

## ▶ ROBERT SHEARER: THE RED SEA ATTACKS – THE LEGAL IMPLICATIONS



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### INTRODUCTION

Since November 2023 there has been a dramatic increase in attacks on shipping in the Red Sea from the Yemen based Houthi Militia. While initially the attacks appeared to be limited to vessels that had either called in or had some form of link to Israel, in recent days and weeks the criteria for the Houthi attacks appear to have become increasingly unclear. By mid-December, some 50% of vessels attacked had no clear link to Israel. This, combined with military intervention from Western powers, means a large proportion of international shipping might reasonably be considered at risk (especially those with a U.S. or UK link). That said, the Red Sea remains a busy shipping route, and most vessels are not attacked by the Houthi

(notwithstanding they may be at some form of risk). As discussed in this article though, each voyage must be individually considered on its own merits.

In recent weeks we have seen enquires from our Membership regarding deviation, cancellation, additional costs and the situation more generally.

This article considers some of the legal implications of the increased Houthi threat in the Red Sea, however, for practical advice we recommend seeking [industry guidance](#), contacting the Club's Loss Prevention department and/or referring to their [advice](#) on this matter.

This article should not be considered as providing legal advice and should not be relied upon when making a decision in relation to the situation in the Red Sea; specific legal advice should always be taken.

### WHAT ARE THE LEGAL ISSUES?

#### 1. Can owners deviate, rather than transiting the Red Sea?

- The position will vary depending on what is contained within the relevant charterparty and if there is an express clause that deals with the situation. There may be either a standard clause (such as the BIMCO clauses, discussed below) or alternatively a bespoke clause which sets out the rights and obligations in such a scenario.
- Where there is no specific clause in a voyage charter, owners are required to take the "usual" route and to prosecute voyages with the utmost dispatch – *Hill Harmony*<sup>1</sup>. This may obligate owners to transit through the Red Sea and the Suez Canal, subject to the Master's overall responsibility for the safety of the vessel, crew and cargo. The position is very fact dependant and therefore any decision would need careful legal consideration.
- The owner may have a right, either expressly or implied in the voyage charter, to deviate if they or the Master reasonably believe the ship or cargo will be exposed to some imminent peril, and the deviation is reasonable. Express rights are often limited, such as "*for the purpose of saving life and/or property*"; this would not apply to this situation.
- Where the Hague or Hague Visby Rules are incorporated into the charterparty, this will allow for deviation where "*reasonable*". In theory, this may apply to the Red Sea situation.
- In time charters, the Master has a general obligation to follow lawful voyage orders, but does have a right to refuse or delay compliance in certain circumstances. The Master is entitled to lawfully refuse

<sup>1</sup> WHISTLER INTERNATIONAL LTD. v. KAWASAKI KISEN KAISHA LTD. (THE "HILL HARMONY")  
[2001] 1 Lloyd's Rep. 147

otherwise valid orders, where the vessel would be exposed to risks not contemplated at the time of the charterparty. Where an order is lawfully refused, the charterer must then give alternative orders. Delayed compliance with an order is allowed for as long as reasonably necessary to assess the risk to the vessel, cargo and crew. This is an important right, given how quickly the situation is evolving.

- However, owners should be aware of the latest Supreme Court decision, of “The Polar”<sup>2</sup> which was published on the 17th of January 2024 and outlines that in charterparties containing an agreement to proceed via Suez and necessarily the Gulf of Aden/ Red Sea, the shipowner cannot exercise general liberties to deviate and proceed around the Cape of Good Hope in order to avoid war risks unless there has been a qualitative change in circumstances after the charterparty was signed.

## 2. The BIMCO War Risk Clauses

- Where BIMCO’s CONWARTIME or VOYWAR 2013 clause is incorporated, the position with regards to owners’ options should be relatively uncontroversial.
- The CONWARTIME enables owners to take certain actions, including but not limited to:
  1. Refusing to call certain ports
  2. Refusing to load certain cargoes
  3. Rerouting (i.e. not transit the Suez Canal)
  4. Reclaiming additional insurance costs from the charterer

where “*in the reasonable judgement of the Master and/or owners*” the vessel, crew and/or cargo may be exposed to War Risks.

- The VOYWAR allows owners, if prior to the commencement of loading and under the reasonable judgement of the Master or owner, to give notice cancelling the contract or refusing the performance of the contract of carriage if it will bring the vessel into a war risk area.
- Where the cargo is already loaded, the owners may reroute, and may charge additional freight if the total extra distance exceeds 100 miles.
- The definition of War Risks in the clauses is very wide, so would likely include the situation in the Red Sea. However, this is only relevant if the vessel, crew or cargo “*may*” be exposed to a risk of exposure to war risks (it is not enough that war risks simply exist in the area). Further, under English law, such a decision must be both made in good faith and also be “*objectively reasonable*” – *Triton Lark*<sup>3</sup>. Caselaw reinforces this, requiring owners to make “*all necessary enquiries*” before relying upon the clause.

## 3. Will the vessel be off-hire?

- This will depend upon the wording of any specific off-hire clause contained within the charterparty.
- However, normally off-hire clauses require a loss of time due to some defect or failing on the part of the ship or its crew, not due to an external event such as a war risk situation.
- Generally speaking, the current situation with the Houthis would not constitute an off-hire event, but each clause should be assessed individually to confirm this.

## 4. Can the charterparty be terminated?

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<sup>2</sup> Herculito Maritime Ltd and others v Gunvor International BV and others (“THE POLAR”) [2024] UKSC 2’.

<sup>3</sup> PACIFIC BASIN IHX LTD v BULKHANDLING HANDYMAX AS (THE “TRITON LARK”) [2012] 1 Lloyd’s Rep. 151

- One issue that will likely arise in some circumstances is whether the charterparty may be terminated by a party or by the operation of the doctrine of frustration. This will depend wholly upon the terms of the charterparty.
- There may be an express right to terminate a charterparty in the event of delays, which might arise out of the situation in the Red Sea. However, this would need to be carefully considered before such a right is exercised.
- VOYWAR does allow for the termination of the charterparty in certain circumstances, as already discussed.
- Frustration terminates the contract where an event occurs after the conclusion of the contract which is not provided for and radically changes the terms of the contract. More onerous performance does not frustrate the contract. Frustration may apply where, for instance, the cargo on the vessel is perishable and would not survive the deviation. Again, this is very fact dependant and depends on the exact terms of the charterparty and the specifics of the voyage.

## 5. Who pays for additional premiums?

- This will, again, be governed by any express provisions of the charterparty.
- If CONWARTIME or VOYWAR have been incorporated then any additional insurance premiums, including War Risks premium will be for the charterers' account.

Members should note that the factual and legal situation is incredibly fast changing, and this does impact the overall legal landscape. If affected, Members are advised to contact the Club's [LCC Team](#) and [Loss Prevention department](#) at an early stage to receive guidance on the current situation.