

Nautical, Commercial and Legal Issue arising due to Houthi's attack in Red Sea Dr., Capt., Barrister Vivek Jain

The author in his book much before the attacks had started "*The Role of the Indian Ocean for Global Peace – Interdisciplinary Issues*" has raised the possibility of disruption due to various aspects in the Indian Ocean, including Red, Persian Gulf, Gulf of Aden, and Red Sea. As a coincidence, just two months after the successful release of the book, the Houthi rebels from Yemen escalated the attack on commercial vessels transiting the Red Sea in response to the situation, arising due to organisation Hamas' terrorists attacks on Israeli civilians and then the counter response of Israel for such attacks in Gaza. As a result, the UK and US forces launched air strikes on the Houthi rebels from 12 January 2024, which was later joined by the UK forces to ensure Freedom of Navigation in Red Sea for the benefit of the maritime community.

Accordingly, many shipping companies have chosen to avoid Red Sea altogether and that has resulted these companies either curtailing maritime voyages (UNCTAD estimates that voyages decreased considerably through Red Sea), or adopt the substitute shipping route avoiding the Red Sea and proceed via longer voyage across Cape of Good Hope. Such substitute journeys could take an additional 13-26 days approximately depending on where the journey will commence on the globe.

In light of the above facts, the author as a subject matter expert in Nautical Science, maritime lawyer and with expertise in International Law has dissected then nautical and maritime law and International law legal issues for readers. A few of the issues are as follows:

A) Nautical Risks

- I. If the substitute voyage is not well planned, then the ship board staff still needs to ensure that they plan for the likelihood of the vessel experiencing heavy weather on the substitute voyage. This will require planning for ensuring the cargo worthiness of the vessel such as suitable stowage, including lashings and care for deck cargo (if any).
- II. A proper passage planning is required for transiting through Cape, including encountering heavy local traffic around Cape, extreme currents, and conditions of fog.
- III. The vessels might have been loaded for different **Load Line Zone** and suddenly deciding to transit Cape of Good Hope may expose the vessel to the Seasonal Winter Zone, unless properly planned. Passage planning should consider this aspect as well so as not to enter the zone that could result in vessel contravening Load Line Convention. Longer voyage may also require the vessel to plan bunkers en route and if possible repairs (if any required).
- IV. Such substitute voyage also would require engine-room planning arising due to experiencing heavy weather, including for engines and lashing inside engine rooms. Maintenance planning should be tweaked if there is a voyage around Cape instead of transiting through Red Sea. There have been cases of black out due to excessive rolling and pitching and affecting fuel in the fuel tanks. Therefore, proper planning is required by the engineering department in consultation with the Master of the vessel as to the route and likelihood of vessel experiencing heavy weather on the route.

For the nautical and the maritime skills needed, the readers can refer to another of the book of the author – “*Maritime Skills on Vessels and Shore*,” which was recently released by Director General of Shipping in India, Admiral (Retd.) (Philippines) and Principal of one of the largest Academies in the worlds, invited for briefing on the book by Deputy CEO of Maritime Port Authority and Director of Singapore Maritime Foundation, nominated for two Awards by Mission to Seafarers (London), Book Review by European Union associated European Transport Lawyers and world recognized Safety4 Sea organization (Greece). The book has been marketed by *Sagar Sandesh*, a premier maritime newsletter originating from maritime nation of India.

(Attach the photo of the book)

In addition, the stakeholders should adopt industry developed *Best Management Practice 5*. According to this BMP5, stakeholders who are planning a passage through the Southern Red Sea and Gulf of Aden should – a) conduct a thorough ship and voyage specific threat, and b) risk assessment by taking into account additional advice from their flag state, updates from organisations such as UKMTOP. The industry further recommends using the *Maritime Security Transit Corridor* (“MSTC”) as was recommended for piracy earlier.

B) Commercial Risks

- I. Due to a likelihood of experiencing heavy weather on the substitute voyage, it is likely there would be enhanced charterparty disputes between the Owners of the vessel and time charterers. For example, speed and performance disputes.
- II. There would be a need for additional bunkering on the vessel and that would result in potential disputes between the ship owners and the charters pertaining to various aspects of bunkering.
- III. Enhanced voyage may need a crew change or for medical needs en route and there could be disputes as to deviation to enable crew change but such disputes can be planned to minimize or avoid deviation.

