterparty that all Members consult with the Managers and/or seek legal advice.

d) Off-hire clause:

Charterers may also attempt to place a chartered vessel off-hire, until the picture surrounding the Red Sea becomes clearer. However, standard-form off-hire clauses are unlikely to 'bite' in instances where the grounds for placing the vessel off-hire do not relate to issues with the vessel itself.

e) Potential liability for cargo claims:

The carrier contracts to transport cargo from the place of delivery or loading to the place of discharge or delivery and is obliged to proceed with due dispatch on the usual route without any unreasonable deviation or delay. If this route poses a high risk which necessitates re-routing, a “deviation” can arise where the vessel geographically departs from the usual route to arrive at the intended destination.

The Hague Visby Rules say that:

“Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this Convention or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom”.

Different jurisdictions have different interpretations, and this leads to uncertainty. The consequences of an unreasonable deviation may be loss of rights and limitations under Hague Visby Rules and, potentially, the loss of P&I cover for any amounts over and above those that would have been payable if those rights and limitations had been maintained.

In our view, a deviation which is not solely for the operational or commercial benefit of the carrier but is, rather, necessary to prosecute the voyage safely and effectively, is unlikely to be held to be a breach of the contract of carriage. However, this would need to be assessed on a case-by-case basis with reference to the specific circumstances of each deviation.

As such it is likely that Members will be held covered without any additional premium where carriers have had to deviate (for example, around the Cape of Good Hope) to arrive at their intended destination. However, as the circumstances of each deviation and contract of carriage are different we recommend that Members consult with their usual contacts at the Club prior to any deviation in the normal manner.

f) Use of armed guards:

Owners or charterers may consider using armed guards on board vessels to mitigate such risks. If armed guards are to be employed, we recommend the Managers at the Club be contacted to ensure there are no cover issues arising from the terms of engagement.

g) Alternative port nomination:

If it has been agreed that cargo is to be delivered to an alternative port, Members as carriers should be mindful of the problems which may arise where an issued bill of lading names a specific port for discharge.

Absent specific wording in the bill of lading which incorporates the terms of the charterparty (or otherwise permits discharge at a port other than that which is expressly stated on the face of the bill), then delivery to an alternative port may potentially constitute a breach of the bill of lading contract.

In cases where the BIMCO CONWAR 2013 clause has been incorporated into the subject charterparty, owners are entitled to an indemnity from charterers for any claims which made are made under any bills of lading, waybills or other documents evidencing contracts of carriage, in circumstances where the vessel

must deviate or otherwise refuse to proceed to a port which may expose the vessel or her crew to War Risks.

h) The decision not to sail:

Notwithstanding an order to the contrary, owners can elect not to sail through the Red Sea. However, as has been noted above, this may attract claims from a variety of stakeholders. In particular, refusal to sail without consent from charterers and/or holders of the applicable bill of lading might give rise to deviation claims under the bill of lading and further provisions under the applicable charterparty. Equally, claims may arise under bills of lading from cargo interest holders, particularly in respect of perishable goods, which may incur damage due to the additional 10-14 days required to deviate a voyage via the Cape of Good Hope.

The extent of the disruption caused by the events in the Red Sea, including the costs, time and challenges, remains unclear. As is often the case, co-operative discussion amongst the stakeholders may mitigate this risk.

4) Final considerations

Where Members have decided to take an alternative route and when considering any of the above protections, Members should take into account the following:

- **Notice:** When invoking a particular clause, Members should check carefully whether a notice is required under the charterparty and when it must be served by. Some clauses contain stringent conditions that need to be complied with for the relevant clause to be effective.
- **Mitigation:** owners and charterers must work together cooperatively in order to find solutions, where possible, that can mitigate any losses or delays caused by the event.
- **Gather evidence:** It is important for parties to collect all contemporaneous documents and all communications related to the event in order to demonstrate the mitigation steps taken and extent of losses suffered should the matter result in a dispute later down the line.
- **Advise your usual contact in the Club's underwriting department when considering not to transit via the Red Sea and/or take a different route to destination.**

Source of Information: The West of England P&I Club