

# Can shipowners refuse to sail via the Red Sea?

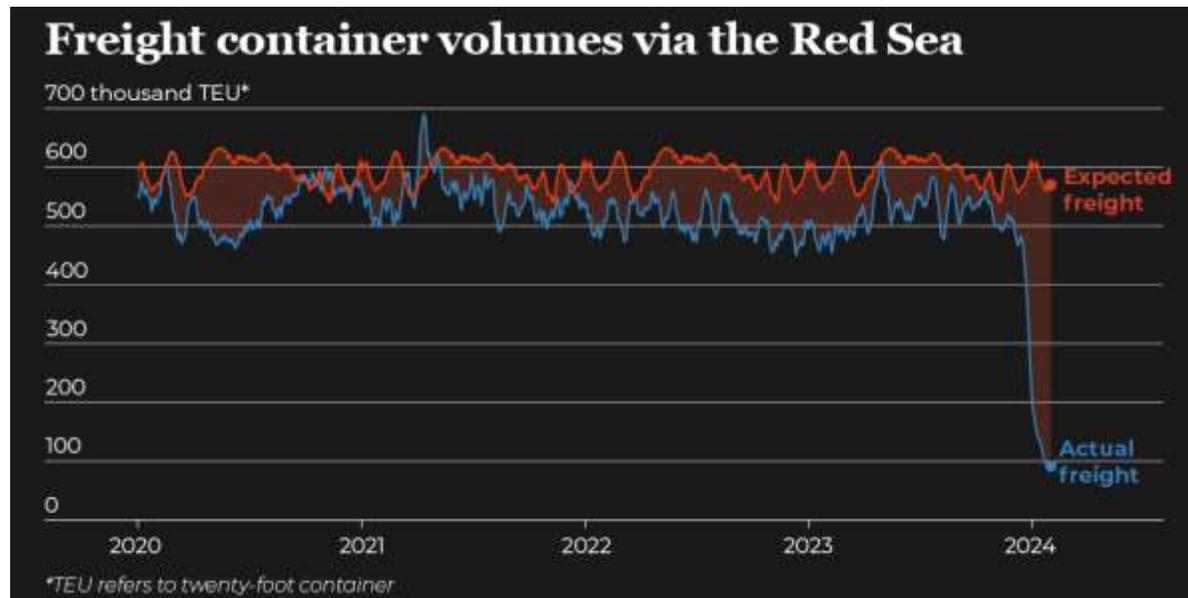
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- ❖ Impact and Timeline
- ❖ CONWARTIME 2013
- ❖ *The Polar* & assumption of risk
- ❖ Other relevant clauses and rights
- ❖ Who pays

Sector specific

Overall, transits at about 50% of pre-crisis levels

Greatest reduction in container ship transits



# Key dates

Date	Event
07 Oct 2023	Hamas attack on Israel
14 Nov 2023	Houthis say they will target Israeli ships in the Red Sea and Bab al-Mandeb
19 Nov 2023	Helicopter attack on <i>Galaxy Leader</i> (Israeli owned)
09 Dec 2023	Houthis say they will attack all ships heading to Israel
12 Dec 2023	<i>Strinda</i> (Norwegian chemical tanker) hit by cruise missile
18 Dec 2023	Operation Prosperity Guardian commences
20 Dec 2023	Houthis say they will attack Prosperity Guardian countries' ships
09 Jan 2024	21 drones and missiles fired at shipping (all intercepted)- until then, largest attack
12 Jan 2024	Operation Poseidon Archer commences
18 Feb 2024	<i>Rubymar</i> struck, and subsequently sank
06 Mar 2024	Fatalities onboard <i>True Confidence</i>
13 Mar 2024	Attack on <i>Huang Pu</i> (Chinese owned tanker carrying Russian crude)

(b) The Vessel shall not be obliged to proceed or required to continue to or through, any port, place, area or zone, or any waterway or canal (hereinafter “Area”), where it appears that the Vessel, cargo, crew or other persons on board the Vessel, **in the reasonable judgement of the Master and/or the Owners, may be exposed to War Risks** whether such risk existed at the time of entering into this Charter Party or occurred thereafter. Should the Vessel be within any such place as aforesaid, which only becomes dangerous, or may become dangerous, after entry into it, the Vessel shall be at liberty to leave it.

