Red Sea war risks and insurance implications

Can a Master deviate from the Red Sea out of security concern for his crew or vessel? And if so, who pays for the extra costs? In this article, we give guidance on some of the most frequently asked insurance questions related to the ongoing conflict in the Red Sea.

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It is fair to say that the industry has had to examine the issue of war risks over the last few years more than anyone had anticipated. Perhaps the most significant legal development in this area has been the recent decision in *The Polar*. Although relating to piracy risks, the case is also directly relevant to other risks covered in common war risks clauses.

In this article, we discuss some of the questions which arise in relation to issues of safe passage under charterparties (both with and without the VOYWAR and CONWARTIME 2013) and the impact of *The Polar* on allocation of risk.

Factual background

In early October 2023, conflict broke out between Israel and Hamas in Gaza. Towards the end of November, the Houthis started to attack commercial vessels, initially indicating that they intended to attack ships with "Israeli links". It was unclear what this meant and a number of ships with no Israeli connections were still attacked. In the first part of January, following the US and UK backed bombing of the Houthis, ships with connections to these countries also became prime targets alongside Israeli linked vessels and there is the risk of collateral damage for other ships.

As a result of these developments, Gard has received many enquiries arising from owners, charterers or crew who do not want to proceed through the Suez Canal and transit the Red Sea due to the war-like activities in the area. There may still be a strong commercial incentive to transit the Red Sea due to the additional time and costs associated with rerouting around the Cape of Good Hope (COGH), estimated to be about 10 days, depending upon the vessel's speed. This will no doubt be balanced against the higher war risk premiums payable at the moment for transiting the Red Sea.

Can the Master deviate to avoid the Red Sea due to concerns about the risk to ship and crew?

The Master is responsible for the safety of the vessel and may decide to deviate from the Red Sea route. This will be at his reasonable discretion but the question of who pays for the costs arising out of such deviation will generally depend on the terms of the Charterparty, particularly:

1. the terms of any routing agreement;

2. the war risk clause, if any.

The factual matrix at the time the decision is taken to reroute the vessel and whether there has been any alteration or heightened risk from the date of the charterparty will also be highly relevant.

Another argument the Master may have, depending on how vessel traffic develops, is that the route around the COGH has become 'a usual route' and therefore one that the Master can take as an alternative to the shorter geographical route. Alternately, he may be able to refuse to proceed through the Red Sea because of danger to the safety of the vessel, *The Hill Harmony* [2001] 1 A.C. 638, in which case the route around the COGH is the only other option. In either case, the onus will be on the Owner to show that the COGH route was 'a usual route' or had to be taken for safety reasons.

Who pays for the deviation?

Fortunately for many parties who are facing the challenges presented by the Israeli/Gaza conflict, the industry has for many years had standard war risks clauses published by BIMCO

expressly regulating the issue. Whilst presently under revision by BIMCO, the current clauses are CONWARTIME 2013 for time charters and VOYWAR 2013 for voyage charters.

It is worth noting that both clauses include wording protecting the shipowners' position if the vessel, cargo, crew or other persons on board "*may be exposed*" to war risks. This wording was introduced to avoid the *Triton Lark no. 1* LLR [2012] 151 finding that "*may be or are likely to be exposed*", used in earlier 2004 versions of the war risk clauses, meant a real likelihood of exposure. The 2013 explanatory notes state that the test for determining whether to proceed has been amended to avoid uncertainty and, although the level of danger is likely to be high, the amended wording should remove the need for complex analysis of risk. Unfortunately, there is no agreement as to how the amendment affects the level or assessment of risk, but it is likely to be a lower threshold.

CONWARTIME 2013

Clause (b) of CONWARTIME 2013 enables the Master to refuse to transit or call at ports in the Red Sea / Gulf of Aden if, in his reasonable judgment or that of the owners, it appears that the Vessel, her cargo, crew or other persons on board the Vessel, "*may be*" exposed to War Risks. Importantly, the Master retains this right even if the war situation existed at the date of the charterparty; there is no requirement for a material change in the risk to the ship.

Although not addressed explicitly by the clause, if the Master is entitled to refuse to transit the Red Sea, it is probably implicit that charterers would have to issue fresh orders and the orders would most probably be to proceed around the COGH, being the only viable alternative route.

VOYWAR 2013

Similarly, under a voyage charter that incorporates VOYWAR 2013, if the vessel has commenced loading or is already on her laden voyage, the Master will be entitled to refuse to transit or call at ports in the Red Sea or Gulf of Aden if the vessel, cargo, crew or other persons on board '*may be exposed*' to war risks. The Master must give notice to the charterers that an alternative route will be taken, but charterers are not required to consent. Sub-clause (d) deals expressly with the financial consequences of taking an alternative route with a pro-rated uplift to the freight where the additional distance exceeds 100 nm.

Unlike CONWARTIME 2013, VOYWAR does not contain wording which entitles the shipowners or Master to exercise their rights under this clause even if the circumstances existed at the time of the charterparty. In the absence of such wording, *Herculito Maritime Ltd v. Gunvor International BV* (*The Polar*) [2024] UKSC 2 has recently confirmed there must be a material increase in the level or nature of risk since the date of the charterparty to trigger this right.

What if the parties have expressly agreed to transit the Red Sea?