It is important to highlight above; the above is applicable if there was to be a requirement to suddenly change the route plan and that would require additional planning. However, in a normal course of voyages, such disputes are common and stakeholders plan thoroughly to avoid it.

Owners should, however, ensure the following – Collate all the documents and logs from the start of voyage and retain these contemporaneous documents (including any correspondence or another evidence relied upon in the decision-making process) to ensure clear record of events as a legal risk management strategy.

C) Legal Issues

- I. **Contractual route and deviating via Cape of Good Hope** – According to the English Law case of *Hill Harmony*[1999] EWCA Civ.J0520-9 the highest Court in England held that the obligation to prosecute voyages with ‘utmost despatch’ would ordinarily require the master to take the route which is the shortest route. It is likely such shortest route would also be the quickest route. The time charterers may also

instruct the master to follow a particular route to a port subject to safety and navigation concerns of master. and therefore, quickest. Following the case of *The Houda* [1994] 2 Lloyd's Rep. 541, the owners are provided customarily reasonable time to consider charterers' orders as to the instructions of route for the voyage. They can seek further information, or seek clarifications with no restrictions except the Owners would remain liable for safety of the vessel in an ordinary seamanship manner so as to speak.

In case of cargo damage, if the Owners is not able to prove that they followed their contractual obligation as to the contractual route, and then they may not be able to take advantage of "negligent navigation" exception available to them to prevent the liability of cargo damage during the voyage. It is my view, if properly advised by the maritime lawyers, it is possible for a master to make a decision which could be covered by the exception before the vessel set sail, and further discussion is beyond the scope of the article.

Can a vessel decide on its own to deviate via Cape of Good Hope? Well, it depends on one or more of the following:

1. *Express terms* –

- The issue will be primarily decided by express terms such as *VOYWAR2013* and *CONWARTIME 2013* and is discussed later in the article in detail.

If the above War Clauses are not incorporated, then express terms such as following should be analysed:

- ✓ If Hague Visby Rules are applicable to Carriage of Goods at Sea, then pursuant to *Article IV, rule 4* of it permits the contractual carrier pursuant to the bill of lading to make a deviation from the agreed route to *save life or property at sea or any reasonable deviation*.
- ✓ The charterparty may also incorporate an express term popularly called as a *liberty clause*. Such clauses give liberty to the ship owner the right to deviate from the contractual voyage on various listed grounds.

2. *Implied Term*, if there were to be no express terms –

- Even where there is no express provision in the bills of lading or charterparty, the shipowner/master has an implied right to deviate if it is necessary to avoid a danger to the vessel and cargo, for example, perishable or a particular kind of cargo.

Applying the law to the ongoing facts of Red Sea, the situation is very dynamic and developing fast. Risk assessment by stakeholders must be carried out within the framework of law to take appropriate decisions to avoid legal disputes from developing. The author has already dealt with such disputes on a few matters. One question that comes to my mind as a maritime lawyer, if say the risk in Red Sea cross a particular threshold, could, then the route via Cape of Good Hope would be

considered as a "usual route." The author will answer this question at another time depending on how situation evolves in the Red Sea in the near future.

II. Force Majeure/Exception Clauses/Frustration –

The author is dealing with a few cases where the ship owners have raised the issue of Force Majeure as a result of attacks in Red Sea. Can the ship owners rely on Force Majeure, well it depends?

1. It will depend on the law and jurisdiction applicable to interpret the clause;
2. Strict wording of Force Majeure Clause;
3. Scope of Force Majeure Clause.

In the English Law, instead there are many *exception clauses* that may assist the ship owners in the circumstances and should be investigated in the charterparty.