...in the reasonable judgement of the Master and/or the Owners...

*Triton Lark*- made in good faith, and objectively reasonable

Vessel, voyage and time specific

Evidence based judgement

Essentially an individuated risk assessment

The relevance of external legal advice

## ...may be exposed to War Risks...

1993 wording- “may be, or are likely to be, exposed to War Risks”

*Triton Lark*- “real likelihood” or “real danger” or “serious possibility” of the Vessel being exposed to War Risks.

## ...may be exposed to War Risks...

*Triton Lark-*

Difference between, *“a serious risk that an event will occur, in this case being exposed to acts of piracy, and a risk that a serious event, being exposed to acts of piracy, will occur.”*

Arbitrators had focused on the seriousness of the event, not the likelihood of attack

## ...may be exposed to War Risks...

BIMCO Explanatory notes- a response to *Triton Lark* decision

The court placed considerable emphasis on the meaning of “may be” and “are likely to be” for determining the existence of the risk of attack by pirates and when owners have the right to refuse to proceed. In order to remove potential uncertainty, the test for determining whether to proceed has been amended and is now based on whether an area is dangerous. The level of danger is likely to be high but a stated reference point removes the need for complex analysis of degree of risk and whether or not it is more or less likely to occur. Sub-clauses (a) and (b) have been amended to reflect the position.

BUT- Teare J had not distinguished between the two!

...whether such risk existed at the time of entering into this Charter Party or occurred thereafter.

Another amendment in 2013

Most important in relation to the assumption of risk

Interface between this clause, and bespoke clauses as to routing

BPVOY4 War Risks clause (including piracy risks) broadly analogous to CONWARTIME 1993 (Clause 39)

Bespoke “Gulf of Aden” clause- costs sharing provisions

Accordingly, clause 39 did not give an “absolute veto” on GoA transit. Far from it.

Owners has assumed known risks of GoA transit

62. ...If [1] different war risks materialised in the Gulf of Aden or [2] there was a change in the nature of the piracy risk, or [3] a change in its degree sufficient to make it qualitatively different, then it may be that clause 39 could be relied upon, but not if there was no change in risk. ...

66. ... If an increased degree in piracy risk may in extreme cases be sufficient to amount to a change in risk, that too should be reasonably straightforward to identify

BUT

BPVOY4 War Risks clause did NOT have equivalent

whether such risk existed at the time of entering into this Charter Party or  
occurred thereafter

Does this make a difference?

## Sub-clause (g) of CONWARTIME

g) The Vessel shall have liberty:

(i) to comply with all orders, directions, recommendations or advice as to departure, arrival, routes, sailing in convoy, ports of call, stoppages, destinations, discharge of cargo, delivery, or in any other way whatsoever, which are given by the government of the nation under whose flag the Vessel sails, or other government to whose laws the Owners are subject, or any other government of any state or territory whether recognised or not, body or group whatsoever acting with the power to compel compliance with their orders or directions;

(ii) to comply with the requirements of the Owners' insurers under the terms of the Vessel's insurance(s)

But, again, assumption of risk?

# Other rights to refuse to transit?

VOYWAR

The BIMCO Piracy clause

Bespoke clauses (assumptions of responsibility, routing, and War Risks)

# Other rights to refuse to transit?

The common law position (*Carver*)

“It is well established that where compliance with the charterer’s orders would endanger the safety of the vessel, cargo or crew, or would expose the vessel to a risk **which the shipowner has not agreed to bear**, the master may refuse to comply.”

Therefore, also subject to assumption of risk

*“Obviously grave danger”*

# Who Pays?

CONWARTIME- if vessel proceeds:

- ❖ Charterers pay increased AWRP
- ❖ Charterers pay crew bonus, or additional wages

If the Vessel diverts, Charterers will probably be liable for hire

VOYWAR- broadly speaking, Charterers pay (additional costs, or additional freight on longer route)

Other clauses? Not so clear

# The Future....?

Risks will continue to change

Clauses (especially assumption of risk/ routing clauses) will continue to change

There is no single, straightforward answer

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