Some fixture recaps provide for a specific route to be taken, e.g., via the Suez Canal. Such charter terms may also become incorporated into bills of lading. In those circumstances, the starting point is that the owners have agreed to accept the risk of proceeding along the particular route and therefore are contractually bound to do so. As such, if the Master and crew were unwilling to proceed via the Red Sea, that would constitute a breach of contract in which case the shipowners would have to absorb the time and costs. This was recently considered in The Polar where the Supreme Court followed The Paiwan Wisdom [2012] 2 LR 416 case.

However, as mentioned above, if the risks have changed since the date of the contract, the shipowners may be regarded as not having accepted the risk and the charterers may have to

absorb the costs of navigating around the COGH. The chance of shipowners having accepted the risk is probably greater for a trip time charter where there is less likely to be a quantitative change in the circumstances than for a long-term time charter where circumstances may materially change over time.

What if there is no war risk clause?

If there is no war risk clause the owners may try to rely on clauses governing the right to deviate to save life or property or any reasonable deviation. The standard 1993 NYPE form charterparty permits a ship to "*deviate for the purpose of saving life or property at sea*", but any deviation contrary to charterers' orders is an off-hire event under Clause 17. However, as mentioned above the Master may be able to argue that he followed another usual route so there was no deviation or that he was entitled to ignore the employment orders of the charterers in relation to route because of a threat to the safety of the vessel (see reference to the Hill Harmony above.) If the owners succeeded in either of these arguments, the vessel would remain on hire. Under a voyage charter, the cost of the deviation would have to be absorbed by shipowners.

What are the relevant factors for assessing safety?

Each ship must assess the situation on an individual basis, based on objective evidence and taking into account its own characteristics including commercial interests, Flag State, ownership, or association with states that are under particular threat (at the moment Israel, UK, and US), type of ship, and the security measures that can be taken. The risk profile for one ship may be very different from the risk profile of another ship and reliance cannot be placed on what other ships are doing. To give one example, other vessels that are rerouting may have the benefit of wide liberty clauses in their charterparties meaning that those owners have very little risk of picking up the costs of the rerouting and in fact it might be commercially beneficial for them.

As regards security steps that can be taken by individual ships, there have been some recommendations, e.g., from the US Navy on travelling at night and switching off AIS. However, the position is very different from the piracy threat being considered in *The Polar* since armed guards offer little protection against missile or drone attacks. The situation continues to develop, so an ad hoc assessment will have to be taken as and when a decision needs to be made. Evidence should be kept in case of later scrutiny.

What other vessels are doing will however become very important if the owners wish to rely on the argument that the COGH route is the 'usual route.' Up to date information on numbers and types of vessels taking the COGH route as compared to the Suez Canal route can be obtained from a number of risk consultants.

Can I rely on a safe port warranty?

There is no evidence to suggest that the Israeli ports themselves are unsafe. Safe port warranties can cover the approach to a port but are unlikely to be relevant where there is an alternative route available. Similarly, provisions in the war risk clauses entitling shipowners to discharge if a port is unsafe are unlikely to be relevant where the concerns arise in relation to the sea passage.

What if the charterparty has a force majeure clause?

Force majeure ("FM") is a purely contractual remedy as far as English law is concerned and careful compliance is required. However, in practice, it is likely to be of limited assistance unless a ship is in ballast because of the practical difficulties of deciding how to deal with the cargo and the separate exposure for non-delivery under any bills of lading.

When can it be argued that a charterparty has been frustrated?

Frustration is a concept which is rarely applied under English law because it requires the contract to become radically different to what has been agreed. An increase in the cost of performance, such as taking a longer route, will not frustrate a contract. If the cargo were perishable and time-sensitive, an extended voyage around the COGH might frustrate the charterparty, as well as related bills of lading. However, most cargoes shipped in bulk, even if perishable, are not so time-sensitive and so in practice this seems unlikely to arise.

What happens if the vessel proceeds through the Red Sea and the ship is damaged by a missile?

In those circumstances the owners could likely make a claim under their war risk insurance. The question for the charterers is whether the owners could then bring a subrogated claim against them. Until recently, it was thought that charterers were protected from such claims arising from war risks because they paid any additional war risk premium, the so-called "insurance code" solution to allocation of risk. In *The Polar*, the Supreme Court clarified that the insurance code will rarely be available and funding insurance premiums alone does not entitle the paying party to benefit from the insurance. As such, charterers cannot rely on payment of additional war risk premium to protect them from any exposure to war risks which might arise.

There is more protection from subrogated claims provided to charterers when named as a co-assured on the owner's war policy but even this is not conclusive in finding an "insurance code." A clause expressly excluding rights of recovery or subrogation for loss or damage covered by the insurance would likely protect the charterers but from the owners point of view such a clause would have to be agreed by their insurers since it is a material term. Charterers would therefore be wise to consider the insurance position and whether they require their own war risks cover before transiting the Red Sea.

Gard provides fixed premium charterers P&I liability cover including cover for damage to hull that does not exclude war risks. Following a notice of cancellation from our non-poolable reinsurers, Gard gave type: asset-hyperlink id: 6NUexUOxC1nSt4OIavJGm3which took effect on 20 February 2024, noon GMT, andcancelled war risk cover in the Red Sea conditional area. There is, however, type: asset-hyperlink id: 7Am0mvvdOEzz0by6xnIK8Zfor war risks available. For information about the buy-back cover please contact your underwriter.