The other concept that can come handy but very difficult to argue in cases is *Frustration*. Just because a new route is longer or more expensive will not activate this concept to assist the ship owners or any other stakeholder. From the case law of *The Eugenia* [1964] 2 Q.B. 226, the English Court of Appeal held that proceeding via the Cape would not frustrate a voyage from Genoa/Black Sea to India via the Suez/Red Sea in circumstances where the Suez Canal was impassable due to the Suez War. The deviation would have increased the voyage from about 108 days to 138 days. The cargo was not perishable or required urgently, and deviation made no difference to the charterers other than in incurring the higher expenses.

The only possibility, where such concept can be activated is where the further execution of obligations of any party is made illegal and/or impossible and/or performance demanded is significantly different from the parties involved as envisaged in the contract.

III. Indemnity in charterparties –

The vessel in following charterers' orders, then it is likely the vessel may be exposed to certain factors such as in the Red Sea that may result in losses or damages being incurred by owners. Commercially, therefore, it makes sense that the charterers should bear any consequences suffered by ship owners which arise out of their employment of the vessel. In general express indemnities will be found in voyage charter parties and implied indemnities in time charter parties that would provide protection to the ship owners (see the dicta of Cresswell J in *Triad Shipping Co v Stellar Chartering & Brokerage Inc (The "Island Archon")* [1993] 2 Lloyd's Rep 388.

However, in law the charterparty as a whole has to be construed completely and will depend whether the losses through Red Sea were foreseeable by the parties when transiting. With the evolving situation, this is a tricky area of law, and maritime lawyer should be consulted. On the other hand, the unforeseen liability; losses or costs incurred by owners as a direct consequence of complying with charterers' orders, it is likely such an indemnity can be activated. However, in the authors view the consequences will remain unforeseen only during stages of attacks and with increased frequency, if the consequences were to become likely, this concept will not assist the ship owners. Additionally, in order to succeed, according to the case of *The White Rose* [1969] 1 WLR 1098, it was necessary for the ship owners to establish "an unbroken chain of causation" from the orders until the loss suffered by them.

IV. War Risks

In the event of an outbreak of war or war-like situation such as in Red Sea, in general there are express provisions permitting the parties to contract for cancellation/termination. The analysis of express terms may become complicated due to the back to back charterparties during the voyage and should be analysed carefully by a maritime lawyer.

In the current scenario in the Red Sea, in a time charterparty, there is an express provision that is incorporated, for example, *CONWARTIME 2013* or any of its earlier versions such as 2004. According to it, if a vessel is being ordered to proceed to a war risk area, the Warrisks' provision may provide that the owner has the right to refuse the order if it is reasonable to do so. It will be for the Master, in his/her reasonable judgment, to decide whether the vessel, her cargo or her crew may be, or are likely to be, exposed to war risks. The test is *objective* rather than *subjective*, see the case *Triton Lark* [2012] EWHC 70 (Comm) where the NYPE time charterparty incorporated *CONWARTIME 1993*. The Owners in order to refuse or request a change in a voyage would be required to demonstrate "a material change of risk" since the charterparty terms had been agreed and not just have to show the risk. It is a heavy burden on the Owners. If the charterparty is signed now and one of the terms is passing Red Sea, then it is unlikely the Owners can refuse the voyage even if such clauses are incorporated.

Other clauses of the charterparty must be interpreted together, whether safe port warranty is excluded or another clause provides that if war risk insurance is available, then the master cannot refuse the order and so forth. It is a complicated area of maritime law.

Similarly, the *VOYWAR2013* clause provides for similar provisions of consent from the owner or notice required for longer route to earn extra freight and so forth. In both *VOYWAR2013* and *CONWARTIME 2013*, the question as to whether the ship "may be" exposed to War Risks is a question which must be determined basis considering all the relevant facts and analysis may differ from case to case, see the English case of *Pacific Basin IHX Limited v BulkhandlingHandymax AS* (2012) 1 Lloyd's Rep. 151.

V. Additional War Risks

If the Red Sea area is **additional war risk area**, then it is likely charterers will be liable to pay for an Additional War Risk insurance and may still be liable for any general average contributions arising out of the incident due to attack in Red Sea.

The Joint War Committee has broadened the areas in the Red Sea that are categorized as "high risk" due to such attacks in Red Sea. The premium is constantly increasing for the last few months, at times on a daily basis.